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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 MEMORANDUM IN OPPOSITION TO PETITIONERS' EMERGENCY APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY RELIEF** Filed on Behalf of: Respondent Fayette County Board of Elections Counsel of Record for this Party: Thomas W. King, III PA. ID. No. 21580 tking@dmkcg.com Thomas E. Breth PA. ID. 66350 tbreth@dmkcg.com Jordan P. Shuber PA. ID. 317823 jshuber@dmkcg.com **DILLON, MCCANDLESS, KING, COULTER & GRAHAM, L.L.P.** 128 West Cunningham Street Butler, PA 16001 (724) 283-2200 (phone) (724) 283-2298 (fax)

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RESPONDENT FAYETTE COUNTY BOARD OF ELECTIONS MEMORANDUM IN OPPOSITION TO PETITIONERS' EMERGENCY APPLICATION FOR PEREMPTORY JUDGMENT AND SUMMARY RELIEF

Respondent, Fayette County Board of Elections (hereinafter "**Fayette County**"), files the following Memorandum in Opposition to Petitioners' Emergency Application for Peremptory Judgment and Summary Relief (the "**Emergency Application**").

I. INTRODUCTION.

Fayette County incorporates its Preliminary Objections to Petitioners' Petition for Review and Response to Petitioners' Emergency Application for Peremptory Judgment and Summary Relief as if fully set forth at length

herein. Those pleadings along with the within Memorandum in Opposition to Petitioners' Emergency Application will collectively be referred to as the "**Opposition**").

Petitioners, Leigh M. Chapman, Acting Secretary of the Commonwealth (hereinafter the "**Acting Secretary**") and the Pennsylvania Department of State (hereinafter the "**Department**") (collectively referred to as "**Petitioners**") inexplicably have contradicted their previous position with regard to the Acting Secretary's authority, in the current litigation. Indeed, the Acting Secretary has previously recognized her own limitations and described her limited authority in *Ziccarelli v. The Allegheny County Board of Elections*, No. 2:20-cv-001831-NR (W.D.Pa.). In *Zicarelli*, in her Brief, the Acting Secretary correctly quoted Justice Donohue stating:

> the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, No. 29 WAP 2020, 2020 WL 6866415, at *15 n.6 (Pa. Nov. 23, 2020) (Opinion Announcing the Judgment of the Court, or "OAJC")…
>
> **********
>
> [i]f a candidate or elector is dissatisfied with a county board of elections' canvassing decision, the remedy is to appeal to the state courts, not to the Secretary. See 25 P.S. § 3157(a)

Nicole ZICCARELLI, Plaintiff, v. THE ALLEGHENY COUNTY BOARD OF ELECTIONS, et al., Defendants., 2020 WL 8225383 (W.D.Pa.).

Indeed, the full quote from Justice Donohue is as follows:

> the Secretary has no authority to definitively interpret the provisions of the Election Code, as that is the function, ultimately, of this Court. The Secretary also clearly has no authority to declare ballots null and void. "[I]t is the Election Code's express terms that control, not the written guidance provided by the Department and as this Court repeatedly has cautioned, even erroneous guidance from the Department or county boards of elections cannot nullify the express provisions of the Election Code." *In re Scroggin*, —— Pa. ——, 237 A.3d 1006, 1021 (2020). ***Moreover, the Secretary has no authority to order the sixty-seven county boards of election to take any particular actions with respect to the receipt of ballots***. 25 P.S. § 2621(f.2).

In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election, 241 A.3d 1058, 1078 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for Pres., Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021) (emphasis added).

The Acting Secretary's powers are essentially to receive and process – nothing more. To that end, Section 2621(f) of the Election Code states:

> [t]o receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections,

> and to issue certificates of election to the successful candidates at such elections, except in cases where that duty is imposed by law on another officer or board.

Further, Section 3159 of the Election Code states:

> [u]pon receiving the certified returns of any primary or election from the various county boards, the Secretary of the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates enumerated in section 1408,1 and upon all questions voted for by the electors of the State at large, and shall thereupon certify and file in his office the tabulation thereof.

Petitioners' current position is breathtakingly broad and dangerous for future elections. Indeed, expanding the Acting Secretary's statutory authority to become the sole auditor of elections in the Commonwealth of Pennsylvania would effectively eviscerate the county boards of elections and their inherent authority to preside over their own elections. As correctly stated in *County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, 2022 WL 1609574, at *8 (Pa. Cmmw. May 23, 2022):

> Section 302 imposes mandatory duties upon the county boards of elections as well as discretionary authority and powers, such as the power to promulgate regulations. In addition, county boards have been given the power to issue subpoenas. *See* Section 304(a) of the Election Code, 25 P.S. § 2644(a). The Supreme Court has held that in their investigation of the conduct of elections, the county boards of elections exercise quasi-judicial authority.

> *Appeal of McCracken*, 370 Pa. 562, 88 A.2d 787, 788 (1952).

After reading the Acting Secretary's position above, it is shocking that she now asserts that, "[t]hree county boards of elections are holding up final certification of Pennsylvania's 2022 primary election…" *See* Memorandum in Support of Emergency Application, p. 1. To the contrary, the Acting Secretary is the one holding up the final certification of Pennsylvania's 2022 primary election without any justification to do so. Indeed, there is absolutely nothing preventing the Acting Secretary from completing ***her own ministerial*** duties as outlined in the Election Code; however, the Acting Secretary continues to tout her import as if she is the chief election official in the Commonwealth of Pennsylvania. She is not. Instead, the county boards of elections, and the Fayette County Board of Elections, are the entities that have authority here, and in any event, they have done nothing to warrant the extreme remedy sought in the current litigation.

The Petition and Emergency Application are legally insufficient, and as explained in the Opposition, they do not meet the standard for this Court to issue either a Writ of Mandamus or Declaratory or Injunctive Relief. Accordingly, the Emergency Application must be denied in its entirety, and ultimately, the Petition must be dismissed with prejudice.

II. COUNTERSTATEMENT OF THE CASE.

The ***Acting Secretary*** is the only reason that Pennsylvania's 2022 primary election remains uncertified. Despite having no authority whatsoever to bring file the Petition, the Acting Secretary chastises three county boards of elections without any support to do so. Indeed, as she correctly stated herself previously, "[m]oreover, the Secretary has no authority to order [three] county boards of election to take any particular actions with respect to the receipt of ballots." *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for Pres., Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021) (citing 25 P.S. § 2621(f.2).

Next, Petitioners aver they had the authority to file the Petition and Emergency Application based upon the Third Circuit's decision in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022). However, that decision is on appeal before the United States Supreme Court and may very well likely be overturned. *See Ritter v. Migliori*, 142 S. Ct. 1824 (2022).

Then, Petitioners aver they had the authority to file the Petition and Emergency Application based upon a case that was voluntarily withdrawn without a final decision. *See McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022). However, that case was never fully decided and

is certainly not a holding that can be relied upon here as controlling precedent. More egregiously, Petitioners misstate Judge Cohn Jubelirer's Order in *McCormick*. That Order never required certification of the county boards of elections ballots. Rather, it only required segregation of the ballots to determine if McCormick had enough votes to challenge Dr. Oz's perceived primary victory.

Miglori and McCormick have absolutely not been "resolved." *See* Petitioners' Memorandum, p. 3. To the contrary, neither matter is binding upon this Court. However, this is another page out of the same playbook from Petitioners. That playbook seeks to create unfettered authority *ex nihilo*, and this Court should deny their latest attempt. *See e.g. County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, 2022 WL 1609574 (Pa. Cmmw. May 23, 2022) and *Corman v. Acting Sec. of Pennsylvania Dept. of Health*, 266 A.3d 452 (Pa. 2021); *Compare with* 25 P.S. §§ 2621(f) and 3159.

III. LEGAL STANDARD.

The legal standard section of Petitioners' Memorandum is so short because it is completely inapplicable here. Indeed, their entire argument misses the mark and relies upon unsettled law.

A. Mandamus.

"A writ of mandamus may issue only where there is a ***clear legal right in the plaintiff*** to compel the performance of a ministerial act or mandatory duty, a corresponding duty in the defendant, and lack of any other appropriate and adequate remedy at law." *S. End Enterprises, Inc. v. City of York*, 913 A.2d 354, H.N. 4, (Pa. Cmmw. 2006), *aff'd*, 947 A.2d 194 (Pa. 2008) (emphasis added). "Mandamus is an ***extraordinary remedy*** that compels official performance of a ministerial act or a mandatory duty." *Id*. at 359 (citing *Pennsylvania Dental Association v. Insurance Department*, 512 Pa. 217, 227, 516 A.2d 647, 652 (1986)). (footnote omitted). (emphasis added).

"A ministerial act has been defined as one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and ***without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.***" *Id*. (emphasis added).

"Where the governmental action sought involves the exercise of discretion, the court may direct the agency to do the act ***but may never direct the exercise of discretion in a particular way***." *Id.* at 360 (citing

Matesic v. Maleski, 155 Pa.Cmwlth. 154, 624 A.2d 776, 778 (1993)). (emphasis added).

"Moreover, ***mandamus will not lie to compel a revision of the decision resulting from such exercise of discretion***, though in fact, the decision may be wrong." *Id.* (citing *Anderson v. City of Philadelphia*, 348 Pa. 583, 587, 36 A.2d 442, 444 (1944) (emphasis added).

"Where the action sought to be compelled is discretionary, mandamus will not lie to control that discretionary act, ... but courts will review the exercise of the actor's discretion where it is arbitrary or fraudulently exercised or is based upon a mistaken view of the law." *County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, 2022 WL 1609574, at *9 (Pa. Cmmw. May 23, 2022) (quoting *Pennsylvania State Association of County Commissioners v. Commonwealth*, 545 Pa. 324, 681 A.2d 699, 701-02 (1996)).

As stated in *Konieczny v. Zappala*, 941 C.D. 2020, 2022 WL 2028246, at *2 (Pa. Cmmw. June 7, 2022):

> [M]andamus is an extraordinary writ which will only issue to compel performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy." *Dotterer v. Sch. Dist. of Allentown*, 92 A.3d 875, 880 (Pa. Cmwlth. 2014) (internal quotation marks omitted). "If any one of the foregoing elements is absent, mandamus does not lie." *Id*. at 881. However, while a court in a mandamus proceeding

> may not compel a public official to exercise discretionary power in a specific manner that the court would deem wise or desirable, "a writ of mandamus can be used to compel a public official to exercise discretion where the official has a mandatory duty to perform a discretionary act and has refused to exercise discretion." *Seeton v. Adams*, 50 A.3d 268, 274 (Pa. Cmwlth. 2012).

"Although mandamus is technically a legal remedy, the equitable doctrine of laches is appropriate to bar a mandamus action where a court, in the exercise of its sound judicial discretion, determines that the complaining party failed to exercise due diligence in instituting the action and thereby prejudiced the party defendant." *McKissick v. Laurel Sch. Bd.*, 479 A.2d 90, 91 (Pa. Cmmw. 1984).

B. Declaratory and Injunctive Relief.

As an initial matter, this Court may not decide issues that would not resolve an actual controversy. *See e.g. Pennsylvania Sch. Boards Ass'n, Inc. v. Barnes*, 885 A.2d 97, 104 (Pa. Cmmw. 2005). "Such an opinion would be merely advisory—an action courts should not take." *Id.* at 104-105 (citing *Borough of Marcus Hook v. Pennsylvania Municipal Retirement Board*, 720 A.2d 803 (Pa.Cmwlth.1998)). Further, "there is no present case or controversy—a necessary element of a declaratory judgment action." *Id.*

"The sine qua non of an injunction is a clear right to relief. As this Court has explained:

> For a party to prevail on a petition for a permanent injunction, the party: [M]ust establish that his [1] right to relief is clear; [2] that there is an urgent necessity to avoid an injury which cannot be compensated for by damages; and [3] the greater injury will result from refusing rather than granting the relief requested.

Coghlan v. Borough of Darby, 844 A.2d 624, 629 (Pa. Cmmw. 2004). Here, Petitioners fail to demonstrate they meet any of the requirements listed above necessary for an injunction.

IV. SUMMARY OF COUNTERARGUMENT.

Petitioners do not meet the standard for this Court to issue a Writ of Mandamus. Specifically, Petitioners seek to inject their own judgment and opinion concerning Fayette County's handling of their ballots contrary to this Court's opinion in *S. End Enterprises, supra*. Indeed, they seek to have this Court "direct [Fayette County's] exercise of discretion in a particular way." *Id.* This is certainly improper because it "compel[s] a revision of Fayette County's decision resulting from [its] exercise of discretion." *Id.* Further, here, there is no clear legal right in the plaintiff, and there is no corresponding duty in the defendant.

Amazingly, Petitioners posit that *Miglori* and *McCormick* are well settled law when neither case has been fully decided. Additionally, Petitioners chide Respondents for not taking an appeal in McCormick, when it is them that were dilatory in not taking an appeal themselves – resulting in

an improper procedural Petition and Emergency Application. Additionally, Petitioners misstate Judge Cohn Jubelirer's Order in *McCormick*. That Order never required certification of the county boards of elections ballots, it only required segregation of the ballots to determine if McCormick had enough votes to challenge Dr. Oz's primary victory.

Finally, Petitioners' claims are barred procedurally, and by laches, because they had an alternative remedy that they chose not to exercise by failing to timely appeal pursuant to 25 P.S. § 3157(a) of the Election Code.

V. COUNTERARGUMENT.

A. Petitioners Do Not Meet the Standard for Mandamus.

Petitioners' argument flips everything entirely on its head. This Court's analysis in *S. End Enterprises, Inc. v. City of York*, 913 A.2d 354 (Pa. Cmmw. 2006), *aff'd*, 947 A.2d 194 (Pa. 2008) is much more applicable here than the position that Petitioners advance. In *S. End Enterprises*, the petitioner, the City of York, sought to "compel the City's exercise of discretion in a particular way." *Id.* at 355. The Commonwealth Court ultimately reversed the trial court and the Supreme Court upheld the Commonwealth Court's decision.

"Section 302 of the Election Code makes the county boards of elections responsible for the honest, efficient and uniform conduct of elections. It states, in relevant part, as follows:

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

(a) To investigate and report to the court of quarter sessions their recommendations on all petitions presented to the court by electors for the division, redivision, alteration, change or consolidation of election districts, and to present to the court petitions for the division, redivision, alteration, change or consolidation of election districts in proper cases.

(b) To select and equip polling places that meet the requirements of this act.

(c) To purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and to procure ballots and all other supplies for elections.
(d) To appoint their own employes[sic], voting machine custodians, and machine inspectors.

* * *

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

> * * *
>
> (i) To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney.
>
> * * *
>
> 25 P.S. § 2642(a)-(d), (f)-(g), and (i) (emphasis added).

County of Fulton v. Sec. of Cmmw., 277 M.D. 2021, *7, 2022 WL 1609574 (Pa. Cmmw. May 23, 2022). In contrast, "Section 1105-A(a) of the Election Code authorizes the Secretary to issue 'directives or instructions,' not 'regulations,' with respect to the 'implementation of electronic voting procedures and for the operation of electronic voting systems.' 25 P.S. § 3031.5(a)." *Id.* at *10. Stated differently, "the Election Code vests the Secretary with responsibility at the macro level and vests the county boards of elections with responsibility at the micro level." *Id.* at *8.

Here, Petitioners attempt to flip-flop the requirements stated above. There is no doubt that the Election Code makes the county boards of elections responsible for the honest, efficient and uniform conduct of elections. However, much like in *S. End Enterprises*, Petitioners are attempting substitute their own discretion and insert their own judgment or opinions concerning the propriety or impropriety of Fayette County's actions.

Along the way, Petitioners also insert their own opinion about the *Miglori* and *McCormick* decisions which is contrary to what actually happened in those cases. Amazingly, Petitioners posit that *Miglori* and *McCormick* are well settled law when neither case has been fully decided.

1) *McCormick* is Inapposite to the Petitioners' Analysis.

Contrary to the averments in the Petition, this Court's Order in *McCormick* actually stated:

> NOW, June 2, 2022, Petitioners' Motion for Immediate Special Injunction is GRANTED, and the County Boards are directed, if they are 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 Leigh M. Chapman***, Acting Secretary of the Commonwealth (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. Additionally, the Amended Application for Voluntary Discontinuance filed by Dave McCormick for U.S. Senate, and David H. McCormick is DENIED without prejudice

(emphasis added). Nothing contained in this Order required the certification of such ballots. Rather, it only required the report of the ballots to determine (as announced by the Court) the number of such ballots in order to determine whether McCormick could possibly overtake Dr. Oz in the Republican

primary for U.S. Senate. Furthermore, this Court's decision in *McCormick* was never published. Additionally, the Court in *McCormick* certainly recognized that the Third Circuit's decision in *Migliori* was persuasive only and not binding on the Court. *See McCormick* at p. 25.

2) *Migliori* is Pending Before the United States Supreme Court.

The Third Circuit's holding in *Migliori v. Cohen*, 36 F.4th 153 (3d Cir. 2022) is not binding on this Court and is not settled law. Indeed, the case is pending before the United States Supreme Court on a Petition for Writ of Certiorari. Although the application for stay presented to Justice Alito and referred by him to the Court was denied, the dissenting opinion indicates that the "Third Circuit's interpretation broke new ground, and at this juncture, it appears to [Justice Alito] that the interpretation is very likely wrong." *Ritter v. Migliori*, 142 S. Ct. 1824 (2022).

Justice Alito further stated that, "[i]f left undisturbed, it could well affect the outcome of the fall elections, and it would be far better for [the Supreme Court of the United States] to address that interpretation before, rather than after, it has that effect." As Justice Alito correctly stated, "[t]he Third Circuit held that the failure to count mail-in ballots that did not include the date on which they were filled out constituted a violation of this provision, but the Third Circuit made little effort to explain how its interpretation can be

reconciled with the language of the statute." *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022).

"The statutory provision in question [in *Migliori*] reads as follows: "No person acting under color of law shall ... deny the right of any individual to vote in any election because of an error or omission on any record or paper related 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 to vote in such election." § 10101(a)(2)(B)." *Ritter v. Migliori*, 142 S. Ct. 1824 (2022).

"This provision has five elements: (1) the proscribed conduct must be engaged in by a person who is "acting under color of law"; (2) it must have the effect of "deny[ing]" an individual "the right to vote"; (3) this denial must be attributable to "an error or omission on [a] record or paper"; (4) the "record or paper" must be "related to [an] application, registration, or other act requisite to voting"; and (5) the error or omission must not be "material in determining whether such individual is qualified under State law to vote in such election." Ibid. *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022). As Justice Alito stated, "elements 2 and 5 are clearly not met." *Id.* (footnote omitted). Justice Alito went on to state:

> I will start with element 2. When a mail-in ballot is not counted because it was not filled out correctly, the

> voter is not denied "the right to vote." Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot. "Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules." *Brnovich v. Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2338, 210 L.Ed.2d 753 (2021).
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> **********
>
> Element 5 weighs even more heavily against the Third Circuit's interpretation. This element requires that the error or omission be "material in determining whether such individual is qualified under State law to vote in such election." There is no reason why the requirements that must be met in order to register (and thus be "qualified") to vote should be the same as the requirements that must be met in order to cast a ballot that will be counted. Indeed, it would be silly to think otherwise. Think of the previously mentioned hypothetical voters whose votes were not counted because they did not follow the rules for casting a vote. None of the rules they violated—rules setting the date of an election, the location of the voter's assigned polling place, the address to which a mail-in ballot must be sent—has anything to do with the requirements that must be met in order to establish eligibility to vote, and it would be absurd to judge the validity of voting rules based on whether they are material to eligibility.

Ritter v. Migliori, 142 S. Ct. 1824, 1825 (2022) (citing *Brnovich v. Democratic National Committee*, 594 U. S. ——, ——, 141 S.Ct. 2321, 2338, 210 L.Ed.2d 753 (2021)).

Here, the Petitioners' argument fails because there is no clear right, and there is no corresponding duty in the Respondents to compel official performance of a ministerial act or mandatory duty here; particularly, when this Court's Opinion in *McCormick* and the Third Circuit's Opinion in *Migliori* are not settled law.

3) The Acting Secretary's "Guidance" is Not Binding and Acknowledge the Law is Unsettled.

Petitioners acknowledge that *McCormick and Miglori* are not binding and unsettled law because they issued non-binding "guidance" following the further litigation of those decision. Such "Guidance" is not only non-binding, but it is also non-compliant with the IRRC regulations. *See County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, 2022 WL 1609574, at *10–*11 (Pa. Cmmw. May 23, 2022) ("Section 1105-A(a) of the Election Code authorizes the Secretary to issue "directives or instructions," not "regulations," and "the legislature has not conferred rulemaking power upon the Secretary anywhere in the Election Code" (citing *Corman v. Acting Sec. of Pennsylvania Dept. of Health*, 266 A.3d 452, 462 (Pa. 2021)). The Court in *McCormick* also acknowledged that fact and stated

> In response to the Third Circuit's judgment in *Migliori*, the Department issued Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes (Guidance) on May 24, 2022, advising the County Boards to count ballots cast with undated

> exterior envelopes in the May 17, 2022 General Primary Election and segregate them from all other voted ballots pending ongoing litigation of the issue. The Guidance advised the same with respect to ballots containing incorrect dates."

See McCormick Opinion, p. 7 (footnote omitted).

Indeed, the Acting Secretary's guidance acknowledged that "[a] determination on whether the segregated tabulations will be used in certifying elections has not been made, given the ongoing litigation."[1] The litigation is still not settled despite Petitioners' averments. Rather, Respondents have done all they are required to by certifying their election returns. *See* 25 P.S. § 2642(k). There is nothing that has changed that would trigger any additional compliance from Respondents, and Respondents have more control over their elections pursuant to the Election Code than Petitioners. Likewise, as is further set forth herein, the Acting Secretary and Department have mandatory functions which require them to certify the results. The Acting Secretary and Department have no authority to audit or interfere with such results. *Compare* 25 P.S. § 2642 *with* 25 P.S. § 2621 and 25 P.S. § 3159.

[1] A copy of the guidance can be found here: (https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-05-24-Guidance-Segregated-Undated-Ballots.pdf).

4) *Petitioners Have an Alternative Remedy.*

There is a lack of jurisdiction over the subject matter of the action because Petitioners failed to exhaust their available remedies and their Petition is untimely. Section 3157(a) of the Election Code states, "[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election…may appeal therefrom within two days after such order or decision shall have been made, whether then reduced to writing or not, to the court specified in this subsection, setting forth why he feels that an injustice has been done, and praying for such order as will give him relief." 25 P.S. § 3157(a).

Based upon Petitioners' own facts their appeals were due two days after the alleged decisions by Respondents. Accordingly, the Petition is untimely pursuant to Section 3157(a) of the Election Code and must be dismissed.

The Petition is also untimely pursuant to the doctrine of laches. "Laches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another." *Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998). "Equity has established the doctrine of laches to preclude actions that are brought

without due diligence and which result in prejudice to the non-moving party." *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Cmmw. 2004).

Here, there was nothing preventing Petitioners from filing a challenge pursuant to Section 3157(a), and as Mandamus is an equitable action, laches applies. *See e.g. Kelly v. Cmmw.*, 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021). For similar reasons as stated in *Koter*, the Election Code's provisions "would be eviscerated if [they] could be challenged at any time, and "[a]llowing untimely challenges could render every[thing]…suspect, leaving the public who adopted it, and the governing body that must implement it, continually unsure as to its status." *Id.* at 33.

B. Petitioners Do Not Meet the Standard For Declaratory and Injunctive Relief.

Petitioners are improperly seeking an advisory opinion regarding an unresolved interpretation of Federal and Pennsylvania law.

As an initial matter, this Court may not decide issues that would not resolve an actual controversy. *See e.g. Pennsylvania Sch. Boards Ass'n, Inc. v. Barnes*, 885 A.2d 97, 104 (Pa. Cmmw. 2005). "Such an opinion would be merely advisory—an action courts should not take." *Id.* at 104-105 (citing *Borough of Marcus Hook v. Pennsylvania Municipal Retirement Board*, 720

A.2d 803 (Pa.Cmwlth.1998)). Further, "there is no present case or controversy—a necessary element of a declaratory judgment action." *Id.*

The majority of Petitioners' argument sounds in what should have been filed as an Amicus Brief in the pending Petition for Writ of Certiorari related to *Ritter v. Migliori*, 142 S. Ct. 1824 (2022). *See* Memorandum, pp. 11 – 27. However, this is exactly the sort of advisory opinion that this Court should ***not*** entertain. If Petitioners were in fact right that the Third Circuit's decision in *Miglori* or this Court's analysis in *McCormick* applied here, they would not have had to utilize so much real estate in their Memorandum to convince this Court of the same. That is simply because those decisions do not apply here and Petitioners are asking the Court to issue an advisory opinion, or litigate those issues here, regarding a case or controversy that does not exist.

Further, "[t]he sine qua non of an injunction is a clear right to relief. As this Court has explained:

> For a party to prevail on a petition for a permanent injunction, the party: [M]ust establish that his [1] right to relief is clear; [2] that there is an urgent necessity to avoid an injury which cannot be compensated for by damages; and [3] the greater injury will result from refusing rather than granting the relief requested.

Coghlan v. Borough of Darby, 844 A.2d 624, 629 (Pa. Cmmw. 2004). Here, Petitioners fail to demonstrate they meet any of the requirements listed above necessary for an injunction. First, as stated at length herein, there is

no clear right to relief. Second, there is no urgent necessity to avoid an injury which cannot be compensated for by damages. Indeed, the Supreme Court of the United States also felt that there was no urgency to decide this matter despite Justice Alito's plea to resolve it now. Third, greater injury will result from ***granting*** Petitioners requested relief as opposed to refusing it. Indeed, granting Petitioners' requested relief will flip-flop the responsibilities of the Acting Secretary with those of the county boards of elections which this Court has already properly identified. "[T]he Election Code vests the Secretary with responsibility at the macro level and vests the county boards of elections with responsibility at the micro level." *See County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, *8 2022 WL 1609574 (Pa. Cmmw. May 23, 2022). It is not the other way around where the Acting Secretary may control the micro level responsibilities of Fayette County's Board of Elections.

VI. CONCLUSION.

Based upon the foregoing, Respondent, Fayette County Board of Elections, requests that this Court:

1) Deny Petitioners' Emergency Application in its entirety; and
2) Order Petitioners to certify the 2022 primary election results submitted by Fayette County.

Respectfully Submitted,

DILLON, MCCANDLESS, KING, COULTER & GRAHAM, L.L.P.

Dated: July 19, 2022

By: /s/ Thomas W. King, III

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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
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