

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

Case No. 286 M.D. 2022

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

Respondents.

**APPLICATION FOR RELIEF
IN THE NATURE OF A VOLUNTARY DISCONTINUANCE
OR, ALTERNATIVELY, A DISMISSAL FOR MOOTNESS**

Petitioners, by and through their undersigned counsel, hereby apply for relief in the nature of a voluntary discontinuance or, alternatively, a dismissal for mootness. In support of this Application, Petitioners aver as follows:

1. On May 17, 2022, a General Primary was held in Pennsylvania, in which candidates for all offices to be filled at the November 8, 2022 General Election were to be nominated by the Pennsylvania Republican Party (“May 17, 2022 Primary”). *See* Section 603 of the Pennsylvania Election Code, 25 P.S. § 2753.

2. One of the offices for which a Republican nominee was to be elected during the May 17, 2022 Primary is the United States Senate.

3. There were eight candidates on the May 17, 2022 Primary ballot for the United States Senate Republican nominee.

4. The unofficial results of said election showed the top two candidates to be Petitioner David H. McCormick, with 418,463 votes, and Dr. Mehmet C. Oz, with 419,365 votes.

5. On May 23, 2022, Petitioners Dave McCormick for U.S. Senate and David H. McCormick (together, “Petitioners”) commenced this action by filing a Petition for Review in the Nature of a Complaint in Equity (“Petition”) in this Court’s original jurisdiction¹ against named Respondents Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth (“Acting Secretary”), and sixty (60) of the sixty-seven (67) Pennsylvania county boards of elections (“County Boards”).

6. In their Petition and a subsequent Motion for Immediate Special Injunction and Supporting Memorandum of Law (“Injunction Motion”), Petitioners alleged that the named County Boards refused to count absentee and mail-in ballots for the Republican Nomination for the Office of United States Senator in the May 17, 2022 General Primary Election, where the voters failed to

¹ Actions that seek equitable and/or declaratory relief fall within this Court’s original jurisdiction under Chapter 15 of the Pennsylvania Rules of Appellate Procedure. *See* Pa. R.A.P. 1501(a)(3), 1532(b).

handwrite a date on the exterior mailing envelope but the ballots were otherwise timely received based upon the date stamped by the County Boards upon receipt and had complied with all other applicable requirements.

7. By Memorandum Opinion and Order dated June 2, 2022, this Court granted Petitioners' Injunction Motion and ordered the County Boards, if they were not already doing so, to segregate the ballots that lack a dated exterior envelope, to canvass those ballots assuming there are no other deficiencies or irregularities that would require otherwise, report two vote tallies to the Acting Secretary, one that includes the votes from ballots that lack dated exterior envelopes and one that does not; and to report a total vote tally which includes the votes from ballots that had both dated and undated exterior envelopes as the total votes cast.

8. Before the Court entered its June 2, 2022 Order, the Acting Secretary issued on May 26, 2022, an Order of Recount for the Republican Primary for United States Senator and a Declaration Regarding Unofficial Returns for the General Primary Held May 17, 2022 ("Statutory Recount").

9. While the Statutory Recount was in progress, on June 3, 2022, Petitioner David H. McCormick conceded the election of the Republican nominee for the United State Senate was over.

10. In light of his Petitioner David H. McCormick's concession, the Petitioners no longer desire to proceed with the litigation and seek to voluntarily discontinue this action pursuant to Pennsylvania Rule of Civil Procedure 229(a). *See* Pa. R.C.P. 229(a) (“[a] discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff before commencement of the trial.”).

11. Rule 106 of the Pennsylvania Rules of Appellate Procedure provides that “unless otherwise prescribed by these rules the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied.” Pa. R.A.P. 106. *See also Utica Mut. Ins. Co. v. Dept. of Labor & Indus.* 566 A.2d 911, 912-13 (Pa. Cmwlth. Ct. 1989) (“under Pa.R.A.P. 106, the Rules of Civil Procedure are applicable” to an action brought in the Commonwealth Court’s original jurisdiction).

12. Accordingly, pursuant to Pennsylvania Appellate Rule 106 and Pennsylvania Civil Procedure Rule 229(a), Petitioners seek to voluntarily discontinue this action as to all parties and claims.

13. Alternatively, the June 3, 2022 election concession has rendered the proceedings in this matter moot. *See Costa v. Cortes*, 142 A.3d 1004, 1016-17 (Pa. Cmwlth.), *aff’d*, 636 Pa. 508, 145 A.3d 721 (Pa. 2016) (“As a general rule,

courts will not decide moot cases. ‘[A] case is moot if there is no actual case or controversy in existence at all stages of the controversy.’ ...”) (citations omitted).

14. Because the case is moot, this Court no longer has the power to entertain the lawsuit or the issues raised in it. *See, e.g., Ioannidis v. Wolf*, 260 A.3d 1091, 2021 WL 2834611, 2021 Pa. Commw. Unpub. LEXIS 344 (Pa. Commw. Ct., No. 635 M.D. 2020, Jul 8, 2021), *aff’d* 270 A.3d 1110, 2022 WL 533308, 2022 Pa. LEXIS 195 (Pa., No. 56 MAP 2021, Feb. 23, 2022) (dismissing as moot a declaratory judgment action challenging the 2020 presidential election). *See also Wortex Mills v. Textile Workers of America*, 85 A.2d 851, 857 (Pa. 1952) (“It is only in very rare cases where exceptional circumstances exist or where matters or questions of great public importance are involved, that this court ever decides moot questions or erects guideposts for future conduct or actions.”); *Mistich v. Commonwealth*, 863 A.2d 116, 121 (Pa. Cmwlth. Ct. 2004) (“[M]ootness, however it may have come about simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.”) (citation omitted).

15. Courts have applied the mootness doctrine to cases involving elections. *See, e.g., Bognet v. Degraffenreid*, ___ U.S. ___, 141 S. Ct. 2508, 209 L. Ed. 2d 544 (U.S., No. 20-740, filed April 19, 2021) (“The petition for a writ of

certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit with instructions to dismiss the case as moot. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36 (1950).”); *Conant v. Brown*, 248 F. Supp. 3d 1014, 1019 (D. Or. 2017), *aff’d* 726 Fed. Appx. 611 (9th Cir. 2018) (“I agree with Defendants that the challenges to the 2016 certified election results and ascertainment of electors are moot because that process is complete, the electors have performed their duties, and the President has been inaugurated.”). *See also Ioannidis*, 2021 Pa. Commw. Unpub. LEXIS 344, at *11-12 (“Because this Court may not grant Petitioner the injunctive or mandamus relief that he requests, the instant matter is deemed to be moot. Moreover, we are not inclined to apply any of the foregoing exceptions to the mootness doctrine in this case because Petitioner failed to avail himself of the statutory remedies provided in the Election Code prior to filing the instant Amended Petition for Review.”) (citations omitted).

16. Rule 1972(a)(4) of the Pennsylvania Rules of Appellate Procedure provides that “[e]xcept as otherwise prescribed by this rule, subject to Pa. R.A.P. 123 [(relating to filing an application for relief)], any party may move ... [t]o dismiss for mootness.” *See* Pa.R.A.P. 1972(a)(4).

17. Accordingly, to the extent their request to voluntarily discontinue this action is denied, Petitioners seek to dismiss their action for mootness.

WHEREFORE, Petitioners respectfully request this Honorable Court to enter an order which reflects that this action has been voluntarily discontinued or, alternatively, has been dismissed as moot. A proposed order is attached.

Respectfully Submitted,

Dated: June 5, 2022

/s/ Ronald L. Hicks, Jr.

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Counsel for Petitioners

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 5, 2022

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Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Application was served this 5th day of June, 2022, upon all parties or counsel of record via the Court's ECF system and email to all parties and/or counsel of record.

Respectfully submitted,

/s/ Ronald L. Hicks, Jr. _____

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	:	
Petitioners,	:	
	:	
v.	:	Case No. 286 M.D. 2022
	:	
LEIGH M. CHAPMAN, in her official	:	
capacity as Acting Secretary of State for	:	
the Commonwealth, et al.,	:	
	:	
Respondents.	:	

ORDER OF COURT

AND, NOW, to-wit, this ____ day of _____, 2022, upon consideration of Petitioners’ Application for Relief in the Nature of a Voluntary Discontinuance or, alternatively, a Dismissal for Mootness, and finding that good cause exists, it is hereby ORDERED, ADJUDGED and DECREED that said Application is GRANTED.

This case is voluntarily discontinued [or dismissed as moot]. All parties are to bear their own fees and costs. The Prothonotary shall mark this case closed.

BY THE COURT:

J.