

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. :

INTERVENOR RESPONDENT JOANNA E. MCCLINTON'S
MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY OBJECTIONS TO PETITION FOR REVIEW

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I. INTRODUCTION

The legal issue before the Court is controlled by two irrefutable legal principles.

First, Pennsylvanians have a fundamental right to representation in the Pennsylvania House of Representatives. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (“[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.”). Electors in Pennsylvania’s 34th and 35th Legislative Districts “have a clear legal right to elected representation, which must be vindicated at special elections.” *Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012). This is beyond dispute.

Second, the authority to issue a writ for a special election for a vacant House seat is constitutionally and exclusively vested in the House of Representatives and exercise of that authority is not subject to challenge or review in the courts. *Perzel v. Cortes*, 870 A.2d 759, 765 (Pa. 2005). The Pennsylvania Supreme Court made clear in *Perzel* that it “offends the separation of powers” to interfere in the internal business of the House in matters related to authority to issue writs of election. *Id.*

Straightforward application of these foundational principles requires the conclusion that the Petition for Review filed by Petitioner Representative Bryan Cutler fails to state any claim upon which relief can be granted. There is no legal basis for Leader Cutler’s effort to void Writs of Election issued by Intervenor

Respondent Joanna E. McClinton, the Leader of the Democratic Caucus of the Pennsylvania House of Representatives, calling for special elections to fill vacancies in the 34th and 35th Legislative Districts.¹ Further, Leader Cutler’s intramural challenge to the validity of the Writs of Election issued by Leader McClinton is a non-justiciable political question. To reject the writs as Leader Cutler proposes would “offend[] the separation of powers.” *Id.* Accordingly, the Petition for Review should be dismissed and the court should not cancel the February 7, 2023 scheduled special elections that are underway in the 34th and 35th Legislative Districts.

II. STATEMENT OF JURISDICTION

While this Court generally has jurisdiction over actions against officers of the Commonwealth government under 42 Pa. C.S.A. § 761(a)(1),² this dispute raises a non-justiciable political question which this Court lacks authority to decide. *See*

¹ The Petition for Review in this case also sought to challenge the Writ of Election issued by Leader McClinton scheduling a special election in the 32nd Legislative District on February 7, 2023. Pet. for Review ¶ 51 & Ex. E. By Stipulation dated December 23, 2022, the parties, intervenor and proposed intervenor agreed that the special election in the 32nd Legislative District would proceed as scheduled on February 7, 2023. There is no longer any dispute concerning the special election for the 32nd Legislative District. Leader Cutler’s claim relating to the 32nd Legislative District and Leader McClinton’s Preliminary Objections to that claim (originally numbered II and III) are now moot.

² Leader Cutler also invokes 42 Pa. C.S.A. § 761(a)(2) as a source of jurisdiction, but that section has no application here because Leader Cutler is not acting in any official capacity with statewide responsibility. *See generally Fischer v. Kassab*, 380 A.2d 926, 928-29 (Pa. Cmwlth. 1977).

Blackwell v. City of Philadelphia, 684 A.2d 1068, 1071 (Pa. 1996) (“Under the political question doctrine, courts generally refuse to scrutinize a legislature’s choice of, or compliance with, internal rules and procedures.”).

III. STATEMENT OF LEGAL STANDARD

In ruling on preliminary objections, all well-pleaded material allegations in the petition for review and any reasonable inferences therefrom are accepted as true.

Pennsylvania Env’tal Def. Found. v. Commonwealth, --- A.3d ---, 2022 WL 16752900, at *4 (Pa. Cmwlth. Nov. 8, 2022). Preliminary objections are properly sustained where the law makes clear that the petitioner cannot succeed on his claim.

Id.

IV. STATEMENT OF QUESTIONS INVOLVED

- A. Whether Leader Cutler fails to state a claim for declaratory relief because the Writs of Election were issued by Leader McClinton within ten days of the vacancies as required by 25 P.S. § 2778 and Leader McClinton properly issued the Writs as Majority Leader pursuant to 46 P.S. § 42.121m while the House was adjourned *sine die*?**

Suggested Answer: Yes.

- B. Whether Leader Cutler’s challenge to Leader McClinton’s authority to act as Majority Leader is barred by the political question doctrine?**

Suggested Answer: Yes.

V. STATEMENT OF THE CASE

All 203 seats in the Pennsylvania House of Representatives were up for election in the November 8, 2022 General Election. Pet. for Review ¶¶ 15-16. Democrats won 102 of the seats and Republicans won 101 of the seats. *Id.* ¶ 17.

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. *Id.* ¶¶ 2, 17, 25.

After being duly sworn in on December 7, 2022, Leader McClinton issued Writs of Election to Respondents Acting Secretary of the Commonwealth Leigh M. Chapman and the Board of Elections of Allegheny County setting February 7, 2023 as the date for a special election to fill a vacancy in the 32nd Legislative District caused by the death of Representative Anthony DeLuca on October 9, 2022 and vacancies in the 34th and 35th Legislative Districts caused by the resignations of Representatives Summer Lee and Austin A. Davis which were effective on December 7, 2022. *Id.* ¶ 28 & Exs. E, F & G. As the leader of the caucus that won a majority of the seats at the November 8, 2022 election, *id.* ¶¶ 17, 25, Leader McClinton was statutorily authorized under 46 P.S. § 42.121m to issue the Writs of Election to fill the vacant seats in the House. *See Perzel*, 870 A.2d at 763-64 (holding that Majority

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

On December 9, 2022, Leader Cutler commenced this action by filing a single-count Petition for Review challenging the authority of Leader McClinton to issue the Writs of Election. Leader Cutler seeks a declaration under the Declaratory Judgments Act, 42 Pa. C.S.A. §§ 7531-7541, invalidating the Writs of Election and directing that the special elections may not proceed as scheduled on February 7, 2023. Also on December 9, 2022, Leader Cutler filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction requesting that the Court preliminarily enjoin Acting Secretary Chapman and the Board of Elections of Allegheny County (where the 34th and 35th Legislative Districts are located) from effectuating the Writs of Election issued by Leader McClinton and from proceeding with the special elections on February 7, 2023.

On December 16, 2022, Leader McClinton filed an Application for Leave To Intervene, which was granted without opposition by Order dated December 22, 2022. The Pennsylvania Democratic Party also sought leave to intervene on December 16, 2022. The Pennsylvania Democratic Party was afforded the opportunity to participate while its application for leave to intervene is pending.

On December 23, 2022, the parties and the Pennsylvania Democratic Party reached a Stipulation that resolved any dispute concerning the special election to fill

the vacant seat in the 32nd Legislative District. Pursuant to the Stipulation, the special election for the 32nd Legislative District will proceed on February 7, 2023.³

VI. SUMMARY OF ARGUMENT

The Petition for Review fails to allege any basis for invalidating the Writs of Election issued by Leader McClinton and any challenge to the validity of the Writs is a non-justiciable political question. There is no legal basis to enjoin the special elections in the 34th and 35th Legislative Districts and therefore Leader McClinton's Preliminary Objections should be sustained and the Petition for Review should be dismissed.

³ To the extent Leader Cutler proposes to advocate in favor of writs of election which he claims to have issued on December 15, 2022, after he filed his Petition for Review, to do so would be improper. Matters outside a petition for review are not properly considered in ruling on a preliminary objection in the nature of a demurrer. *Minor v. Kraynak*, 155 A.3d 114, 124 (Pa. Cmwlth. 2017). Tellingly, Leader Cutler has not amended his Petition for Review to seek a declaration that the writs of election that he claims to have issued on December 15, 2022 are valid. Simply put, Leader Cutler seeks to sow confusion and slow walk the scheduling of the special elections by inviting this Court to opine on his colleague Leader McClinton's authority to issue Writs of Election as Majority Leader. If this Court does not decline the invitation, it will likely be called upon repeatedly to pick winners and losers in the House, which must function with nearly equal constituencies in the Democratic and Republican caucuses.

VII. ARGUMENT

A. The Petition for Review Fails To State a Claim for Relief.

While Leader Cutler would prefer to delay filling the vacant seats in the 34th and 35th Legislative Districts for months beyond February 7, 2023, he offers no legal basis to avoid or set aside the Writs of Election issued by Leader McClinton, no valid ground to cancel the special elections set for February 7, 2023 and no justification for further delay in providing citizens of those House districts their constitutional right to representation in the House of Representatives. Leader Cutler fails to state any claim upon which relief may be granted, and his Petition for Review must therefore be dismissed.

Article II, § 2 of the Pennsylvania Constitution provides that, “[w]henver 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.” Pa. Const. art. II, § 2. “[A]lacrity is required.” *Fagan*, 41 A.3d at 819. This constitutional provision contemplates that “writs should issue quickly.” *Id.* The Election Code specifically addresses the timing for issuance of writs of election and provides 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 . . . and to the Secretary of the Commonwealth, for a special election to fill said vacancy . . .

.” 25 P.S. § 2778. Under this provision, the special election shall be held at least 60 days after issuance of the writ, but no later than the next primary, municipal or general election. *Id.*

The duty to issue a writ of election for a special election to fill a vacancy in the House is “nondiscretionary.” *Fagan*, 41 A.3d at 819. Voters in districts with vacant seats “have a clear legal right to elected representation, which must be vindicated at special elections.” *Id.* at 818. The Supreme Court has held that a writ of election may properly be issued after the House adjourns *sine die* and before the House reconvenes and a new Speaker is elected. *Perzel*, 870 A.2d at 763-64. During this period, the Majority Leader is statutorily authorized under 46 P.S. § 42.121m to issue a writ of election. *Id.* at 764. That section 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. § 42.121m.

Leader Cutler concedes, as he must, that Democrats won a majority of the 203 House districts at the general election on November 8, 2022. He concedes in Paragraph 17 of the Petition for Review that “102 of the Democratic Party’s candidates won seats in the House of Representatives and . . . 101 of the Republican Party’s candidates won seats in the House of Representatives.” Pet. for Review ¶ 17. He asserts that Leader McClinton was re-elected to serve as Democratic Leader of

the House of Representatives. *Id.* ¶¶ 2, 17, 25. Further, Leader Cutler avers that, after being sworn into office 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 special elections to fill vacancies in the 32nd Legislative District caused by the death of Representative DeLuca and vacancies in the 34th and 35th Legislative Districts caused by the resignations of Representatives Davis and Lee. *Id.* ¶ 28 & Exs. E, F & G.

Because Leader McClinton is the leader of the caucus that won a majority of the seats at the November 8, 2022 election, she properly issued Writs of Election on December 7, 2022 pursuant to 46 P.S. § 42.121m to fill the vacant seats in the 34th and 35th Legislative Districts. *See Perzel*, 870 A.2d at 763-64 (holding that Majority Leader is authorized to issue writ of election after General Assembly adjourns *sine die*). Leader Cutler's challenge to the Writs of Election issued by Leader McClinton is without legal merit and therefore the Petition for Review should be dismissed for failure to state a claim upon which relief can be granted.

B. Any Challenge to Leader McClinton's Authority To Issue Writs of Election Is a Non-Justiciable Political Question.

Leader Cutler fails to state any claim upon which relief may be granted because his challenge to Leader McClinton's authority to act as Majority Leader is not subject to judicial review but rather constitutes a non-justiciable political question.

“The cornerstone of our republican democracy is the principle of government divided into three separate, co-equal branches that both empower and constrain one another.” *William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A.3d 414, 435 (Pa. 2017) (citation omitted). It has long been recognized that the separation of powers sometimes requires judicial abstention. *Id.* at 436. In the seminal case *Baker v. Carr*, the U.S. Supreme Court identified six factors which trigger political question treatment. 369 U.S. 186, 217 (1962). “The presence of any one of these elements will prompt a court to refrain from considering the claim asserted.” *Zemprelli v. Daniels*, 436 A.2d 1165, 1169 (Pa. 1981). Under the first factor—the textual commitment factor—Pennsylvania courts abstain from reviewing actions of another branch “where ‘the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for ‘self-monitoring.’”” *William Penn Sch. Dist.*, 170 A.3d at 439 (quoting *Sweeney v. Tucker*, 375 A.2d 698, 706 (Pa. 1977)).

It is beyond dispute that leadership is a matter entrusted exclusively to the House of Representatives. The Constitution directs that “[t]he House of Representatives shall elect one of its members as Speaker.” Pa. Const. art. II, § 9. That same section goes on to direct that “[e]ach House shall choose its other officers, and shall judge of the election and qualifications of its members.” Pa. Const. art. II, § 9. The Constitution further directs that “[e]ach House shall have power to

determine the rules of its proceedings . . . and shall have all other powers necessary for the Legislature of a free State.” Pa. Const. art. II, § 11. The Constitution thus commits exclusively and absolutely to the House of Representatives the power and authority to select its own officers and to determine its own rules. Who serves as presiding officer is a paradigmatic non-justiciable political question. *See, e.g., Blackwell*, 684 A.2d at 1073 (issue of whether city council properly dismissed employee is non-justiciable political question); *Dintzis v. Hayden*, 606 A.2d 660, 662 (Pa. Cmwlth 1992) (issue of whether member violated House rule by manipulating roll call device is non-justiciable political question).

The Supreme Court of Pennsylvania recognized and acknowledged the House’s exclusive authority over writs of election in *Perzel*. As in this case, *Perzel* involved a writ of election issued to fill a vacancy in the House that occurred after the House adjourned *sine die* and before the House convened for the new session and selected a new Speaker. 870 A.2d at 760-62. The Secretary rejected the writ issued jointly by the House Majority Leader and the last-elected Speaker because the House was adjourned and, in the Secretary’s view, there was no presiding officer with legal authority to issue the writ. *Id.* The Supreme Court rejected this argument and held that the Majority Leader was statutorily authorized by 46 P.S. § 42.121m to issue the writ while the House was in adjournment. *Id.* at 764. The Court further held that the Secretary lacked authority to challenge the writ under the separation of powers

doctrine. *Id.* at 765. The Court explained 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.*” *Id.* (emphasis added) (citation omitted). The Court concluded that rejection of the writ determined to be “appropriate” by representatives of the House “was an act unsupported by constitutional or statutory authority, and accordingly offends the separation of powers.” *Id.*

Perzel controls this political dispute. As in *Perzel*, the separation of powers precludes the judiciary from rejecting the Writs of Election issued by Leader McClinton as Majority Leader of the House. To enjoin action on the Writs of Election as Leader Cutler implores this Court to do would be “an act unsupported by constitutional or statutory authority, and . . . [would] offend[] the separation of powers.” *Id.* Indeed, *Perzel* applies perforce where one elected leader disputes the authority of his colleague who was selected following an election in which her party won a majority of seats. What could be more political?

Perzel is dispositive on the textual commitment factor and, as a result, there is no need to address the other *Baker* factors. Two of those factors, however, also support political question treatment. As to the second *Baker* factor, there is no judicially discoverable and manageable standard for resolving an internal House

dispute over which House member has authority to act as presiding officer. *Baker*, 369 U.S. at 217.⁴ The third and fourth *Baker* factors also point to non-justiciability because it is impossible to decide a dispute over control of the House without making a policy determination reserved to the House and without expressing lack of respect due to the General Assembly as a coordinate branch of government. *Id.* Dictating who controls another branch of government is the ultimate impertinence. The second, third and fourth *Baker* factors thus also favor abstention.

⁴ Leader Cutler cites *Zemprelli* and a facially non-binding “Legal Opinion” from the Legislative Reference Bureau which heavily relies on *Zemprelli* as ostensible support for his position that a majority is calculated based on the number of “members elected, living, sworn, and seated.” Pet. for Review ¶¶ 64-65, 70. His reliance on *Zemprelli* for this proposition is misplaced. That case involved interpretation of Article IV, § 8(a) which requires “consent of . . . a majority of the members elected to the Senate” for appointments *after* the Senate convenes and Senate Rule XXII-8 which defined “majority of the Senators elected” as “a majority of the Senators elected, living, sworn, and seated.” *Zemprelli*, 436 A.2d at 1166. Here, there is no constitutional provision that purports to govern who controls the House, but rather the power to choose officers and determine rules is constitutionally delegated exclusively to the House. Pa. Const. art. II, §§ 9, 11. The Supreme Court’s interpretation of different language in an inapplicable constitutional provision in *Zemprelli* is not relevant here and the different issue presented here is a non-justiciable political question. Further, the “Legal Opinion” by the Legislative Reference Bureau is admittedly “only advisory” and not “binding,” Pet. for Review, Ex. H, and is plainly inadmissible, *see Browne v. Commonwealth*, 843 A.2d 429, 433 & n.1 (Pa. Cmwlth. 2004) (“legal opinion testimony is not admissible”). Nothing underscores more the nonjusticiable political nature of this dispute than Leader Cutler’s unjustified invocation of the advisory opinion that his own Chief of Staff solicited for use in support of his claim filed two days later.

Put simply, the courts are without power to declare the presiding officer of the House or otherwise interfere in the House's internal affairs. Leader McClinton's authority to issue Writs of Election as presiding officer during the recess is a political question that is non-justiciable. Accordingly, to the extent Leader Cutler is challenging Leader McClinton's authority as Majority Leader to issue the Writs of Election, he raises a non-justiciable political question which this Court lacks power to consider or decide.⁵

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⁵ The other *Baker* factors—an unusual need for unquestioning adherence to a political decision already made and the potentiality of embarrassment from multifarious pronouncements by various departments on one question, 369 U.S. at 217—are not directly implicated here.

VIII. CONCLUSION

The Petition for Review fails as a matter of law to state any claim upon which relief may be granted and raises a non-justiciable political question. Leader McClinton's Preliminary Objections should be sustained and the Petition for Review should be dismissed.

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 28, 2022

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PROOF OF SERVICE

I, Daniel T. Brier, hereby certify that I served the forgoing Memorandum of Law in Support of Preliminary Objections 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 28, 2022

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