

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPRESENTATIVE BRYAN CUTLER, :
Leader of the Republican Caucus of the :
Pennsylvania House of Representatives, :

Petitioner, :

v. :

No. 588 MD 2022

LEIGH M. CHAPMAN, Acting Secretary :
of the Commonwealth of Pennsylvania, :
THE PENNSYLVANIA DEPARTMENT :
OF STATE, and THE BOARD OF :
ELECTIONS OF ALLEGHENY :
COUNTY, :

Respondents. :

APPLICATION FOR LEAVE TO INTERVENE BY
HOUSE DEMOCRATIC CAUCUS LEADER JOANNA E. MCCLINTON

Pursuant to Rule 1531(b) of the Pennsylvania Rules of Appellate Procedure, Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives, by and through her undersigned counsel, hereby applies for leave to intervene in the above-captioned matter seeking to invalidate three Writs of Election that Leader McClinton issued on December 7, 2022 and, in support thereof, states as follows:

1. Leader McClinton is a duly elected member of the Pennsylvania House of Representatives representing the 191st Legislative District and Leader of the House Democratic Caucus for the 2023-24 Legislative Session.

2. Leader McClinton previously served as Minority Leader of the House of Representatives for the 2021-2022 Legislative Session. She was reelected to the House at the general election on November 8, 2022 and was sworn in for the 2023-2024 legislative session at approximately 9:42 am on December 7, 2022.

3. Democrats won a majority of the 203 House districts in the general election on November 8, 2022—a total of 102 seats.

4. Republicans won 101 House districts.

5. Representative Anthony DeLuca, a member of the House Democratic Caucus and representative of the 32nd Legislative District, passed away on October 9, 2022. Representative DeLuca's name remained on the ballot and he was re-elected at the November 8, 2022 general election. No Republican candidate ran for this office against Representative DeLuca.

6. To ensure full and fair representation for the residents of the 32nd Legislative District, the vacant seat formerly occupied by Representative DeLuca is required to be filled by special election.

7. Pursuant to Article II, § 2 of the Pennsylvania Constitution, when a vacancy occurs, “the presiding officer” of the House of Representatives “shall issue a writ of election to fill such vacancy for the remainder of the term.” Pa. Const. art. II, § 2.

8. Given the importance of representation in the General Assembly, writs of election must be issued within 10 days after a vacancy. 25 P.S. § 2778.

9. Under 46 P.S. § 42.121m, when the office of Speaker is vacant, the duties of the Speaker are performed by the majority leader.

10. As the leader of the caucus that won a majority of the seats at the November 8, 2022 election, Leader McClinton was authorized by 46 P.S. § 42.121m and 25 P.S. § 2778 to issue a writ of election to fill the seat formerly occupied by Representative DeLuca.

11. Leader McClinton was also authorized to issue a writ of election filling the seats occupied by Austin A. Davis, the representative of the 35th Legislative District who was elected on November 8, 2022 to serve as Lieutenant Governor, and Summer Lee, the representative of the 34th Legislative District who was elected to represent the 12th Congressional District in the U.S. House of Representatives.¹ Both Representative Davis and Representative Lee tendered their resignations on December 6, 2022. Representative Lee's resignation was effective at 10:00 am on December 7, 2022 and Representative Davis's resignation was effective at 10:30 am on December 7, 2022, thereby rendering their seats vacant as of that time. Under 25

¹ Neither Representative Lee nor Representative Davis had a Republican opponent in the 2022 general election.

P.S. § 2778, writs of elections were required to be issued within 10 days of December 7, 2022, or on or before December 17, 2022.

12. In accordance with Article II, § 2 of the Constitution and 25 P.S. § 2778, on December 7, 2022, Leader McClinton issued Writs of Election to the Secretary of the Commonwealth and the Board of Elections of Allegheny County setting February 7, 2023 as the date for a special election to fill the vacancies in the 32nd, 34th and 35th legislative districts. Copies of the Writs of Election are attached hereto as Exhibits A-C.

13. Petitioner Bryan D. Cutler, who was elected to represent the 100th Legislative District and serves as Leader of the House Republican Caucus, commenced this action on December 9, 2022, challenging Leader McClinton's authority to issue the writs of election. Leader Cutler seeks a declaratory judgment declaring that the writs issued by Leader McClinton on December 7, 2022 are invalid and enjoining Respondents Acting Secretary of the Commonwealth Leigh M. Chapman, the Department of State and the Allegheny County Board of Elections from proceeding with the special election scheduled for February 7, 2023.² Leader

² Preparations for the February 7, 2023 special election are already underway. Public notice of the election has been published on the Department of State website together with candidate requirements, at least one candidate has submitted required paperwork in support of his candidacy, county election officials have arranged for poll workers and polling places and conducted other administrative work. *See Allegheny County is moving ahead with special elections for vacant state House*

Cutler also filed on the same date an application for special relief in the nature of a preliminary injunction seeking to bar election officials from proceeding with the special election on February 7, 2023.

14. Leader McClinton seeks leave to intervene as a party in this action to enforce and defend the Writs of Election which she issued. Leader McClinton also seeks leave to intervene to assert and vindicate her authority as leader of the House Democratic Caucus as it relates to calling for a special election to fill vacancies in the House.

Standard for Intervention

15. The Pennsylvania Rules of Civil Procedure governing intervention, which are made applicable in this original jurisdiction proceeding by Rule 106 of the Pennsylvania Rules of Appellate Procedure, permit a person not a party to an action to intervene if, *inter alia*, he or she “could have joined as an original party in the action or could have been joined therein” or the determination of the action “may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.” Pa. R. Civ. P. 2327(3), (4).

seats (Dec. 16, 2022), available at <https://www.penncapital-star.com/campaigns-elections/allegheeny-county-is-moving-ahead-with-special-elections-for-vacant-state-house-seats/> (last visited Dec. 16, 2022). Derailing the process now would waste government resources and cause harm to candidates and prospective candidates as well as prejudice the residents of the 32nd, 34th and 35th Legislative Districts.

16. Where a potential intervenor meets one of the threshold requirements in Rule 2327, intervention may be refused only if:

- (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
- (2) the interest of the petitioner is already adequately represented; or
- (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R. Civ. P. 2329.

17. Leader McClinton has sufficient interest in this action to intervene under both Rule 2327(3) and Rule 2327(4) and there is no basis to refuse intervention under Rule 2329. Therefore she should be allowed to intervene.

Intervention Pursuant to Pa. R. Civ. P. 2327(3)

18. Rule 2327(3) permits a party to intervene if he or she “could have joined as an original party in the action or could have been joined therein.” Pa. R. Civ. P. 2327(3).

19. It is settled law in Pennsylvania that, where litigation involves functions and responsibilities entrusted to a Commonwealth official, the official has party standing and is a proper party. *See Commonwealth, Pa. Game Comm’n v. Commonwealth, Dep’t of Env’tal Protection*, 555 A.2d 812, 815 (Pa. 1989) (an agency invested by statute with functions, duties and responsibilities “is a proper

party litigant, *i.e.*, that it has ‘standing.’”); *Com., Dep’t of Health v. Hanes*, 78 A.3d 676, 686 (Pa. Cmwlth. 2013) (finding that the Department of Health “possesses a substantial, direct, and immediate interest” in action to compel compliance with Marriage Law where the General Assembly conferred to the Department the duty to enforce its provisions); *Corman v. Nat’l Collegiate Athletic Ass’n*, 74 A.3d 1149, 1160-61 (Pa. Cmwlth. 2013) (Senator has standing to bring action challenging use of funds where statute vests Senator “with oversight responsibility and authority regarding the monies”); *Commonwealth v. E. Brunswick Twp.*, 956 A.2d 1100, 1111 (Pa. Cmwlth. 2008) (Attorney General is proper party where statutory duty to bring an action is “legislatively conferred”); *Pennsylvania Game Comm’n v. Pa. Pub. Util. Comm’n*, 651 A.2d 596, 603-04 (Pa. Cmwlth. 1994) (Game Commission has standing to challenge action which would have adverse interest on lands and wildlife under its control).

20. In *Perzel v. Cortes*, Majority Leader Samuel H. Smith was recognized as a proper party in an action involving the validity of writs of election that he issued to fill a vacancy in the House of Representatives after adjournment *sine die* and before the next General Assembly convened. 870 A.2d 759 (Pa. 2005).

21. Because Leader McClinton has a statutory duty to issue writs of election under Article II, § 2 and 25 P.S. § 2778, she is a proper party and could have

been joined as an original party in this action seeking to invalidate the Writs of Election that she issued.

22. Accordingly, Leader McClinton has a right to intervene under Rule 2327(3).

Intervention Pursuant to Pa. R. Civ. P. 2327(4)

23. Rule 2327(4) permits a person to intervene if the determination of such action “may affect any legally enforceable interest of such person.” Pa. R. Civ. P. 2327(4).

24. Having issued the writs of election that Leader Cutler is seeking to invalidate, Leader McClinton indisputably has a legally enforceable interest in the subject of this litigation. *See Com., Pa. Game Comm’n v. Com., Dep’t of Env’tal Protection*, 555 A.2d 812, 815 (Pa. 1989) (“[W]hen the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters.”); *Wells Fargo Bank, N.A. v. James*, 90 A.3d 813, 816-17 (Pa. Cmwlth. 2014) (purchaser of property at tax sale has interest sufficient to intervene in action challenging mortgage foreclosure).

25. Because the relief sought in this matter implicates a non-justiciable political question and threatens to directly affect Leader McClinton’s authority under Article II, § 2 and 25 P.S. § 2778 and the validity of the Writs of Election that she issued, she is presumptively entitled to intervene under Rule 2327(4).

No Grounds to Refuse Intervention Pursuant to Pa. R. Civ. P. 2329

26. None of the grounds for refusing intervention under Rule 2329 exist here.

27. Leader McClinton's defense of the Writs of Election that she issued is not insubordinate to the existence of this action.

28. Leader McClinton's interest in defending the writs is not adequately represented by the existing parties. While the named Respondents, Acting Secretary Chapman, the Department of State and the Allegheny County Board of Elections, undoubtedly share Leader McClinton's interest in expeditiously filling the vacant seats, none of the existing Respondents can or will assert Leader McClinton's right as House Democratic Leader to call for a special election or defend her actions in issuing the Writs of Election that are at issue.

29. Leader McClinton has not unduly delayed in filing this application for leave to intervene, but instead she is applying for intervention just seven days after the action was commenced and within the timeframe set by the Court in the December 13, 2022 Order.

30. Allowing Leader McClinton to intervene to assert her interest as Democratic Leader and to defend the writs of election she issued will not unduly delay, embarrass or prejudice the disposition of this proceeding, but rather will enable complete transparency and participation in this matter of public importance

affecting the representation of hundreds of thousands of Pennsylvanians in the House of Representatives and will allow for full development of the record in this important matter.

31. If granted leave to intervene, Leader McClinton will take all necessary steps to ensure this matter proceeds quickly and without delay to avoid any prejudice to the rights of the other parties.

Leader McClinton Should Be Allowed To Intervene

32. Leader McClinton is entitled to intervene because she has met the requirements of Rule 2327(3) and (4) and no grounds for exclusion in Rule 2329 apply.

33. Leader McClinton has concurrently filed a Memorandum of Law in Support of this Application pursuant to the Court's Order dated December 12, 2022.

34. Pursuant to Rule 2328(a) and the December 12, 2022 Order, attached as Exhibit "D" are the Preliminary Objections which Leader McClinton will file if permitted to intervene.

35. Pursuant to Rule 3707, counsel for Leader Cutler has advised that he does not oppose Leader McClinton's application to intervene.

WHEREFORE, Leader McClinton respectfully requests that this Honorable Court grant her application for leave to intervene as a party in the above-captioned matter.

Respectfully submitted:

/s/ Daniel T. Brier
Daniel T. Brier
Donna A. Walsh
Richard L. Armezzani

Myers, Brier & Kelly, LLP
425 Biden Street, Suite 200
Scranton, PA 18503

/s/ Michael A. Comber
Michael A. Comber

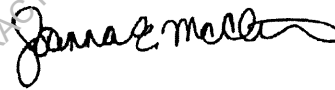
Reisinger Comber & Miller LLC
300 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219

Attorneys for Joanna E. McClinton,
Leader of the Democratic Caucus of
the Pennsylvania House of
Representatives

Date: December 16, 2022

VERIFICATION

I, Joanna E. McClinton, am the elected state representative for the 191st legislative district and the leader of the Pennsylvania House Democratic Caucus and am authorized to swear and affirm that the factual allegations contained in the Application for Leave to Intervene are true and correct to the best of my knowledge, information, and belief. This statement is made pursuant to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

A handwritten signature in black ink, appearing to read "Joanna E. McClinton", written over a horizontal line.

Joanna E. McClinton

Date: December 16, 2022

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel T. Brier

Daniel T. Brier

Date: December 16, 2022

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EXHIBIT “A”

RETRIEVED FROM DEMOCRACYDOCKET.COM

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-SECOND LEGISLATIVE DISTRICT OF THE COUNTY OF
ALLEGHENY, CAUSED BY THE DEATH OF ANTHONY M. DELUCA, THE
REPRESENTATIVE-ELECT FROM SAID DISTRICT ON THE 9TH DAY OF
OCTOBER, TWO THOUSAND TWENTY-TWO.

NOW, THEREFORE, THE HOUSE OF REPRESENTATIVES BEING
ADJOURNED SINE DIE AND THUS A VACANCY CURRENTLY EXISTING IN
THE OFFICE OF SPEAKER, I, JOANNA E. MCCLINTON, MAJORITY LEADER
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-SECOND
LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY ON THE 7TH

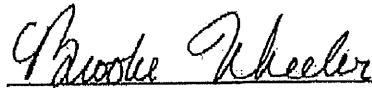
DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE, TO CHOOSE A PERSON TO REPRESENT THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION 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 7TH DAY OF DECEMBER, A.D. TWO THOUSAND TWENTY-TWO.




MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES

ATTEST:


CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

2022 DEC -7 PM 3:30

CLERK
JAN
TINS

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 7 DAY OF DECEMBER 12, 2022

BY David R. Wynn

EXHIBIT ‘B’

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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.

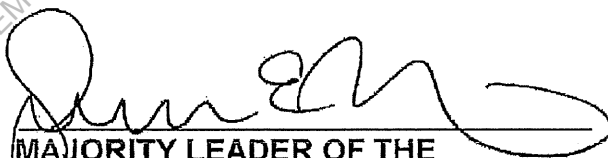
NOW, THEREFORE, THE HOUSE OF REPRESENTATIVES BEING
ADJOURNED SINE DIE AND THUS A VACANCY CURRENTLY EXISTING IN
THE OFFICE OF SPEAKER, I, JOANNA E. MCCLINTON, MAJORITY LEADER
OF THE HOUSE OF REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY
VESTED IN ME BY THE CONSTITUTION OF PENNSYLVANIA AND BY THE
ACTS OF 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 7TH

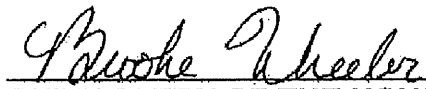
DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE, TO CHOOSE A PERSON TO REPRESENT THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION 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 7TH DAY OF DECEMBER, A.D. TWO THOUSAND TWENTY-TWO.




MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES

ATTEST:


CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 7th DAY OF December, 2022

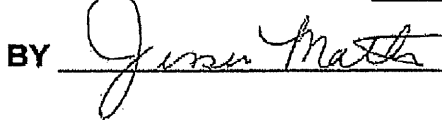
BY 

EXHIBIT “C”

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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-FIFTH LEGISLATIVE DISTRICT OF THE COUNTY OF
ALLEGHENY, CAUSED BY THE RESIGNATION OF AUSTIN DAVIS, THE
REPRESENTATIVE-ELECT FROM SAID DISTRICT ON THE 7TH DAY OF
DECEMBER, TWO THOUSAND TWENTY-TWO.

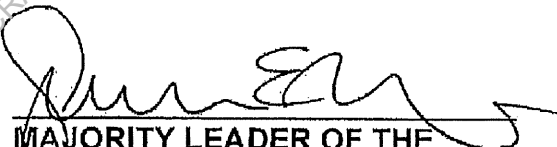
NOW, THEREFORE, THE HOUSE OF REPRESENTATIVES BEING
ADJOURNED SINE DIE AND THUS A VACANCY CURRENTLY EXISTING IN
THE OFFICE OF SPEAKER, I, JOANNA E. MCCLINTON, MAJORITY LEADER
OF THE HOUSE OF REPRESENTATIVES, BY VIRTUE OF THE AUTHORITY
VESTED IN ME BY THE CONSTITUTION OF PENNSYLVANIA AND BY THE
ACTS OF ASSEMBLY IN SUCH CASE MADE AND PROVIDED, DO HEREBY
COMMAND:

THAT YOU CAUSE AN ELECTION TO BE HELD IN THE THIRTY-FIFTH
LEGISLATIVE DISTRICT OF THE COUNTY OF ALLEGHENY ON THE 7TH

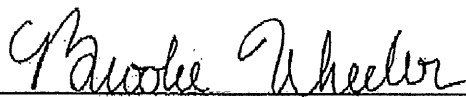
DAY OF FEBRUARY, TWO THOUSAND TWENTY-THREE, TO CHOOSE A PERSON TO REPRESENT THE LEGISLATIVE DISTRICT IN THE HOUSE OF REPRESENTATIVES OF PENNSYLVANIA FOR THE REMAINDER OF THE TERM EXPIRING ON THE 1ST DAY OF DECEMBER, TWO THOUSAND AND TWENTY-FOUR, AND THAT YOU GIVE DUE AND PUBLIC NOTICE OF THE ELECTION 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 7TH DAY OF DECEMBER, A.D. TWO THOUSAND TWENTY-TWO.




MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES

ATTEST:


CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

SERVICE OF THE WRITTEN WRIT AND RECEIPT OF SAME IS HEREBY

ACKNOWLEDGED THIS 7th DAY OF December, 2022

BY Jessie Mathis

EXHIBIT “D”

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REPRESENTATIVE BRYAN CUTLER, :
Leader of the Republican Caucus of the :
Pennsylvania House of Representatives, :
 :
Petitioner, :

V.

No. 588 MD 2022

**LEIGH M. CHAPMAN, Acting Secretary :
of the Commonwealth of Pennsylvania, :
THE PENNSYLVANIA DEPARTMENT :
OF STATE, and THE BOARD OF :
ELECTIONS OF ALLEGHENY :
COUNTY, :**

Respondents.

**PROPOSED INTERVENOR JOANNA E. MCCLINTON'S
PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW**

Pursuant to Rule 1516(b) of the Pennsylvania Rules of Appellate Procedure and Rule 1028 of the Pennsylvania Rules of Civil Procedure, Proposed Intervenor Joanna E. McClinton, by and through her undersigned counsel, states the following as her Preliminary Objections in response to the Petition for Review in the above-captioned matter:

1. This action is an effort by Petitioner Bryan D. Cutler, Leader of the Republican Caucus of the Pennsylvania House of Representatives, to circumvent valid and timely Writs of Election issued by House Democratic Caucus Leader McClinton to fill vacant seats in the House of Representatives.

2. The Petition for Review includes a single count for declaratory relief under the Declaratory Judgments Act, 42 Pa. C.S.A. §§ 7531-7541, seeking a pronouncement that the Writs of Election issued by Leader McClinton on December 7, 2022 scheduling the special elections for February 7, 2023 are invalid.

3. The claim asserted by Leader Cutler is devoid of legal merit and procedurally flawed and the Petition for Review should be dismissed pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure.

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

4. Leader Cutler's claim for declaratory relief rests on the incorrect legal premise that the Writs of Election issued by Leader McClinton are invalid.

5. As Leader of the House Democratic Caucus, Leader McClinton issued Writs of Election scheduling special elections on February 7, 2023 to fill seats rendered vacant by death and resignation.

6. Pursuant to Article II, § 2 of the Pennsylvania Constitution, when a vacancy occurs, "the presiding officer" of the House of Representatives "shall issue a writ of election to fill such vacancy for the remainder of the term." Pa. Const. art. II, § 2.

7. Writs of election must be issued within 10 days after a vacancy. 25 P.S. § 2778.

8. Under 46 P.S. § 42.121m, when the office of Speaker is vacant, the duties of the Speaker are performed by the Majority Leader.

9. Democrats won a majority of the 203 House districts at the general election on November 8, 2022—a total of 102 seats—whereas House Republicans won 101 seats. Pet. for Review ¶ 17.

10. Leader McClinton was re-elected to serve as Democratic Leader of the House of Representatives on November 15, 2022 and was sworn in as Representative of the 191st Legislative District for the 2023-2024 legislative session on December 7, 2022. Pet. for Review ¶¶ 2, 17, 25.

11. On December 7, 2022, after being duly sworn into office, Leader McClinton issued Writs of Election to the Secretary of the Commonwealth and the Board of Elections of Allegheny County setting February 7, 2023 as the date for special elections to fill vacancies in the 32nd Legislative District caused by the death of Representative Anthony DeLuca and vacancies in the 34th and 35th Legislative Districts caused by the resignations of Summer Lee and Austin A. Davis, respectively. *Id.* ¶ 28 & Exs. E, F & G.

12. As the leader of the caucus that won a majority of the seats at the November 8, 2022 election, *id.* ¶¶ 17, 25, Leader McClinton issued Writs of Election to fill the vacant seats in the 32nd, 34th and 35th Legislative Districts under 46 P.S. § 42.121m and 25 P.S. § 2778. *See Perzel v. Costa*, 870 A.2d 759, 763-64 (Pa. 2005)

(holding that Majority Leader is authorized to issue writ of election after General Assembly adjourns *sine die*).

13. The Writs of Election issued by Leader McClinton on December 7, 2022 are valid under Article II, § 2 and 25 P.S. § 2778.

14. Leader Cutler's challenge to the Writs of Election issued by Leader McClinton is without legal merit and therefore the Petition for Review is properly dismissed for failure to state a claim upon which relief can be granted.

WHEREFORE, the Petition for Review fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

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

15. Representative Cutler alleges that Acting Secretary of the Commonwealth Leigh M. Chapman incorrectly rejected the document that he issued on November 30, 2022 calling for a special election on February 7, 2023 (the same date later selected by Leader McClinton) to fill the vacancy in the 32nd Legislative District resulting from the death of Representative DeLuca. Pet. for Review ¶ 32.

16. On November 30, 2022, Representative Cutler purported to declare a special election to fill the "remainder of [Representative DeLuca's] term expiring November 30th, Two Thousand Twenty-Four." Pet. for Review, Ex. A.

17. As detailed in the December 7, 2022 letter from Acting Secretary of the Commonwealth Leigh M. Chapman (attached to the Petition for Review as Exhibit I), the Writ of Election issued by Leader Cutler on November 30, 2022 is invalid as a matter of law for at least two reasons.

18. *First*, a writ of election is required to be issued within ten days of the vacancy. 25 P.S. § 2778. The Writ of Election issued by Leader Cutler on November 30, 2022 was issued more than 10 days after Representative DeLuca's death on October 9, 2022 and therefore, as a matter of law, was ineffective to call for an election to fill his term ending in 2022. Further, a writ may only fill an unexpired term and may only call for a special election more than 60 days after the vacancy and therefore no special election could be held to fill Representative DeLuca's term which expired on November 30, 2022. *See* 25 P.S. § 2778.

19. *Second*, because Representative DeLuca was elected to a new two-year term at the November 8, 2022 General Election, a new vacancy for his seat was created on December 1, 2022. Pa. Const. art. II, § 2. Therefore, the first date for issuance of a writ of election to fill the current term was December 1, 2022. The document issued by Leader Cutler on November 30, 2022 predated the vacancy that occurred following the November 8, 2022 General Election and Leader Cutler could not call for a special election for a term that had not yet commenced.

20. As a matter of law, the document issued by Leader Cutler on November 30, 2022 was ineffective and could not validly seek to fill a vacancy in Representative DeLuca's unexpired term ending in 2024 which would not occur until the following day.

WHEREFORE, the Petition for Review fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

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

21. Leader Cutler proposed February 7, 2023 as the date for the special election—the *same date* in the Writs of Election issued by Leader McClinton which he is seeking to invalidate.

22. It is well settled in Pennsylvania that a declaratory judgment is unavailable where the relief sought would have no practical effect. *See Gulnac by Gulnac v. South Butler Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (“A declaratory judgment must not be employed . . . as a medium for the rendition of an advisory opinion which may prove to be purely academic.”) (citations omitted); *McCandless Twp. v. Wylie*, 100 A.2d 590, 592 (Pa. 1953) (“[A] petition for declaratory judgment is properly dismissed where the proceeding may prove to be merely academic.”); *Brown v. Commonwealth, Liquor Control Bd.*, 673 A.2d 21, 23 (Pa. Cmwlth. 1996); *Funk v. Wolf*, 144 A.3d 228, 251 (Pa. Cmwlth. 2016) (denying request for declaratory

relief that “would have no practical effect”), *aff’d*, 158 A.3d 642 (Pa. 2017); *Stackhouse v. Commonwealth, Pa. State Police*, 892 A.2d 54, 62 (Pa. Cmwlth. 2006) (“[i]t is improper to utilize declaratory pronouncements to issue advisory opinions which can have no practical effect on the parties.”) (citation omitted).

23. Where, as here, “the matter does not present a case or controversy, the courts have consistently held that they were without jurisdiction to hear the matter.” *Brown*, 673 A.2d at 23.

24. Because Leader McClinton selected the same date for the Allegheny County special elections proposed by Leader Cutler for the vacancy in the 32nd Legislative District, there is no case or controversy and this Court lacks jurisdiction to hear the matter.

WHEREFORE, the Petition for Review fails to state a claim upon which relief can be granted and this Court lacks jurisdiction over this matter and therefore the Petition for Review should be dismissed pursuant to Rule 1028(a)(1) and/or Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

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

25. To the extent Leader Cutler is alleging that the document he issued on November 30, 2022 should take precedence over the Writ of Election that Leader McClinton validly issued on December 7, 2022, his claim raises a political question that is not within the scope of this Court’s jurisdiction.

26. The Supreme Court made clear in *Perzel v. Cortes* that “[t]he authority to issue a writ for a special election for a vacant seat in the General Assembly is vested exclusively in that body pursuant to Article II, section 2 of the Pennsylvania Constitution. No branch shall exercise authority exclusively vested in another branch.” 870 A.2d 759, 765 (Pa. 2005).

27. Accordingly, to the extent Leader Cutler is challenging Leader McClinton’s authority as Majority Leader to serve the Writs of Election, his claim is a non-justiciable political question which this Court lacks jurisdiction to consider or decide.

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WHEREFORE, the Petition for Review should be dismissed for lack of jurisdiction pursuant to Rule 1028(a)(1) of the Pennsylvania Rules of Civil Procedure.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel T. Brier
Daniel T. Brier

Date: December 16, 2022

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PROOF OF SERVICE

I, Daniel T. Brier, hereby certify that I served the forgoing Application for Leave To Intervene upon all counsel of record via the Court's PACFile eService system, which service satisfies the requirements of Pa.R.A.P. 121.

/s/ Daniel T. Brier _____
Daniel T. Brier

Date: December 16, 2022

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