

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. :

**PROPOSED INTERVENOR JOANNA E. MCCLINTON’S
ANSWER TO APPLICATION FOR SPECIAL RELIEF**

In an attempt to further his own partisan goals by disenfranchising voters, Petitioner Bryan D. Cutler, Leader of the Republican Caucus of the Pennsylvania House of Representatives, seeks special relief in the nature of a preliminary injunction barring government officials from proceeding with special elections to fill two vacant seats in the House scheduled for February 7, 2023. Leader Cutler fails to establish any of the “essential prerequisites”¹ necessary for an award of preliminary injunctive relief and therefore his application must be denied.

¹ The six “essential prerequisites” that a party must establish to obtain preliminary injunctive relief are: (1) the injunction is necessary to prevent immediate

First, Leader Cutler fails to establish the irreparable harm requirement because his sole claim for relief is admittedly speculative and the relief sought will cause, rather than prevent, irreparable harm. Leader Cutler is seeking the extraordinary remedy of disrupting a special election that is underway based on his speculative assertion that he might “possibly” become Majority Leader next month and the February 7, 2023 special election might “possibly” be “unlawful.” Appl. 32. Such speculation cannot serve as the basis for an injunction. *See Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (“speculative considerations cannot form the basis for issuing a preliminary injunction”) (citation and internal punctuation omitted); *Yarmoski v. Lloyd*, 531 A.2d 1169, 1171-72 (Pa. Cmwlth. 1987) (claim that harm “may” occur at some future point cannot form basis for issuance of preliminary injunction). Moreover, Leader Cutler himself chose February 7, 2023 as the date for the special election to fill the vacant seat in the 32nd

and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it and issuance of an injunction will not substantially harm other interested parties in the proceeding; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct (4) the activity sought to be restrained is actionable and the right to relief is clear; (5) the injunction sought is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004). If the petitioner fails to establish any one of these requirements, there is no need to address the others and the application fails. *County of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988).

Legislative District. Pet. for Review ¶ 22.² Proceeding with the special elections for the 34th and 35th Legislative Districts on the same date more than seven weeks from now that Leader Cutler himself selected poses no harm at all to Leader Cutler, let alone immediate and irreparable harm necessary to justify the extraordinary remedy of a preliminary injunction. *See Jamal v. Commonwealth, Department of Corrections*, 549 A.2d 1369, 1371 (Pa. Cmwlth. 1988) (“Injunctive relief is not available to eliminate a possible remote future injury or invasion of rights.”).

Second, it cannot be denied that greater injury will result from granting the requested injunctive relief, than from denying relief. Preparations for the three special elections scheduled for February 7, 2023 are already underway. The special election calendar has been established and published by the Department of State.³ The nomination period for political party and political body candidates began on

² The document issued by Leader Cutler on November 30, 2022 in the 2020-2022 term was facially defective because the 2022-2024 term had not yet begun and there was not yet a vacancy to be filled. In addition, the newly reapportioned 32nd Legislative District did not “take[] effect” until the next term began on December 1, 2022. *See Fagan v. Smith*, 41 A.3d 816, 820 (Pa. 2012).

³ *See* <https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/Special%20Elections/2023/2023-SpecialElection-Calendar-32nd-Leg.pdf>;
<https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/Special%20Elections/2023/2023-SpecialElection-Calendar-34-Leg.pdf>;
<https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Documents/Special%20Elections/2023/2023-SpecialElection-Calendar-35-Leg.pdf>.

December 7, 2022, candidates will be nominated by local committees on December 17, 2022, and nominations are due on December 19, 2022. Other election deadlines follow in short order. A spokesperson for Allegheny County, where the three special elections will be held, publicly confirmed that the County is moving forward with election preparations , including “confirming polling locations, scheduling poll workers and other administrative work.”⁴ Derailing the ongoing process now prior to a ruling on the merits will waste government resources and will prejudice candidates and prospective candidates as well as voters in the 34th and 35th Legislative Districts who will be denied basic representation until another materially delayed special election can be scheduled. The second factor thus weighs overwhelmingly against a preliminary injunction. *See, e.g., Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at *19 (Pa. Cmwlth. Sept. 29, 2022) (denying request to enjoin counties from implementing notice and cure procedure with respect to mail-in ballots because “it would seriously harm the public interest and orderly administration of . . . the . . . General Election[] which is already well underway”) (unreported opinion), *aff’d by equally divided court*, 284 A.3d 207 (Pa. Oct. 21, 2022); *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902

⁴ *See Allegheny County is moving ahead with special elections for vacant state House seats* (Dec. 16, 2022), available at <https://www.penncapital-star.com/campaigns-elections/allegheny-county-is-moving-ahead-with-special-elections-for-vacant-state-house-seats/>.

A.2d 476, 489 (Pa. 2006) (permanent injunction altering voting procedure on referendum unavailable where greater injury would result from granting injunction than denying it).

Third, the injunction sought will destroy rather than restore the *status quo*. “The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made[;] it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *In re Appeal of Little Britain Twp. From Decision of Zoning Hearing Bd. of Little Britain Twp.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) (citation omitted). Leader Cutler seeks to fundamentally and irreversibly alter the *status quo* by cancelling the special elections. His request amounts to final relief on the merits which is not available under Rule 1531. *See, e.g., Soja v. Factoryville Sportsmen’s Club*, 522 A.2d 1129, 1132 (Pa. Super. 1987) (reversing trial court order which “improperly granted a final injunction in response to a request for a preliminary injunction”).

Fourth, this dispute over the validity of Leader McClinton’s Writs of Election is not justiciable and Leader Cutler is not likely to prevail on the merits. The power to schedule a special election is entrusted solely to the legislature. The Supreme Court has held 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.” *Perzel v. Cortes*, 870 A.2d 759, 765 (Pa. 2005) (citation omitted). Because the power to schedule special elections has been entrusted “exclusively and finally” to the legislative branch, the Writs of Election issued by Leader McClinton on December 7, 2022 are not subject to challenge or review in the courts. *See Blackwell v. City of Philadelphia*, 684 A.2d 1068, 1071 (Pa. 1996) (“[T]he question of whether the legislature violated its own internal rules is generally non-justiciable since the courts cannot interfere with the internal workings of the legislature ‘without expressing the lack of respect due coordinate branches of government.’”) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).⁵

Further, Leader Cutler has not established and cannot establish a likelihood of success on the merits. As the leader of the House Democratic Caucus whose

⁵ In his Petition for Review, Leader Cutler cites *Zemprelli v. Daniels* as ostensible support for his argument that Democrats did not win a majority of seats in the House because Representative DeLuca was no longer living when Leader McClinton issued the Writs of Election. Pet. for Review ¶¶ 64-66. *Zemprelli*, however, is plainly inapposite. Among other glaring differences, that case involved interpretation of the phrase “subject to the consent of . . . a majority of the members elected to the Senate” in Article IV, § 8(a) of the Pennsylvania Constitution which governs the manner of appointing Commonwealth officers. 436 A.2d 1165, 1166 (Pa. 1981). This case presents no such issue of constitutional interpretation, but rather involves the internal workings of the House and, specifically, the authority to issue a writ of election. This is a non-justiciable political question. *Perzel*, 870 A.2d at 765. In addition, other than respecting the will of the voters on election day as Leader McClinton does, there is no judicially manageable standard that would not interject the Court into the internal proceedings of the House and trample the separation of powers.

members won a majority of seats in the general election on November 8, 2022, Leader McClinton had authority under 25 P.S. § 2778 and 46 P.S. § 42.121m as presiding officer of the House to issue the Writs of Election. Leader Cutler, as the representative of the minority party in the House, cannot prevail on the merits and therefore preliminary injunctive relief is properly denied. *See Luzerne County Council v. Luzerne County Bd. of Elections*, 266 A.3d 1216 (Table), 2021 WL 5014062 (Pa. Cmwlth. Oct. 28, 2021) (not reported) (petition to preliminarily enjoin election properly denied where petitioner failed to establish clear right to relief and likelihood of success on the merits of its claim that scheduling election violated statute).

Fifth, preliminary injunctive relief is not reasonably suited to abate the alleged offending activity. The preliminary injunctive relief that Leader Cutler seeks is not available as a matter of law. The Supreme Court stated in *Butcher v. Rice* that “[i]t is clear beyond question that equity is without jurisdiction” to grant a preliminary injunction precluding an election. 153 A.2d 869, 873-74 (Pa. 1959). “[M]atters pertaining to elections are deemed to be purely political questions and hence outside the scope of equitable jurisdiction.” *Id.* at 873. Further, declaratory relief is not available in these circumstances because the election date set by Leader McClinton is the same date originally selected by Leader Cutler. Declaratory relief 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, 251-52 (Pa. Cmwlth. 2016) (denying request for declaratory relief that “would serve no practical purpose”); *Stackhouse v. Commonwealth, Pa. State Police*, 892 A.2d 54, 62 (Pa. Cmwlth. 2006) (“It is improper to utilize declaratory pronouncements to issue advisory opinions which can have no practical effect on the parties.”) (citation omitted).

Sixth, the preliminary injunctive relief sought will harm the public interest. The public interest favors a full House of Representatives. Disrupting and materially delaying an election to fill the vacant seats deprives citizens of their basic right of representation. Leader Cutler’s transparent attempt to seize control by preventing the special elections will harm the citizens in the 34th and 35th Legislative Districts who will needlessly be without elected representatives in the House of Representatives during any period in which those elections were enjoined. The relief sought is thus contrary to the “longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise.” *Pa. Democratic Party v.*

Boockvar, 238 A.3d 345, 360-61 (Pa. 2020) (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). Electors in the 34th and 35th Legislative Districts “have a clear legal right to elected representation, which right must be vindicated at special elections.” *Fagan v. Smith*, 41 A.3d 816, 818-19 (Pa. 2012) (citing Pa. Const. art. 1, §15 and Pa. Const. art. II, §2). The “goal must be to enfranchise and not to disenfranchise the electorate,” *Pa. Democratic Party*, 238 A.3d at 361. Because injunctive relief will harm the public interest, Leader Cutler’s request must be denied.

Leader Cutler fails to satisfy any of the essential prerequisites for granting preliminary injunctive relief. He cites no relevant authority for his extraordinary and unprecedented request for a court order delaying the special elections for the 34th and 35th Legislative Districts while the special election for the neighboring 32nd Legislative District proceeds on February 7, 2023.⁶ And there is no good reason for the delay. Instead, the bifurcated special elections are transparently intended to

⁶ In his Petition for Review, Leader Cutler refers to a December 7, 2022 “Legal Opinion” issued by the Legislative reference Bureau at the request of his Chief of Staff, Jake Smeltz. Pet. for Review ¶ 7. The “Legal Opinion” was issued only for the requester’s “individual use,” is admittedly “only advisory” and does not, of course, constitute a “binding legal opinion[.]” Pet. for Review, Ex. H, p.1. It does not address the precise issues raised here and, in any event, is entitled to no weight. Indeed, Leader Cutler himself discouraged reliance on an advisory opinion issued by the Legislative Reference Bureau when displeased by an opinion issued by the Bureau relating to proposed abortion legislation. *See* Pa. Leg. J., May 14, 2019, p. 843.

forestall elections in two districts just won by Democratic candidates and where no Republican candidates were even nominated in the November 2022 General Election. The demonstrated unclean hands provides further grounds for denying preliminary injunctive relief. *See Jacob v. Halloran*, 710 A.2d 1098, 1103 (Pa. 1998) (doctrine of unclean hands requires that party seeking equity acted fairly and without fraud or deceit as to controversy in issue) (citations omitted).

In sum, Leader Cutler has failed to carry his heavy burden of demonstrating a right to preliminary injunctive relief. “[T]he grant of a preliminary injunction is a harsh and extraordinary remedy” which “is to be granted only when and if *each* criteria has been fully and completely established.” *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (citation omitted) (emphasis

in original). Leader Cutler has failed to satisfy this burden and, as a result, his request for preliminary injunctive relief must be denied.

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

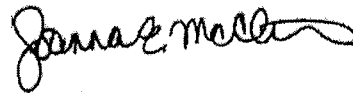
Reisinger Comber & Miller LLC
300 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219

Attorneys for Representative
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 Answer to Application for Special Relief 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.



Joanna E. McClinton

Date: December 16, 2022

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

PROOF OF SERVICE

I, Daniel T. Brier, hereby certify that I served the forgoing Answer to Application for Special Relief 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