

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 PRELIMINARY
OBJECTIONS TO
PETITIONERS' PETITION FOR
REVIEW**

Filed on Behalf of:

Respondent Fayette County
Board of Elections

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PRELIMINARY OBJECTIONS TO
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Respondent, Fayette County Board of Elections (hereinafter "**Fayette County**"), serve the following Preliminary Objections to Petitioners' Petition for Review (the "**Petition**").

I. INTRODUCTION

The very first sentence of 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**") Petition is incorrect. Fayette County

has not “refuse[d] to execute [its]...duty to certify the results of the 2022 primary election.” See Petition, ¶ 1. To the contrary, it is the Petitioners who refuse to certify Fayette County’s official election returns. They failed to do so, and instead, filed a meritless Petition. Additionally, Petitioners’ argument incorrectly posits the current state of both Pennsylvania and Federal law.

The introduction to the Acting Secretary’s Petition for Review casts aspersions on Respondents calling them, “outliers;” however, the Acting Secretary has previously recognized her own limitations and argued that very position to the court in *Zicarelli v. The Allegheny County Board of Elections*, No. 2:20-cv-001831-NR (W.D.Pa.). In *Zicarelli*, 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).

Stated differently, 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' request is breathtakingly broad. 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).

Accordingly, the Petition is legally insufficient for the reasons more fully set forth herein.

II. LEGAL STANDARD

A. Preliminary Objections.

1. The preceding Introduction is incorporated herein by reference as if more fully set forth at length herein.

2. “In reviewing preliminary objections in the nature of a demurrer, this Court “must accept as true all well[-]pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom.” *County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, 2022 WL 1609574, at *8 (Pa. Cmmw. May 23, 2022) (citing *Buoncuore v. Pennsylvania Game Commission*, 830 A.2d 660, 661 (Pa. Cmwith. 2003).

3. “We are not required to accept as true “conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Id.* For this Court to sustain preliminary objections, “it must appear with certainty that the law will not permit recovery[.]” *Id.*

4. “Where there is any doubt, this Court will overrule the preliminary objections.” *Id.*

B. Mandamus.

5. “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).

6. “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).

7. “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).

8. “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.Cmwlt. 154, 624 A.2d 776, 778 (1993)). (emphasis added).

9. “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)).

10. “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)).

11. 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. Cmwlt. 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).

12. “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).

13. Here, 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*.

14. Indeed, they seek to have this Court “direct [Fayette County’s] exercise of discretion in a particular way.” *Id.*

15. This is certainly improper because it “compel[s] a revision of Fayette County’s decision resulting from [its] exercise of discretion.” *Id.*

16. Further, here, there is no clear legal right in the plaintiff, and there is no corresponding duty in the defendant.

17. Additionally, Petitioners’ claims are barred by laches because they failed to timely appeal.

18. Further, 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.

III. PROCEDURAL BACKGROUND

19. On July 11, 2022, Petitioners filed their Petition against the Berks County Board of Elections, Fayette County Board of Elections, and Lancaster County Board of Elections.

20. On July 11, 2022, Petitioners filed an "Emergency Application for Preemptory Judgment and Summary Relief."

21. On July 11, 2022, Petitioners filed their "Memorandum in Support of Petitioners' Emergency Application for Preemptory Judgment and Summary Relief."

22. On July 13, 2022, this Court issued an Order scheduling a "hearing on Petitioners' Emergency Application...for Thursday, July 28, 2022 at 10:00 a.m.," and ordering Respondents to "serve an answer to the Emergency Application no later than 4:00 p.m. on Tuesday, July 19, 2022."

23. Fayette County files the within Preliminary Objections to the Petition, and separately files an Answer to Petitioners' Emergency Application and Memorandum in Opposition to Petitioners' Emergency Application contemporaneously herein.

IV. PRELIMINARY OBJECTIONS

A. Preliminary Objection No. 1 – Demurrer – Counts I and II Fail to State A Claim Upon Which Relief Can Be Granted – Pa. R. Civ. P. 1028(a)(4).

i. Pertinent Facts.

24. Paragraph 29 of the Petition states, “[a] writ of mandamus is used to ‘compel official performance of a ministerial act or mandatory duty where there is a ***clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy.***” *Jackson v. Vaughn*, 777 A.2d 436, 438 (Pa. 2001); See also *MFW Wine Co., LLC v. Pennsylvania Liquor Control Bd.*, 231 A.3d 50, 56 (Pa. Commw. Ct. 2020) (emphasis added).

25. As the Supreme Court explained, “[w]here 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)).

26. Paragraph 34 of the Petition states, “[w]ith respect to absentee and mail-in ballots, election districts must canvass and count as part of their election returns every ballot...if the voter’s identity was verified and the declaration on the ballot’s return envelope was sufficient...” See Petition, ¶ 34 (citing 25 P.S. § 3146.8(d), (g)).

27. Paragraph 36 of the Petition states, “[c]onsistent with this statutory framework, this Court’s order in *McCormick* requires the three Respondent boards to certify election returns that include ballots submitted without a handwritten date on the ballot’s return envelope.”

28. Paragraph 45 of the Petition states, “[i]nterpreting Pennsylvania law to allow a county board of election to exclude a ballot from its final certified results because of a **“minor and meaningless irregularity, such as a voter omitting a date from the declaration”** on a timely received ballot, would fail to fulfill the purpose of the Pennsylvania Election Code and would risk a conflict with both the Pennsylvania Constitution and federal law.” See Petition, ¶ 45 (citing *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022) (emphasis added)).

29. Paragraphs 48 and 49 of the Petition state, “[a] voter’s failure to write a date on the declaration of a timely received ballot’s return envelope is an immaterial omission under” federal law, and “both the Third Circuit and

this Court have recently ruled as much.” See Petition, ¶¶ 48-49 (citing *Miglioni v. Leigh County Bd. of Elections*, 36 F.4th 153, 162-64 (3d Cir. 2022); Memorandum Opinion at 22-31, *McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 2, 2022)).

30. Petitioners incorrectly cite the current state of Pennsylvania and Federal law.

31. In doing so, they fail to meet the necessary requirements for a mandamus action as a matter of law.

32. Here, as already mentioned above, Petitioners failed to timely appeal pursuant to Section 3157(a) which demonstrates that they did not adhere to the “appropriate and adequate remedy” that was available to them.

33. Notwithstanding that fact, and contrary to Petitioners’ argument, there is “no clear legal right in the plaintiff,” or “a corresponding duty in the defendant” that is applicable to the facts of the Petition.

ii. *McCormick* is Inapposite to the Petitioners’ Analysis.

34. 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).

35. Nothing contained in this Order required the certification of such ballots.

36. 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.

37. Furthermore, this Court's decision in *McCormick* was never published.

38. 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.

iii. ***Migliori* is Pending Before the United States Supreme Court.**

39. 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.

40. Indeed, the case is pending before the United States Supreme Court on a Petition for Writ of Certiorari.

41. 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).

42. 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."

43. 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).

44. “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).

45. “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).

46. As Justice Alito stated, “elements 2 and 5 are clearly not met.” *Id.* (footnote omitted).

47. 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).

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. Miglioril, 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)).

48. Here is that Petitioners' request for a Writ of Mandamus in Count I, and request for Declaratory and Injunctive Relief in Count II, fail 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.

iv. The Acting Secretary's "Guidance" is Not Binding and Acknowledged the Law is Unsettled.

49. Petitioners acknowledge that *McCormick* and *Migliori* are not binding and unsettled law because they issued non-binding "guidance" following the further litigation of those decision.

50. 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)).

51. 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).

52. 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

53. The litigation is still not settled despite Petitioners’ averments.

54. Rather, Respondents have done all they are required to by certifying their election returns. See 25 P.S. § 2642(k).

55. 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.

56. Likewise, as is further set forth herein, the Acting Secretary and Department have mandatory functions which require them to certify the results.

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>).

57. 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.

v. The Election Code Provides the County Boards of Elections with the Sole Authority to Act.

58. The Acting Secretary has previously argued she has more authority than the County Boards of Elections and has failed to convince this Court of the same. *See County of Fulton v. Sec. of Cmmw.*, 277 M.D. 2021, 2022 WL 1609574 (Pa. Cmmw. May 23, 2022).

59. Instead, this Court recognized that “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.

60. “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.

61. In contrast, “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 employees[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).

Id. at *7.

62. “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).” *Id.* at *8.

63. Despite the clear authority of the county boards of elections, in *County of Fulton*, “the [Acting] Secretary read[] her authority to issue a ‘directive’ as an end in itself, *i.e.*, as a grant of power to regulate county boards of elections.” *Id.* at *10.

64. This is exactly what the Acting Secretary is attempting to do here, yet again; however, “Section 302(g) of the Election Code obligates county boards of elections 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.’ 25 P.S. § 2642(g).” *Id.* at *12.

65. Further, “the legislature has not conferred rulemaking power upon the Secretary anywhere in the Election Code. By contrast, the legislature has expressly vested county boards of elections with this power. See Sections 1111(c) and 1110-A(d) of the Election Code, 25 P.S. §§ 3011(c), 3031.10(d)15 (stating that county boards may make reasonable rules and regulations concerning the conduct of political party representatives present during election preparation). Unlike a management directive, a regulation has general application and has the force and effect of law. *Corman*, 266 A.3d at 462.” *Id.* at *11.

66. Based upon the foregoing, Counts I and II of the Petition fails as a matter of law.

B. Preliminary Objection No. 2 – Lack of Jurisdiction – Pa. R. C. P. 1028(a)(1).

67. 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.

68. Paragraph 25 of the Petition states, “[t]he Fayette County Board of Elections informed the Department on June 26, 2022, that it would not

transmit to the Department certified election results that included any timely received absentee or mail-in ballot for which the voter failed to handwrite a date on the return envelope's declaration. The Fayette County Board did not respond to any of the Department's subsequent communication."

69. 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).

70. Based upon Petitioners' own facts their appeals were due two days after the alleged decisions by Respondents.

71. Accordingly, the Petition is untimely pursuant to Section 3157(a) of the Election Code and must be dismissed.

72. The Petition is also untimely pursuant to the doctrine of laches.

73. "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).

74. “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).

75. 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).

76. 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.

WHEREFORE, Respondent, Fayette County Board of Elections, requests that this Court:

- 1) Sustain its Preliminary Objections and enter an order dismissing Petitioners’ Petition for Review in its entirety;
- 2) Order Petitioners to certify the Fayette County and Pennsylvania 2022 primary election; and
- 3) Grant any other relief this Court deems just and necessary.

Respectfully Submitted,

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

Dated: July 19, 2022

By: /s/ Thomas W. King, III

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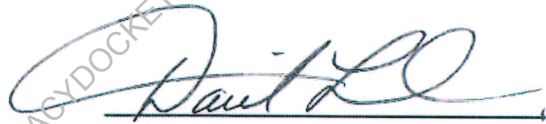
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*Counsel for Respondent, Fayette
County Board of Elections*

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VERIFICATION

I, David Lohr, Chairman 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.

A handwritten signature in blue ink, appearing to read "David Lohr", is written over a horizontal line.

David Lohr,
Chairman of the Fayette
County Board of Elections

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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
Thomas W. King, III

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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

PROPOSED ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of Respondent Fayette County Board of Elections Preliminary Objections, and any responses in opposition thereto, it is hereby ORDERED that the Preliminary Objections are SUSTAINED. It is FURTHER ORDERED that:

- 1) Petitioners' Petition for Review is dismissed in its entirety *with prejudice*;
- 2) Petitioners are Ordered to certify the 2022 primary election; and
- 3) Fayette County is awarded attorneys' fees and costs related to responding to the Petition and Emergency Application.

_____, J.