

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 :

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**PETITIONER’S OMNIBUS BRIEF IN OPPOSITION TO THE
PRELIMINARY OBJECTIONS OF INTERVENOR-RESPONDENT
JOANNA E. MCCLINTON AND PROPOSED INTERVENOR-
RESPONDENT THE PENNSYLVANIA DEMOCRATIC PARTY**

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I. INTRODUCTION

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”), initiated this action to challenge the validity of three writs of election relating to three vacancies in the Pennsylvania House of Representatives.

In an attempt to have this action dismissed, Representative McClinton and the Pennsylvania Democratic Party have filed nearly identical Preliminary Objections. Therein, Representative McClinton and the Pennsylvania Democratic Party contend that Representative Cutler fails to state a claim upon which relief can be granted. More specifically, Representative McClinton and the Pennsylvania Democratic Party argue that Representative McClinton lawfully issued the writs of election in question and, therefore, Representative Cutler’s challenge of the validity of the writs must fail. However, a review of the law demonstrates that the writs of election in question were not lawfully issued.

Pursuant to the Pennsylvania Constitution, as well as the Pennsylvania Election Code,¹ the authority to issue writs of election rests with the presiding officer of the House of Representatives, which is, in effect, the Speaker of the House. In

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

the event of a vacancy in the Office of Speaker of the House of Representatives, the Act of January 10, 1968, P.L. 925, authorizes the Majority Leader of the House to carry out the duties of the Speaker, including issuing writs of election. Representative McClinton was neither the Speaker nor the Majority Leader of the House of Representatives when she issued the writs of election at issue. Thus, Representative McClinton issued the writs of election in question without constitutional or statutory authority. Therefore, Representative McClinton's argument that the Petition for Review fails to state a claim upon which relief can be granted is without merit.

Representative McClinton and the Pennsylvania Democratic party also contend that Representative Cutler's challenge of the validity of the writs of election is a non-justiciable political question. However, 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 non-justiciable political question is misplaced.

Accordingly, for these reasons, which are explained in further detail below, the Preliminary Objections of Representative McClinton and the Pennsylvania Democratic Party should be overruled.

II. STATEMENT OF THE CASE

This action centers around the validity of multiple writs of election issued by Representative McClinton on December 7, 2022.

A. FACTUAL BACKGROUND

Representative Cutler initiated this action by filing a Petition for Review in the Nature of a Complaint for Declaratory Judgment (“Petition for Review”) in this Court’s original jurisdiction. As set forth in the Petition for Review, the factual background of this case is as follows.

Pennsylvania’s 2022 General Election, as prescribed in the Election Code, was held on November 8, 2022. (Pet. for Review ¶ 15). As with General Election, all 203 seats of the House of Representatives were up for election. (*Id.* ¶ 16). The results of the 2022 General Election reflect that 102 of the Democratic Party’s candidates won seats in the House of Representatives and that 101 of the Republican Party’s candidates won seats in the House of Representatives. (*Id.* ¶ 17).

On October 9, 2022, prior to the 2022 General Election, Anthony DeLuca, the duly elected member of the House of Representatives for the 32nd Legislative District and candidate for reelection (“former Representative DeLuca”), passed away. (*Id.* ¶ 18). Former Representative DeLuca’s death occurred too close to the 2022 General Election to remove his name from the ballot. (*Id.* ¶ 19). As such, former

Representative DeLuca's name appeared on the ballot for the 2022 General Election and, despite his death, he was reelected to the House of Representatives. (*Id.* ¶ 20). Former Representative DeLuca's pre-election death created a vacancy in the House of Representatives. (*Id.* ¶ 21).

Then-Speaker Cutler issued a writ of election to the Pennsylvania Department of State ("DOS") and the Board of Elections of Allegheny County ("Board of Elections") on November 30, 2022, the last day of the 206th General Assembly, setting a special election for February 7, 2023, to fill former Representative DeLuca's seat in the House of Representatives. (*Id.* ¶ 22; *see also id.* at Ex. A).

With the pre-election death of former Representative DeLuca, the membership of the Democratic Caucus of the House of Representatives was comprised of 101 members of the House of Representatives on December 1, 2022, the start of the 207th General Assembly, one member short of a majority. (*Id.* ¶ 24). That the membership of the Democratic Caucus of the House of Representatives did not constitute a majority of the House at the start of the 207th General Assembly was confirmed by the non-partisan Pennsylvania Legislative Reference Bureau. (*Id.* at Ex. H). On December 7, 2022, the Legislative Reference Bureau issued a "Legal Opinion" regarding the question of "[w]hether the Democratic Caucus holds a majority of seats in the House of Representatives. (*Id.*). Upon review of the relevant

legal authority, the Legislative Reference Bureau concluded that the Democratic Caucus did not hold a majority of the seats in the House of Representatives as of the date of the Legal Opinion. (*Id.* at 2.). In this regard, the Legislative Reference Bureau opined that “[w]hile the Democratic Party won a total of 102 elections to the House of Representatives at the 2022 general election, the Democratic Caucus is able to seat only 101 members due to the death of a member-elect, falling short of the 102 members necessary for a majority.” (*Id.*).

Despite being one member short of a majority, Representative McClinton declared herself to be the Majority Leader of the House of Representatives on December 7, 2022, and subsequently had a Judge of the Court of Common Pleas of Delaware County administer the oath of office to her on the floor of the House chamber. (Pet. for Review ¶ 25).

On that same day, two members of the House of Representatives, Austin A. Davis, the duly elected member of the House of Representatives for the 35th Legislative District and the Lieutenant Governor-elect (“former Representative Davis”), and Summer L. Lee, the duly elected member of the Pennsylvania House of Representatives for the 34th Legislative District and member-elect of the United States House of Representatives (“former Representative Lee”), resigned their seats in the Pennsylvania House of Representatives. (*Id.* ¶ 26). The resignations of former

Representatives Davis and Lee on December 7, 2022, created two additional vacancies in the House of Representatives, thereby reducing the membership of the Democratic Caucus of the House to 99 members. (*Id.* ¶ 27).

Notwithstanding the fact that the membership of the Democratic Caucus of the House of Representatives comprised a minority of the members of the House, Representative McClinton, purporting to exercise the authority reserved to the Majority Leader of the House during a vacancy in the Office of Speaker of the House, subsequently issued writs of election on December 7, 2022, to DOS and the Board of Elections setting special elections for February 7, 2023, to fill the seats of former Representatives DeLuca, Davis, and Lee. (*Id.* ¶ 28).

On December 12, 2022, subsequent to the filing of the Petition for Review, a Judge of the Court of Common Pleas of Dauphin County administered the oath of office to Representative Cutler on the floor of the House of Representatives' chamber. Given that Representative McClinton was neither Speaker of the House of Representatives nor Majority Leader when she issued the writs of election in question and given the fact that the membership of the Republican Caucus of the House comprises a majority of that chamber, Representative Cutler, as Majority Leader of the House, issued writs of election on December 15, 2022, to DOS and the

Board of Elections setting special elections for May 16, 2023, to fill the seats of former Representatives Davis and Lee.

B. PROCEDURAL HISTORY

Representative Cutler initiated this case on December 6, 2022. Representative Cutler's Petition for Review names as Respondents Leigh M. Chapman, the Acting Secretary of the Commonwealth ("Acting Secretary Chapman"), DOS, and the Board of Elections. Contemporaneous with the filing of the Petition for Review, Representative Cutler filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction requesting this Court enjoin Acting Secretary Chapman, DOS, and the Board of Elections from executing the writs of election issued by Representative McClinton until the Court can adjudicate this action on the merits.

This Court entered a scheduling Order on December 12, 2022, directing, *inter alia*, that any "Applications for Leave to Intervene, complete with proposed filings and a memorandum of law in support thereof shall be PACFiled and served no later than 12:00 p.m. on Friday, December 16, 2022." *Cutler v. Chapman* (Pa. Cmwlth., No. 588 M.D. 2022, filed Dec. 12, 2022) (*Per Curiam* Order). The Pennsylvania Democratic Party attached to its intervention application a single proposed filing entitled "Alternative Application for Emergency Relief." Representative McClinton

attached to her intervention application, as proposed filings, Preliminary Objections and an Answer to Representative Cutler's injunction request.

On December 20, 2022, Representative Cutler filed an Answer opposing the intervention application of the Pennsylvania Democratic Party as well as an Answer consenting to the intervention of Representative McClinton. The Court held a status conference the following day during which it granted the unopposed intervention application of Representative McClinton. This was confirmed by the Court in an Order issued December 22, 2022. *Cutler v. Chapman* (Pa. Cmwlth., No. 588 M.D. 2022, filed Dec. 22, 2022) (*Per Curiam* Order). The Court also indicated in the December 22, 2022 Order that it was taking the intervention application of the Pennsylvania Democratic Party under advisement. *Id.*

Subsequent to the status conference, the parties to this action, as well as the Pennsylvania Democratic Party, entered into a Stipulation, which was filed with this Court on December 23, 2022, and accepted by this Court on January 3, 2023, regarding the vacancy in the 32nd Legislative District. As set forth above, Representative Cutler and Representative McClinton each issued separate writs of election setting a special election to fill former Representative DeLuca's seat for February 7, 2023. Given that both Representative Cutler and Representative McClinton set the special election for the same day, the Parties, as well as the

Pennsylvania Democratic Party, agreed that the special election to fill former Representative DeLuca's seat in the House of Representatives would indeed be held on February 7, 2023, notwithstanding Representative Cutler's challenge to the validity of Representative McClinton's writ of election regarding former Representative DeLuca's seat. Representative Cutler's challenge to the validity of the writs of election issued by Representative McClinton regarding former Representatives Davis and Lee remains pending before this Court.

On December 28, 2022, the Pennsylvania Democratic Party filed its own set of Preliminary Objections. Thus, there are presently two sets of Preliminary Objections before the Court.

III. STANDARD GOVERNING THE REVIEW OF PRELIMINARY OBJECTIONS

Pursuant to Pennsylvania Rule of Civil Procedure 1028(a), any party may file preliminary objections on the following grounds:

- (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form of service of a writ of summons or a complaint;
- (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- (3) insufficient specificity in a pleading;
- (4) legal insufficiency of a pleading (demurer);

- (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action;
- (6) pendency of a prior action or agreement for alternative dispute resolution;
- (7) failure to exercise or exhaust a statutory remedy; and
- (8) full, complete and adequate non-statutory remedy at law.

Pa.R.Civ.P. 1028(a).

When examining preliminary objections, a court “must accept as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefore.” *Envirotest Partners v. Dep’t of Transp.*, 664 A.2d 208, 211 (Pa. Cmwlth. 1995). “In order to sustain preliminary objections it must appear with certainty that the law will not permit recovery, and any doubt should be resolved by a refusal to sustain” the objections. *Smolsky v. Governor’s Off. of Admin.*, 990 A.2d 173, 174 (Pa. Cmwlth. 2010).

IV. ARGUMENT

As stated above, Representative McClinton and the Pennsylvania Democratic Party have filed nearly identical Preliminary Objections to the Petition for Review.²

² The fact that the Pennsylvania Democratic Party has taken a nearly identical position to that of Representative McClinton is further support for denying the intervention application of the Pennsylvania Democratic Party. *See* Pennsylvania Rule of Civil Procedure 2329(2), Pa.R.Civ.P. 2329(2) (setting forth that “an application for intervention may be refused[] if . . . the interest of the petitioner is already adequately represented.”).

Therein, Representative McClinton and the Pennsylvania Democratic Party contend the Petition for Review fails to state a claim upon which relief can be granted and, therefore, should be dismissed. Representative McClinton and the Pennsylvania Democratic Party also contend that the claim set forth in the Petition for Review is a non-justiciable political question. For the reasons set forth below, both of these objections are without merit. Accordingly, Representative Cutler respectfully requests the Preliminary Objections of Representative McClinton and the Pennsylvania Democratic Party be overruled.

A. THE PETITION FOR REVIEW STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In their Preliminary Objections, Representative McClinton and the Pennsylvania Democratic Party contend that Representative Cutler fails to state a claim upon which relief can be granted. More specifically, Representative McClinton and the Pennsylvania Democratic Party argue that Representative McClinton lawfully issued the writs of election in question and, therefore, Representative Cutler's challenge of the validity of the writs must fail. However, a review of law demonstrates that the writs of election in question were not lawfully issued.

Article II, Section 2 of the Pennsylvania Constitution provides that when a vacancy occurs in either chamber of the General Assembly, "the presiding officer

[of that chamber] shall issue a writ of election to fill such vacancy for the remainder of the term.” PA. CONST. art. II, § 2. Likewise, Section 628 of the Election Code provides, in relevant part, that

[w]henver a vacancy shall occur in either house of the General Assembly whether or not it then be in session, the presiding officer of such house shall, within ten (10) days after the happening of the vacancy, issue a writ of election to the proper county board or boards of election and to the Secretary of the Commonwealth, for a special election to fill said vacancy, which election shall be held 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 (60) days following the issuance of the writ as the presiding officer may deem appropriate . . .

25 P.S. § 2778.

Rule 1 of the 2021-2022 General Operating Rules of the House of Representatives designates the Speaker of the House as the presiding officer.³ At all times relevant hereto there was a vacancy in the Office of Speaker of the House of Representatives. Representative Cutler ceased to hold the office of Speaker of the House of Representatives at 11:59 p.m. on November 30, 2022, the last day of the 206th General Assembly. *See* PA. CONST. art. II, § 2. A new Speaker was elected by the members of the House of Representatives on January 3, 2022, the first day the 207th General Assembly reconvened. *See* PA. CONST. art. II, § 4.

³ The 2021-2022 General Operating Rules of the House of Representatives are publicly available on the House’s website: <https://www.house.state.pa.us/rules.cfm>.

Section 21.13 of the Act of January 10, 1968, P.L. 925, provides that “[i]f 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.” 46 P.S. § 41.121m. The Pennsylvania Supreme Court has held that Section 21.13 of the foregoing Act authorizes the Majority Leader of the House to issue writs of election between the adjournment of the House of Representatives and the start of the next legislative session. *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005).

Representative McClinton was neither the Speaker of the House of Representatives nor the Majority Leader when she issued the writs of election at issue. Thus, Representative McClinton issued the writs of election without constitutional or statutory authority.

Representative McClinton does not have issued the writs of election in question under the authority granted to the Speaker of the House of Representatives. She does, however, to have issued the writs of election in question under the authority granted to the Majority Leader of the House of Representatives. The term “Majority Leader” is not defined in the Act of January 10, 1968, P.L. 925. Section 1903(a) of the Statutory Construction Act of 1972 provides that when interpreting statutes, the “[w]ords and phrases shall be construed according to rules of grammar

and according to their common and approved usage.” 1 Pa.C.S. § 1903(a). Thus, “where a court needs to define an undefined term, it may consult dictionary definitions for guidance.” *Sheppleman v. City of Chester Aggregated Pension Fund*, 271 A.3d 938, 949 (Pa. Cmwlth. 2021) (quoting *THW Group, LLC v. Zoning Bd. of Adjustment*, 86 A.3d 330, 336 (Pa. Cmwlth. 2014)).

Black’s Law Dictionary defines the term “Majority Leader” as “[t]he legislator in charge of the legislative caucus that has the most members” “Majority Leader,” *Black’s Law Dictionary* (11th ed. 2019). Article II, Section 16 of the Pennsylvania Constitution sets the number of seats in the House of Representatives at 203. PA. CONST. art. II, § 16. Thus, a majority of the House of Representatives is 102 members. As such, the Majority Leader is the leader of the caucus with the most sitting members if no single caucus has 102 members.

As set forth above, the results of the 2022 General Election reflect that 102 of the Democratic Party’s candidates won seats in the House of Representatives and that 101 of the Republican Party’s candidates won seats in the House of Representatives. However, on December 1, 2022, the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives was only able to seat 101 members due to the pre-election death of former Representative DeLuca. That former Representative DeLuca is not counted when calculating the membership

of the Democratic Caucus is underscored by the Pennsylvania Supreme Court's decision in *Zemprelli v. Daniels*, 436 A.2d 1165 (Pa. 1981).

In *Zemprelli*, the Supreme Court examined who qualifies as a member of the General Assembly for purposes of establishing a majority. That case concerned the confirmation of a member of the State Tax Equalization Board by the Pennsylvania Senate. Article IV, Section 8(a) of the Pennsylvania Constitution provides that certain gubernatorial appointments “shall be subject to the consent of two-thirds or a majority of the members elected to the Senate as is specified by law.” PA. CONST. art. IV, § 8(a). The relevant statutory provision required confirmation by a majority vote. *Zemprelli*, 436 A.2d at 1166.

On January 27, 1981, a confirmation vote was held. At the time the confirmation vote was held the Senate had 48 members and two vacancies. *Id.* A senator had been elected to fill one of those vacancies but had yet to take the oath of office. An election had not yet been held to fill the other vacancy, which was caused by the resignation of a senator.

At the confirmation vote, the nominee “received 25 ‘yeas’ and 22 ‘nays,’ and the President of the Senate, finding that the requisite vote of a constitutional majority had been obtained, ruled the appointment confirmed.” *Id.* A handful of Senators initiated an action challenging the confirmation, arguing that a majority should be

computed based upon the total number of Senators elected (50), rather than the total number in office (48). The result being that 25 yeas would not constitute a majority and, therefore, the nominee did not receive sufficient votes to be confirmed.

Upon review, the Pennsylvania Supreme Court rejected this argument, writing that “to compute a majority based on a number rather than the total voting group . . . would be irrational.” *Id.* at 1171. The Court reasoned that “[t]o include among the number of individuals charged with the responsibility of reviewing the qualifications of the Governor’s nominees, senators-elect or former senators, neither entitled to vote in the Senate, would in no way enhance the ability of the Senate to advise and consent.” *Id.* Accordingly, the Court construed the phrase “a majority of the members elected to the Senate” to mean those Senators “elected, living, sworn, and seated.” *Id.* at 1172 (citation omitted).

Here, as former Representative DeLuca passed away prior to December 1, 2022, the first day of the 207th General Assembly, the Democratic Caucus of the House of Representatives cannot claim to have ever had a majority of 102 living members or more members than the Republican Caucus. Rather, with former Representative DeLuca’s pre-election death, the House of Representatives, according to *Zemprelli*, was comprised of 101 members of the Democratic Caucus

and 101 members of the Republican Caucus on the first day of the 207th General Assembly.

The resignations of former Representatives Davis and Lee on December 7, 2022, further reduced the membership of the Democratic Caucus of the House of Representatives to 99. Thus, when Representative McClinton purported to exercise authority specifically reserved to the Majority Leader of the House, the Democratic Caucus was three members short of a majority. In other words, Representative McClinton was not the Majority Leader of the House when she issued the writs of election at issue.⁴ Therefore, it is clear as a matter of law that Representative McClinton lacked constitutional or statutory authority to issue the writs of election in question. This conclusion is consistent with the Legal Opinion issued by the Legislative Reference Bureau on December 7, 2022.

⁴ The Pennsylvania Democratic Party contends that Representative McClinton was indeed the Majority Leader of the House at the time she issued the writs of election in question because she was the “leader of the caucus with the most certified winners on December 7, 2022.” (Party’s Mem. of Law in Supp. of Prelim. Objs. at 9). The Pennsylvania Democratic Party has not provided any authority suggesting that the General Assembly or a court has ever calculated the membership of caucuses on a rolling basis based upon the certification of votes. As such, this Court should not entertain the Pennsylvania Democratic Party’s certification theory.

Furthermore, the Pennsylvania Democratic Party’s certification theory is rife for manipulation. Under the Pennsylvania Democratic Party’s theory, the leader of a minority caucus could exercise official action as the Majority Leader of the House during the certification process. To ensure this window of opportunity, recounts could be requested to ensure certification is delayed so that the leader of a minority caucus could exercise official action during the certification process. In light of this, the Court should not accept the Pennsylvania Democratic Party’s certification theory.

In light of the foregoing, it cannot be said, as Representative McClinton and the Pennsylvania Democratic Party contend, that the Petition for Review fails to state a claim upon which relief can be granted.

B. REPRESENTATIVE CUTLER’S CHALLENGE OF THE VALIDITY OF THE WRITS OF ELECTION IS JUSTICIABLE.

In their Preliminary Objections, Representative McClinton and the Pennsylvania Democratic Party contend that Representative Cutler’s challenge to the validity of the writs of election is a non-justiciable political question. However, a review of the law indicates Representative Cutler’s challenge of the writs of election is justiciable.

Regarding the political question doctrine, this Court has explained that the doctrine should be invoked by a court only “when considering matters that are textually committed to a co-equal branch of government which do not involve another branch of government acting outside its scope of constitutional authority.” *Lawless v. Jubelirer*, 789 A.2d 820, 827 (Pa. Cmwlth. 2002). In other words, courts will avoid reviewing disputes regarding the action of another branch of government of where “the action taken is within the power granted by the Constitution [and] has been entrusted exclusively and finally to the political branches of government for ‘self-monitoring.’” *William Penn Sch. Dist. v. Dep’t of Educ.*, 170 A.3d 414, 439 (Pa. 2017) (quoting *Sweeney v. Tucker*, 375 A.2d 698, 706 (Pa. 1977)). This is

because “[t]he cornerstone of our republican democracy is the principle of government divided into three separate, co-equal branches that both empower and constrain one another.” *Id.* at 435.

That being said, courts “will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty.” *Id.* at 438 (quoting *Council 13, Am. Fed’n of State, Cnty. & Mun. Emps., AFL-CIO ex rel. Fillman v. Rendell*, 986 A.2d 63, 76 (Pa. 2009)).

Here, Representative Cutler raises a single claim in his Petition for Review regarding the validity of the writs of election in question. The Pennsylvania Supreme Court previously considered a challenge to the validity of a writ of election in *Perzel* and issued a decision on the merits.

Perzel, like this case, involved a writ of election issued after the end of one legislative session but before the House of Representatives convened for the next session. 870 A.2d at 761. The writ of election under review there was jointly issued by the Speaker of the House in the previous session as well as the then-Majority Leader of the House. *Id.* at 762. The Secretary of the Commonwealth rejected the writ on the grounds that there was no presiding officer with authority to issue the writ of election during the vacancy in the Office of Speaker of the House. *Id.* The

Supreme Court rejected this argument, holding that Section 21.13 of the Act of January 10, 1968, P.L. 925, authorizes the Majority Leader of the House to issue writs of election during a vacancy in the Office of Speaker. *Id.* at 763-64. Accordingly, contrary to the position taken by Representative McClinton and the State Democratic Party, this precedent from the Supreme Court indicates that consideration of whether a writ of election is valid is justiciable.

While the Supreme Court examined the validity of a writ of election in *Perzel*, Representative McClinton argues that the political question doctrine is implicated in this action because the Court will effectively have to decide who the Majority Leader of the House of Representatives is to resolve this action. Citing Article II, Section 9 of the Pennsylvania Constitution, PA. CONST. art. II, § 9, which provides, *inter alia*, that “[e]ach House shall choose its [] officers,” Representative McClinton contends the question of “[w]ho serves as presiding officer is a paradigmatic non-justiciable political question.” (McClinton’s Mem. of Law in Support of Prelim. Objs. at 11). The Pennsylvania Democratic Party similarly submits that “it is not for this Court to wade into the process of leadership selection or elections within the Legislative Branch.” (Party’s Mem. of Law in Support of Prelim. Objs. at 8).

The arguments of Representative McClinton and the Pennsylvania Democratic Party are based upon the incorrect premise that the House of

Representatives, as a whole, elects the Majority Leader. However, the Majority Leader is not elected by the House of Representatives as whole. In practice, the Majority Leader of the House is the leader of the caucus with the most members. Each caucus internally selects its leader. *See Perzel*, 870 A.2d at 763 (“[T]he House Republican Caucus has reelected Majority Leader Smith to his office for the 2005-2006 Legislative Session.”). Thus, the leader of the caucus with the most members is the Majority Leader of the House.

Therefore, this Court need not wade into the selection of the officers of the House of Representatives as Representative McClinton and the Pennsylvania Democratic Party suggest. Rather, all this Court must do to resolve this case is decide which caucus of the House of Representatives had a majority of members on December 7, 2022, the date on which Representative McClinton issued the writs of election in question.

The Supreme Court has previously examined the issue of who is considered a member of the General Assembly for purposes of calculating a majority. *See generally Zempelli*, 436 A.2d 1165. As such, the question of which caucus of the House of Representatives comprised a majority of that body on December 7, 2022 is clearly a justiciable question.

Representative McClinton and the Pennsylvania Democratic Party also contend that because the Constitution confers upon the General Assembly the exclusive authority to issue writs of election, the courts are precluded from rejecting writs of election as invalid under the political question doctrine. This argument is misplaced. “[T]he issue in the political question doctrine is not whether the constitutional text commits exclusive responsibility for a particular government function to one of the political branches. . . . Rather, the issue is whether the constitution has given one of the political branches final responsibility for interpreting the scope and nature of such a power.” *William Penn Sch. Dist.*, 170 A.3d at 439 (quoting *Nixon v. United States*, 506 U.S. 224, 240 (1993) (Stevens, J. concurring)).

Neither Representative McClinton nor the Pennsylvania Democratic Party have provided any authority suggesting the Constitution confers upon the General Assembly the final responsibility for determining whether writs of election are constitutionally and statutorily sound. Absent such authority, the arguments of Representative McClinton and the Pennsylvania Democratic Party that because the Constitution confers upon the General Assembly the authority to issue writs of election courts are precluded from rejecting writs of election as invalid is without merit.

Notwithstanding the foregoing, accepting the position of Representative McClinton and the Pennsylvania Democratic Party could have disastrous consequences. If the validity of writs of election are never reviewable, any member of the General Assembly could issue writs of election, regardless of whether they are constitutionally or statutorily authorized to do so, and those writs would not be reviewable by Pennsylvania's courts. The political question doctrine surely was not intended to block review of whether writs of election are constitutionally or statutorily sound. After all, courts "will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth." *William Penn Sch. Dist.*, 170 A.3d at 439.

In light of the foregoing, it cannot be said that Representative Cutler's challenge to the validity of the writs of election in question is a non-justiciable political question.

V. CONCLUSION

Based upon the foregoing reasons, Representative Cutler respectfully requests this Court overrule the Preliminary Objections filed by Representative McClinton and the Pennsylvania Democratic Party should the Party be granted leave to intervene.

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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.

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PROOF OF SERVICE

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