

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 67 MAP 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 EMERGENCY
APPLICATION TO STAY**

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The Republican National Committee and Republican Party of Pennsylvania's Emergency Application to Stay satisfies neither the substantive nor procedural requirements for a stay pending appeal. It therefore should be denied.

A candidate for the Republican Party's nomination for Pennsylvania's 2022 U.S. Senate election initiated this action, seeking an order directing counties to canvass absentee and mail-in ballots returned in envelopes on which the voter had omitted a handwritten date, provided those ballots were timely received and otherwise valid. That candidate has now conceded.¹

¹ The defeated candidate has filed an application in Commonwealth Court to discontinue the suit, or have it dismissed as moot. This Court should still proceed with the appeal. Mootness is a prudential limitation, not a jurisdictional one. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). There is an exception to the prudential limitation for cases of public importance, especially if 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 exception applies here.

Whether counties should 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 an unsettled question in Pennsylvania courts. This year alone, Commonwealth Court judges have come to different conclusions in three cases as 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). Plus, any county that refuses to canvass those ballots may be ordered by a federal court to do so. *See Migliori v. Lehigh Cnty Bd. of Elections*, No. 22-1499, 2022 WL 1701850 (3d Cir. May 27, 2022).

Affirming the Commonwealth Court's decision here would finally resolve this issue, providing needed clarity.

With that concession, no party can demonstrate that a stay is needed to avoid any immediate and irreparable injury that it will experience. Such a showing is necessary for a stay pending appeal. *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (Pa. 1990); *Pennsylvania Pub. Util. Comm’n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983). The Republican National Committee and the Republican Party of Pennsylvania—the only parties to appeal and the parties actually requesting the stay—certainly cannot show any immediate and irreparable injury that they will suffer without a stay. Indeed, the application for a stay does not even allege any injury that either applicant will suffer. That failure alone requires denying the application.

Additionally, however, the Republican committee and party have not made a substantial case on the merits, as they also must for a stay. *Maritrans*, 573 A.2d at 1003; *Pennsylvania Pub. Util. Comm’n*, 467 A.2d at 808-09. For this reason, too, the application must be denied.

Federal law prohibits counties from denying the right to vote on the basis that the voter neglected to write a date on the return envelope, as the Commonwealth Court’s comprehensive decision correctly concluded. Under the relevant federal statute, the right to vote may not be denied “because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting if such error or omission is not material in determining

whether such individual is qualified under State law.” 52 U.S.C. § 10101(a)(2)(B). Omitting a date from a voter’s ballot return envelope is such an error because the handwritten date is immaterial to assessing a voter’s qualifications. *See McCormick v. Chapman*, No. 286 MD 2022, Slip Op. at 28-30 (Pa. Commw. Ct. June 2, 2022). That counties canvass ballots returned with obviously “wrong” dates ends any doubt that the voter’s handwritten date is insignificant. *Id.* at 26 (quoting *Migliori v. Lehigh Cnty Bd. of Elections*, No. 22-1499, 2022 WL 1701850 (3d Cir. May 27, 2022)). On a virtually identical record, the United States Court of Appeals for the Third Circuit recently interpreted § 10101(a)(2)(B) to require the same result that the Commonwealth Court reached. *Migliori v. Lehigh Cnty Bd. of Elections*, No. 22-1499, 2022 WL 1701850 (3d Cir. May 27, 2022).

Nevertheless, the application for a stay concludes, without justification, that the Commonwealth Court’s thorough decision is “unsupported by law,” Application at ¶ 12, pointing to this Court’s decision in *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020) and to Justice Alito’s administrative stay of the *Migliori* mandate.

Yet this Court has never resolved if § 10101(a)(2)(B) prohibits disqualifying timely ballots because a voter failed to write a date on the ballot return envelope. Rather, four Justices raised that voiding such ballots might conflict with federal law, with three noting the “persuasive force” of the argument for a conflict. *In re*

Canvas, 241 A.3d at 1074 n.5 (opinion announcing judgment); *id.* at 1089 n.54 (Wecht, J., concurring and dissenting).

Nor is Justice Alito’s administrative stay of the mandate entered in *Migliori* a comment on the merits of the Third Circuit’s decision. A “stay order is not a decision on the merits.” *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh and Alito, concurring in grant of applications for stays). Below, the Commonwealth Court properly rejected an effort to ascribe far more importance to Justice Alito’s administrative stay than it can bear. *McCormick v. Chapman*, No. 286 MD 2022, Slip Op. at 25 n.16 (Pa. Commw. Ct. June 2, 2022).

Independently, Pennsylvania law also is best read not to permit disenfranchising voters for neglecting to write an inconsequential date on their ballot’s return envelope. Here, too, the application fails to make a substantial case that the Commonwealth Court’s careful analysis is wrong. While the Election Code states that voters “shall . . . fill out, date and sign” the declaration on a ballot’s return envelope before submitting it, 25 P.S. §§ 3146.6(a), 3150.16(a), the Election Code does not identify the remedy when a voter overlooks this instruction. When the General Assembly means for noncompliance to result in disenfranchisement, it says so explicitly in the Election Code. *See, e.g.*, 25 P.S. §§ 3055(d), 3146.8(d), 3146.8(g)(1)(ii), 3146.8(g)(4)(ii). The Election Code is thus

ambiguous as to the consequence of a voter omitting a handwritten date from a ballot return envelope.

Consistent with the Statutory Construction Act, the ambiguity should be interpreted to avoid a conflict with federal law, to avoid a potential conflict with the Pennsylvania Constitution, and to be consistent with the longstanding principle in Pennsylvania law that voters not be disenfranchised for inconsequential mistakes. 1 Pa.C.S. §§ 1921(c)(1), (3), (4), (6), 1922(2), (3); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020). Even if *In re Canvass* might be read to suggest differently, it is distinguishable, as the Commonwealth Court noted, because this Court did not have the same factual record before it. *McCormick v. Chapman*, No. 286 MD 2022, Slip Op at 32-33 (Pa. Commw. Ct. June 2, 2022).

Finally, with exceptions not applicable here, an application for a stay pending appeal “must ordinarily be made in the first instance to the trial court.” Pa.R.A.P. 1732(a). That has not happened. If an applicant makes their initial request in an appellate court, the applicant “shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action.” *Id.* at 1732(b). That also has not happened.

For any of these reasons, this Court should deny the emergency application for a stay.

June 6, 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 6, 2022

/s/ Jacob B. Boyer
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