

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
TO VACATE**

June 8, 2022

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Dr. Oz and his campaign committee ask this Court to vacate its thorough opinion, which explains that timely received absentee and mail-in ballots should not be disregarded because the voter failed to write an inconsequential date on the ballot return envelope. There is no justification for granting this request.

First, this Court need not take seriously the argument that the failure to join counties never alleged to be unlawfully disqualifying the votes at issue here requires vacating the injunction or this Court's opinion. This Court already concluded that those parties' absence was not reason to refrain from entering the injunction in the first place. *McCormick v. Chapman*, No. 286 MD 2022, Slip Op. at 3 n.1 (Pa. Commw. Ct. June 3, 2022). If Dr. Oz had legitimate concerns about ballots that counties were canvassing, his recourse was to bring an action against the counties he believed were acting unlawfully or to seek to join them to this litigation. But there was no reason for petitioners here to assert claims against counties they believed were following the law.

Moreover, Dr. Oz distorts the nature of an indispensable party. Indispensable parties have *rights* so implicated by a case that justice cannot be done without their participation. *See, e.g., Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981); *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (1975); *Church of Lord Jesus Christ of Apostolic Faith, Inc. v. Shelton*, 740 A.2d 751, 755 (Pa. Commw. Ct. 1999). The counties not involved in this litigation

have no such rights, and the collection of property disputes that Dr. Oz cites in support of his application bear no useful resemblance to election matters.

Parties that will be guided by a court’s resolution of a legal question as a matter of precedent do not necessarily have rights at stake, and thus are not necessarily indispensable. Indeed, the Pennsylvania Supreme Court regularly resolves election disputes without every county named as a party. For example, in *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058 (Pa. 2020)—the focus of much attention in this matter—Philadelphia and Allegheny were the only county parties. Likewise, in *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), in which the Supreme Court determined what access counties must afford canvassing observers under the Election Code, Philadelphia was the only participating county.

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. Dr. Oz, however, still disputes that they should be. *See* 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, and there is no warrant to vacate this Court’s injunction or the opinion explaining it.

Even if the defeated candidate’s electoral concession did moot this action, this Court should not vacate its opinion—or take any other action—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. 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. Vacating the Court’s thorough opinion, or taking any other action on mootness, would be a needless step backward.

Third, the order granting the application for a preliminary injunction has been appealed. *See McCormick v. Chapman*, No. 67 MAP 2022 (Pa.). Appeals divest a trial court of jurisdiction over the appealed matter. 42 Pa.C.S. § 5505 (limiting court’s authority to modify orders to instances when “no appeal from such order has been taken”); Pa.R.A.P. 1701 (explaining that, with exceptions inapplicable here, trial courts cannot proceed further on a matter that has been appealed). This statute and rule codify the common law principle that, “[a] court of first instance cannot further proceed with a cause after [an appeal has been filed in] an appellate court.”

Mitchell v. Milburn, 199 A.3d 501, 506 (Pa. Commw. Ct. 2018). The Pennsylvania Supreme Court has expressly disapproved of courts that “modify or reverse an order from which an appeal has been taken.” *Corace v. Balint*, 210 A.2d 882, 889 (1965). Thus, this Court does not have jurisdiction right now to vacate the injunction order or opinion explaining it.

For these reasons, this Court should deny the application to vacate its opinion.

June 8, 2022

Respectfully submitted,

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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