

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.

588-MD-2022

**PETITION FOR INTERVENTION OF
THE PENNSYLVANIA DEMOCRATIC PARTY**

Petitioner, the Pennsylvania Democratic Party (“PA Dems”), files this petition for leave to intervene and avers as follows:

1. Proposed Intervenor PA Dems is a “major political party” as defined in the Pennsylvania Election Code (25 P.S. § 2601) and is statutorily created. *See* 25 P.S. §§ 2834, *et seq.*
2. For each general election, the PA Dems nominates individuals for Pennsylvania’s federal, state, and local offices.

3. Under the Election Code, each major political party nominates candidates for such elections through filing a nomination certificate. *See* 25 P.S. § 2867.

4. The PA Dems elects nominees for special elections for State Representative under Rule IX of the Pennsylvania Democratic Party Bylaws through a vote of the Executive Committee of the Pennsylvania Democratic Party. *See* Rules of the Democratic Party of the Commonwealth of Pennsylvania, at Rule IX; *also available at* www.padems.com/wp-content/uploads/2022/11/2022-Bylaws-State-4-1.pdf (accessed December 15, 2022).

5. It is the practice of the PA Dems to consult with local leaders in advance of a nomination to a seat representing a District. *See* Declaration of Lisa Rhodes, at ¶ 10, attached at Exhibit A.

6. In reliance on the writs of election issued first by the outgoing-Speaker, and then by the incoming-Speaker, as approved by the Secretary of the Commonwealth (the “Secretary”), local committeepeople within the 32nd House District met on December 11, 2022, to select a recommended candidate. *See id.*, at ¶ 11.

7. Thereafter, beginning that night, and concluding on December 12, 2022, the PA Dems Executive Committee conducted an election and selected Joseph McAndrew, the candidate recommended by the local leaders. *See id.*, at ¶ 12.

8. Joseph McAndrew's nomination was documented by the Chairman of the PA Dems and filed with the Secretary on December 12, 2022. *See Exhibit A-1*, attached; Rhodes Declaration at ¶ 13.

9. The PA Dems has thus nominated a candidate for State Representative in the upcoming special election on February 7, 2023, for the 32nd Legislative District.

10. Similar processes are underway for the 34th and 35th Legislative Districts, with local leaders scheduled to meet on December 17, 2022, so that the recommended candidates can be reviewed and elected by the PA Dems Executive Committee in time for a nomination to be timely filed with the Secretary on December 19, 2022. *See Declaration of Lisa Rhodes*, at ¶¶ 14-15.

Standard for Intervention

11. The grant or denial of a Petition to Intervene is governed by the standards set forth in Pennsylvania Rules of Civil Procedure 2326-2350.

12. Rule 2327 denotes four categories of persons or entities that may intervene “[a]t any time during the pendency of an action,” including any person or entity that has “any legally enforceable interest” that may be affected by a judgment in the action. Pa. R. Civ. P. 2327(4).

13. By contrast, Rule 2329 provides certain grounds for refusal to permit the intervention of a person who fits within the parameters of Rule 2327, including that such person's interests are “already adequately represented.” Pa. R. Civ. P.

2329(2). “Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.” *Larock v. Sugarloaf Tp. Zon. Hearing Bd.*, 740 A.2d 308, 313 (Pa. Cmmw. Ct. 1999).

14. Even if a ground for refusal under Rule 2329 is present, the Court still possesses discretion to permit intervention. *Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, 225 A.3d 902, 908 (Pa. Commw. Ct. 1999) (citing *Larock*, 740 A.2d at 313).

Intervention for PA Dems is Appropriate

15. PA Dems meets the standard for mandatory intervention because it possesses a “legally enforceable interest” that may be affected by a judgment in the action. Pa. R. Civ. P. 2327(4).

16. Specifically, Plaintiffs’ requested relief would invalidate a process already completed in one case and begun in two others to nominate candidates and ensure that voters have a chance to elect candidates of their choice on the date first selected by the then-majority Republican leadership and then agreed-to by the now-majority Democratic leadership.

17. Additionally, PA Dems represents thousands of registered members who reside in Districts 32, 34, and 35 who have an interest in having duly elected

representation in the General Assembly, including that their members have the fullest opportunity to vote afforded them by law.

18. PA Dems represents the interests of Democratic voters in Pennsylvania. There are approximately four-million-and-twenty-four-thousand registered Democrats throughout the Commonwealth. *See* Declaration of Lisa Rhodes, at ¶ 6. There are approximately twenty-nine thousand registered Democrats in District 32, thirty-eight thousand registered Democrats in District 34, and twenty-nine thousand registered Democrats in District 35. *See id.*, at ¶ 7.

19. PA Dems also represents the interests of Democratic candidates, including by providing campaign resources, logistical support, and coordination with other candidates. *See id.*, at ¶¶ 3-4.

20. PA Dems does not meet the elements that foreclose intervention, as set forth in Rule 2329. *See* Pa. R. Civ. P. 2329.

21. Indeed, PA Dems's interests are not adequately represented by the Respondents, who do not share PA Dems's interests in nominating the best candidates, prevailing in Commonwealth elections, and giving their members the fullest opportunity to vote.

22. PA Dems has not unduly delayed its application for intervention since this matter was filed on December 9, 2022, and no court action has been taken since

that time, other than issuance of a scheduling order requiring any application for intervention be filed by December 16, 2022.

23. Proposed Intervenor will not unduly delay or burden the efficient hearing and resolution in this matter because PA Dems will abide by schedules set by the Court.

24. Accordingly, because PA Dems meets the factors necessary for this Court to grant intervention under Rule 2327, and because none of the exceptions of Rule 2329 apply, this Court must grant PA Dems intervention.

25. Proposed Intervenor's Alternative Application for Emergency Relief is attached at Exhibit B, to be filed once this Court grants intervention.

WHEREFORE, the Pennsylvania Democratic Party respectfully requests that this Court grant its Petition for Intervention and grants leave to file the proposed Alternative Application for Emergency Relief substantially in the form attached.

Respectfully submitted,

GREENBERG TRAURIG, LLP

Dated: December 15, 2022

By: /s/ Kevin Greenberg

Kevin Greenberg (I.D. No. 82311)

Peter Elliot (I.D. No. 327465)

1717 Arch Street, Suite 400

Philadelphia, PA 19103

(215) 988-7800

greenbergk@gtlaw.com

elliotp@gtlaw.com

DENTONS COHEN & GRIGSBY P.C.

Clifford B. Levine (I.D. No. 33507)

Conor Daniels (I.D. No. 332318)

625 Liberty Avenue, 5th Floor

Pittsburgh, PA 15222-3152

(412) 297-4900

clifford.levine@dentons.com

conor.daniels@dentons.com

*Counsel for Proposed Intervenor-
Respondent Pennsylvania Democratic Party*

CERTIFICATE OF COMPLIANCE

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/ Peter Elliot

Peter Elliot

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on December 15, 2022, by this Court's electronic filing system.

/s/ Peter Elliot
Peter Elliot

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Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM

DECLARATION OF LISA RHODES

I, LISA RHODES, hereby declare and state upon personal knowledge as follows:

I. PA Dems

1. The Pennsylvania Democratic Committee (“PA Dems”) is the official state affiliate of the Democratic National Committee and is a major political party as defined under the Pennsylvania Election Code. PA Dems oversees 67 subsidiary county committees, including the Allegheny County Democratic Committee (“ACDC”).
2. PA Dems has an interest in electing Democratic candidates and represents the interest of Democratic Candidates.
3. PA Dems invests significant resources in all federal, state, and local elections, including, most recently, the 2022 General Election.
4. PA Dems will similarly invest resources to support our candidates and voters in the special elections called for 2023.
5. PA Dems represents the interests of Democratic voters in Pennsylvania by supporting candidates who share these voters’ values.
6. There are roughly four-million-and-twenty-four-thousand registered Democrats throughout the Commonwealth.
7. As of this week, there are approximately twenty-nine thousand registered Democrats who reside in House District 32, thirty-eight thousand registered Democrats in House District 34, and twenty-nine thousand registered Democrats in House District 35.

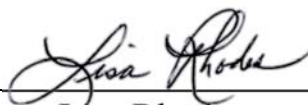
II. Professional Experience

8. I am the Deputy Executive Director and Acting Executive Director of PA Dems. I have been Acting Executive Director since November 15, 2022. As Acting Executive Director of PA Dems, I work with PA Dems officers to oversee all of the operations of PA Dems.
9. Prior to serving in these roles, I served in various capacities working for PA Dems since 2020 and have been employed with or volunteered with PA Dems and its affiliates since approximately 2010.

III. Special Elections in Districts 32, 34, and 35

10. It is the practice of the PA Dems to consult with local leaders in advance of a nomination to select a nominee in a special election for a District.
11. Based on the writ of election issued first by the outgoing-Speaker, and then the writ of election issued by the incoming-Speaker, as approved by the Secretary of the Commonwealth, local committeepeople within the 32nd House District met on December 11, 2022, to recommend a candidate for the nomination.
12. Thereafter, beginning that night, and concluding on December 12, 2022, the PA Dems Executive Committee conducted an election and selected the recommended candidate, Joseph McAndrew.
13. Joseph McAndrew's nomination was documented by the Chairman of the PA Dems and filed with the Secretary on December 12, 2022.
14. Similar processes are underway for the 34th and 35th Legislative Districts, with local leaders scheduled to meet on December 17, 2022 to make recommendations.
15. The PA Dems Executive Committee is scheduled to meet thereafter in time for a nomination to be timely filed with the Secretary of the Commonwealth on December 19, 2022.

I declare under that the foregoing is true and correct, subject to the penalties for false statements to authorities under 18 Pa. C.S. § 4904.



Lisa Rhodes

December 15, 2022

Exhibit A-1

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
Bureau of Elections

NOMINATION CERTIFICATE

- ① State Representative from House District 32
Office and District
- ② Death of Hon. Anthony M. DeLuca
Cause of Vacancy (Death, Resignation, etc. of Person Vacating)
- ③ Joseph M. McAndrew ④ Small Business Owner
Name of Candidate Duly Nominated Herein Occupation
- ⑤ 1718 Outlook Dr., Verona PA 15147
Street Address/Post Office/Zip Code of Candidate Duly Nominated Herein
- ⑥ Pennsylvania Democratic Party, Executive Comm. December 11-12, 2022 via electronic mail
Name of Party Committee/Caucus/Convention Date/Time/Place of Meeting
Rule IX, Section 2(a)(b.)
- ⑧ _____
Party Rule or Rules Applicable to This Nomination Certificate
(NOTE: Attach text of applicable party rule or rules)

Member or Proxy Present

See attached list

Member or Proxy Present

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(Note: Attach separate 8-1/2" x 11" sheets if additional space is required)

We, the presiding officer and secretary or secretaries of the committee, caucus or convention listed above, do swear (or affirm) that a quorum of said committee, caucus or convention as provided by party rules, duly convened, and those present at said meeting are the duly elected or appointed members, or their proxies, of said committee, caucus or convention; and do further swear (or affirm) that the names of those present at said meeting, the office and district (if any) where the vacancy exists, the cause of said vacancy, the name, address and occupation of the candidate duly nominated, and the rule or rules of the political party setting forth the provisions applicable to the nomination of a candidate to fill said vacancy are as set forth above and/or on the attached sheet or sheets.

⑨ Sworn to and subscribed before me this
12th day of December, 2022

Lorraine M. Bradley
Notary Public
Official Title

My Commission Expires Dec. 18, 2023

COMMONWEALTH OF PENNSYLVANIA - NOTARY SEAL
Lorraine M. Bradley, Notary Public
Philadelphia County
My Commission Expires 12/18/2023
Commission Number 1016016

⑩ [Signature]
Signature of Presiding Officer
Sharif Street, Chairman
Printed Name and Title

⑪ _____
Signature of Secretary

⑫ [Signature]
Printed Name and Title
Signature of Assistant Secretary
Kevin Greenberg, Assistant Secretary
Printed Name and Title

Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPRESENTATIVE BRYAN CUTLER,
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588-MD-2022

ALTERNATIVE APPLICATION FOR EMERGENCY RELIEF

Intervenor-Respondent, the Pennsylvania Democratic Party (“PA Dems”),
files this Alternative Application for Emergency Relief and avers as follows:

Background

1. There are three vacancies in the Pennsylvania House of Representatives.
2. The first vacancy occurred on December 1, 2022, when the term began, as the Hon. Anthony DeLuca had passed away in October and was reelected posthumously, and thus never began this new term representing the 32nd House District.
3. Legislators' "term of service shall begin on the first day of December next after their election." Pa. Const. art. II, § 2.
4. The other two vacancies occurred on December 7, 2022, when Congresswoman-Elect Summer Lee and Lieutenant Governor-Elect Austin Davis resigned their seats representing the 34th and 35th House Districts, respectively, to which they were each reelected in November.
5. All three districts are in Allegheny County; in fact, they are adjacent to each other.
6. Joanna McClinton has, at all times relevant hereto, been the elected Democratic Leader, serving as Minority Leader during the 2021-22 Session.
7. Bryan Cutler was the Speaker of the House for the 2021-22 Session and has been selected as the Republican Leader for the 2023-24 Session.
8. On November 30, 2022, after adjournment *sine die* and before the end of the then-current Session, then-Speaker Cutler issued a writ of election for a

Special Election in District 32 for February 7, 2023, to provide for representation in the upcoming 2023-24 Session.

9. Leader McClinton promptly publicly challenged the validity of the writ on the basis that the legislative session had ended.
10. However, Leader McClinton announced that she would respect the date set by the previous Speaker and issue a subsequent valid writ for the special election in House District 32 for the same day established by the former Speaker.
11. Subsequently, the Secretary of the Commonwealth rejected the writ issued by Speaker Cutler scheduling the special election because a former Speaker does not have authority to act for a vacancy that would occur in the next legislative Session. Former Speaker Cutler has taken no further action to have the November 30 writ treated as valid.
12. On December 7, 2022, Joanna McClinton appropriately took the oath of office as Majority Leader and, as Acting Speaker.¹ She then scheduled special

¹ While PA Dems believes who will become speaker is irrelevant to the issue before the Court in these unique circumstances, we want to be clear that our analysis does not rely on Democrats winning 102 of 203 House District races according to published but uncertified results. Any estimation, even a good one, is just a projection of the eventual outcome.

On December 7, 2022—and still today—Leader McClinton was the Majority Leader because more Democrats had been certified as winners at all relevant times. There had been three certifications completed on November 30, December 2, and December 6 that certified the winners in 171 races, with Democrats winning 91 of those races and Republicans winning 80. The 91 Democratic wins include Representatives DeLuca, Lee, and Davis, so if Representative DeLuca were disregarded it would have been 90-80. An additional nine races were certified on December 7, either before or

elections for each of the three vacant seats, on the date previously—but improperly—set by then-Speaker Cutler. Representatives Lee and Davis had resigned earlier on December 7 before the writs issued.

13. Pursuant to the writ and the governing state law, the PA Dems already have selected and filed a nomination certificate for the Democratic nominee in the 32nd District.

14. This weekend, the PA Dems will select nominees in the two other districts and will file those nomination certificates by the December 19 deadline. *See* 25 P.S. § 2779. Upon information and belief, the Republican Party, the other major political party in the Commonwealth, is also following a similar process in compliance with the deadlines set under state law.

after the resignations and Leader McClinton's swearing-in. Those races broke 6-3 Republican, but even crediting all of these certifications as occurring prior to the swearing-in and issuance of writs, and further deducting Representatives Lee and Davis, *arguendo*, the Democratic advantage on December 7 was at least 91-86. We are not aware of any certifications since December 7 that would change that analysis.

As such, when Leader McClinton acted on December 7, she represented a majority of certified winners. And when Leader Cutler reportedly acted today, he did not.

Upon information and belief, the 23 uncertified races arise because a disproportionately significant number of Republican seats were not finally and unconditionally certified due to the on-going legal challenges relating to the 2022 election process filed by members of the Republican Caucus and their allies. But, as with the 102-101 eventual outcome, neither the cause nor the projection matters, at least not here as no one at fault is benefiting from the frivolous and baseless litigation.

15. Upon information and belief, at least one political body candidate nomination paper is already being circulated in anticipation of the upcoming special elections.
16. By the time the Court convenes its scheduled status conference next week, both major political parties and any political bodies that chose to do so will already have nominated their candidates for special elections. In addition, under the Election Code, the nomination of candidates for special elections triggers the challenge processes, which would have to be filed with this Court by the day after the scheduled status conference.

The Cutler Petition

17. Despite having set the February 7, 2023, date when he was still Speaker, Leader Cutler now objects to the Department of State and the Allegheny County Board conducting elections on the date he picked, ostensibly because the Secretary has scheduled the elections pursuant to writs issued by Leader McClinton and not by him.
18. The Speaker of the House of Representatives, as its presiding officer, has a nondiscretionary duty to issue writs of election for special elections to fill vacancies in the House of Representatives. *See* Pa. Const. art. II, § 2 (“Whenever a vacancy shall occur in either House, the presiding officer

thereof shall issue a writ of election to fill such vacancy for the remainder of the term.”).

19. There is no exception in Article II, Section 2 for the period between December 1 and the formal reorganization of the Chamber, which is expected on January 3. *Id.*

20. In fact, the statutes adopted by the General Assembly expressly contemplate a vacancy occurring when the Legislature is not in session. *See* 25 P.S. § 2778. The Election Code requires that “[w]henever 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. . . .” *Id.* (emphasis added).

PA Dems Alternative Proposed Relief

21. This Court can resolve the scheduling of these special elections without the need to determine the underlying political questions regarding chamber leadership raised by Leader Cutler’s petition.

22. At the time of redistricting last year by the Legislative Reapportionment Commission (“LRC”), the populations of House Districts 32, 34, and 35 were 64,205 people, 61,582 people and 64,711 people, respectively. *See* Report of

the LRC (available at www.redistricting.state.pa.us/Resources/GISData/Districts/Legislative/House/2021-Final/PDF/LRC%20House%20Final.pdf) (accessed December 14, 2022).

23. Those 190,498 people are unrepresented now, a period which will extend to at least four months for residents of the 32nd District, who have been unrepresented since Representative DeLuca's passing on October 9, 2022. Those citizens will already have been without representation for 10 weeks by the time of the Court's scheduled status conference on December 21 and for four months by the date of the February 7 special election. These people are Constitutionally entitled to representation without regard to which person ultimately has the authority to call the various special elections.
24. While there is an academic argument as to which member has the statutory authority to sign the writ to call these elections, both possible leaders have acknowledged the Constitutional obligation to call these special elections and, at least in respect to the 32nd District, have selected the same exact date.
25. The voters have a fundamental right to representation in each of these House districts. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) ("the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.").

26. By the time of the Court's scheduled status conference, PA Dems will have nominated candidates for all three special elections. Each candidate will have started campaigning and made expenditures towards the February 7 special elections.
27. This current situation is parallel to the circumstances confronted by the Pennsylvania Supreme Court in 2012, when, in exercising its King's Bench authority, the Court issued a writ of mandamus requiring then-Speaker Smith to call six special elections which he wished to delay in contravention of the Constitution. *Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012) (per curiam).
28. Our Supreme Court recognized that residents within a legislative district have a "clear legal right to elected representation, which right must be vindicated at special elections." *See id.* (citing Pa. Const. art. I, § 5).
29. In *Fagan*, the Supreme Court not only set the date of the six special elections but also authorized the Secretary of the Commonwealth to consolidate the campaign calendar accordingly as needed. *See id.* at 822.
30. There neither appears to be any dispute as to *whether* there must be special elections, nor *when* those ideally should be held.
31. At bottom, the petition filed by Leader Cutler only questions under whose authority elections should be convened, and seeks to enmesh this Court in a fundamentally political dispute over chamber leadership in another branch.

32. Mandamus is thus problematic as there is a dispute as to who could even be subject to mandamus as the presiding officer. However, the requirement that the presiding officer has a constitutional obligation to schedule the special election, and a statutory obligation to do so within 10 days is beyond dispute.
33. The Court can opt to avoid that question as a matter of justiciability and prudence, leaving it for the Legislative Branch to resolve.
34. So long as this Court agrees that (i) the United States Constitution, Pennsylvania Constitution, and the Election Code require these seats be promptly filled, and (ii) that the date proposed by both Leaders McClinton and Cutler is appropriate for all three special elections, then this Court can direct the Department of State and the Allegheny County Board of Elections to conduct these special elections on February 7.
35. The necessity of the non-discretionary ministerial duty to issue writs of election for special elections to fill the vacancies is agreed-to, including the date for such elections. It is thus unnecessary for this Court to resolve the question of which leader carries the mantle of presiding officer.

When the Special Elections Should Be Scheduled

36. If the Court determines to schedule the elections itself, rather than deny the petition outright and allow the writs already issued and approved to govern,

PA Dems believes that the Court should apply the February 7 date first selected by Leader Cutler and since selected by Leader McClinton.

37. PA Dems acknowledges that in *Fagan*, by the time the Supreme Court decided the case, the date of election was a non-discretionary element as then-Speaker Smith had delayed to the point where elections could not be called prior to the last possible date under the Constitution.

38. Here, however, both Leaders have recognized the desirability of the February 7 date; and there can be no plausible reason why one district in the eastern suburbs of Allegheny County should somehow be treated differently than two other districts located in adjacent eastern suburbs of that same county.

39. As of this submission, both writs for the 32nd District use the February 7 date, and the only writs confirmed to have finally issued for the 34th and 35th Districts also use that date.²

40. The Court can recognize that these districts are all adjacent to each other, all share the same Pittsburgh media market and even common micro-media channels. The voters in these three districts will drive the same roads and ride

² As this filing was being finalized, PA Dems learned of press reports of alleged writs issued by Leader Cutler today scheduling the elections in Districts 34 and 35 for the date of the municipal primary. PA Dems presumes such writs will be rejected by the Secretary as being for seats where elections have already been scheduled and having been issued by a leader who represents a minority of certified Representatives.

the same buses and will see posters and campaign materials for multiple special elections.

41. As such, the Court can recognize the possibility of voter confusion if different dates are selected.

42. Similarly, all three elections are to be administered by the Allegheny County Board of Elections. Each election has its own calendar, including deadlines for voter registration, deadlines to vote by mail, deadlines for canvassing and reports, and myriad other election administration tasks. It makes no sense to offer confusing and inconsistent deadlines and election dates, particularly within the same county in adjacent areas, and further when the political parties and candidates already have responded to the set of deadlines associated with the February 7 date.

43. Given the requirement that a special election be called within 10 days – and the issues associated with determining which individual can undertake that task—this Court can appropriately ensure that over 190,000 residents of Allegheny County can enjoy the constitutional right of representation.

44. Proceeding with the current schedule will avoid delays and uncertainty as questions may arise as to the validity of nominations made in accordance with the February 7 scheduled date.

45. Such a path is equitable and is the most deferential decision available, respecting the independent sovereignty of the Legislative Branch to determine its own leadership, while balancing the constitutional right of residents of three legislative districts have representation and a voice in their state government.

For the foregoing reasons, Intervenor-Respondent urges this Court to summarily establish the date of each of the special elections as February 7, 2023 and instruct the Secretary of the Commonwealth to appropriately adjust the election calendars for such elections accordingly.

Respectfully submitted,

GREENBERG TRAUIG, LLP

Dated: December 15, 2022

By: /s/ Kevin Greenberg

Kevin Greenberg (I.D. No. 82311)

Peter Elliot (I.D. No. 327465)

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*Counsel for Proposed Intervenor-
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