

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 ANSWER IN OPPOSITION TO
THE PROPOSED PRELIMINARY OBJECTIONS OF PROPOSED
INTERVENOR-RESPONDENT PENNSYLVANIA DEMOCRATIC PARTY**

Petitioner Bryan D. Cutler, in his capacity as the duly elected member of the Pennsylvania House of Representatives for the 100th Legislative District and as Leader of the Republican Caucus of the House of Representatives (“Representative Cutler”), by and through his counsel, McNeese Wallace & Nurick LLC, hereby files this Answer in Opposition to the Proposed Preliminary Objections of the Proposed Intervenor-Respondent, the Pennsylvania Democratic Party.

The Pennsylvania Democratic Party raises two objections to the Petition for Review in the Nature of a Complaint for Declaratory Judgment filed by Representative Cutler (“Petition for Review”). As explained in further detail below, as well as in the accompanying Omnibus Brief in Opposition to the Preliminary Objections of Intervenor-Respondent Joanna E. McClinton and Proposed Intervenor-Respondent the Pennsylvania Democratic Party, the objections raised by the Pennsylvania Democratic Party are without merit and should be overruled in the event the Party is granted leave to intervene.

The Pennsylvania Democratic Party initially objects on the basis that Representative Cutler’s Petition for Review raises a political question outside this Court’s jurisdiction. Representative Cutler’s Petition for Review asks this Court to declare the writs of election in question invalid as Representative McClinton lacked the authority to issue the writs. In *Perzel v. Cortes*, 870 A.2d 759 (Pa. 2005), the Pennsylvania Supreme Court considered a challenge to the validity of a writ of election and issued a decision on the merits. Thus, the Pennsylvania Democratic Party’s argument that the Petition for Review raises a political question outside this Court’s jurisdiction is misplaced. Accordingly, the Pennsylvania Democratic Party’s first objection should be overruled in the event the Party is granted leave to intervene.

The Pennsylvania Democratic Party also objects on the basis that Representative Cutler’s Petition for Review fails to state a claim upon which relief can be granted. In other words, the Pennsylvania Democratic Party’s first objection is a demurrer. However, this objection is misplaced. In the Petition for Review, Representative Cutler raises a single claim challenging the writs of election issued by Representative McClinton on December 7, 2022. The authority to issue writs of election rests with the Speaker of the House of Representatives or, during a vacancy in the Office of Speaker of the House, with the Majority Leader of the House. Representative McClinton was neither Speaker nor Majority Leader of the House when she issued the writs of election in question. Thus, contrary to the argument of the Pennsylvania Democratic Party, Representative Cutler’s Petition for Review does indeed state a claim upon which can be granted. Accordingly, the Pennsylvania Democratic Party’s second objection should be overruled in the event the Party is granted leave to intervene.

In further response, Representative Cutler answers the Preliminary Objections of the Pennsylvania Democratic Party as follows:

BACKGROUND

1. Denied. The averments in this paragraph are conclusions of law to which no response is required.

2. Admitted with clarification. It is admitted that a vacancy in the House of Representatives occurred upon the death of Representative Anthony DeLuca.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted upon information and belief.

9. Admitted upon information and belief.

10. Admitted in part and denied in part. It is admitted that the Acting Secretary of the Commonwealth rejected the writ of election issued by Representative Cutler on November 30, 2022. The remaining averments in this paragraph are denied. The rationale of the Acting Secretary of the Commonwealth for rejecting the writing of election issued by Representative Cutler is set forth in a letter dated December 7, 2022. (*See* Pet. for Review at Ex. I.). The December 7, 2022 letter of the Acting Secretary of the Commonwealth is a writing which speaks for itself. Any characterizations inconsistent therewith are specifically denied.

11. Admitted in part and denied in part. It is admitted that Representative McClinton was sworn in on December 7, 2022. It is further admitted that after being

sworn in, Representative McClinton issued three writs of election, which were attested by the Chief Clerk of the House of Representatives, setting special elections to fill three vacancies in the House for February 7, 2023. The remaining averments in this paragraph are specifically denied. By way of further response, it is specifically denied that Representative McClinton has ever been the Majority Leader of the House of Representatives. The Democratic Party's candidates won a total of 102 seats in the House of Representatives. However, on the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives had only 101 living members due to the pre-election death of Representative Anthony DeLuca. On December 7, 2022, Representatives Austin A. Davis and Summer L. Lee resigned their seats in the House of Representatives, which reduced the membership of the Democratic Caucus to 99 members. Thus, at the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question. The authority to issue writs of election rests with the Majority Leader of the House of Representatives during a vacancy in the Office of Speaker of the House.

Accordingly, Representative McClinton lacked the authority to issue the writs in question.

12. Admitted in part and denied in part. It is admitted that upon receiving the writs of election issued by Representative McClinton, the Secretary of the Commonwealth scheduled three special elections for February 7, 2023, notified the political parties of the special elections, and publicly posted the timeline for the nomination of candidates. It is specifically denied that the writs of election issued by Representative McClinton on December 7, 2022 are “facially valid.” At the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question. Accordingly, Representative McClinton lacked the authority to issue the writs in question.

13. Admitted upon information and belief.

14. Admitted in part and denied in part. It is admitted that on December 15, 2022, Representative Cutler issued writs of election scheduling special elections to fill the vacancies for the 34th and 35th Legislative Districts. It is specifically denied that the writs of election issued by Representative Cutler on December 15, 2022 are

invalid. The authority to issue writs of election rests with the Majority Leader of the House of Representatives during a vacancy in the Office of Speaker of the House. On December 15, 2022, when the writs were issued, Representative Cutler was the Majority Leader of the House. Therefore, the writs of election issued by Representative Cutler on December 15, 2022 are valid.

15. Admitted.

ARGUMENT

16. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required.

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

17. Denied. The averments in this paragraph are conclusions of law to which no response is required.

18. Denied. The averments in this paragraph are conclusions of law to which no response is required.

19. Denied. The averments in this paragraph are conclusion of law to which no response is required.

20. Denied. The averments in this paragraph are conclusions of law to which no response is required.

21. Denied. The averments in this paragraph are conclusions of law to which no response is required.

22. Admitted in part and denied in part. It is admitted that the Acting Secretary of the Commonwealth accepted the writs of election issued by Representative McClinton on December 7, 2022. It is specifically denied that it was appropriate for the Acting Secretary of the Commonwealth to accept the writs of election issued by Representative McClinton. At the time that Representative McClinton issued the writs in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the House. As such, Representative McClinton was not the Majority Leader of the House of Representatives at the time she issued the writs of election in question. Accordingly, Representative McClinton lacked the authority to issue the writs. Thus, it is specifically denied that Representative Cutler has no basis to request relief from this Court.

WHEREFORE, Representative Cutler respectfully requests this Court overrule the initial objection of the Pennsylvania Democratic Party in the event the Party is granted leave to intervene.

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. Denied. The averments in this paragraph are conclusions of law to which no response is required.

24. Denied. The averments in this paragraph are conclusions of law to which no response is required.

25. Denied. The averments in this paragraph are conclusions of law to which no response is required.

26. Admitted in part and denied in part. It is admitted that Representative McClinton took the oath of office on December 7, 2022 and thereafter issued three writs of election. The remaining averments in this paragraph are denied. It is specifically denied that Representative McClinton has ever been the Majority Leader of the House of Representatives. The Democratic Party's candidates won a total of 102 seats in the House of Representatives. However, on the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives had only 101 living members due to the pre-election death of Representative Anthony DeLuca. On December 7, 2022, Representatives Austin A. Davis and Summer L. Lee resigned their seats in the House of Representatives, which reduced the membership of the Democratic Caucus to 99 members. Thus, at the time that

Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question. Upon reasonable investigation, Representative Cutler is without sufficient information to admit or deny the remaining averments in this paragraph regarding the certification of votes.

27. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. It is specifically denied that Representative McClinton has ever been the Majority Leader of the House of Representatives. The Democratic Party's candidates won a total of 102 seats in the House of Representatives. However, on the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives had only 101 living members due to the pre-election death of Representative Anthony DeLuca. On December 7, 2022, Representatives Austin A. Davis and Summer L. Lee resigned their seats in the House of Representatives, which reduced the membership of the Democratic Caucus to 99 members. Thus, at the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the

House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question.

28. Denied. It is specially denied that Representative McClinton has ever been the Majority Leader of the House of Representatives. The Democratic Party's candidates won a total of 102 seats in the House of Representatives. However, on the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives had only 101 living members due to the pre-election death of Representative Anthony DeLuca. On December 7, 2022, Representatives Austin A. Davis and Summer L. Lee resigned their seats in the House of Representatives, which reduced the membership of the Democratic Caucus to 99 members. Thus, at the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question. Upon reasonable investigation, Representative Cutler is without sufficient information to admit or deny the remaining averments in this paragraph regarding the certification of votes.

29. Denied. The averments in this paragraph are conclusions of law to which no response is required.

30. Denied. The averments in this paragraph are conclusions of law to which no response is required. It is specially denied that Representative McClinton has ever been the Majority Leader of the House of Representatives. The Democratic Party's candidates won a total of 102 seats in the House of Representatives. However, on the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives had only 101 living members due to the pre-election death of Representative Anthony DeLuca. On December 7, 2022, Representatives Austin A. Davis and Summer L. Lee resigned their seats in the House of Representatives, which reduced the membership of the Democratic Caucus to 99 members. Thus, at the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question.

31. Denied as stated. It is specifically denied that the writs of election issued by Representative McClinton are facially valid. At the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the

Majority Leader at the time she issued the writs of election in question. Accordingly, Representative McClinton lacked the authority to issue the writs in question. Thus, it is specifically denied that the Acting Secretary of the Commonwealth was required to process the writs of election issued by Representative McClinton.

32. Admitted in part and denied in part. It is admitted that Representative Cutler issued writs of election on December 15, 2022 regarding the vacancies for the 34th and 35th Legislative Districts. The remaining averments in this paragraph are denied. It is specifically denied that Representative Cutler's December 15, 2022 writs of election provided "alternative election dates." The authority to issue writs of election rests with the Speaker of the House of Representatives or, during a vacancy in the Office of Speaker of the House, with the Majority Leader of the House. On December 15, 2022, when the writs were issued, Representative Cutler was the Majority Leader of the House. Therefore, the writs of election issued by Representative Cutler on December 15, 2022 are valid. As the writs of election issued by Representative McClinton for the 34th and 35th Legislative District are invalid, the writs of election issued by Representative Cutler do not provide "alternative election dates" but rather set the valid election dates.

33. Denied as stated. The authority to issue writs of election rests with the Speaker of the House of Representatives or, during a vacancy in the Office of

Speaker of the House, with the Majority Leader of the House. On December 15, 2022, when the writs were issued, Representative Cutler was the Majority Leader of the House. Therefore, the writs of election issued by Representative Cutler on December 15, 2022 are valid. As such, it is specially denied that the writs of election issued by Representative Cutler are nullities. While Representative McClinton had already issued writs of election, those writs of election are invalid. At the time that Representative McClinton issued the writs of election in question, the membership of the Democratic Caucus of the House of Representatives constituted a minority of the membership of the House. As such, Representative McClinton was not the Majority Leader at the time she issued the writs of election in question. Accordingly, Representative McClinton lacked the authority to issue the writs in question.

34. Admitted in part and denied in part. It is admitted that if the writs of election issued by Representative McClinton are held invalid, the special elections to fill the vacancies in the 34th and 35th Legislative Districts will be held on May 16, 2023 pursuant to the writs of election issued by Representative Cutler. The remaining averments in this paragraph are denied as conclusions of law.

35. Denied. The averments in this paragraph are conclusions of law to which no response is required.

WHEREFORE, contrary to the argument of the Pennsylvania Democratic Party, Representative Cutler's Petition for Review does indeed state a claim upon which can be granted. Accordingly, the objection of the Pennsylvania Democratic Party should be overruled in the event the Party is granted leave to intervene.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

Date: January 4, 2023

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

VERIFICATION

I, Bryan D. Cutler, hereby certify that the facts in the foregoing are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of Section 4904 of the Crimes Code, 18 Pa.C.S. § 4904, relating to unworn falsification to authorities

Dated: January 4, 2023

By:


Bryan D. Cutler

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: January 4, 2023

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. Janocsko, 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
gjanocsko@alleghenycounty.us
aopsitnick@opsitnickslaw.com
lisa.michel@alleghenycounty.us

Counsel for the Board of Elections of Allegheny County

Kevin Greenberg, 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

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 Proposed Intervenor-Respondent Joanna E. McClinton

McNEES WALLACE & NURICK LLC

Date: January 4, 2023

By: 
Kandice K. Hull