

**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.** :

**INTERVENOR RESPONDENT JOANNA E. MCCLINTON'S  
MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION FOR  
SPECIAL RELIEF IN NATURE OF PRELIMINARY INJUNCTION**

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## INTRODUCTION

Leadership is fundamentally an internal matter for the House of Representatives. Who serves as Speaker of the House and as its Majority and Minority Leaders and who has authority to act as presiding officer are paradigmatic political questions that this Court is without power to question, review or determine. With regard to writs of election, the Supreme Court has made clear 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” and the separation of powers precludes any other branch from questioning the validity of a writ of election or the authority to issue the writ. *Perzel v. Cortes*, 870 A.2d 759, 765 (Pa. 2005).

Petitioner Bryan Cutler, Leader of the Republican Caucus of the House of Representatives, urges this Court to ignore *Perzel*, invade internal processes of the House, and take the unprecedented action of enjoining ongoing special elections to fill vacancies in the House based on his claim that he, not Democratic Leader Joanna E. McClinton, was permitted to call for the elections. There is no authority for the relief Leader Cutler seeks and he falls far short of the showing necessary for a preliminary injunction that would delay the fundamental right to elected representation for more than 100,000 Pennsylvanians in the affected districts. The

application for special relief should be denied and the special elections should proceed as scheduled on February 7, 2023.

### **ARGUMENT**

Leader Cutler fails to establish any of the “essential prerequisites”<sup>1</sup> necessary for a preliminary injunction and, as a result, his application for special relief should be denied.

#### **A. There Is No Actionable Dispute and No Clear Right to Relief.**

Leader Cutler posits that he, not Leader McClinton, was the majority leader authorized to issue writs of election. Supp. Br. at 18. This, however, is a political question not subject to review in the courts and, as a result, there is no actionable dispute.

The Supreme Court made clear in *Perzel* that the power to schedule a special election is entrusted solely to the legislature. 870 A.2d at 765. The Supreme Court’s

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<sup>1</sup> The six “essential prerequisites” that a party must establish to obtain preliminary injunctive relief are: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it and issuance of an injunction will not substantially harm other interested parties in the proceeding; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the activity sought to be restrained is actionable and the right to relief is clear; (5) the injunction sought is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004). If the petitioner fails to establish any one of these requirements, there is no need to address the others and the application fails. *Cnty. of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988).

ruling is direct and controlling: “The authority to issue a writ for a special election for a vacant seat in the General Assembly is vested *exclusively* in that body pursuant to Article II, Section 2 of the Pennsylvania Constitution. No branch shall exercise authority exclusively vested in another branch.” *Id.* (emphasis added) (citation omitted). *Perzel* further held that “[r]ejection” of a writ of election issued by the House “offends the separation of powers.” *Id.*

Leader Cutler urges the Court to ignore *Perzel* and enjoin the writs issued by Leader McClinton based on his claim to the role of presiding officer. Supp. Br. at 18. He argues that he qualified as “majority leader” based on the definition in Black’s Law Dictionary and the understanding of “constitutional majority” needed for consent to gubernatorial appointments under Article IV, § 8(a). Supp. Br. at 14-16.<sup>2</sup> However, Black’s Law Dictionary and Article IV, § 8(a) do not control

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<sup>2</sup> Leader Cutler cites *Zemprelli* and a facially non-binding and *ex parte* “Legal Opinion” from the Legislative Reference Bureau which heavily relies on *Zemprelli* as ostensible support for the proposition that the Majority Leader is the leader of the caucus with the most members “elected, living, sworn, and seated.” Supp. Br. at 15-17. *Zemprelli* does not bear the weight attributed to it. For one thing, *Zemprelli* has nothing to do with who is the presiding officer or Majority Leader or who has authority to issue writs of election. *Zemprelli* involved interpretation of Article IV, § 8(a) which requires “consent of . . . a majority of the members elected to the Senate” for appointments *after* the Senate convenes and a Senate Rule XXII-8 that also has no application here. *Zemprelli*, 436 A.2d at 1166. There is no constitutional provision that purports to govern who controls the House, but rather the power to choose officers and determine rules is constitutionally delegated exclusively to the House. Pa. Const. art. II, §§ 9, 11. The Supreme Court’s interpretation of different language in an inapplicable constitutional provision in *Zemprelli* is not relevant and the different issue presented here is a non-justiciable political question as detailed above.

leadership of the House. The procedure for choosing officers and the power to determine House rules are instead constitutionally delegated exclusively to the House. Pa. Const. art. II, §§ 9, 11. As a result, leadership is a political question that the House of Representatives and only the House of Representatives has authority to decide. *See Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996) (“[T]he question of whether the legislature violated its own internal rules is generally non-justiciable since the courts cannot interfere with the internal workings of the legislature ‘without expressing the lack of respect due coordinate branches of government.’”) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *Dintzis v. Hayden*, 606 A.2d 660, 662 (Pa. Cmwlth 1992) (issue of whether member violated House rule by manipulating roll call device is non-justiciable political question).<sup>3</sup>

Put simply, the separation of powers poses an absolute bar to the preliminary injunction sought by Leader Cutler. Further, the newly elected Speaker of the

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Further, the “Legal Opinion” by the Legislative Reference Bureau is admittedly “only advisory” and not “binding,” Pet. for Review, Ex. H, and is plainly inadmissible, *see Browne v. Commonwealth*, 843 A.2d 429, 433 & n.1 (Pa. Cmwlth. 2004) (“legal opinion testimony is not admissible”). Nothing underscores the nonjusticiable political nature of this dispute more than Leader Cutler’s unjustified invocation of the advisory opinion that his own Chief of Staff solicited for use in support of his claim filed two days later.

<sup>3</sup> The different standards proposed by Leader Cutler for determining who is the majority leader demonstrate the political nature of the dispute. *Baker*, 369 U.S. at 217 (“lack of judicially discoverable and manageable standards for resolving” dispute signifies non-justiciable political question).



House, Mark Rozzi,<sup>4</sup> just yesterday ratified and confirmed the Writs of Election issued by Leader McClinton on December 7, 2022, thereby affirming the position of the House of Representatives that the special elections must proceed on February 7, 2023.<sup>5</sup> There is no actionable dispute and no clear right to relief. *See Luzerne County Council v. Luzerne County Bd. of Elections*, 266 A.3d 1216 (Table), 2021 WL 5014062 (Pa. Cmwlth. Oct. 28, 2021) (not reported) (petition to preliminarily enjoin election properly denied where petitioner failed to establish clear right to relief and likelihood of success on the merits of its claim that scheduling election violated statute).<sup>6</sup>

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<sup>4</sup> Indeed, Leader Cutler was one of sixteen Republican members who voted in favor of the election of Speaker Rozzi. *See* House Roll Calls – 2023 RCS# 4 – PA House of Representatives (state.pa.us) (last visited Jan. 4, 2023).

<sup>5</sup> This changed circumstance moots the claim in Leader Cutler’s Petition for Review and will be the subject of a separate filing.

<sup>6</sup> Leader Cutler is seeking the extraordinary remedy of disrupting a special election that is underway based on his speculative assertions that the special elections might “possibly” be “unlawful,” Appl. for Special Relief ¶ 32, and the writs Leader McClinton issued were “questionable,” Supp. Br. at 2. Such speculation cannot serve as the basis for an injunction. *See Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (“speculative considerations cannot form the basis for issuing a preliminary injunction”) (citation and internal punctuation omitted); *Yarmoski v. Lloyd*, 531 A.2d 1169, 1171-72 (Pa. Cmwlth. 1987) (claim that harm “may” occur at some future point cannot form basis for issuance of preliminary injunction).

**B. There Is No Immediate and Irreparable Harm.**

Leader Cutler argues that Leader McClinton violated 46 P.S. § 46.121m by issuing the writs and the alleged violation constitutes immediate and irreparable harm. Supp. Br. at 17-19. He is wrong on both assertions.

As the leader of the House Democratic Caucus whose members won a majority of seats in the general election on November 8, 2022, Leader McClinton served as presiding officer of the House after adjournment *sine die* and therefore acted in conformity with 25 P.S. § 2778 and 46 P.S. § 42.121m in issuing the Writs of Election. Leader Cutler, as the representative of the minority party in the House, has not been harmed in any way by the special elections. *See generally Cappiello v. Duca*, 672 A.2d 1373, 1377-78 & n. 1 (Pa. Super. 1996) (preliminary injunction properly denied where movants failed to establish statutory violation).<sup>7</sup> Nor can he credibly claim harm given that the special elections were scheduled on *the same*

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<sup>7</sup> The cases cited by Leader Cutler involve materially different circumstances and do not support issuance of preliminary injunctive relief here. *See Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 583 (Pa. Cmwlth. 2012) (preliminary injunction properly issued to require school to bus students under School Code where defendant's legal argument for refusing to provide school bus service was "unsustainable" given Supreme Court ruling); *Grine v. County of Centre*, 138 A.3d 88, 101 (Pa. Cmwlth. 2016) (preliminary injunction properly issued to enjoin disclosure of judicial records in violation of procedure in Right To Know Law); *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610 (Pa. Cmwlth. 2020) (preliminary injunction properly issued to enjoin school tax increase in violation of statute where school district offered no evidence disputing taxpayers' showing that increase violated statute).

*date* that he previously selected for the special election to fill the vacant seat in the 32nd Legislative District. Stipulated Facts ¶ 10.<sup>8</sup> Moreover, under *Perzel*, any challenge to Leader McClinton’s authority to issue the writs is not justiciable. *See supra* pp. 3-6.

Leader Cutler has not established and cannot establish immediate and irreparable harm necessary for preliminary injunctive relief.

**C. Greater Injury Will Result From Granting a Preliminary Injunction.**

It cannot seriously be denied that greater injury will result from granting the requested injunctive relief, than from denying relief.

Preparations for the three special elections scheduled for February 7, 2023 are already well underway. Stipulated Facts ¶ 25. The special election calendar has been established and published by the Department of State.<sup>9</sup> The nomination period for

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<sup>8</sup> The document issued by Leader Cutler on November 30, 2022 in the 2020-2022 term was facially defective because the 2022-2024 term had not yet begun and there was not yet a vacancy to be filled. In addition, the newly reapportioned 32nd Legislative District did not “take[] effect” until the next term began on December 1, 2022. *See Fagan v. Smith*, 41 A.3d 816, 820 (Pa. 2012).

<sup>9</sup> *See*  
<https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/Special%20Elections/2023/2023-SpecialElection-Calendar-32nd-Leg.pdf> (last visited Jan. 4, 2023);  
<https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/Special%20Elections/2023/2023-SpecialElection-Calendar-34-Leg.pdf> (last visited Jan. 4, 2023);  
<https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice>

political party and political body candidates began on December 7, 2022 and candidate nominations were filed on December 19, 2022. A spokesperson for Allegheny County, where all three special elections will be held, publicly confirmed that the County is moving forward with election preparations, including “confirming polling locations, scheduling poll workers and other administrative work.”<sup>10</sup> Derailing the ongoing process now prior to a ruling on the merits will waste government resources, prejudice candidates and needlessly delay basic representation to voters in the 34th and 35th Legislative Districts. Further, delaying the special elections will adversely affect electors in the affected districts by requiring them to reapply for mail-in ballots. *See* 25 P.S. § 3150.12(g)(1). The balance of harms thus militates against a preliminary injunction. *See, e.g., Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at \*19 (Pa. Cmwlth. Sept. 29, 2022) (denying request to enjoin counties from implementing notice and cure procedure with respect to mail-in ballots because “it would seriously harm the public interest and orderly administration of . . . the . . . General Election[] which is already well underway”) (unreported opinion), *aff’d* by

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/Documents/Special%20Elections/2023/2023-SpecialElection-Calendar-35-Leg.pdf (last visited Jan. 4, 2023).

<sup>10</sup> *See Allegheny County is moving ahead with special elections for vacant state House seats* (Dec. 16, 2022), available at <https://www.penncapitalstar.com/campaigns-elections/allegheny-county-is-moving-ahead-with-special-elections-for-vacant-state-house-seats/>.

*equally divided court*, 284 A.3d 207 (Pa. Oct. 21, 2022); *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 489 (Pa. 2006) (permanent injunction altering voting procedure on referendum unavailable where greater injury would result from granting injunction than denying it).

Leader Cutler surmises that proceeding with the election preparations while this dispute is litigated risks waste of “taxpayer dollars” if it is later determined that he had authority to issue writs of election, Supp. Br. at 19, but the threat of wasted resources is unfounded. It has already been stipulated that the special election in the 32nd Legislative District will proceed as scheduled on February 7, 2023. Stipulated Facts ¶ 20. Holding the special elections in the adjoining 34th and 35th Districts in the same county on the same date will instead foster and enable the efficient use of election resources.<sup>11</sup>

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<sup>11</sup> Holding the special elections in the 34th and 35th Legislative Districts on the date of the primary election, May 16, 2023, will not achieve any efficiency for a number of reasons, including that the primary election is open to party registrants only whereas special elections are open to all electors and the primary election will include races throughout Allegheny County, not just the three special election districts. County election officials would be required to print, administer and count two different sets of ballots for the affected districts, thereby increasing the risk of confusion, separated ballots and miscounting. Holding all three special elections on the same date is unquestionably more convenient for county election officials. Further, holding the special elections on February 7, 2023 avoids the need for voters in the affected districts to make an additional request for a mail in ballot. *See* 25 P.S. § 3150.12(g)(1) (mail-in ballot application previously submitted serves as application for mail-in ballot “for all special elections to be held before the third Monday in February of the succeeding year”).

The balance of harms thus favors denial of preliminary injunctive relief.

**D. Preliminarily Enjoining the Special Elections Will Alter, Not Preserve, the *Status Quo*.**

Leader Cutler seeks to fundamentally and irreversibly alter the *status quo* by “pausing” the special elections. Supp. Br. at 20. Enjoining the election preparations would effectively cancel the special elections set for February 7, 2023 and require rescheduling on a later date. Leader Cutler’s request thus amounts to final relief on the merits which is not available by way of a preliminary injunction under Rule 1531. *See, e.g., Soja v. Factoryville Sportsmen’s Club*, 522 A.2d 1129, 1132 (Pa. Super. 1987) (reversing trial court order which “improperly granted a final injunction in response to a request for a preliminary injunction”).

Leader Cutler argues that “pausing” the special election preparations in the 34th and 35th Legislative Districts will restore the *status quo*, Supp. Br. at 20-21, but this argument ignores that Leader Cutler himself called for a special election on February 7, 2023 *before* Leader McClinton issued the Writs of Election sought to be enjoined. Stipulated Facts ¶ 10. The relevant status to be preserved is holding a special election to fill vacancies on February 7, 2023. Enjoining the special elections would improperly and irreversibly alter this *status quo*. *In re Appeal of Little Britain Twp. From Decision of Zoning Hearing Bd. of Little Britain Twp.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) (“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made[;]

it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.”) (citation omitted).

The preliminary injunction sought will destroy rather than restore the *status quo* and therefore the application for special relief should be denied.

**E. The Requested Preliminary Injunction Is Not Reasonably Suited To Abate Any Offending Activity.**

The political question doctrine stands as a stone wall in the path of Leader Cutler’s application for special relief in the nature of a preliminary injunction. The issue he seeks to litigate—whether he or Leader McClinton had authority to issue writs of election to fill House vacancies—is a matter entrusted exclusively to the House and is not subject to judicial determination or review. *See Perzel*, 870 A.2d at 765 (“The authority to issue a writ for a special election for a vacant seat in the General Assembly is vested exclusively in that body pursuant to Article II, Section 2 of the Pennsylvania Constitution.”). Leader Cutler himself acknowledges the essential holding in *Butcher* that the judiciary lacks authority to enjoin an election where the action at issue is a “purely political non-justiciable question[.]” Supp. Br. at 23. Because the issue here is a purely political question, preliminary injunctive relief is not available as a matter of law. Further, Leader Cutler, in the ultimate example of the efficacy of the political question doctrine, voted for Speaker Rozzi who later issued writs affirming February 7, 2023 as the will of the House of Representative for the date on which the special elections must occur.

**F. The Preliminary Injunction Sought Will Seriously Harm the Public Interest.**

There can be no doubt that enjoining the special elections as Leader Cutler urges would harm the public interest. Electors in Pennsylvania’s 34th and 35th Legislative Districts “have a clear legal right to elected representation, which must be vindicated at special elections.” *Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012); *see generally Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (“[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.”). “[A]lacritty is required” when filling vacancies in the General Assembly. *Fagan*, 41 A.3d at 819. Article II, Section 2 contemplates that “writs should issue quickly.” *Id.* Disrupting and materially delaying the special elections to fill the vacant seats deprives citizens of their basic right of elected representation. The relief sought is thus contrary to the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020) (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

Leader Cutler argues that the public interest is due lesser consideration here because the action at issue is prohibited by the General Assembly. Supp. Br. at 24. This is not correct. There is no statutory prohibition barring issuance of writs of election, but rather Leader Cutler is (improperly) seeking to litigate which House member had authority to issue the writs. Further, as demonstrated above, Leader



Cutler has not clearly established and cannot establish a statutory violation. It would be error to ignore or discount the strong public interest against granting preliminary injunctive relief in these circumstances. *See Cnty. of Allegheny v. Commonwealth*, 544 A.2d 1305 (Pa. 1988) (“For a preliminary injunction to issue, every one of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.”) (citation omitted).<sup>12</sup>

### **CONCLUSION**

Leader Cutler fails to satisfy any of the essential prerequisites for granting preliminary injunctive relief. He cites no relevant authority for his extraordinary and unprecedented request for a court order delaying the special elections for the 34th and 35th Legislative Districts while the special election for the neighboring 32nd Legislative District proceeds on February 7, 2023. And there is no good reason for the delay. Instead, the bifurcated special elections are transparently intended to

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<sup>12</sup> Leader Cutler’s argument for a relaxed public interest standard is based on cases where a statutory violation was admitted or not seriously contested. *See Pa. Pub. Utility Comm’n v. Israel*, 52 A.2d 317, 321 (Pa. 1947) (contention that taxi companies were violating the Public Utility Law was “not seriously disputed by the defendants” and they “presented no authorities to the Court to substantiate the suggestion that their plan of operation” was lawful); *Cumberland County v. Pa. Dep’t of Trans.*, No. 199 MD 2022 (Pa. Cmwlth. May 18, 2022) (record evidence demonstrated lack of compliance with statute relating transportation projects); *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 601 (Pa. Cmwlth. 2020) (school district presented no witnesses and offered only budgets in opposition to taxpayers’ demonstration that school district raised taxes without voter approval in violation of School Code). That is not the situation here.

forestall elections in two districts just won by Democratic candidates and where no Republican candidates were even nominated in the November 2022 General Election. The demonstrated unclean hands provides further grounds for denying preliminary injunctive relief. *See Jacob v. Halloran*, 710 A.2d 1098, 1103 (Pa. 1998) (doctrine of unclean hands requires that party seeking equity acted fairly and without fraud or deceit as to controversy in issue) (citations omitted).

In sum, Leader Cutler has failed to carry his heavy burden of demonstrating a right to preliminary injunctive relief. “[T]he grant of a preliminary injunction is a harsh and extraordinary remedy” which “is to be granted only when and if *each* criteria has been fully and completely established.” *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (citation omitted) (emphasis in original). Leader Cutler has failed to satisfy this burden and, as a result, his request for preliminary injunctive relief must be denied.

Respectfully submitted:

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Representatives

Date: January 4, 2023

## **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: January 4, 2023

**PROOF OF SERVICE**

I, Daniel T. Brier, hereby certify that I served the forgoing Memorandum of Law in Opposition to Application for Special Relief 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: January 4, 2023