

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEIGH M. CHAPMAN, ACTING
SECRETARY OF THE
COMMONWEALTH AND THE
PENNSYLVANIA
DEPARTMENT OF STATE,

Petitioners,

v.

BERKS COUNTY BOARD OF
ELECTIONS, FAYETTE
COUNTY BOARD OF
ELECTIONS, AND LANCASTER
COUNTY BOARD OF
ELECTIONS,

Respondents.

No.: 355 MD 2022

**RESPONDENT FAYETTE
COUNTY BOARD OF
ELECTIONS AMENDED
RESPONSE TO PETITIONERS'
EMERGENCY APPLICATION
FOR PEREMPTORY
JUDGMENT AND SUMMARY
RELIEF**

Filed on Behalf of:
Respondent Fayette County
Board of Elections

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No.: 355 MD 2022

**RESPONDENT FAYETTE COUNTY BOARD OF ELECTIONS
SUPPLEMENTAL RESPONSE TO PETITIONERS' EMERGENCY
APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY
RELIEF**

Respondent, Fayette County Board of Elections (hereinafter "**Fayette County**"), files the within Supplemental Response to Petitioners' Emergency Application for Peremptory Judgment and Summary Relief (the "**Emergency Application**").

Fayette County incorporates its Response to Petitioners' Emergency Application for Preemptory Judgment and Summary Relief as if fully set forth herein. Further, the parties have stipulated that the Butler County Board of Elections ("Butler County") submitted certified results of the 2022 general

primary elections that did not include any votes from timely received undated absentee and mail-in ballots. Butler County notified the Acting Secretary of the Commonwealth that it did not include any votes from timely received undated absentee and mail-in ballots in its final certified election results.

The Acting Secretary has certified election results for district-level offices that represent all or part of Butler County, as follows:

A. U.S. House of Representatives: Congressman Mike Kelly (R),
and opponent Dan Pastore (D).

B. Pennsylvania House of Representatives:

1. Rep. Marci Mustello (R) and opponent Gregory Deal (L)
– District 11.

2. Rep. Aaron Bernstine (R) – District 8.

3. Rep. Timothy Bonner (R) – District 17.

4. Candidates Stephanie Scallaba (R) and opponent
Robert Vigue (D) and Jonathan Raso (L), - District 12.

C. Republican and Democrat State Committee members from
Butler County.

“A motion for ‘[s]ummary judgment is properly granted where there is no genuine issue of material fact as to a necessary element of a cause of action and the moving party has clearly established entitlement to judgment

as a matter of law.” Javitz v. Luzerne County, 260 A.3d 1100, 1105, (Pa. Cmwlth. 2021) [Opinion not reported], quoting *LaChance v. Michael Baker Corp.*, 869 A.2d 1054, 1056 n.3 (Pa. Cmwlth. 2005). “A fact is material only if it directly affects the disposition of the case.” Javitz v. Luzerne County, 260 A.3d 1100, 1105, (Pa. Cmwlth. 2021) [Opinion not reported], quoting *Pyeritz v. Commonwealth*, 956 A.2d 1075, 1079 (Pa. Cmwlth. 2008) (citing *Allen v. Colautti*, 53 Pa.Cmwlth. 392, 417 A.2d 1303 (Pa Cmwlth. 1980)). “All doubts as to the existence of a genuine issue of a material fact are to be resolved against the granting of summary judgment.” Javitz v. Luzerne County, 260 A.3d 1100, 1105, (Pa. Cmwlth. 2021) [Opinion not reported], quoting *Shoats v. Commissioners, Pa. Dep’t of Cor.*, 139 Pa.Cmwlth. 607, 591 A.2d 326, 330 (Pa. Cmwlth. 1991) (citing *Penn Ctr. House, Inc. v. Hoffman*, 520 Pa. 171, 553 A.2d 900 (Pa. 1989)).

In the present matter, Petitioners’ mandamus action is solely based upon Petitioners’ asserted interpretations of this Court’s June 2, 2022, Order in the McCormick, et al., v. Chapman, et al., matter (286 M.D. 2022). It is respectfully submitted that Petitioners’ interpretation of the Court’s Order is misplaced, and Petitioners’ mandamus action fails as a matter of law.

With respect to Petitioners’ request for declaratory relief, there is no real or actual case or controversy properly before this Court and Fayette

County respectfully encourages this Court to intervene in a matter in which the Court is unable to resolve the legal issues asserted in the matter. "The justiciability doctrine of ripeness addresses whether judicial intervention occurs at the appropriate time." *Pennsylvania Independent Oil & Gas Association v. Commonwealth of Pennsylvania, et al.*, 135 A.3d 1118, 1127-1128 (Pa. Cmwlth. 2015), citing *Town of McCandless v. McCandless Police Officers Association*, 587 Pa. 525, 901 A.2d 991, 1002 (2006). "An actual controversy exists when litigation is both imminent and inevitable and the declaration sought will practically help to end controversy between the parties." *Pennsylvania Independent Oil & Gas Association v. Commonwealth of Pennsylvania, et al.*, 135 A.3d 1118, 1127-1128 (Pa. Cmwlth. 2015), quoting *Chester Community Charter School v. Department of Education*, 996 A.2d 68, 80 (Pa. Cmwlth. 2010).

If Petitioners' Emergency Application for Peremptory Judgment and Summary Relief is granted, none of the issues before this Court will be resolved for the parties. The issue of whether undated absentee and mail-in ballots must be counted will remain an issue for potential review by the U.S. Supreme Court. This Court will have granted the Secretary of the Commonwealth the extraordinary authority to compel county boards of elections to submit and/or resubmit certified county election results beyond

any statutory time period to contest the election result based upon the Secretary's interpretation of the Election Code and existing case law. Finally, all of the Butler County election results which have been certified by the Secretary of the Commonwealth will need to be "recertified" without any legal authority for the same.

WHEREFORE, Respondent, Fayette County Board of Elections, requests that this Honorable Court deny Petitioners' Emergency Application for Peremptory Judgment and Summary Relief in its entirety.

Respectfully Submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, L.L.P.**

Dated: August 8, 2022

By: /s/ Thomas W. King, III

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VERIFICATION

I, Scott Dunn, member of the Fayette County Board of Elections, am authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Scott Dunn

CERTIFICATE OF COMPLIANCE

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

/s/ Thomas W. King, III
Thomas W. King, III

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