

**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**

American Civil Liberties Union  
Foundation of Pennsylvania and  
Elizabeth Kurian

Plaintiffs,

V.

York County Board of Elections

Defendant.

For Plaintiffs

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**DEFENDANT’S BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO  
PLAINTIFFS’ ACTION**

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AND NOW, this 22nd day of March, 2024, come the Defendant, the York County Board of Elections, by and through counsel, files this Brief in Support of Defendant's Preliminary Objections to Plaintiffs' Action and, in support thereof, states as follows:

**I. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>**

On March 5, 2024, Plaintiffs American Civil Liberties Union Foundation of Pennsylvania ("ACLU-PA") and Elizabeth Kurian filed an Action for Declaratory Judgment and Injunctive Relief in the above captioned action. Plaintiff Elizabeth Kurian declared that on November 10,

<sup>1</sup> For the purposes of these Preliminary Objections, Defendant assumes, but does not admit, the truth of the Plaintiffs' factual allegations contained within the Action.

2023, she was prevented from observing the canvass. (Plaintiffs' Exhibit A ¶¶8-10). The Action seeks to have this court, inter alia: (i) declare a right that members of the public are authorized to observe the Board of Elections canvassing, (ii) declare that the Board of Election violated the Pennsylvania Election Code by prohibiting Plaintiff, Elizabeth Kurian, from observing the canvass, and (iii) issue an injunction enjoining the Board of Elections from excluding Plaintiffs and members of the public from observing canvassing. (¶¶33-43). On March 22, 2024, Defendant filed Preliminary Objections seeking to dismiss the Action pursuant to Pa.R.C.P. 1028. Defendant submits this brief in support.

## II. QUESTIONS

1. Whether the Preliminary Objections should be sustained due to lack of standing pursuant to Pa. R. Civ. P. 1028(a)(5)?

Suggested Answer: Yes

2. Whether the Preliminary Objections should be sustained due to a failure to state a claim pursuant to Pa. R. Civ. P. 1028(a)(4)?

Suggested Answer: Yes

3. Whether the Preliminary Objections should be sustained due to a lack of jurisdiction over the matter pursuant to Pa. R. Civ. P. 1028(a)(1)?

Suggested Answer: Yes

4. Whether the Preliminary Objections should be sustained due to the Action being barred by the doctrine of laches pursuant to Pa. R. Civ. P. 1028(a)(5)?

Suggested Answer: Yes

### III. ARGUMENT

#### A. Whether the Preliminary Objections should be sustained due to lack of standing pursuant to Pa. R. Civ. P. 1028(a)(5)?

The Action is a pleading that fails for lack of standing. Plaintiffs bring this action in the interest of the general public seeking a right to observe the official canvass. (¶¶37, 39). They allege no interest discernable from a right to the public at large. In Pennsylvania, it is well settled that, to have standing, “one who seeks to challenge governmental action must show a direct and substantial interest.” Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 286 (Pa. 1975). Further, the interest must be discernable from the interest of the public at large. The “plaintiff must have an interest in the matter that is distinguishable from the interest shared by other citizens; to surpass that common interest, the plaintiff’s interest must be substantial, direct and immediate. A substantial interest in the outcome of a dispute is an interest that surpasses the common interest of all citizens in seeking obedience to the law.” Szoko v. Twp. Of Wilkins, 974 A.2d 1216, 1219-20 (Pa. Commw. Ct. 2009). Plaintiff, ACLU-PA, must be dismissed from this action for lack of standing, as it asserts no rights distinguishable from the public interest in seeking obedience to the law.

To establish standing, a party must also be aggrieved. “Aggrievability is obtained by having a substantial, direct, and immediate interest in proceedings or litigation. When the standards for substantiality, directness, and immediacy are readily met, the inquiry into aggrievability, and therefore standing, ends. Should, however, a party’s immediate interest not be apparent, a zone of interests analysis may (and should) be employed to assist a court in determining whether a party has been sufficiently aggrieved, and therefore has standing.” Johnson v. American Standard, 8 A.3d 318, 333 (Pa. 2010). “An immediate interest...is shown

where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute in question...” S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 555 A.2d 793, 795 (Pa. 1989).

Plaintiff, Elizabeth Kurian, must be dismissed from this action for lack of standing because her claims alleged contain no immediate interest under the Election Code for standing. Put differently, there is no explicit, Constitutional, statutory, nor innate right for a member of the public, who is not authorized under the Election Code, to observe canvassing as Plaintiffs wish. Because there is no right, Plaintiff Elizabeth Kurian’s alleged “harm” does not constitute harm sufficient to establish standing.

**B. Whether the Preliminary Objections should be sustained due to a failure to state a claim pursuant to Pa. R. Civ. P. 1028(a)(4)?**

Under Pennsylvania law, a preliminary objection in the form of a demurrer, “admits every well-pleaded material fact set forth in the pleadings to which it is addressed as well as all inferences reasonably deducible therefrom, but not conclusions of law. In order to sustain the demurrer, it is essential that the Plaintiff’s complaint indicate on its face that his claim cannot be sustained, and that the law will not permit recovery. If there is any doubt, this should be resolved in favor of overruling the demurrer.” National Recovery Systems v. Frebraro, 430 A.2d 686, 687 (1981) (quoting Gekas v. Shapp, 364 A.2d 691, 693 (Pa. 1976)). Plaintiffs’ Action does not state a claim for relief because all facts and inferences contained therein, when assumed to be true, do not permit recovery under the law.

The Action identifies two “causes of action”: Declaratory Judgment and Equitable Action Seeking Injunctive Relief. Each is deficient.

The Court, under the Declaratory Judgment Act, 42 Pa.C.S.A. §§ 7531-7541, may issue declaratory judgment when “it would be ‘of practical help in ending [a] controversy’ concerning an independent, substantive legal right.” Worth & Co., Inc. v. Getzie, 11 F.Supp.3d 484, 495 (E.D.Pa. 2014) (citing Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist., 587 A.2d 699, 700–01 (Pa. 1991)). There is no independent, substantive legal right for members of the general public to observe canvassing, in any section of the Election Code. It does not exist. See 25 P.S. §§ 1-4501.

Plaintiffs’ action identifies sections of the Election Code which use the term “public”. However, mere use of the word does not confer an independent, substantive legal right nor is it sufficient to demonstrate a legislative intent to create such right. To the contrary, the Election Code confers specific rights upon authorized individuals to observe the canvass process. See 25 P.S. § 2650 (authorizing candidates, watchers, and attorney representatives at any computation or canvassing), 25 P.S. § 3146.8 (authorizing watchers and authorized representatives to be present for absentee and mail-in ballot canvassing), and 25 P.S. § 3153 (authorizing the Board of Elections to arrange for adequate accommodations for the watchers and attorneys for computation and canvassing). These sections, when read together, establish the limited, statutory means by which the canvass process is made public.

The Pennsylvania Supreme Court has refused to expand more narrow rights like what the Plaintiffs seek in this Action. “The General Assembly, had it so desired, could have easily established such parameters: however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so.” See In re Canvassing Observation, 241 A.3d 339, 350 (Pa. 2020) (holding that the Election Code only required that an authorized representative be permitted in the canvassing room, not with proximate access to the ballots.)

To find that a legal right exists for the general public to be present for canvassing would negate these strictures of the Election Code and the intent of the General Assembly. Any other finding would render these existing rules superfluous.

Further, the Plaintiffs' fail to state a claim because the Declaratory Judgment Act is not available where "another statutory remedy has been specially provided for the character of case in hand." Petition of Kariher, 131 A. 265, 271 (Pa. 1925) citing Barraclough v. Brown [1897] A. C. 615 and Bull v. Attorney-General [1916] 2 A. C. 564. The remedy for a denial by a board of election to permit an authorized person to be present at computation and canvassing of returns is clearly prescribed in the Election Code. 25 P.S. § 3506. A violation of this kind is a misdemeanor and, upon conviction, mandates a fine not exceeding one thousand (1,000) dollars, or to undergo an imprisonment not exceeding one (1) year, or both, in the discretion of the court. This is a remedy available to all people permitted to be present at the canvassing as authorized under the act, specifically, "any overseer or watcher, attorney or candidate." Violations of the Election Code of this type are under the jurisdiction of the Attorney General and the district attorney of any county in which a violation has occurred. 25 P.S. § 3555.

The Election Code provides the actual, proper statutory remedy for an authorized person denied permission to be present at canvassing. Thus, the Declaratory Judgment Act is not available, and Plaintiffs fail to state a claim upon which relief may be granted in Count I.

Plaintiffs' Count II request for injunctive relief must also be dismissed. "Injunctive relief will lie where there is no adequate remedy at law." Hatfield Twp. v. Lexon Ins. Co., 15 A.3d 547, 552 (Pa. Commw. Ct. 2011). A plaintiff must prove the following elements to prevail on a petition for permanent injunction: 1) a right to relief is clear, 2) 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. P.J.S. v. Pennsylvania State Ethics Com'n, 669 A.2d 1105, 1113 (Pa. Commw. Ct. 1996). The Election Code is clear that persons not otherwise authorized by the Election Code have no right to observe canvassing. An injunction cannot be issued where there is no injured right to be relieved.

**C. Whether the Preliminary Objections should be sustained due to a lack of jurisdiction over the matter pursuant to Pa. R. Civ. P. 1028(a)(1)?**

Plaintiffs here seek injunctive relief under this Court's equitable jurisdiction to prevent the Board from exercising its statutory authority and duties under the Election Code. 25 P.S. § 2642. "Jurisdiction to resolve election disputes is not of common law origin but is founded entirely upon statute and cannot be extended beyond the limits defined by the General Assembly." Rinaldi v. Ferrett, 941 A.2d 73, 78 (Pa. Commw. Ct. 2007) citing In re Granting Malt Beverage Licenses, 1 A.2d 670, 671 (Pa. 1938). See also Gunnnett v. Trout, 112 A.2d 333, 336 (Pa. 1955); Tartaglione v. Graham, 573 A.2d 679, 680 n. 3 (Pa. Commw. Ct. 1990); Reese v. Bd. of Elections of Lancaster County, 308 A.2d 154, 158 (Pa. Commw. Ct. 1973).

"The proper remedies for violations of the Election Code are to be found within the comprehensive legislative framework of the Code itself." Brunwasser v. Fields, 409 A.2d 352, 354 (Pa. 1979). See also Lurie v. Republican Alliance, 192 A.2d 367, 369 (Pa. 1963) (holding that where the Election Code provides a particular procedure for pursuing certain types of claims asserting Code violations, complainants are legally required to follow the Code's prescriptions in bringing such claims.) The statutory provisions providing resolution are the exclusive means by which such disputes may be pursued and resolved. Rinaldi, 941 A.2d at 78. Plaintiffs cannot invoke this Court's equity jurisdiction to circumvent the statutory controls of the Election Code.



As stated above, the Election Code provides remedies for alleged violations like the Plaintiffs describe, for aggrieved people who are so authorized by the Code. Because neither Plaintiff qualifies for the authority to bring such an action, this Court lacks the jurisdiction to award the relief requested.

**D. Whether the Preliminary Objections should be sustained due to the Action being barred by the doctrine of laches pursuant to Pa. R. Civ. P. 1028(a)(5)?**

“Laches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another.” Sprague v. Casey, 550 A.2d 184, 187 (Pa. 1988). Laches may be raised in preliminary objections if its “existence ... is clear on the face of the record.” In re Marushak’s Estate, 413 A.2d 649, 951 (Pa. 1980). Plaintiffs were not diligent in bringing this Action by delaying nearly four (4) months. The Plaintiffs filed this Action on or about March 5, 2024, claiming wrongful conduct that occurred on or about November 10, 2023. The Election Code prescribes a process for remedy for “any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election” by allowing “an appeal therefrom within two days after such order or decision shall have been made” to the Court of Common Pleas. 25 P.S. § 3157.

Notwithstanding that Plaintiffs fail to qualify as a person aggrieved under the Election Code, Plaintiffs delayed nearly four (4) months in bringing this suit. There is no dispute that Plaintiffs knew or should have known about a legal claim to challenge the Board’s denial.

Now, Plaintiffs file suit seven weeks before the upcoming Primary election. This delay is sufficient that laches may bar this Action. See Maddox v. Wrightson, 421 F. Supp. 1249, 1252 (D. Del. 1976) (where suit filed “a mere five weeks before the election” was barred by laches when plaintiffs were aware of the ballot issue at least seven weeks before the suit was filed.) The

Board of Elections has already established policies and procedures in preparation for this upcoming Primary election and to recognize a new right under 25 P.S. § 3154 for the general public to be present would prejudice the Board.

#### IV. CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that this Honorable Court sustain the Preliminary Objections and dismiss the Plaintiffs' Action with prejudice.

Respectfully submitted,

Date: 3-21-2024



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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.

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	:	
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	:	
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**CERTIFICATE OF SERVICE**

I, Jonelle Harter Eshbach, Solicitor for the County of York, Pennsylvania, hereby certify that I have served a copy of the Brief in Support of Defendant's Preliminary Objections to Plaintiffs' Action for Declaratory Judgment and Injunctive Relief on the following via electronic delivery.

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