

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 286 MD 2022

**DAVE McCORMICK FOR U.S. SENATE, and DAVID H.
McCORMICK,**

Petitioners

v.

**LEIGH M. CHAPMAN, in her official capacity as Secretary of
State for the Commonwealth, et al.,**

Respondents

**ACTING SECRETARY CHAPMAN'S ANSWER TO THE APPLICATION
FOR RELIEF IN THE NATURE OF A VOLUNTARY DISCONTINUANCE
OR, ALTERNATIVELY, A DISMISSAL FOR MOOTNESS**

June 8, 2022

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Petitioners ask this Court to discontinue this action or dismiss it as moot. Pennsylvania's Rules of Appellate Procedure prohibit granting the first request at this time and the Court should reject the second because this matter is not moot.

First, discontinuances may not be granted while any appeal is pending. Where “an appeal has been docketed in the appellate court, the prothonotary or clerk of the lower court . . . shall not accept a *praecipe* to discontinue the action until it has received notice from the appellate court prothonotary or certification of counsel that all pending appeals in the action have been discontinued.” Pa. R.A.P. 1973(b); *see Est. of Paterno v. Nat'l Collegiate Athletic Ass'n*, 168 A.3d 187, 203 (Pa. Super. Ct. 2017) (holding that plaintiffs’ “discontinuance, and any trial court order permitting a discontinuance, were a nullity” while discovery matters were on interlocutory appeal). Here, an appeal of this Court’s Order granting an Immediate Special Injunction is pending in the Pennsylvania Supreme Court. *See McCormick v. Chapman*, No. 67 MAP 2022 (Pa.). Moreover, to discontinue this action while an appeal is live “would create the anomalous situation where the disposition of [the] appeal and the attendant remand of the record would not be capable of returning to the action from which they derived.” *Paterno*, 168 A.3d at 203.

Second, this case is not moot. While one candidate in the Republican Senate primary has conceded to the other, the counties and the Department of State still must complete their administration of Pennsylvania’s 2022 primary election.

With or without a candidate's concession, counties are directed for all primary and general elections that "all absentee ballots which have not been challenged under [25 P.S. § 3146.2b(c)] and all mail-in ballots which have not been challenged under [25 P.S. § 3150.12b(a)(2)] and that have been verified under [25 P.S. § 3146.8(g)(3)] shall be counted and included with the returns of the applicable election district." 25 P.S. § 3146.8(g)(4).

Once canvassing of all ballots is complete, counties must "tabulate the figures for the entire county and sign, announce and attest the same, as required by this section." *Id.* § 3154(a). After confirming that the total number of ballots issued and votes cast in an election match, county officials must announce the figures of the final vote. *Id.* § 3154(d). If the reported figures do not suggest any problems in a county's tabulation, then the county records the results and maintains them until "all the returns from the various election districts which are entitled to be counted have been duly recorded, when they shall be added together, announced and attested by the clerks who made and computed the entries respectively and signed by members of the county board." *Id.* § 3154(f). Returns remain unofficial for five days and unofficial results for statewide offices are reported to the Secretary of the Commonwealth. *Id.* Once all recounts, recanvasses, or other contests are concluded, a county officially certifies its results. *Id.*

In elections for federal office, statewide office, a judicial seat, a place in the General Assembly, and some others, “a separate certificate, showing totals of the returns cast for each of such offices respectively, shall also be forwarded by the county board to the Secretary of the Commonwealth on forms furnished by the Secretary of the Commonwealth.” *Id.* § 3158. The Secretary then proceeds “to tabulate, compute and canvass the votes cast.” *Id.* § 3159.

All ballots without the voter’s handwritten date on the return envelope will be canvassed in the 2022 primary election because of the order in this case. Several parties to this case, however, still dispute that they should be. *See* Intervenors’ Emergency Application to Stay Order of the Commonwealth Court ¶¶ 11-12, *McCormick v. Chapman*, No. 67 MAP 2022 (Pa. June 3, 2022); Dr. Oz’s Answer in Support of Emergency Application to Stay at 7-13, *McCormick v. Chapman*, No. 67 MAP 2022 (Pa. June 6, 2022) (arguing to stay this Court’s injunction because appellants have a substantial case on the merits). Therefore, this case is not moot.

Even if the defeated candidate’s electoral concession did moot this action, this Court should not dismiss it on mootness grounds. In Pennsylvania, mootness is a prudential limitation, not a jurisdictional one. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). One of the prudential considerations is whether the matter concerns issues of public importance, especially when the governing law may be unclear. *Commonwealth v. Cromwell Twp.*, 32 A.3d 639, 652 (Pa. 2011); *Rendell*

v. Pa. State Ethics Comm'n, 983 A.2d 708, 719 (Pa. 2009). That consideration applies here.

Whether to canvass timely received absentee and mail-in ballots when a voter neglects to write a date on the mailing envelope is a recurring and important question. It affects elections other than the one for the Republican nomination for U.S. Senate. It also is a question that the Pennsylvania Supreme Court has not conclusively resolved. And this year alone, this Court has come to different conclusions in three cases related to whether those ballots must be canvassed. *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022); *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (table) (Pa. Commw. Ct. 2022) (split decision); *Ritter v. Lehigh Cnty. Bd. of Elections*, 272 A.3d 989 (table) (Pa. Commw. Ct. 2022) (split decision).

Final resolution of whether to canvass timely received absentee and mail-in ballots cast without a handwritten date on the return envelope is needed to bring clarity to Pennsylvania elections—and it certainly is better to do so now, five months before the next general election. Dismissing this action on mootness would be a needless step backward.

For these reasons, this Court should deny Petitioners' application to discontinue this action or dismiss this action as moot.

June 8, 2022

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CERTIFICATE OF COMPLIANCE

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

Dated: June 8, 2022

/s Jacob B. Boyer

Jacob B. Boyer