

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 PRELIMINARY OBJECTIONS OF
INTERVENOR-RESPONDENT JOANNA E. MCCLINTON**

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, McNees Wallace & Nurick LLC, hereby files this Answer in Opposition to the Preliminary Objections of the Intervenor-Respondent, Joanna E. McClinton, the duly elected member of the House of

Representatives for the 191st Legislative District and Leader of the Democratic Caucus of the House of Representatives (“Representative McClinton”).

Representative McClinton raises four objections to the Petition for Review in the Nature of a Complaint for Declaratory Judgment filed by Representative Cutler (“Petition for Review”), two of which are moot. 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 two remaining objections raised by Representative McClinton are without merit and should be overruled.

Representative McClinton initially 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, Representative McClinton’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 Representative McClinton, Representative Cutler's Petition for Review does indeed state a claim upon which relief can be granted. Accordingly, Representative McClinton's first objection should be overruled.

Representative McClinton also objects on the basis that Representative Cutler raises a political question outside this Court's jurisdiction. Again, 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, Representative McClinton's argument that the Petition for Review raises a political question outside this Court's jurisdiction is misplaced. Accordingly, Representative McClinton's remaining objection should be overruled.

In further response, Representative Cutler answers the Preliminary Objections of Representative McClinton as follows:

1. Denied as stated. Representative Cutler acknowledges he initiated this action to challenge the validity of the writs of election issued by Representative McClinton on December 7, 2022. However, it is specifically denied that the writs of election at issue are valid. The authority to issue writs of election rests with the

Speaker of the House or, during a vacancy in the Office of Speaker of the House of Representatives, with the Majority Leader of the House. Representative McClinton was neither Speaker nor Majority Leader of the House of Representatives when she issued the writs of election in question. Thus, the writs of election in question are invalid.

2. Admitted.

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

I. Preliminary Objection Raising Legal Insufficiency, Pa.R.Civ.P. 1028(a)(4).

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

5. Admitted in part and denied in part. It is admitted that Representative McClinton issued writs of election scheduling special elections for February 7, 2023. The remaining averments in this paragraph are denied. It is specifically denied that Representative McClinton had the authority to issue the writs of election in question. As Representative McClinton was neither the Speaker nor the Majority Leader of the House of Representatives at the time the writs of election in question were issued, Representative McClinton lacked the authority to issue the writs. Thus, the writs of election in question are invalid as a matter of law.

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

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

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

9. Admitted.

10. Admitted.

11. Admitted in part and denied in part. It is admitted that Representative McClinton issued writs of election after being sworn in on December 7, 2022. It is specifically denied that Representative McClinton had the authority to issue the writs of election in question as she was neither Speaker nor Majority Leader of the House when she issued the writs.

12. Admitted in part and denied in part. It is admitted that Representative McClinton issued writs of election on December 7, 2022. The remaining averments in this paragraph are denied. By way of further response, it is specifically denied that because the Democratic Party's candidates won a total of 102 seats in the House of Representatives that Representative McClinton had the authority to issue the writs of election in question. 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. Accordingly, Representative McClinton lacked the authority to issue the writs in question.

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

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

WHEREFORE, contrary to the argument of Representative McClinton, Representative Cutler's Petition for Review does indeed state a claim upon which relief can be granted. Accordingly, the objection of Representative McClinton should be overruled.

II. Preliminary Objection Raising Legal Insufficiency, Pa.R.Civ.P. 1028(a)(4).

15.-20. Paragraphs 15-20 of Representative McClinton's Preliminary Objections concern the special election to fill the vacancy in the seat for the 32nd Legislative District. Pursuant to the Stipulation filed with this Court on December 23, 2022, which this Court approved on January 3, 2023, the Parties to this action, as well as the Proposed Intervenor-Respondent, the Pennsylvania Democratic Party, agreed that the special election for the 32nd Legislative District will be held on February 7, 2023. As such, Representative McClinton's second objection is moot, which Representative McClinton acknowledges in Footnote 1 of her Memorandum of Law in Support of Preliminary Objections to Petition for Review.

WHEREFORE, Representative Cutler respectfully requests this Court dismiss Representative McClinton's second objection as moot.

III. Preliminary Objection Raising Lack of Jurisdiction and Legal Insufficiency, Pa.R.Civ.P. 1028(a)(1), (4).

21.-24. Paragraphs 21-24 of Representative McClinton's Preliminary Objections concern the special election to fill the vacancy in the seat for the 32nd Legislative District. Pursuant to the Stipulation filed with this Court on December 23, 2022, which this Court approved on January 3, 2023, the Parties to this action, as well as the Proposed Intervenor-Respondent, the Pennsylvania Democratic Party,

agreed that the special election for the 32nd Legislative District will be held on February 7, 2023. As such, Representative McClinton's third objection is moot, which Representative McClinton acknowledges in Footnote 1 of her Memorandum of Law in Support of Preliminary Objections to Petition for Review.

WHEREFORE, Representative Cutler respectfully requests this Court dismiss Representative McClinton's third objection as moot.

IV. Preliminary Objection Raising Lack of Jurisdiction, Pa.R.Civ.P. 1028(a)(1).

25. Paragraph 25 of Representative McClinton's Preliminary Objections concerns the special election to fill the vacancy in the seat for the 32nd Legislative District. Pursuant to the Stipulation filed with this Court on December 23, 2022, which this Court approved on January 3, 2023, the Parties to this action, as well as the Proposed Intervenor-Respondent, the Pennsylvania Democratic Party, agreed that the special election for the 32nd Legislative District will be held on February 7, 2023. As such, the allegations in this paragraph are moot.

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

27. Admitted in part and denied in part. It is admitted that Representative Cutler's Petition for Review challenges the validity of the writs of election in question. The remaining averments in this paragraph are denied as conclusions of

law. It is specifically denied that Representative Cutler's claim regarding the validity of the writs of election in question is a non-justiciable political question. In *Perzel*, 870 A.2d 759, the Pennsylvania Supreme Court considered a challenge to the validity of a writ of election and issued a decision on the merits. Thus, Representative McClinton's argument that the Petition for Review raises a political question outside this Court's jurisdiction is misplaced.

WHEREFORE, Representative Cutler respectfully requests this Court overrule the final objection of Representative McClinton.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

Date: January 4, 2023

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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

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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: _____

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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:

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