

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**REPRESENTATIVE BRYAN CUTLER,)
LEADER OF THE REPUBLICAN)
CAUCUS OF THE PENNSYLVANIA)
HOUSE OF REPRESENTATIVES)**

Petitioner,

v.

**LEIGH M. CHAPMAN, ACTING)
SECRETARY OF THE)
COMMONWEALTH, THE)
PENNSYLVANIA DEPARTMENT OF)
STATE, and THE BOARD OF)
ELECTIONS OF ALLEGHENY)
COUNTY)**

Respondents.

No. 588 MD 2022

**MEMORANDUM OF LAW OF ALLEGHENY COUNTY BOARD OF
ELECTIONS IN OPPOSITION TO EMERGENCY APPLICATION FOR
SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION**

I. INTRODUCTION

The essential facts in this matter are outlined in the Stipulation of Facts filed by the Parties. On December 9, 2002, Petitioner Bryan D. Cutler, in his capacity as the duly elected member of the 100th Legislative District, and Leader of the Republican Caucus filed the instant litigation challenging the authority of Representative Joanna E. McClinton, Intervenor, and Leader of the Democratic Caucus (“Representative McClinton”) to act as Majority Leader. On December 7, 2022, Representative McClinton issued Writs of Election to fill two vacancies

which resulted from the resignations of 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 House of Representatives for the 34th Legislative District and member-elect of the United States House of Representatives (“former Representative Lee”), resigned.¹

Representative Cutler subsequently issued his own writs of elections to fill vacancies, directing elections on May 16, 2023, the same date as the statewide primary election and here asserts that Leader McClinton lacked authority to issue the writs of election and seeks to enjoin their implementation.

As the undersigned were finalizing this Memorandum for filing, the Respondent was served with two Writs for Election issued on January 4, 2023 by Mark L. Rozzi, the newly elected Speaker of the Pennsylvania House. These two Writs confirm the previously issued Writ and once again set the special elections for the vacancies in the 24th and 35th Legislative Districts for February 7, 2023. Copies are attached hereto as Exhibits. Speaker Rozzi was elected by a majority of the representatives on January 3, 2023.

¹ Representative Cutler also sought to enjoin the Writ issued by Representative McClinton for the Special Election to fill the vacancy resulting from the death of Representative Anthony DeLuca, but that matter was resolved by stipulation of the parties to hold that special election on February 7, 2023 and on January 3, 2023, the Court entered an Order adopting said Stipulation.

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

The Parties and Intervenors filed a Joint Stipulation on December 30, 2022 that outlines the undisputed facts in this matter. This Respondent, the Allegheny County Board of Elections (hereafter “Allegheny BOE”), submits that its role as the recipient of such writs is to execute such writs. Thus, the focus of this discussion herein will center on facts relating to execution of such writs.

The Acting Secretary of the Commonwealth Leigh M. Chapman, and the Department of State (hereafter “DOS”) and the Allegheny BOE received the Writs of Election and have scheduled special elections in the 34th and 35th Legislative Districts for February 7, 2023. Joint Stipulation filed December 30, 2022, ¶17. On December 9, 2022, DOS promulgated special election calendars for the three special elections which announced to the public, political parties and political bodies the filing deadlines, including those deadlines to nominate candidates and object to candidate filings.

Representative Cutler, having been sworn in on the floor of the 207th General Assembly, issued another set of 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. *Id.*, ¶22. Pursuant to the Election Code, the deadline for submission of candidates in all three races was December 19, 2022, fifty

days prior to Election Day. 25 P.S. §2779. On or prior to December 19, 2022, Nomination Certificates were filed with DOS on behalf of Democrat Abigail Salisbury and Republican Robert J. Pagane to fill the vacant seat in the 34th Legislative District and on behalf of Democrat Matthew R. Gergely and Republican Donald R. Nevills to fill the vacant seat in the 35th Legislative District. *Id.*, ¶19.

By email of January 4, 2023, the Acting Secretary of the Commonwealth forwarded the official candidates list, dated January 3, 2023, for the 32nd , 34th , and 35th Legislative District to Allegheny BOE along with an accompanying election calendar, indicating that the Special Election for each District is February 7, 2023. Said official candidates list and election calendars are attached as exhibits to this Brief.

Therefore, Allegheny BOE and its administrative arm, the County Elections Division, began preparations for the February 7, 2023 Special Elections. These preparations include, but not limited to, preparing mail-in ballots for transmittal to voters, preparing paper ballots for voting on the date of the special election; securing the polling locations and securing adequate staffing of the polls. Joint Stipulation, ¶25.

There are 81 polling locations in the 34th Legislative District, and 97 polling locations in the 35th Legislative District. Pursuant to 25 P.S. § 3146.2(e.1) and 25 P.S. § 3150.12(g), Pennsylvania voters residing in the 34th and 35th Legislative

Districts who timely completed and returned a mail-in ballot application or absentee ballot application in 2022, and who indicated in their application that they wished to receive ballots for the remainder of the year, will automatically receive a mail-in or absentee ballot for these special elections if the elections are held on or before the third Monday in February of 2023, that being February 20, 2023. If the special elections are held after February 20, 2023, then such voters will need to re-apply to receive a mail-in or absentee ballot and cast their ballot by mail or absentee ballot for the special elections in their district. Presently, 9,744 voters in the 34th Legislative District and approximately 5,973 voters in the 35th Legislative Districts are registered to receive mail-in or absentee ballots, and therefore 15,717 voters would need to reapply for mail-in or absentee ballots if the special elections in those Legislative Districts occur after February 20, 2023.

III. SUMMARY OF THE ARGUMENT

With the issuance of the new Writs by the duly and newly elected Speaker, Allegheny BOE submits that this matter is moot.

In the alternative, the Respondent Allegheny BOE submits its argument that Petitioner Cutler cannot satisfy all the requisite elements under the test for granting injunctive relief as a matter of law and the Application must therefore be denied.

IV. ARGUMENT

Petitioner seeks a preliminary injunction under Pennsylvania Rule of Appellate Procedure 1532 (a). The requirements for a preliminary injunction under this appellate rule mirror the requisite elements for a preliminary injunction under the Pennsylvania Rules of Civil Procedure. As asserted by Petitioner Cutler in his application:

“There are six prerequisites a moving party must demonstrate to obtain a preliminary injunction, which are as follows:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages;

(2) greater injury would result from refusing the injunction than from granting it, and concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings;

(3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

(4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits;

(5) the injunction is reasonably suited to abate the offending activity; and,

(6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014).”

Cutler Application for Relief, ¶28.

“ The burden is on the party who requested preliminary injunctive relief.”

Warehime v. Warehime, 860 A.2d 41, 47 (Pa. 2004).

Respondent Allegheny BOE asserts that Petitioner cannot satisfy the second and sixth requirements because enjoining these presently scheduled elections will affect the interests of other parties to the litigation, the voters whose interests are advocated herein by the Intervenors, and the overall public interest.

As to the public interest, the voters in the 34th and 35th Legislative Districts, “have a clear legal right to elected representation, which right must be vindicated at special elections. PA. CONST. art. I, § 5. *Fagan v. Smith*, 615 Pa. 87, 91, 41 A.3d 816, 818 (2012)(citing *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) “the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.”).

Allegheny BOE’s function is to serve all the citizens of Allegheny County. Allegheny BOE indeed is mindful of its stated duty to conduct elections and properly tabulate and certify results. The public interest in representation for the voters in this district is paramount but it is not limited to floor votes on pending legislation in the House. Representatives, and their staff, provide resources and services to their constituents daily, from directing them to appropriate offices for administrative services, to assisting them in applications for government services such as licensing

and benefits. Elected representatives in the House also represent the interests of the municipalities and school districts within their districts in promoting initiatives, spending and statutes that govern these bodies. Protracted vacancies are detrimental to the public interest of the highly populated municipalities situated in the Monongahela River Valley of Allegheny County which these legislative districts serve.

As stated above, efforts have been underway. the Allegheny County Elections Division is advertising that it will have printed a ballot test deck and engage in logic and accuracy testing. These activities will be conducted during the week of January 9, 2023. The Elections Division also continues to contact and secure polling locations within these two Legislative Districts, as well as the stations for the 32nd District House Seat. Those locations will develop their plans for community access. Additionally, the Elections Division is coordinating staffing for the 178 polling locations. This staffing consists of panels of a minimum of four persons, plus a constable. Nearly one thousand people are being mobilized to make themselves available for the daylong assignments to man the polls.

Furthermore, the four candidates for these seats are budgeting and staffing their campaigns and coordinating campaign activities and outreach for a February 7, 2023 election and have been since December 19, 2022.

In short, the proverbial ship of election is in transit and moving ahead at full steam.

With regard to the issue of mail-in and absentee ballots, firstly, these ballots must be printed and readied for delivery to voters. Allegheny County voters have adopted the mail-in or absentee ballot practice with over 162,000 ballots returned countywide for the 2022 General Election. Those voters who have selected mail-in balloting often select to receive these ballots for the entire election year and would automatically receive ballots for the February 7, 2023 special election. Deferring the election would require voters to request a mail-in ballot, an imposition on the voters and potentially disenfranchise some. This delay would also cause additional work for the Elections Division and its vendor to batch mail-in ballots as requests arrive rather than issue the ballots to the existent cohort of voters.

Similarly, for those persons who travel or have scheduled medical events and request absentee ballots, the certainty of knowing this election in on February 7, 2023 permits them to plan accordingly.

Balancing the substantial harm to the citizens of Allegheny County residing in these districts and the continued derogation of their rights and benefits of representation in the Pennsylvania House, the interest of candidates, and the efficiencies of the Respondent governmental body which has already expended considerable resources in preparation against the Petitioner's interest in deferring the

election more than ninety days for no valid reason cannot satisfy this element. The request for injunctive relief must therefore be denied.

V. CONCLUSION

In light of yesterday's issuance of new Writs of Election from the recently elected Speaker of the House, Mr. Rozzi, Respondent Allegheny County Board of Elections respectfully suggests that this case is moot. Accordingly, it should be dismissed.

Alternatively, if the Court believes that a case or controversy still exists, Respondent Allegheny BOE respectfully requests this Court to act expeditiously in this matter so that it can effectively prepare and conduct the special elections in the 34th and 35th legislative Districts. Respondent Allegheny BOE would urge a swift determination of the dispute between the Petitioner and DOS because the public interest warrants that the special elections should be held expeditiously so that the citizens in Allegheny County living in the affected districts have representation in the State House of Representatives.

Respectfully submitted,

/s/ George M. Janocsko

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Attorneys for Respondent Allegheny County
Board of Elections

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January 3, 2023

TO ALLEGHENY COUNTY BOARD OF ELECTIONS:

In accordance with the provisions of section 916 of the Pennsylvania Election Code, I hereby certify that the attached constitutes the official list of candidates' names for the political parties and office set forth herein to be printed on the official ballot for the Special Election for Representative in the General Assembly for the 35th Legislative District to be held Tuesday, February 7, 2023 in your county. Candidates' names must be printed on the official ballot in the order in which they appear on this certification.



In testimony whereof, I have hereunto set my hand and caused the seal of the Secretary's office to be affixed this third day of January, A.D. 2023.

Leigh M. Chapman
Acting Secretary of the Commonwealth

OFFICIAL LIST OF CANDIDATES
SPECIAL ELECTION
REPRESENTATIVE IN THE GENERAL ASSEMBLY

35th Legislative District
February 7, 2023

DEMOCRATIC

MATTHEW R. GERGELY
102 HERSHEY DRIVE
MCKEESPORT, PA 15132

REPUBLICAN

DON NEVILLS
530 N 6TH ST
CLAIRTON, PA 15025

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As of January 3, 2023

WRIT OF ELECTION

**TO LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH,
AND TO RICH FITZGERALD, BETHANY HALLAM, AND SAM DEMARCO, III,
CONSTITUTING THE BOARD OF ELECTIONS OF ALLEGHENY COUNTY.**

**GREETINGS: WHEREAS, A VACANCY EXISTS IN THE OFFICE OF
REPRESENTATIVE OF THE COMMONWEALTH OF PENNSYLVANIA FOR
THE THIRTY-FOURTH LEGISLATIVE DISTRICT OF THE COUNTY OF
ALLEGHENY, CAUSED BY THE RESIGNATION OF SUMMER LYNN LEE,
THE REPRESENTATIVE-ELECT FROM SAID DISTRICT ON THE 7TH DAY
OF DECEMBER, TWO THOUSAND TWENTY-TWO.**

**NOW THEREFORE, I, MARK ROZZI, SPEAKER OF THE HOUSE OF
REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY
THE CONSTITUTION OF PENNSYLVANIA AND BY THE ACTS OF
ASSEMBLY IN SUCH CASE MADE AND PROVIDED, DO HEREBY
COMMAND:**

**THAT YOU CAUSE AN ELECTION TO BE HELD IN THE THIRTY-
FOURTH LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY ON
THE DAY ESTABLISHED IN THE WRIT ISSUED ON DECEMBER 7, 2022, BY
LEADER JOANNA E. MCCLINTON TO CHOOSE A PERSON TO REPRESENT**

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THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION THROUGHOUT THE DISTRICT IN THE FORM AND MANNER DIRECTED BY LAW.

GIVEN UNDER MY HAND AND THE SEAL OF THE HOUSE OF REPRESENTATIVES AT HARRISBURG, PENNSYLVANIA, THIS 3RD DAY OF JANUARY, A.D. TWO THOUSAND TWENTY-THREE.



Mark E. Rozzi

SPEAKER OF THE HOUSE OF REPRESENTATIVES

ATTEST:

Brooke Wheeler

CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

RECEIVED

DEPARTMENT OF STATE
2023 JAN -4 AM 9:31

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 4th DAY OF January, 2023

BY Jessie Math