

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioner, :

v. :

Docket No. 588 M.D. 2022

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

Respondents :

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

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I. INTRODUCTION

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”), initiated this action to challenge the validity of three writs of election relating to three vacancies in the Pennsylvania House of Representatives. As explained in further detail below, the three writs of election were issued on December 7, 2022, by Joanna E. McClinton, the duly elected member of the House of Representatives for the 191st Legislative District and Leader of the Democratic Caucus of the House of Representatives (“Representative McClinton”).

Pursuant to the Pennsylvania Constitution, as well as the Pennsylvania Election Code,¹ 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. 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 of the House to carry out the duties of the Speaker, including issuing writs of election. Representative McClinton was neither the Speaker nor the Majority Leader of the House of Representatives when she issued the writs of election at issue. Thus,

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

Representative McClinton issued the writs of election in question without constitutional or statutory authority.

In light of the questionable nature under which Representative McClinton issued the writs of election on December 7, 2022, Representative Cutler respectfully requests this Court enjoin the execution of the writs of election issued by Representative McClinton that remain in dispute until the Court can adjudicate this action on the merits.²

II. STATEMENT OF THE CASE

As set forth above, this action centers around the validity of multiple writs of election issued by Representative McClinton on December 7, 2022.

A. FACTUAL BACKGROUND

By way of background, Pennsylvania's 2022 General Election, as prescribed in the Election Code, was held on November 8, 2022. As with every election, all 203 seats of the House of Representatives were up for election in the 2022 General Election. 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.

² As discussed more fully below, the Parties, as well as the Pennsylvania Democratic Party, have agreed to a stipulated resolution regarding one of the three writs of election issued by Representative McClinton on December 7, 2022.

On October 9, 2022, prior to the 2022 General Election, Anthony DeLuca, the duly elected member of the House of Representatives for the 32nd Legislative District and candidate for reelection (“former Representative DeLuca”), passed away. Former Representative DeLuca’s death occurred too close to the 2022 General Election to remove his name from the ballot. 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. Former Representative DeLuca’s pre-election death created a vacancy in the House of Representatives.

Then-Speaker Cutler issued a writ of election to the Pennsylvania Department of State (“DOS”) and Board of Elections of Allegheny County (“Board of Elections”) on November 30, 2022, the last day of the 206th General Assembly, setting a special election for February 7, 2023, to fill former Representative DeLuca’s seat in the House of Representatives. (*See* Inj. App. at Ex. A).

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, one member short of a majority. That the membership of the Democratic Caucus of the House of Representatives did not constitute a majority of the House at the start of the 207th General Assembly was

confirmed by the non-partisan Pennsylvania Legislative Reference Bureau. (*See id.* at Ex. H). On December 7, 2022, the 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.” (*Id.* at 1). Upon review of the relevant legal authority, the Legislative Reference Bureau concluded that the Democratic Caucus did not hold a majority of the seats in the House of Representatives as of the date of the Legal Opinion. (*Id.* at 2). In this regard, the Legislative Reference Bureau opined 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 the death of a member-elect, falling short of the 102 members necessary for a majority.” (*Id.*)

Despite being one member short of a majority, Representative McClinton declared herself to be the 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 floor of the House chamber. (*See Inj. App.* at Ex. B).

On 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 Pennsylvania 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. (*See id.* at Exs. C, D). The resignations of former Representatives Davis and Lee on December 7, 2022, created two additional vacancies in the House of Representatives, thereby reducing the membership of the Democratic Caucus of the House to 99 members.

Notwithstanding the fact that the membership of the Democratic Caucus of the House of Representatives comprised a minority of the members of the House, Representative McClinton, purporting to exercise the authority reserved to the Majority Leader of the House during a vacancy in the Office of Speaker of the House, subsequently issued writs of election on December 7, 2022, to DOS and the Board of Election setting special elections for February 7, 2023, to fill the seats of former Representatives DeLuca, Davis, and Lee. (*See id.* at Exs. E, F, and G).

Thereafter, on December 12, 2022, a Judge of the Court of Common Pleas of Dauphin County administered the oath of office to Representative Cutler on the floor of the House of Representatives’ chamber. Given that Representative McClinton was neither Speaker of the House of Representatives nor Majority Leader when she issued writs of election in question and given the fact the membership of the

Republican Caucus of the House comprises a majority of that chamber, Representative Cutler, as the Majority Leader of the House, issued writs of election on December 15, 2022, to DOS and the Board of Elections setting special elections for May 16, 2023, to fill the seats of former Representatives Davis and Lee. True and correct copies of the writs of election issued by Representative Cutler on December 15, 2022, are attached hereto as Exhibits J and K.

B. PROCEDURAL HISTORY

On December 9, 2022, Representative Cutler filed a Petition for Review in the Nature of a Complaint for Declaratory Judgment (“Petition for Review”) in this Court’s original jurisdiction challenging the validity of the writs of election issued by Representative McClinton on December 7, 2022. The Petition for Review names as Respondents Leigh M. Chapman, the Acting Secretary of the Commonwealth (“Acting Secretary Chapman”), DOS, and the Board of Elections. Contemporaneous with the filing of the Petition for Review, Representative Cutler filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction requesting this Court enjoin Acting Secretary Chapman, DOS, and the Board of Elections from executing the writs of election issued by Representative McClinton until the Court can adjudicate this action on the merits.

This Court entered a scheduling Order on December 12, 2022, directing, *inter alia*, that any “Applications for Leave to Intervene, complete with proposed filings and a memorandum of law in support thereof shall be PACFiled and served no later than 12:00 p.m. on Friday, December 16, 2022.” *Cutler v. Chapman* (Pa. Cmwlth., No. 588 M.D. 2022, filed Dec. 12, 2022) (*Per Curiam* Order). The Pennsylvania Democratic Party and Representative McClinton each filed timely intervention applications on December 16, 2022. The Pennsylvania Democratic Party attached to its intervention application a single proposed filing entitled “Alternative Application for Emergency Relief.” Representative McClinton attached to her intervention application, as proposed filings, Preliminary Objections and an Answer to Representative Cutler’s injunction request.

On December 20, 2022, Representative Cutler filed an Answer opposing the intervention application of the Pennsylvania Democratic Party as well as an Answer consenting to the intervention of Representative McClinton. The Court held a status conference the following day during which it granted the unopposed intervention application of Representative McClinton. This was confirmed by the Court in an Order issued December 22, 2022. *Cutler v. Chapman* (Pa. Cmwlth., No. 588 M.D. 2022, filed Dec. 22, 2022) (*Per Curiam* Order). The Court also indicated in the

December 22, 2022 Order that it was taking the intervention application of the Pennsylvania Democratic Party under advisement.³ *Id.*

Subsequent to the status conference, the parties to this action, as well as the Pennsylvania Democratic Party, entered into a Stipulation, which was filed with this Court on December 23, 2022, regarding the vacancy in the 32nd Legislative District. As set forth above, Representative Cutler and Representative McClinton each issued separate writs of election setting a special election to fill former Representative DeLuca's seat for February 7, 2023. Given that both Representative Cutler and Representative McClinton set the special election for the same day, the Parties, as well as the Pennsylvania Democratic Party, agreed that the special election to fill former Representative DeLuca's seat in the House of Representatives would indeed be held on February 7, 2023, notwithstanding Representative Cutler's challenge to the validity of Representative McClinton's writ of election regarding former Representative DeLuca's seat.

Representative Cutler's challenge to the validity of the writs of election issued by Representative McClinton regarding former Representatives Davis and Lee remains pending before this Court.

³ Should this Court grant the intervention application of the Pennsylvania Democratic Party at a later date, the Pennsylvania Democratic Party should be deemed, as a matter of law, unopposed to Representative Cutler's injunction request because it did not file an Answer opposing that request as directed by the Court's December 12, 2022 scheduling Order.

III. STANDARD FOR OBTAINING A PRELIMINARY INJUNCTION

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). 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).

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. Pennsylvania Rule of Civil Procedure 1531 sets forth the procedural steps for obtaining a preliminary injunction. Pursuant to that rule, a preliminary injunction will not issue until after notice and a hearing. Pa.R.Civ.P. 1531.

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).

IV. ARGUMENT

As set forth below, Representative Cutler has met his burden of demonstrating the six prerequisites for obtaining a preliminary injunction. Accordingly, Representative Cutler respectfully requests this Court enjoin Acting Secretary Chapman, DOS, and the Board of Elections, as well as all persons working in concert with the foregoing, from executing the writs of election in question until this Court can adjudicate this action on the merits.

A. REPRESENTATIVE CUTLER’S RIGHT TO RELIEF IS CLEAR

In order to establish that an applicant for an injunction has a clear right to relief, the applicant “need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties.” *SEIU Healthcare*, 104 A.3d at 506; *see also Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 185 A.3d 985, 995 (Pa. 2018) (“In the context of a motion for preliminary injunction, only a substantial legal issue need be apparent for the moving party to prevail on the clear-right-to-relief prong.”).

Here, the Petition for Review filed by Representative Cutler sets forth a single claim for declaratory judgment. Specifically, Representative Cutler’s Petition for Review “requests this Court declare the writs of election issued by Representative McClinton invalid such that DOS and the Board of Elections should not proceed with holding the February 7, 2023 special elections.” (Pet. For Review ¶ 37). Upon review of the relevant legal authority, Representative Cutler’s right to relief on this claim is clear.

Article II, Section 2 of the Pennsylvania Constitution provides that when a vacancy occurs in either chamber of the General Assembly, “the presiding officer [of that chamber] shall issue a writ of election to fill such vacancy for the remainder

of the term.” PA. CONST. art. II, § 2. Likewise, Section 628 of the Election Code provides, in relevant part, that

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

25 P.S. § 2778.

Rule 1 of the 2021-2022 General Operating Rules of the House of Representatives designates the Speaker of the House as the presiding officer.⁴ There is currently a vacancy in the Office of Speaker of the House of Representatives. Representative Cutler ceased to hold the office of Speaker of the House of Representatives at 11:59 p.m. on November 30, 2022, the last day of the 206th General Assembly. *See* PA. CONST. art. II, § 2. The earliest a new Speaker will be elected by the members of the House of Representatives is January 3, 2022, the first day the 207th General Assembly convenes. *See* PA. CONST. art. II, § 4.

⁴ The 2021-2022 General Operating Rules of the House of Representatives are publicly available on the House’s website: <https://www.house.state.pa.us/rules.cfm>.

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

Representative McClinton was neither the Speaker of the House of Representatives nor the Majority Leader when she issued the writs of election at issue. Thus, Representative McClinton issued the writs of election without constitutional or statutory authority.

Representative McClinton does not claim to be Speaker of the House of Representatives. She does, however, claim to be Majority Leader of the House, at least at the time she issued the writs of election in question. The term “Majority Leader” is not defined in the Act of January 10, 1968, P.L. 925. Section 1903(a) of the Statutory Construction Act of 1972 provides that when interpreting statutes, the “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage.” 1 Pa.C.S. § 1903(a). Thus, “where

a court needs to define an undefined term, it may consult dictionary definitions for guidance.” *Sheppleman v. City of Chester Aggregated Pension Fund*, 271 A.3d 938, 949 (Pa. Cmwlth. 2021) (quoting *THW Group, LLC v. Zoning Bd. of Adjustment*, 86 A.3d 330, 336 (Pa. Cmwlth. 2014)).

Black’s Law Dictionary defines the term “Majority Leader” as “[t]he legislator in charge of the legislative caucus that has the most members” “Majority Leader,” *Black’s Law Dictionary* (11th ed. 2019). Article II, Section 16 of the Pennsylvania Constitution sets the number of seats in the House of Representatives at 203. PA. CONST. art. II, § 16. Thus, a majority of the House of Representatives is 102 members. As such, the Majority Leader is the leader of the caucus the most sitting members if no single caucus has 102 members.

As set forth above, 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. However, on December 1, 2022, the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives was only able to seat 101 members due to the pre-election death of former Representative DeLuca. That former Representative DeLuca is not counted when calculating the membership

of the Democratic Caucus is underscored by the Pennsylvania Supreme Court's decision in *Zemprelli v. Daniels*, 436 A.2d 1165 (Pa. 1981).

In *Zemprelli*, the Supreme Court examined who qualifies as a member of the General Assembly for purposes of establishing a majority. That case concerned the confirmation of a member of the State Tax Equalization Board by the Pennsylvania Senate. Article IV, Section 8(a) of the Pennsylvania Constitution provides that certain gubernatorial appoints "shall be subject to the consent of two-thirds or a majority of the members elected to the Senate as is specified by law." PA. CONST. art. IV, § 8(a). The relevant statutory provision required confirmation by a majority vote. *Zemprelli*, 436 A.2d at 1166.

On January 27, 1981, a confirmation vote was held. At the time the confirmation vote was held the Senate had 48 members and two vacancies. *Id.* A senator had been elected to fill one of those vacancies but had yet to take the oath of office. An election had not yet been held to fill the other vacancy, which was caused by the resignation of a senator.

At the confirmation vote, the nominee "received 25 'yeas' and 22 'nays,' and the President of the Senate, finding that the requisite vote of a constitutional majority had been obtained, ruled the appointment confirmed." *Id.* A handful of Senators initiated an action challenging the confirmation, arguing that a majority should be

computed based upon the total number of Senators elected (50), rather than the total number in office (48). The result being that 25 yeas would not constitute a majority and, therefore, the nominee did not receive sufficient votes to be confirmed.

Upon review, the Pennsylvania Supreme Court rejected this argument, writing that “to compute a majority based on a number rather than the total voting group . . . would be irrational.” *Id.* at 1171. The Court reasoned that “[t]o include among the number of individuals charged with the responsibility of reviewing the qualifications of the Governor’s nominees, senators-elect or former senators, neither entitled to vote in the Senate, would in no way enhance the ability of the Senate to advise and consent.” *Id.* Accordingly, the Court construed the phrase “a majority of the members elected to the Senate” to mean those Senators “elected, living, sworn, and seated.” *Id.* at 1172 (citation omitted).

Here, as former Representative DeLuca passed away prior to December 1, 2022, the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives cannot claim to have ever had a majority of 102 living members or more members than the Republican Caucus. Rather, with former Representative DeLuca’s pre-election death, the House of Representatives, according to *Zemprelli*, was comprised of 101 members of the Democratic Caucus

and 101 members of the Republican Caucus on the first day of the 207th General Assembly.

The resignations of former Representatives Davis and Lee on December 7, 2022, further reduced the membership of the Democratic Caucus of the House of Representatives to 99. Thus, when Representative McClinton purported to exercise authority specifically reserved to the Majority Leader of the House, the Democratic Caucus was three members short of a majority. In other words, Representative McClinton was not the Majority Leader of the House when she issued the writs of election at issue. Therefore, it is clear as a matter of law that Representative McClinton lacked constitutional or statutory authority to issue the writs of election in question. This conclusion is consistent with the Legal Opinion issued by the Legislative Reference Bureau on December 7, 2022.

Accordingly, based upon the foregoing, Representative Cutler’s right to relief is clear and he is likely to prevail on the merits of his claim.

B. THE INJUNCTION IS NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE HARM

It is well-established that the “[f]ailure to comply with a statute is sufficiently injurious to constitute irreparable harm.” *Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 583 (Pa. Cmwlth. 2012). Further, “[d]eprivation of a statutory right constitutes

irreparable harm.” *Grine v. County of Centre*, 138 A.3d 88, 101 (Pa. Cmwlth. 2016); *see also Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610 (Pa. Cmwlth. 2020).

Here, Representative McClinton’s issuance of the writs of election without statutory authority constitutes irreparable harm per se. Again, pursuant to Section 21.13 of the Act of January 10, 1968, P.L. 925, “[i]f any vacancy shall occur during the recess of the Legislature in the office of the Speaker of the House of Representative, the duties of said office shall be performed by the Majority Leader of the House of Representatives.” 46 P.S. § 41.121m.

As discussed above, Representative McClinton was not the Majority Leader of the House when she issued the writs of election in question. Therefore, her “[f]ailure to comply with” Section 21.13 of the Act of January 10, 1968, P.L. 925, “is sufficiently injurious to constitute irreparable harm.” *Wyland*, 52 A.3d at 583.

Additionally, by exercising authority not delegated to her, Representative McClinton deprived Representative Cutler of his statutory right to issue writs of election as the Majority Leader of the House of Representatives. This harm to Representative Cutler also constitutes irreparable harm. *Grine*, 138 A.3d at 101.

Neither of the foregoing harms can be compensated by damages. Accordingly, an injunction is necessary to prevent the irreparable and immediate

harm arising from Representative McClinton acting in contravention of Section 21.13 of the Act of January 10, 1968, P.L. 925.

C. GREATER INJURY WOULD RESULT FROM REFUSING THE INJUNCTION THAN FROM GRANTING IT

This Court has made clear that “[s]tatutory violations constitute irreparable harm *per se*, which relieve[s] the trial court of undertaking the balance of the harm inquiry.” *Wolk*, 228 A.3d at 611.

As described above, Representative McClinton violated Section 21.13 of the Act of January 10, 1968, P.L. 925, by issuing writs of election despite the fact that she was not the Majority Leader of the House of Representatives. This statutory violation constitutes irreparable harm *per se* and “relieve[s] this Court of undertaking the balance of the harm inquiry.” *Wolk*, 228 A.3d at 611.

Regardless, it is readily apparent that greater injury will result from denying the injunction than from granting it. If this Court should deny the injunction request, the special elections set by the suspect writs of election in question will be carried out. This will result in this litigation continuing through and potentially after the special elections. Should this Court conclude, after the special elections have taken place, that the writs of election in question are indeed invalid, countless taxpayer dollars will have been wasted in carrying out the special elections. Furthermore, the

public confidence in the election system will be further eroded if this Court is forced to set aside an election after the fact.

In her Answer opposing Representative Cutler's injunction request, Representative McClinton submits that greater injury will result from issuing the injunction than from denying it because preparations for the special elections are already underway. (Answer to Inj. App. at 3). This argument is unpersuasive because the carrying out of a potentially invalid special election is certainly more harmful than the harm that would be caused by pausing the preparations underway for the special elections.

Accordingly, greater injury would result from denying the injunction than from granting it.

D. AN INJUNCTION WILL RESTORE THE STATUS QUO

“A preliminary injunction is appropriate where it restores the parties to the status quo that existed prior to the alleged wrongful conduct.” *Wolk*, 228 A.3d at 611.

Here, the status quo prior to Representative McClinton issuing the writs of election at issue was that special elections had not been set to fill the seats of former Representatives Davis and Lee in the House of Representatives. Thus, an injunction

preventing the execution of the writs of election at issue would restore the status quo.

In her Answer opposing Representative Cutler’s injunction request, Representative McClinton argues that an injunction would “fundamentally and irreversibly alter the status quo by canceling the special election.” (Answer to Inj. App. at 5). This argument is misplaced as it ignores the fact that the purpose of a preliminary injunction is to restore the parties “to the status quo that existed **prior to the alleged wrongful conduct.**” *Wolk*, 228 A.3d at 611 (emphasis added). Here, the alleged wrongful conduct is Representative McClinton’s issuance of the writs of election in question. Therefore, the status quo before the alleged wrongful conduct was that no special elections to fill the seats of former Representatives Davis and Lee had been set.

Accordingly, an injunction would restore the status quo.

E. THE INJUNCTION IS REASONABLY SUITED TO ABATE THE OFFENDING ACTIVITY

To abate the offending activity, this Court need only enjoin the execution of the writs of election at issue. Representative Cutler’s injunction request is narrowly tailored to do just that. Thus, an injunction would abate the offending activity by preventing Acting Secretary Chapman, DOS, and the Board of Elections from

holding special elections based upon suspect authority until this Court can adjudicate the action on the merits.

In her Answer opposing Representative Cutler's injunction request, Representative McClinton submits the injunction relief request is not reasonably suited to abate the alleged offending activity as the relief requested "is not available as a matter of law." (Answer to Inj. App. at 7). According to Representative McClinton, the Pennsylvania Supreme Court "stated in *Butcher v. Rice*[, 153 A.2d 869, 873-74 (Pa. 1959)] that '[i]t is clear beyond question that equity is without jurisdiction' to grant a preliminary injunction precluding an election." (*Id.*).

Representative McClinton blatantly misstates the holding in *Butcher*. In that case, the plaintiffs/appellants brought an action against the Secretary of the Commonwealth alleging that the General Assembly had not set nearly equal senatorial districts as required by the Pennsylvania Constitution, but had in fact set eight enormously disproportionate senatorial districts. *See* PA. CONST. art. II, § 16 ("The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable."). As part of the requested relief, the plaintiffs/appellants sought to enjoin the Secretary of the Commonwealth

from holding elections for the office of State Senator from the Philadelphia districts at issue. *Id.* at 870.

Upon review, the Supreme Court upheld the lower court’s dismissal of the action on the grounds that the case presented purely political non-justiciable questions. *Butcher*, 153 A.2d at 871 (setting forth that whether the General Assembly “divides the State into senatorial districts ‘as nearly equal in population as may be’ is not justiciable but rests alone in the discretion of the General Assembly.”). Nowhere did the Court, as Representative McClinton represents, conclude that it was generally without jurisdiction to enjoin the carrying out of elections.

This Court was confronted with the question of whether an election should be enjoined in *Luzerne County Council v. Luzerne County Board of Elections* (Pa. Cmwlth., No. 1088 C.D. 2021, filed 2021).⁵ Therein, the plaintiffs/appellants sought to preliminarily enjoin an election for the Office of District Attorney for Luzerne County. The trial court denied the injunction request on the grounds that the plaintiffs/appellants did not meet their burden to obtain a preliminary injunction. Upon review, the Commonwealth Court affirmed. The Commonwealth Court did

⁵ Pursuant to Pennsylvania Rule of Appellate Procedure 3716(e), Pa.R.A.P. 3716(e) and Section 414(b), 210 Pa. Code § 69.414(b), unreported decisions of this Court may be cited for their persuasive value.

not affirm on the grounds that courts do not have the authority to enjoin elections, as Representative McClinton suggests. Rather, this Court agreed that the plaintiffs/appellants did not meet their burden to obtain a preliminary injunction. If courts do not have the authority to enjoin elections as Representative McClinton suggests, it would have been unnecessary for this Court to examine whether plaintiffs/appellants had in fact met their burden to obtain a preliminary injunction.

Accordingly, the injunction is reasonably suited to abate the offending activity.

F. THE INJUNCTION WILL NOT ADVERSELY AFFECT THE PUBLIC INTEREST

This Court has explained that “a statutory violation greatly relaxes the standard of proof for the[]” public interest factor. *Cumberland County v. Pa. Dep’t of Trans.* (Pa. Cmwlth., No. 109 M.D. 2022, filed May 18, 2022), slip op. at 41-42. “This is because ‘the argument that a violation of law can be a benefit to the public is without merit,’ and once the General Assembly has prohibited conduct, ‘it is tantamount in law to calling it injurious to the public.’” *Id.* (quoting *Pa. Pub. Utility Comm’n v. Israel*, 52 A.2d 317, 321(Pa. 1947)).

Here, Representative McClinton’s violated the law by issuing writs of election without authority. Enjoining the execution of the questionable writs of election will

not adversely affect the public because the public does not benefit from the execution of invalid writs of election. *Id.*

In her Answer opposing Representative Cutler's injunction request, Representative McClinton argues enjoining the execution of the writs of election in question will harm the public interest because "[t]he public interest favors a full House of Representatives." (Answer to Inj. App. ¶ 8). Representative Cutler does not dispute the public would be best served by a full House of Representatives. However, the special elections needed to fill the vacancies in the House of Representatives must arise from valid writs of election.

Representative Cutler issued valid writs of election on December 15, 2022. (*See* Ex. J, K.). Thus, the House of Representatives will have a full complement upon the execution of those writs.

Accordingly, the requested injunction will not adversely affect the public interest.

V. CONCLUSION

For the reasons set forth above, Representative Cutler respectfully requests this Court grant his Emergency Application for Special Relief in the Nature of a Preliminary Injunction and enjoin Acting Secretary Chapman, DOS, and the Board of Elections, as well as all persons working in concert with the foregoing, from

execution the writs of election issued on December 7, 2022 by Representative McClinton to fill former Representatives Davis and Lee's seats in the House of Representatives such that Acting Secretary Chapman, DOS and the Board may not proceed with holding the special elections.

McNEES WALLACE & NURICK LLC

Date: December 28, 2022

By: _____

Kandice Kerwin Hull

I.D. No. 86345

Drew Crompton

I.D. No. 69227

Ryan Gonder

I.D. No. 321027

Austin D. Hughey

I.D. 326309

100 Pine Street, P.O. Box 1166

Harrisburg, PA 17108-1166

(717) 237-8000

khull@mcneeslaw.com

dcrompton@mcneeslaw.com

rgonder@mcneeslaw.com

ahughey@mcneeslaw.com

Attorneys for Petitioner

EXHIBIT J

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-FOURTH LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY,
CAUSED BY THE RESIGNATION OF SUMMER LYNN LEE, THE REPRESENTATIVE-
ELECT FROM SAID DISTRICT, ON THE SEVENTH 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, BRYAN CUTLER, MAJORITY LEADER OF THE HOUSE OF
REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE
CONSTITUTION OF THE COMMONWEALTH 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 SIXTEENTH
DAY OF MAY, 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 THIRTIETH, 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 FIFTEENTH DAY OF DECEMBER, 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 15 DAY OF December 2022

BY Michael Chruslan

DEPARTMENT OF STATE
HARRISBURG, PA

2022 DEC 15 PM 2:21

EXHIBIT K

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-FIFTH LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY,
CAUSED BY THE RESIGNATION OF AUSTIN DAVIS, THE REPRESENTATIVE-
ELECT FROM SAID DISTRICT, ON THE SEVENTH 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, BRYAN CUTLER, MAJORITY LEADER OF THE HOUSE OF
REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE
CONSTITUTION OF THE COMMONWEALTH 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 SIXTEENTH
DAY OF MAY, 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 THIRTIETH, 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 FIFTEENTH DAY OF DECEMBER, TWO THOUSAND TWENTY-TWO.



MAJORITY LEADER OF THE HOUSE OF REPRESENTATIVES



ATTEST:



CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

DEPARTMENT OF STATE
2022 DEC 15 PM 2:22

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 15 DAY OF December 2022

BY Robert Christensen

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 28, 2022

By: 
Kandice K. Hull

PROOF OF SERVICE

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

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

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

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

George M. Janocko, County Solicitor
Allan J. Opsitnick, Assistant County Solicitor
Lisa G. Michel, Assistant County Solicitor
Allegheny County Law Department
300 Fort Pitt Commons Building
445 Fort Pitt Boulevard
Pittsburgh, PA 15219

Counsel for the Board of Elections of Allegheny County

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

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

Counsel for Intervenor-Respondent Joanna E. McClinton

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

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

Counsel for Proposed Intervenor-Respondent Pennsylvania Democratic Party

McNEES WALLACE & NURICK LLC

Date: December 28, 2022

By: 
Kandice K. Hull