

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioner, :

v. :

Docket No. 588 M.D. 2022

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

Respondents :

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**PETITIONER’S MEMORANDUM OF LAW IN OPPOSITION TO
THE INTERVENTION APPLICATION OF
THE PENNSYLVANIA DEMOCRATIC PARTY**

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I. INTRODUCTION

Petitioner Bryan D. Cutler, in his capacity as the duly elected member of the Pennsylvania House of Representative for the 100th Legislative District and as Leader of the Republican Caucus of the House of Representatives (“Representative Cutler”), by and through his counsel, McNeese Wallace & Nurick, LLC, hereby files this Memorandum of Law in support of his Answer in Opposition to the Intervention Application of the Pennsylvania Democratic Party.

As explained in further detail below, the outcome of this action will not affect any legally enforceable interest of the Pennsylvania Democratic Party. As such, the Pennsylvania Democratic Party is not entitled to intervene in this matter. Accordingly, Representative Cutler respectfully requests this Court deny the intervention application of the Pennsylvania Democratic Party.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Representative Cutler initiated this action on December 9, 2022, by the filing of a Petition for Review in this Court’s original jurisdiction. Therein, Representative Cutler challenges the validity of three writs of election issued by Joanna E. McClinton, the duly elected member of the House of Representatives for the 191st Legislative District and the Leader of the Democratic Caucus of the House of Representatives (“Representative McClinton”).

As set forth in the Petition for Review, all 203 seats in the House of Representatives were up for election in the 2022 General Election. (Pet. ¶ 16). The results of the 2022 General Election reflect that 102 of the Democratic Party's candidates won seats in the House of Representatives and that 101 of the Republican Party's candidates won seats in the House of Representatives. (*Id.* ¶ 17).

On October 9, 2022, prior to the 2022 General Election, Anthony DeLuca, the duly elected member of the House of Representatives for the 32nd Legislative District and candidate for reelection ("former Representative DeLuca"), passed away. (*Id.* ¶ 18). Former Representative DeLuca's death occurred too close to the 2022 General Election to remove his name from the ballot. (*Id.* ¶ 19). As such, former Representative DeLuca's name appeared on the ballot for the 2022 General Election and, despite his death, he was reelected to the House of Representatives. (*Id.* ¶ 20). Former Representative DeLuca's pre-election death created a vacancy in the House of Representatives. (*Id.* ¶ 21).

With the pre-election death of former Representative DeLuca, the membership of the Democratic Caucus of the House of Representatives was comprised of 101 members on December 1, 2022, the start of the new legislative session, which is one member short of a majority. (*Id.* ¶ 24). Despite being one member short of a majority, Representative McClinton declared herself to be

Majority Leader of the House of Representatives on December 7, 2022, and subsequently had a Judge of the Court of Common Pleas of Delaware County administer the oath of office to her on the House floor. (*Id.* ¶ 25).

That same day, two members of the House of Representatives, Austin A. Davis, the duly elected member of the House of Representatives for the 35th Legislative District and the Lieutenant Governor-elect (“former Representative Davis”), and Summer L. Lee, the duly elected member of the House of Representatives for the 34th Legislative District and member-elect of the United States House of Representative (“former Representative Lee”), resigned their seats in the Pennsylvania House of Representatives. (*Id.* ¶ 26). The resignations of former Representatives Davis and Lee reduced the membership of the Democratic Caucus of the House of Representatives to 99 members. (*Id.* ¶ 27).

Representative McClinton issued writs of election on December 7, 2022, to the Pennsylvania Department of State and the Board of Elections of Allegheny County setting special elections for February 7, 2023, to fill the seats of former Representatives DeLuca, Davis, and Lee. (*Id.* ¶ 28).

Pursuant to the Pennsylvania Constitution, as well as the Election Code,¹ the authority to issue writs of election rests with the presiding officer of the House of

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Representatives, which is, in effect, the Speaker of the House. PA. CONST. art. II, § 2; Section 628 of the Election Code, 25 P.S. § 2778. In the event of a vacancy in the Office of Speaker of the House of Representatives, the Act of January 10, 1968, P.L. 925, authorizes the Majority Leader of the House to carry out the duties of the Speaker, including issuing writs of election. Section 21.13 of the Act of January 10, 1968, P.L. 925, 46 P.S. § 41.12m.

As set forth more fully in the Petition for Review, Representative McClinton is neither Speaker of the House of Representatives nor is she the Majority Leader of the House, despite her claim to the contrary, because the membership of the Democratic Caucus does not constitute a majority of the House. As such, Representative McClinton issued the writs of election at issue without constitutional or statutory authority.

Representative Cutler initiated this action to challenge the validity of the writs of election issued by Representative McClinton. More specifically, Representative Cutler's Petition for Review requests declaratory relief in the form of an order declaring the three writs of election issued by Representative McClinton on December 7, 2022, invalid as a matter of law. (Pet. at Wherefore Clause). Contemporaneous with the filing of the Petition for Review, Representative Cutler also filed an Emergency Application for Special Relief in the Nature of a Preliminary

Injunction requesting this Court enjoin the Pennsylvania Department of State and the Board of Elections of Allegheny County from effectuating the writs of election issued by Representative McClinton until this Court can determine whether those writs are legally valid.

This Court issued a scheduling Order on December 12, 2022. *Cutler v. Chapman* (Pa. Cmwlth., No. 588 M.D. 2022, filed Dec. 12, 2022) (*Per Curiam* Order). Among other things, the Court directed “Applications for Leave to Intervene, complete with proposed filings and a memorandum of law in support thereof . . ., shall be PACFiled and served no later than 12:00 p.m. on Friday, December 16, 2022.” *Id.* (emphasis omitted). The Pennsylvania Democratic Party filed a timely intervention application on December 15, 2022, which is presently pending before the Court.

In its intervention application, the Pennsylvania Democratic Party contends that it should be permitted to intervene in this action on the basis that the outcome of this case could affect a legally enforceable interest of the Party. However, as explained below, the Pennsylvania Democratic Party does not have a legally enforceable interest that would entitle it to intervene in this matter.

III. STANDARD FOR INTERVENTION

The standard governing intervention is set forth in Pennsylvania Rule of Civil Procedure 2327, Pa.R.Civ.P. 2327, which provides as follows:

At any time during the pending of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if:

- (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) such person is so situated as be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
- (3) such person could have joined as an original party in the action or could have been joined therein; or
- (4) the determination of such action may affect any legally enforceable interest to such person whether or not such person may be bound by a judgment in the action.

Pa.R.Civ.P. 2327.

The Pennsylvania Democratic Party contends it has a right to intervene pursuant to Rule 2327(4). This Court has made clear that “[t]o satisfy Rule 2327(4), ‘the applicant must own an interest in or a lien upon property in question or must own a cause of action which will be affected by the action.’” *Acorn Dev. Corp. v. Zoning Hearing Bd. of Upper Merion Twp.*, 523 A.2d 436, 437-38 (Pa. Cmwlth. 1987) (citation omitted). “The fact that [a] proceeding may, in some way, affect the

proposed intervenor is not sufficient to invoke a ‘legally enforceable interest.’” *In re L.J.*, 691 A.2d 520, 527 (Pa. Super. 1997). Rather, “[i]f the claim of [the proposed intervenor] does not encompass a right of liability recognized and enforceable at law or in equity as distinguished from an economic motive or interest in seeing one litigant or another prevail in the proceeding, petitioner does not fall within the contemplation of [R]ule 2327(4).” *Bank of Am. v. McCauley*, 23 Pa. D & C. 2d 362, 364, 1961 WL 6276, * 2 (Pa. C.C.P. of Allegheny Cnty. 1961).

IV. ARGUMENT

This case centers around the question of whether the three writs of election issued by Representative McClinton on December 7, 2022, are invalid as a matter of law. While the Pennsylvania Democratic Party will be generally affected by the outcome of this case, the outcome of this case will not affect any legally enforceable interest of the Pennsylvania Democratic Party. As such, the Pennsylvania Democratic Party does not have a right to intervene in this matter.

In its intervention application, the Pennsylvania Democratic Party generally submits that it “meets the standard for mandatory intervention because it possesses a ‘legally enforceable interest’ that may be affected by a judgment in the action.” (Intervention Application ¶ 15). The Pennsylvania Democratic Party identifies the legally enforceable interest that may be affected by the outcome of this matter as its

right under the Election Code to nominate candidates for special elections.² (*Id.* ¶ 16); *see* Section 630 of the Election Code, 25 P.S. § 2780 (setting forth that “[e]ach political party shall be entitled to nominate and to file nomination certificates for as many candidates as will be voted for at such special election.”). However, the Pennsylvania Democratic Party’s authority under the Election Code to nominate candidates will be unaffected by the outcome of this action.

Again, this case concerns the validity of the writs of election issued by Representative McClinton on December 7, 2022. The Pennsylvania Democratic Party’s right to nominate candidates for the open seats in the House of Representative for the 32nd, 34th, and 35th Legislative Districts will not be altered by this litigation. This litigation will not somehow take away the Pennsylvania Democratic Party’s right to nominate candidates for the open seats.

Should this Court conclude the writs of election issued by Representative McClinton are invalid as a matter of law, the Pennsylvania Democratic Party will

² The Pennsylvania Democratic Party also claims to represent the interests of the registered members of the Democratic Party who reside in the 32nd, 34th, and 35th Legislative Districts, the Democratic Party voters in Pennsylvania, and the Democratic Party candidates. (Intervention Application ¶¶ 17-19). To the extent the Pennsylvania Democratic Party is asserting this somehow gives rise to some legally enforceable interest, the Pennsylvania Democratic Party does not identify what that legally enforceable interest is or how the outcome of this matter may affect that unnamed legally enforceable interest. As such, the sole legally enforceable interest identified by the Pennsylvania Democratic Party is its right under the Election Code to nominate candidates for special elections.

still be able to exercise its right to nominate candidates for the foregoing open seats in the House of Representatives upon the effectuation of valid writs of election.

Accordingly, the Pennsylvania Democratic Party does not “own a cause of action which will be affected by th[is] action.” *Acorn De. Corp.*, 523 A.2d at 437-38 (citation omitted). While the Pennsylvania Democratic Party could be generally affected by the outcome in this matter in that its ability to nominate candidates for the open seats in the House of Representatives for the 32nd, 34th, and 35th Legislative Districts may be delayed until the effectuation of valid writs of elections, “[t]he fact that [a] proceeding may, in some, affect the [Pennsylvania Democratic Party] is not sufficient to invoke a ‘legally enforceable interest.’” *In re L.J.*, 691 A.2d at 527. Accordingly, the Pennsylvania Democratic Party does not have a legally enforceable interest that would be affected by the outcome of this action.³

³ Even if the Pennsylvania Democratic Party is permitted to intervene, the Party should be deemed to be unopposed to Representative Cutler’s injunction application.

This Court’s December 12, 2022 scheduling Order directed that applications requesting leave to intervene submit their intervention applications “*with proposed filings . . . no later than 12:00 p.m. on Friday, December 16, 2022.*” (emphasis added). While the Pennsylvania Democratic Party did timely file its intervention application, it did not file a proposed answer to Representative Cutler’s injunction application as directed by the Court’s Order. As such, should the Pennsylvania Democratic Party be permitted to intervene, the Party should be deemed unopposed to Representative Cutler’s injunction application.

V. CONCLUSION

For the reasons set forth above, Representative Cutler respectfully requests this Court deny the intervention application of the Pennsylvania Democratic Party.

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CERTIFICATE OF COMPLIANCE

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

McNEES WALLACE & NURICK LLC

Date: December 20, 2022

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