

**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

**PENNSYLVANIA DEMOCRATIC PARTY’S BRIEF IN  
OPPOSITION TO INJUNCTIVE RELIEF**

Pursuant to this Court’s Order of December 22, 2022, the Pennsylvania Democratic Party (“PA Dems”), files this brief in opposition the application for emergency relief filed by Bryan Cutler (“Petitioner’s Preliminary Injunction”).

## **I. INTRODUCTION**

Yesterday, our Commonwealth saw a political solution to a political question. In a bipartisan vote, Representative Mark Rozzi was elected Speaker as an independent, reflecting the narrow division of the chamber.

That outcome brings home that the leadership of the Chamber is not a question that this Court should resolve, as a matter of justiciability and prudence. As Respondents and the PA Dems have argued since the outset that this case presents a nonjusticiable political question and, for those reasons, along with other reasons outlined below and in the pending preliminary objections, this Court should find that Petitioner will fail on the merits and is thus not entitled to injunctive relief.

Crucially, nor does Petitioner meet any of the other five necessary elements for injunctive relief. Cancellation of any of the special elections will cause irreparable harm to voters, candidates, and the political parties, upset the status quo and be a fundamentally unjust outcome. Accordingly, this Court should deny Petitioner's Preliminary Injunction.

## **II. BACKGROUND**

The 207<sup>th</sup> General Assembly commenced on December 1, 2022. Today, there are three vacancies in the Pennsylvania House of Representatives, one of which occurred at the beginning of the session and two others created by resignations with

effective dates of December 7, 2022. *See* Stipulation of Facts at ¶¶ 8-9, 12, 15. The districts are all contiguous and are all in Allegheny County. *See id.* at ¶ 24.

Joanna McClinton has, at all times relevant hereto, been the Democratic Leader in the Pennsylvania House of Representatives. *See id.* at ¶ 3. She served as Minority Leader during the 206<sup>th</sup> General Assembly and was selected as Democratic Leader for the 207<sup>th</sup> General Assembly. 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. *See id.* at ¶ 1.

On November 30, after adjournment *sine die* and before the end of the then-current term, then-Speaker Cutler issued a document, purporting to be a writ of election for a Special Election in the 32<sup>nd</sup> House District, and attempted to schedule the election for February 7, 2023. *See id.* at ¶ 10. 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 the 32<sup>nd</sup> House District for February 7, 2023.

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. *See id.* at ¶ 18; Stipulated Pet. Ex. I. That same day, 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, scheduling the special elections for February 7, 2023, the date previously—but improperly—set by the former Speaker. *See id.* at ¶ 16; Stipulated Pet. Exs. E-G. The writs were each attested to by the Chief Clerk of the House of Representatives. *See* Stipulated Pet. Exs. E-G.

Upon receiving the facially valid writs, in accordance with state law, the Acting Secretary of the Commonwealth scheduled three special elections for February 7, 2023, notified the political parties, and promulgated the timelines for political body candidates to qualify for the ballot. *See* Stipulated Exs. 3-5.

Both the Democratic and Republican state parties have selected candidates in all three races, the campaigns are underway, and the Department of State and Allegheny County Board of Elections have begun administering the special elections scheduled for February 7, 2023.

### **III. STATEMENT OF QUESTION INVOLVED**

Question Presented: Whether Petitioner has established his clear entitlement to the injunctive relief sought?

**Suggested Answer:** No.

#### IV. APPLICABLE LEGAL STANDARD

##### A. Preliminary Injunction Standard

The Court may order special relief, including a preliminary or special injunction. *See* Pa. R.A.P. 1532(a); *Commonwealth, ex rel. Pappert v. Coy*, 860 A.2d 1201 (Pa. Cmmw. 2004).

The test for obtaining a preliminary injunction under Rule 1532(a) is the same as that for the grant of a preliminary injunction under the Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Department of Health*, 499 Pa. 39, 451 A.2d 434 (Pa. 1982). The party seeking a preliminary injunction must prove:

1. “[T]he activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, [the petitioner] must show that it is likely to prevail on the merits”;
2. “[A]n injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages”;
3. “[G]reater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings”;
4. “[A] preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; and
5. “[T]he injunction it seeks is reasonably suited to abate the offending activity”; [and]
6. “[A] preliminary injunction will not adversely affect the public interest.”

*County of Allegheny v. The Cracked Egg, LLC*, 101 C.D. 2021, at \*4 n.2 (Pa. Cmmw. Ct. July 23, 2021) (quoting *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)).

## V. SUMMARY OF THE ARGUMENT

Petitioner cannot satisfy any of the six elements for a preliminary injunction. Petitioner is unlikely to succeed on the merits. Petitioner's Complaint can only succeed if the Court were to intervene to resolve a non-justiciable issue: the issuance of writs of elections for special elections, an authority vested solely in the General Assembly. But even if the issue were justiciable, and it is not, Petitioner's claim still fails because as of December 7, 2022, the day Leader McClinton issued the writs of elections for the 34<sup>th</sup> and 35<sup>th</sup> House Districts, she was in fact the Majority Leader and thus the presiding officer of the House of Representatives. Thus, the Acting Secretary properly relied on the validly-issued writs in setting the elections for the 34<sup>th</sup> and 35<sup>th</sup> House Districts. As to the other, equitable, factors, each strongly dictates rejection of injunctive relief, for the reasons set forth more fully below.

## **VI. ARGUMENT**

### **A. Petitioner Has Failed to Establish a Clear Right to Relief.**

Petitioner is not entitled to an injunction because he is unlikely to succeed on the merits of his claim because (1) Petitioner’s Preliminary Injunction involves a non-justiciable political question regarding the issuance of writs of elections, an act that is constitutionally vested solely with the Legislative Branch; and (2) even if his claims were justiciable, the writs issued by Representative McClinton were valid given her status as Majority Leader.

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

The internal workings of the Pennsylvania House of Representatives generally, and specifically with respect to the calling of special elections, are non-justiciable questions.

The Pennsylvania Supreme Court has explained, “[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.” *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”). 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)).

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, 2022. 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. *See Perzel*, 582 Pa. at 113. To that end, facially valid writs issued by the General Assembly are to be honored by the Executive and Judicial Branches. *Id.*

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

**2. Petitioner Is Unlikely to Prevail on the Merits Because Representative Joanna McClinton Satisfied the Statutory Requirements to Serve As Presiding Officer and Issue the Writs.**

Non-justiciability aside, Petitioner argues Leader McClinton issued the writs of election in the 34<sup>th</sup> and 35<sup>th</sup> House Districts on December 7, 2022, without authority. Not so. Leader McClinton issued writs of election for those races pursuant to her statutory authority as Majority Leader. *See Perzel*, 582 Pa. at 113; *see also* 46 P.S. § 42.121m.

At the time Majority Leader McClinton issued the writs, she did so with proper authority as the Democrats held a 93-84 lead amongst certified winners at that time, after adjusting for the three members who had resigned or passed. *See* Exhibits A-D of PA Dems’ Preliminary Objections.

<b>Certification Date</b>	<b>Then-Current Certified Democratic Members</b>	<b>Then-Current Certified Republican Members</b>
November 30	34	12
December 2	80*	56
December 6	92*	78
<b>December 7</b>	<b>93*^</b>	<b>84</b>

\* adjusted to exclude the late Rep. DeLuca, whose victory was certified on December 2

^ also adjusted to recognize the December 7 resignations of Reps. Davis and Lee

### 3. Open-Ended Delay Was Not an Option

Under the Pennsylvania Constitution, 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).

By statute, the presiding officer of the House of Representatives—who is usually the Speaker—must issue a writ of election within 10 days of any vacancy occurring. 25 P.S. § 2778. During any vacancy in the Speakership, the Majority Leader is the presiding officer of the House of Representatives and is responsible for filling the Speaker’s duties. *See* 46 P.S. § 42.121m.

Here, at the time of the vacancies of the 34<sup>th</sup> and 35<sup>th</sup> House Districts—December 7, 2022—the Speakership for the 207<sup>th</sup> General Assembly was vacant. As a result, pursuant to statute, the Majority Leader was not only authorized but was required to issue writs to fill the vacancies in the 34<sup>th</sup> and 35<sup>th</sup> House Districts sometime between December 7, 2022, and December 17, 2022. *See* 25 P.S. § 2778; *see also* 46 P.S. § 42.121m. Leader McClinton did just that.

Once the facially valid writs for special election in the 34<sup>th</sup> and 35<sup>th</sup> House Districts were submitted, the Acting Secretary was required to process them and cause the elections to occur.

Because Leader McClinton satisfied the statutory requirements of the presiding officer when she issued the writs of election for the 34<sup>th</sup> and 35<sup>th</sup> House Districts on December 7, 2022, and because the Acting Secretary rationally and correctly relied on the facially valid writs, Petitioner is unlikely to prevail on the merits.

**B. The Proposed Preliminary Injunction Is Not Necessary to Prevent Irreparable Harm and Will Lead to Greater Irreparable Harm.**

Contrary to his claims, it is Petitioner’s proposed “remedy” that would lead to immediate and irreparable harm. First, a change in the special election schedule for the 34<sup>th</sup> and 35<sup>th</sup> House Districts would sow confusion in the ongoing validly-scheduled elections for those seats. Second, irreparable harm arises from the unnecessarily wasted resources which would result from rescheduling the special elections. Indeed, the Department of State, Allegheny County Board of Elections, the parties, candidates, and voters have settled expectations regarding the current election date and have expended significant resources in reliance on that date.

Granting the requested preliminary injunction will lead to greater harm than it seeks to remedy. There is no good reason to delay the elections for these seats, especially because the writs of elections were validly issued. Additionally, nobody will suffer any harm if the current date of February 7, 2023, continues to be honored for the special elections in the 34<sup>th</sup> and 35<sup>th</sup> House Districts.

**C. Declining to Enjoin the Validly Scheduled Elections in the 34<sup>th</sup> and 35<sup>th</sup> House Districts Will Not Harm Petitioner or Anyone.**

Petitioner will not suffer any injury from the denial of his requested preliminary injunction because Leader McClinton validly issued the writs of election for the 34<sup>th</sup> and 35<sup>th</sup> House Districts on December 7, 2022, as explained above. To the extent Leader McClinton selected February 7, 2023 for the special elections in the 34<sup>th</sup> and 35<sup>th</sup> House Districts, and Leader Cutler now disagrees with that scheduled date, that date is the same date then-Speaker Cutler attempted to schedule for the special election in the 32<sup>nd</sup> House District and to which all the participants in this litigation have stipulated (and the Court has since ordered) is an appropriate date for the 32<sup>nd</sup> District race. Each of the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> House Districts are in Allegheny County and are contiguous. *See* Stipulated Facts at ¶ 24. There are obvious efficiencies, rather than harms, created by maintaining the current schedule, and there is no good reason to change the dates, to conduct these elections on different dates, or to delay the dates by which the citizens of the 34<sup>th</sup> and 35<sup>th</sup> House Districts will be represented in the House.

Additionally, the Department of State, the Allegheny County Board of Elections, the political parties, candidates, and voters have settled expectations regarding the set date for the elections and have expended significant resources in reliance on that date. Indeed, Nomination Certificates have already been filed with the Department of State on behalf of Democratic and Republican candidates in each

of the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts. *See id.* at ¶ 19. These candidates, their supporters, and the parties who have nominated them will be harmed, financially and through dissemination of stale election information, if any changes are made to the calendar so close in time to the special elections.

**D. The Status Quo is Allowing the Scheduled Elections to Proceed.**

Preserving the status quo is allowing the validly-scheduled elections to proceed as scheduled, without modification or delay.

Petitioner attempts to create a false baseline for measuring the status quo by pointing to other irrelevant times. The application for emergency relief was filed on December 9, and it seeks to dislodge actions taken on December 7. Writs of special election are not subject to later revision by the whim of the holder of the office that issued the writ. On December 9, when relief was sought, the December 7 writs had been issued, and, as described above, were valid and in place. Later actions by an alleged then-Majority Leader cannot retroactively alter the baseline measure for determining the status quo of already issued writs.

Political parties, candidates, and supports have engaged in significant efforts in reliance on the already-scheduled special elections. Canceling the special elections not only alters the status quo, it deprives the residents of the 34<sup>th</sup> and 35<sup>th</sup> House Districts of representation. *Fagan*, 41 A.3d at 818 (voters have a “clear legal right to elected representation, which right must be vindicated at special elections.”).

**E. The Requested Injunction is Not Reasonably Tailored to Actual Imminent Harm.**

As an initial matter, Petitioner’s Preliminary Injunction merely raises the *possibility* of harms or offensive activity. The mere possibility of harm cannot form the basis for a preliminary injunction, and for that reason alone Petitioner’s requested relief is not available. *See Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (“speculative considerations cannot form the basis for issuing a preliminary injunction”).

Even if the Petition for Preliminary Injunction properly alleged an irreparable harm, which it does not, Petitioner wrongly argues the requested relief will abate the offending activity. Because Leader McClinton issued the writs in accordance with the law, the Petitioner’s proposed injunction, which would have the effect of canceling the special elections, is not reasonably suited to abate the allegedly offending activity.

Nor can Petitioner hide under the asserted claim that the writs somehow usurped Representative Cutler’s authority as the Leader of the Republican Caucus of the House of Representatives and the authority of a “possibly” Majority Leader of the House of Representatives.

First, Leader McClinton’s issuance of the writs of elections on December 7 has no bearing on Representative Cutler’s authority as Leader of the Republican

Caucus since that caucus was not in the majority when Leader McClinton issued the writs of elections. *See* Ex. A-D.

Second, as of December 7, 2022, Representative Cutler was not—and cannot claim to have been—the Majority Leader of the House of Representatives. Due to baseless election challenges in multiple counties, at all times between December 1 and December 7, Leader McClinton was the clear leader of a majority caucus of certified members.

**F. The Requested Injunction Is Not in the Public Interest.**

Finally, the public interest heavily favors against the Petitioner’s requested preliminary injunction for several reasons.

First, the unrepresented citizens of the 34<sup>th</sup> and 35<sup>th</sup> House Districts are Constitutionally and statutorily entitled to timely representation. *See Fagan*, 41 A.3d at 818, citing the Free and Equal Elections Clause, Pa. Const. art I, § 5 (voters have “a clear legal right to elected representation, which right must be vindicated at special elections.”); *see also* 25 P.S. § 2778 (special elections must be called within ten days of the vacancy occurring).

Second, the Department of State, the Allegheny County Board of Elections, the political parties, candidates, and voters have settled expectations regarding the set date for the special elections in the 34<sup>th</sup> and 35<sup>th</sup> House Districts and have expended significant resources in reliance on that date in both races. As noted above,

Nomination Certificates have already been filed with the Department of State on behalf of Democratic and Republican candidates in both races. *See* Stipulated Facts, filed December 30, 2022, at ¶ 19. These candidates, their supporters, and the parties who have nominated them will be harmed, financially and through dissemination of stale or false election information, if any changes are made to the election calendar so close in time to the special elections.

Third, the special elections in the 34<sup>th</sup> and 35<sup>th</sup> House Districts are set for the same date as the special election in the 32<sup>nd</sup> House District. There are efficiencies created by holding all three special elections in contiguous House districts that are administered by a single county board of elections on the same day.

Given the above, the public interest weighs heavily against granting Petitioner's requested relief.

## **VII. CONCLUSION**

For the foregoing reasons, this Court should deny Petitioner’s Emergency Application for Special Relief in the Nature of a Preliminary Injunction.<sup>1</sup>

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January 4, 2023

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<sup>1</sup> Petitioner asserts in a footnote in his brief that the PA Dems be deemed to have supported his position despite the PA Dems intervening expressly to oppose his absurd argument and seeking alternative emergency relief from the Court. This asserted support for his efforts to suppress representation is as fictional as Petitioner’s role as majority leader on December 7. PA Dems properly filed its application for leave to intervene on December 15, 2022, pursuant to the Court’s order. *See* Order of Court, December 12, 2022, at ¶ 2 (ordering applications for intervention be filed no later than 12:00 p.m. on December 16, 2022). PA Dems subsequently complied with the Court’s December 22, 2022 order directing PA Dems to “PACFile and serve responsive pleadings or Preliminary Objections to the Petition for Review in the Nature of a Complaint for Declaratory Judgment, with respective Briefs in Support thereof (4 copies), no later than Wednesday, December 28” by filing its Preliminary Objections on December 28, 2022 at 3:09 p.m. *See* Order of Court, December 22, 2022, at ¶ 1, and docket in the instant matter.

**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was served upon all  
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**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/ Peter Elliot  
Peter Elliot

**CERTIFICATE OF LENGTH**

Pursuant to Rule 2135(a), I hereby certify that this brief has a word count of 3,455, as counted by Microsoft Word's word count tool.

*s/ Peter Elliot*  
Peter Elliot