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## I. INTRODUCTION

Respondents Leigh M. Chapman, Acting Secretary of the Commonwealth (“Acting Secretary Chapman”), and the Pennsylvania Department of State (“the Department”) (Acting Secretary Chapman and the Department are collectively referred to as the “Commonwealth Respondents”) submit this Memorandum of Law in Opposition to the Emergency Application for Special Relief in the Nature of a Preliminary Injunction (the “Application”) filed by Representative Bryan Cutler (“Representative Cutler”).

Although the Commonwealth Respondents do not take a position on how the House of Representatives determines who is the Majority Leader, Representative Cutler’s request—enjoining currently scheduled and publicized special elections and delaying the right of citizens in Pennsylvania’s 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts to vote—would create greater harm than denying the Application, including working a harm to the public’s interest in elections. There is no dispute that special elections for the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts will occur. There is also no dispute that the special election for the 32<sup>nd</sup> Legislative District will occur on February 7, 2023. The only issue presented in the Application is whether the special elections in the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts—which also have been scheduled for February 7, 2023, and for which Republican and Democratic candidates have filed

nomination certificates—should be canceled and held on a later date.<sup>1</sup> Currently, the Commonwealth Respondents and the Board of Elections of Allegheny County are undertaking preparations for the February 7, 2023 special elections. The issuance of an injunction will result in the cancelation of the special elections in the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts on February 7, 2023, creating voter confusion and delaying the ability of the citizens in those districts to have elected representation in the House of Representatives. Permitting all three special elections to proceed on the same date promotes stability, efficiency, and clarity in the election process, especially where those special elections have already been publicized and scheduled.

Representative Cutler presents no meritorious argument as to how any harm he will suffer outweighs allowing the citizens of the Commonwealth to vote in special elections on February 7, 2023, especially when he selected February 7, 2023, as an appropriate date for a special election in Allegheny County.<sup>2</sup> On the other

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<sup>1</sup> As outlined below, on January 4, 2023, the Commonwealth Respondents received writs regarding special elections for the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts signed by Mark Rozzi, Speaker of the House of Representatives, and attested by the Chief Clerk (“Speaker Rozzi Writs”). The Speaker Rozzi Writs directed special elections to be held for these districts “on the day established in the writ issued on December 7, 2022, by Leader Joanna E. McClinton.”

<sup>2</sup> Both Representative McClinton and Representative Cutler selected February 7, 2023, as a date for a special election for the 32<sup>nd</sup> Legislative District. *See* Dec. 9, 2022 Emergency App. for Special Relief (“Application”) Ex. A. The parties have

hand, if an injunction is denied, this Court will still be able to address the central issue raised by the Petition, if it presents a justiciable question, namely whether Representative Cutler or Representative McClinton is the Majority Leader in the House of Representatives. There is no reason to cancel these special elections—which all parties agree must be held at some point, which are currently scheduled for February 7, 2023, and for which preparations are well underway.

## II. STATEMENT OF THE CASE

### A. **Representative McClinton’s December Writs directed the Commonwealth Respondents to conduct special elections on February 7, 2023, for which they are currently preparing.**

On October 9, 2022, Representative Anthony DeLuca, the Representative for Pennsylvania’s 32<sup>nd</sup> Legislative District in the House of Representatives, passed away. December 30, 2022 Stip. (“Stip.”) ¶ 8. At the time of his death, the 206<sup>th</sup> House of Representatives was in session, which commenced on December 1, 2020, and ended on November 30, 2022. *Id.* ¶¶ 10-11; 101 Pa. Code § 7.21 (“The General Assembly is a continuing body during the term for which its Representatives are elected which begins on December 1 of each even-numbered year and ends at the expiration of November 30 of the next even-numbered year.”). Representative

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since stipulated that the special election in this District may proceed on February 7, 2023. *See* Dec. 23, 2022 Stip.

DeLuca's death accordingly created a vacancy in his seat in the 206<sup>th</sup> House of Representatives.

Section 628 of Pennsylvania's Election Code, 25 P.S. § 2778, provides the process through which a vacancy in the House of Representatives can be filled with a special election. When a Representative in Pennsylvania's House of Representatives dies or otherwise vacates his or her seat, Section 628 instructs that a writ of election to fill that vacancy "shall" be issued to the Secretary of the Commonwealth within 10 days of the vacancy by the "presiding officer" of the House of Representatives. *Id.* That presiding officer is typically the Speaker of the House, but when there is also a vacancy in the office of Speaker of the House, the Majority Leader may issue the writ of election. *See* 46 P.S. § 42.121m ("If 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.").

The special election "shall" be conducted "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 days following the issuance of the writ** as the presiding officer may deem appropriate." *Id.* (emphasis added). Accordingly, in no event can a special election be held in less than sixty days from the vacancy arising.

In this case, Representative DeLuca died on October 9, 2022, which was less than 60 days before the end of his term, which ended on November 30, 2022. *See* Stip. ¶ 10. It was, therefore, statutorily impossible to carry out a special election to fill the vacancy of his seat in the 206<sup>th</sup> House of Representatives. Accordingly, no special election for Representative DeLuca's seat in the 206<sup>th</sup> House of Representatives occurred.

A general election was held on November 8, 2022, for all 203 seats in Pennsylvania's House of Representatives for the 207<sup>th</sup> legislative session. *Id.* ¶¶ 5-6. Representative DeLuca died less than a month before this election, and his name still appeared on the ballot for the seat in Pennsylvania's 32<sup>nd</sup> Legislative District. *Id.* ¶ 9. Representative DeLuca was reelected posthumously. *Id.* Accordingly, because the deceased Representative DeLuca could not take the seat to which he was elected in the 207<sup>th</sup> legislative session, that seat became vacant upon the commencement of the 207<sup>th</sup> legislative session on December 1, 2022. *See generally id.* ¶¶ 11-12.

After the commencement of the 207<sup>th</sup> House of Representatives on December 1, 2022, two additional members of the House of Representatives also resigned, creating additional vacancies in the House of Representatives. *Id.* ¶ 15. Representative Summer L. Lee of the 34<sup>th</sup> Legislative District and Representative



Austin A. Davis of the 35<sup>th</sup> Legislative District vacated their seats on December 7, 2022. *Id.*

On December 7, 2022, Representative Joanna E. McClinton, Leader of the Democratic Caucus of the House of Representatives, issued writs of election to fill the vacancies in the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts (the “December Writs”). *Id.* ¶ 16; *see* Application Exs. E-G. The December Writs directed Acting Secretary Chapman to conduct special elections for these seats on February 7, 2023. *Id.* ¶ 16. As of the date of the December Writs, no election for the Speaker of the House had yet occurred in the 207<sup>th</sup> House of Representatives, *id.* ¶ 13, and the December Writs identified Representative McClinton as the Majority Leader of the House of Representatives, a position which would allow her to issue the writs of election. Application Exs. E-G; *see also* 46 P.S. § 42.121m. Each of the December Writs was attested to by the Chief Clerk of the House of Representatives. Application Exs. E-G.

Section 628 of the Election Code provides that a special election “shall” be held upon receipt of writs scheduling such elections. 25 P.S. § 2778. Accordingly, Acting Secretary Chapman began the process of preparing for special elections in the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts of Allegheny County to be held on February 7, 2023, as directed. *See* Application Exs. E-G; Stip. Exs. 3-5 (calendar of

relevant dates for February 7, 2023 special elections). The preparations for those special elections are ongoing today:

- The Commonwealth Respondents have issued a calendar for the February 7, 2023 special elections in the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts. Stip. Exs. 3-5.
- The Department accepted nomination certificates and associated paperwork in the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts through the applicable deadline, December 19, 2022. *Id.*
- Both Republican and Democratic candidates filed nomination certificates for the special elections in the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts. *Id.* ¶ 19.
- December 27, 2022, was the last date for candidates to withdraw from the February 7, 2023 special elections. *Id.*
- The last day for Acting Secretary Chapman to certify names and residences of candidates for the special elections is January 8, 2023, Stip. Exs. 3-5, and she issued those certifications on January 3, 2023.
- The Allegheny Board of Elections must undertake additional preparation efforts before February 7, 2023, which are already underway. *Id.* ¶ 25.

The preparations for the February 7, 2023 special elections will also include the distribution of mail-in and absentee ballots to voters in the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts. Pursuant to Sections 1302(e.1) and 1302-D(g) of the Election Code, 25 P.S. §§ 3146.2(e.1), 3150.12(g), voters on the permanent mail-in and absentee lists who timely completed and returned a mail-in ballot or absentee ballot application in 2022 will automatically receive a mail-in or absentee ballot for special elections that are held on or before the third Monday in February of 2023, which is

February 20, 2023. This means that approved voters in the 32<sup>nd</sup> Legislative District will automatically receive mail-in and absentee ballots for the February 7, 2023 special election. If the special elections for the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts are postponed to a date after February 20, 2023, approved voters in these legislative districts will need to reapply to receive mail-in or absentee ballots. 25 P.S. §§ 3146.2(e.1), 3150.12(g).

**B. Prior to the December Writs, Representative Cutler attempted to direct Acting Secretary Chapman to conduct a special election for February 7, 2023, but his writ of election was premature.**

Before the December Writs, Representative Cutler, who was the Speaker of the House for the 206<sup>th</sup> House of Representatives, attempted to call a special election to fill Representative DeLuca's seat in the 32<sup>nd</sup> Legislative District. *See* Application Ex. A. On November 30, 2022, *before* the 207<sup>th</sup> House of Representatives began, Representative Cutler issued a writ of election to fill the yet-to-occur vacancy in Representative DeLuca's seat. *Id.* Representative Cutler's attempted writ of election set a special election to fill Representative DeLuca's seat for February 7, 2023, the same date on which Representative McClinton directed the Commonwealth Respondents to hold the special elections in the December Writs. *Compare id.*, with Application Exs. E-G.

Acting Secretary Chapman returned Representative Cutler's November 30, 2022 writ of election because it was premature, as the 207<sup>th</sup> House of Representatives

had yet to commence and therefore did not have any vacancies. *See* Application Ex. I. In a December 7, 2022 letter to the Chief Clerk of the House of Representatives, Acting Secretary Chapman explained why she could not accept Representative Cutler’s writ of election: “Because the document issued by then-Speaker Cutler was dated November 30, 2022[,] but purported to fill the term that concludes in 2024 that had not yet commenced, that document was premature.” *Id.*<sup>3</sup> She further explained that Representative Cutler’s purported writ of election “could not validly seek to fill a vacancy in Representative DeLuca’s unexpired term ending in 2024, which vacancy would not occur until the following day, when the next term and legislative session begins under our Constitution.” *Id.*<sup>4</sup>

**C. Since the issuance of the December Writs, Representative Cutler has attempted to issue additional writs for elections already scheduled.**

On December 15, 2022, Representative Cutler submitted two additional writs of election for the vacancies in the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts, seeking to hold special elections on May 16, 2023. *See* Stip. Exs. 1-2. The vacancies in the 34<sup>th</sup> and

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<sup>3</sup> It would have been statutorily impossible to schedule a special election for Representative DeLuca’s seat for the 206<sup>th</sup> House of Representatives. *See supra* pp. 4, 5.

<sup>4</sup> Acting Secretary Chapman’s return of the November 30, 2022 writ is not at issue in the Petition for Review, *see* Petition for Review ¶¶ 34-71, but Representative Cutler’s selection of February 7, 2023, as a date for a special election in Allegheny County is highly relevant to his injunction request and his claim of harm.

35<sup>th</sup> Legislative Districts were the subject of the December Writs, and preparations for special elections on February 7, 2023, pursuant to those writs are currently underway. The Commonwealth Respondents are following the first facially valid writs received (the December Writs) unless this Court instructs otherwise.

**D. Speaker of the House Mark Rozzi issued writs on January 4, 2023 directing special elections for the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts to be held on the dates established in the December Writs.**

On January 3, 2023, Representative Mark Rozzi was elected as Speaker of the House of Representatives. On January 4, 2023, the Commonwealth Respondents received two writs for special elections for the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts signed by Mark Rozzi, Speaker of the House of Representatives, and attested by the Chief Clerk. The Speaker Rozzi Writs directed that special elections be held for 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts “on the day established in the writ issued on December 7, 2022, by Leader Joanna E. McClinton.”

### **III. STANDARD OF REVIEW**

To prevail on a preliminary injunction request, the party requesting relief must show that: (1) “an 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, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings;” (3) the injunction “will properly restore the parties to their status as it

existed immediately prior to the alleged wrongful conduct;” (4) “that it is likely to prevail on the merits,” meaning that “the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest;” (5) “that the injunction . . . is reasonably suited to abate the offending activity;” and (6) “that a preliminary injunction will not adversely affect the public interest.” *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

#### **IV. SUMMARY OF ARGUMENT**

All parties agree that special elections for the three vacancies in the 32<sup>nd</sup>, 34<sup>th</sup>, and 35<sup>th</sup> Legislative Districts will occur; practically, the only question presented by the Application is whether the right of citizens in the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts to elect their representatives should be delayed. The Commonwealth Respondents scheduled and publicized special elections for February 7, 2023, after receiving facially valid writs, attested to by the Chief Clerk of the House of Representatives, directing special elections to be held on that date. Since then, the Commonwealth Respondents, the Board of Elections of Allegheny County, and candidates have been preparing for the special elections. Issuing an injunction and canceling currently scheduled elections would create confusion and delay the ability of citizens of these districts to choose their representatives. This harm significantly outweighs the harm of denying an injunction. Moreover, an injunction does not promote the public interest nor meet the other requirements for injunctive relief,

especially where all parties agree that special elections will occur, Representative Cutler also selected February 7, 2023 as the date for a special election in Allegheny County, and Speaker of the House Rozzi issued writs confirming February 7, 2023, as the special election date for the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts.

## V. ARGUMENT

This Court should not enter a preliminary injunction enjoining the special elections from going forward on February 7, 2023. Although the Commonwealth Respondents take no position on how the House of Representatives determines who is the Majority Leader, the Commonwealth Respondents acted appropriately in proceeding with the special elections pursuant to facially valid writs that were attested to by the Chief Clerk of the House. Enjoining the currently scheduled special elections would unnecessarily create confusion and frustrate the rights of Allegheny County's citizens to both elect their representatives and enjoy representation in the 207th House of Representatives. This Court should not issue a preliminary injunction because: (1) the harm from issuing a preliminary injunction will outweigh the harm from denying one; (2) a preliminary injunction will harm the public's interest in promptly held elections and elected representation in Pennsylvania's House of Representations; (3) a preliminary injunction will not preserve the status quo, which already selected February 7, 2023, as an appropriate date for special elections and required that a writ of election be issued promptly; and

(4) a preliminary injunction barring an election is an unnecessary remedy under the specific circumstances of this case.

*First*, the harm of issuing an injunction significantly outweighs the harm of denying one. Even if a statute has been violated as Representative Cutler alleges, and even if such violation is a technical, *per se* harm, the issuance of an injunction will cause far greater harm.<sup>5</sup> To issue a preliminary injunction, this Court must find that “greater 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.” *Summit Towne Ctr., Inc.*, 828 A.2d at 1001.

Representative Cutler asserts that he, and he alone, holds authority to issue writs of special election, but articulates no specific “injury” that would result if special elections proceed as scheduled by another Representative’s facially valid writs. *See* Cutler Br. 19. Representative Cutler specifically requests that this Court “preliminarily enjoin, pending further order of the Court, Respondents and all

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<sup>5</sup> Representative Cutler contends that because he alleges a statutory violation, this Court need not balance the harms of issuing a preliminary injunction. Cutler Br. 19. He relies upon *Wolk v. Sch. Dist. of Lower Merion*, where the court noted that balancing of harm inquiry was not required (but nevertheless did so). *See* 228 A.3d 595, 610 (Pa. Commw. Ct. 2020). *Wolk* is an outlier. The Pennsylvania Supreme Court has, after finding a statutory violation, still conducted a balancing of the harm inquiry. *See SEIU Healthcare Penn. v. Pennsylvania*, 104 A.3d 495, 509 (Pa. 2014) (holding that the Court “must next examine whether SEIU has demonstrated that greater injury would result from refusing an injunction than from granting it[.]”).



government official employed by Respondents from effectuating the [December Writs].” Application ¶ 31. Holding the scheduled elections, however, can hardly be considered an injury because Representative Cutler sought to schedule a special election in Allegheny County for the same date—February 7, 2023. Application Ex. A. Indeed, holding special elections is a process that, under Section 628 of the Pennsylvania Election Code, must begin within 10 days of a vacancy arising. 25 P.S. § 2778.<sup>6</sup>

While any harm to Representative Cutler is *de minimis* if elections go forward on February 7, 2023, the harm to Pennsylvania citizens is substantial if those elections are cancelled. The cancellation of the February 7, 2023 special election will cause voter confusion. The special elections have already been published for this date, *see* Stip. Exs. 7-9, candidates have submitted nomination paperwork, Stip. ¶¶ 29-31, and those nominated candidates are presumably campaigning at present for the election on that date. Moreover, if the election is scheduled after February

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<sup>6</sup> In an effort to magnify the harm Representative Cutler will suffer if he does not obtain a preliminary injunction, he argues that this Court will have to “set aside an election after the fact” if the special elections are not enjoined and he ultimately prevails on his Petition for Review. Cutler Br. 20. Representative Cutler cites no authority for the extreme position that a democratic election could be set aside after-the-fact because of a dispute over who signed the writ of election. This is especially so where the Speaker of the House has issued writs confirming the special election date of February 7, 2023.

20, 2023, approved permanent voters in the relevant districts would need to reapply for mail-in or absentee ballots, causing additional confusion particularly given that such voters in the 32<sup>nd</sup> Legislative District would not need to do so. *Id.* ¶ 36.

*Second*, issuing an injunction is against the public interest. Section 628 of the Election Code, including its requirement that writs of election be issued within ten days of a vacancy, 25 P.S. § 2778, acknowledges the public's interest in prompt elections to fill vacancies. As the Pennsylvania Supreme Court recently acknowledged, "the longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise." *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020). This Court echoed the same sentiment last year: "[T]he overarching principle guiding the interpretation of the Election Code is that it should be liberally construed so as not to deprive electors of the right to elect a candidate of their choice." *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*13 (Pa. Commw. Ct. Aug. 19, 2022) (Cohn Jubelirer, P.J.).

Granting an injunction will create harm to the public because it will deprive the citizens of Allegheny County of representation in the House of Representatives for a longer time. *See generally Repub. Nat'l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at \*4 (Pa. Commw. Ct. Sept. 29, 2022) (denying injunction to stop election process favored the public interest in the "orderly administration of the 2022 General Election, which is already well under way.").

While the public also has an interest in correctly ascertaining the Majority Leader in the House of Representatives, that interest can be addressed through Representative Cutler's Petition for Review without the need to cancel the February 7, 2023 special elections and without divesting the citizens of Allegheny County of representation. Moreover, the public interest runs in favor of stability and clarity in elections, both of which are undermined by moving already-announced elections. That interest is further bolstered by the efficiency of the same county holding all three special elections on the same date.

Representative Cutler contends that an injunction "will not adversely affect the public interest" because "the public does not benefit from the execution of invalid writs of election." Cutler Br. 24. This misses the point because the Commonwealth Respondents received and scheduled special elections pursuant to facially valid writs attested to by the Chief Clerk of the House of Representatives. The public is harmed by the cancelation of already-announced special elections and the unnecessary deprivation of legislative representation for members of Pennsylvania's 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts for months.

*Third*, a preliminary injunction will not truly maintain the status quo. The status quo for a preliminary injunction is "the last peaceable and lawful uncontested status preceding the underlying controversy." *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Commw. Ct. 2011) (quoting *In re Milton Hershey Sch. Tr.*, 807

A.2d 324, 333 (Pa. Commw. Ct. 2002). Representative Cutler claims that issuing an injunction will cause no injury because it will “maintain the status quo” before the December Writs were issued. Cutler Br. 21. But this ignores that both Representatives Cutler and McClinton had selected February 7, 2023 as an appropriate date for a special election. Prior to the issuance of the December Writs, Representative Cutler had already selected February 7, 2023, as the date for a special election to fill the vacancy for the 32<sup>nd</sup> Legislative District. Moreover, prior to the issuance of the December Writs, the resignations of Representatives Davis and Lee put in motion a statutory process to promptly fill vacancies. In particular, the Pennsylvania Election Code directs that special elections “shall” be noticed within 10 days of a vacancy occurring and that elections shall promptly thereafter be held. 25 P.S. § 2778. Accordingly, promptly held special elections are the status quo, and the February 7, 2023 date for a special election was selected on November 30, 2022, by Representative Cutler.

*Fourth*, an injunction is not reasonably suited to abate the offending activity. Representative Cutler argues that the injunction is narrowly tailored because “this Court need only enjoin the execution of the writs of election at issue.” Cutler Br. 21. However, while the Application seeks to prevent effectuating the December Writs and the February 7, 2023 special elections for the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts, this is only an ancillary goal, as Representative Cutler himself sought to

notice a special election for February 7, 2023. *See* Application Ex. A. In other words, there is no genuine objection to holding a special election on February 7, 2023, and, indeed, a special election will be held on that date anyway, *see* Dec. 23, 2022 Stip. Instead, the ultimate question at issue is whether Representative Cutler or Representative McClinton is the Majority Leader. To answer this question, Representative Cutler asks this Court to postpone elections for months. These special elections, though, can and should proceed while that debate is resolved.

## VI. CONCLUSION

For the reasons set forth herein, the Commonwealth Respondents respectfully request that this Court deny Representative Cutler's request for a preliminary injunction enjoining special elections in the 34<sup>th</sup> and 35<sup>th</sup> Legislative Districts scheduled for February 7, 2023.

Date: January 4, 2023

Respectfully Submitted,

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## **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 require filing confidential information and documents differently than non-confidential information and documents.

*/s/ Justin G. Weber*

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