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**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.

CIVIL DIVISION

Case No. 2024-SU-000643

**PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS'**  
**PRELIMINARY OBJECTIONS**

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## I. INTRODUCTION

Transparency around election administration makes our democracy stronger by increasing public confidence in electoral outcomes and reducing the distrust that arises when procedures take place behind closed doors. To promote confidence in the electoral system, the Election Code provides opportunities for the public to observe the work of election officials, including the process leading to the announcement of final election results. The computation and canvassing of the election returns must be commenced “publicly.” 25 P.S. § 3154(a). The Election Code could not be clearer on this point. Indeed, Pennsylvania courts have “stress[ed] the public nature of the Commonwealth’s election procedures,” which “provide the opportunity to obtain evidence of fraud or error” in the computation of votes “when it exists.” *In re: Petitions to Open Ballot Box Pursuant to 25 P.S. §3261(A)*, 295 A.3d 325, 339 (Pa. Commw. Ct. 2023).

Section 1404 of the Election Code provides that the county board “shall,” on the third day following the election, “publicly commence the computation and canvassing of the [election] returns” at a “convenient public place.” 25 P.S. § 3154(a). It does not require much—just that members of the public be permitted to observe the official canvass. Defendant York County Board of Elections (the Board) violated this rule on November 10, 2023, when it refused to allow Plaintiff Elizabeth Kurian—a volunteer with the ACLU of Pennsylvania—to observe its “Official Canvass and Computation.” And without court intervention, they will continue to violate this rule in the 2024 election cycle and beyond. While the Board’s representatives have indicated that individuals with a “watcher’s certificate” may attend the Official Canvass, watcher’s certificates are only available to party and candidate representatives. By its plain terms, the “public” referenced in Section 1404 is not limited to partisan representatives.

The question presented in this lawsuit is very simple: Does the word “public”—and its variations “publicly commence” and “publicly announce” as used in Section 1404 of the Election Code—mean what it says? Basic principles of statutory interpretation instruct the court to adopt a plain-language, commonsense interpretation of the word “public.” The Board’s Preliminary Objections provide no reason to rule otherwise. Both Plaintiffs are negatively impacted by the Board’s violation of the Election Code and basic principles of transparency, conferring on each the standing to bring this suit. And this Court has both the jurisdiction and power to remedy the Board’s violation through equitable relief.

Looking past the sideshow issues raised by the Board’s Preliminary Objections, the underlying legal issue boils down to straightforward interpretation of plain statutory language. Viewed in this light, the Board cannot justify its confounding policy—unique among Pennsylvania counties—that only partisan representatives count as members of the “public” eligible to observe this Election Code procedure. This Court should overrule the Preliminary Objections and in doing so, rule as a matter of law that the Election Code requires the Board to permit Plaintiffs and other members of the public to attend and observe the “Official Canvass” procedure laid out at 25 P.S. § 3154.

## **II. QUESTIONS PRESENTED**

1. Should Defendant’s Preliminary Objection as to lack of standing be overruled?
2. Should Defendant’s Preliminary Objection as to failure to state a claim be overruled?
3. Should Defendant’s Preliminary Objection as to lack of jurisdiction be overruled?
4. Should Defendant’s Preliminary Objection as to whether the Action is barred under the doctrine of laches be overruled?

**Suggested Answer as to All: Yes**

### III. FACTS

Plaintiff Kurian, an ACLU-PA volunteer, attempted to attend the Official Canvass and Computation (“Official Canvass”) of returns for the November 2023 election in York County. *See* Compl. ¶¶ 22-23. At the Official Canvass, as defined at 25 P.S. § 3154, county election officials (or, in many cases, their designees) reconcile, aggregate and announce the tally of votes from each voting method for each of the county’s precincts. This procedure normally precedes any official Board meeting to take action on issues that may arise in the computation of returns or certification of results. And pursuant to Section 1404, almost every county Board of Elections in Pennsylvania allows members of the public to observe the Official Canvass procedure.

In connection with the 2023 general election, the York County Board of Elections was scheduled to commence this procedure on November 10, 2023. Compl. ¶¶ 22-23. Ms. Kurian, a registered York County voter and volunteer for the ACLU of Pennsylvania, sought to exercise her right under the Election Code to observe this public proceeding. *Id.* at ¶¶ 10, 22-23. Upon arrival, however, Ms. Kurian was denied entry to the room where the procedure was scheduled to commence because she did not have a “watcher’s certificate.” *Id.* at 25-27. When Ms. Kurian explained that she was a volunteer with a nonpartisan organization and only seeking to *observe* the proceedings, the official reiterated that a “watcher’s certificate” was required to enter the room. *Id.* Under the Election Code, however, “watchers” are appointed as such by political parties to *participate* at “any computation and canvassing of returns.” 25 P.S. § 2650(a). But “watchers” are specifically invited into election proceedings to represent partisan entities. *See* 25 P.S. § 2687(b) (“Each watcher shall be provided with a certificate from the county board of elections, stating . . . the name of the candidate, party or political body he represents”). As such, it would not be appropriate for an unaffiliated citizen or any representative of an expressly



nonpartisan organization like ACLU-PA to attend as a partisan “watcher.” Because Ms. Kurian was thus ineligible for a watcher’s certificate, the Board would not allow her to observe the Official Canvass. Compl. ¶¶ 26-27

The Board’s Preliminary Objections do not take issue with any of these facts. *See* Def.’s Br. 1-2. Nor could it. In its February 9, 2024 email response to Plaintiffs’ pre-litigation letter, the Board’s representatives reiterated its position that a “Watcher’s certificate is required to observe the canvassing of the returns” and that the *Watchers*’ presence in the county building constitutes “the public process” under the Election Code. *See* Compl., Ex. C. In short, York County has acknowledged that it denied Ms. Kurian access to the Official Canvass and Computation of returns: “The general public may not simply appear and expect to observe the proceedings.” *Id.* Accordingly, the only issue left for this Court is a legal question of whether the limited ability of partisan watchers to attend the Official Canvass satisfies the requirement of Section 1404 of the Election Code that it be open to the public. 25 P.S. § 3154.

#### **IV. LEGAL STANDARD FOR ADDRESSING PRELIMINARY OBJECTIONS**

In determining whether to sustain or overrule preliminary objections, the court must “accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts.” *Raynor v. D’Annunzio*, 243 A.3d 41, 52 (Pa. 2020) (quoting *Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 234 (Pa. 2017)). A preliminary objection to the legal sufficiency of a pleading (a demurrer) raises questions of law and “should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted.” *Yocum v. Commonwealth Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 234 (Pa. 2017). “If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.” *Feingold v.*

*Hendrzak*, 15 A.3d 937, 941 (Pa. Super. Ct. 2011) (quoting *Haun v. Cmty. Health Sys. Inc.*, 14 A.3d 120, 123 (Pa. Super. Ct. 2011)).

## V. ARGUMENTS

### A. PLAINTIFFS HAVE STANDING TO BRING THIS SUIT.

Defendant's first preliminary objection seeks dismissal for lack of standing, suggesting that neither Plaintiff was harmed when election officials prevented Ms. Kurian from observing a proceeding that, by law, must be conducted in public. This objection must be overruled: The "keystone to standing" is that the plaintiff is "negatively impacted in some real and direct fashion." *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (quoting *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005)). Plaintiffs experienced a substantial injury when the Board refused to permit a volunteer (Plaintiff Kurian) from a non-partisan organization (Plaintiff ACLU-PA) to attend the Official Canvass, thereby depriving Plaintiffs of their right to observe a "publicly" accessible procedure under the Election Code. And Defendant's unequivocal confirmation that it will do the same in future elections constitutes a clear, direct, and ongoing harm for purposes of a standing analysis.

A plaintiff has standing to sue if it has "a substantial, direct, and immediate interest in litigation." *Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010). A "substantial interest" is one that "surpasses the common interest of all citizens in procuring obedience to the law." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Commw. Ct. 2018). A "direct interest requires a causal connection between the asserted violation and the harm complained of." *Id.* "An interest is immediate when the causal connection is not remote or speculative." *Id.*

Defendant argues that ACLU-PA fails under the first prong because it does not have an interest that is "distinguishable from the interest shared by other citizens." Def.'s Br. at 3. In

making this argument, Defendant misconstrues the “substantial interest” standard to mean that a plaintiff must have completely unique interests not shared with any other members of the public. Pennsylvania law is clear, however, that a plaintiff is not without recourse “simply because may [sic] others have suffered a similar injury . . . Rather, the concern is to distinguish those who have suffered some individual injury from those asserting only the common right of the entire public that the law be obeyed.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 286–87 (Pa. 1975). Put another way, courts have not required a plaintiff alleging that government action violates a statute to “assert that only they are affected,” but only that the challenged action has a “discernible adverse effect” on their interest. *Open PA Sch. v. Dep’t of Educ.*, No. 504 M.D. 2020, 2022 WL 1498764, at \*4 (Pa. Commw. Ct. May 12, 2022) (quoting *Nat’l Election Def. Coal. v. Boockvar*, 266 A.3d 76, 101 (Pa. Commw. Ct. 2021)). Otherwise, under Defendant’s limited concept of standing, no person or entity could challenge the constitutionality or legality of a generally applicable law or government action. But Pennsylvania courts routinely allow such actions.

Here, ACLU-PA has a “substantial” interest that is “distinguishable” from the public at large in seeking a declaration that the procedure under Section 1404 be publicly accessible and not restricted only to partisan representatives. ACLU-PA’s volunteer who was present to observe those proceedings was denied entry, and thus ACLU-PA suffered an adverse effect to its interest under the Election Code in observing specified election administration proceedings throughout the Commonwealth. As a nonprofit, non-partisan civil liberties organization that seeks to guarantee voting rights and promote transparency, ACLU-PA regularly sends volunteers to

observe election meetings and proceedings.<sup>1</sup> The specific procedure in Section 1404 provides an opportunity to observe as election officials aggregate the election results from all voting methods previously tallied, reconcile the ballots from in person voting, and read aloud the general returns for each candidate in each race on the ballot. *See* 25 P.S. §§ 2602(a.1), 3154(a), 3154(c). That “other citizens” stand to benefit from the requested declaratory relief does not negate ACLU-PA’s particular interest in having its own volunteers and coalition partners attend.

Plaintiff Kurian suffered a similar harm based on her personal interest in exercising the right to observe a public election procedure under the Election Code. In suggesting otherwise, Defendant presents a circular argument—*i.e.*, that she lacks the requisite “immediate interest” because there is “no explicit, Constitutional, statutory, nor innate right for a member of the public . . . to observe canvassing.” Def.’s Br. at 4. But the existence of that right is the precise question to be answered on the merits in this declaratory judgment action. The standing analysis, by contrast, is only concerned with whether the Plaintiff is “a proper person to challenge the alleged illegality.” *Wm. Penn Parking Garage*, 346 A.2d at 287 n. 32. Our Supreme Court has explained that “when determining whether plaintiffs have standing to challenge the legality of an action, it must be assumed that the action is in fact contrary to some rule of law . . . Put another way, assuming that the action is indeed illegal in the fashion claimed by the plaintiff, would he be entitled to any relief.” *Id.* Defendant’s standing argument as to Ms. Kurian fails because it assumes the opposite—*i.e.*, that she does not have the right alleged on the merits.

Ms. Kurian is an ACLU-PA volunteer who attempted to observe a publicly accessible proceeding under the Election Code and was denied entry. Assuming, as the Court must for the

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<sup>1</sup> ACLU-PA volunteers and community partners have been permitted to attend the Official Canvass and Computation proceedings in counties across the Commonwealth, including, among others, Berks, Bucks, Chester, Dauphin, Delaware, Lancaster, Lehigh, Luzerne and Montgomery.

purposes of the standing analysis, that the denial of access was a violation of the Election Code as Plaintiffs have alleged, there is indisputably a “causal connection” between the Defendant’s actions and the violation of Ms. Kurian’s rights. Plaintiff’s interest in seeking a declaratory judgment regarding the contours of Section 1404 is not too “remote or speculative,” because she was actually denied entry and pleads a desire to observe the proceeding in a future election.<sup>2</sup>

Thus, both Plaintiffs readily satisfy the standing requirements because they suffered a substantial injury when the Board denied access to a proceeding that must be conducted publicly under the Election Code.

#### **B. PLAINTIFFS SET FORTH COGNIZABLE AND SUFFICIENT LEGAL CLAIMS AGAINST DEFENDANT**

Defendant also filed a Preliminary Objection in the form of a demurrer, alleging that Plaintiffs failed to state a claim for declaratory relief because “[t]here is no independent, substantive legal right for members of the general public to observe canvassing” under the Election Code. Def.’s Br. at 5. Whether the “general public” has a “legal right . . . to observe” the procedure provided at Section 1404 is the central legal question presented by this declaratory judgment lawsuit.

The Declaratory Judgment Act provides that “[a]ny person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa.C.S. § 7533. The statute by its own terms is to be “liberally construed and administered,” and its purpose is to “settle and to afford relief from

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<sup>2</sup> Because Defendant’s immediacy argument as to Ms. Kurian fails, so too does its argument that a “zone of interest” analysis is also required where the immediacy prong is not “apparent,” Def.’s Br at 3. Where, as here, the standards for substantiality, directness, and immediacy are “readily met,” the standing inquiry ends. *Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010).

uncertainty and insecurity with respect to rights, status, and other legal relations.” 42 Pa.C.S. § 7541. *See also P.J.S. v. Pennsylvania State Ethics Comm’n*, 669 A.2d 1105, 1109 (Pa. Commw. Ct. 1996) (declaratory judgment is used “to declare the state of the existing law on a particular issue”); *Curtis v. Cleland*, 552 A.2d 316, 318 (Pa. Commw. Ct. 1988) (a declaratory judgment is “remedial in nature and its purpose is to provide relief from uncertainty and establish various legal relationships”).

The situation here is ideally suited for an action under the Declaratory Judgment Act: Plaintiffs have asked this Court for an interpretation of Section 1404 of the Election Code in order to “settle . . . [the] uncertainty” over whether that provision requires the Official Canvass to be open to the public. 42 Pa.C.S. § 7541. Defendant believes that the word “public” in Section 1404 is restricted only to pre-determined partisan representatives with “watcher’s certificates.” This Court is now being asked to “declare the state of the existing law” on this issue. *P.J.S.*, 669 A.2d at 1109.

Indeed, as there are no factual disputes to resolve in this case, the Court can and should take this opportunity to declare what the law requires and grant Plaintiffs their requested relief. When ruling on preliminary objections in the nature of a demurrer as to which “there is no factual dispute in the case, only a dispute over the interpretation of the law, it is appropriate for the trial court . . . to interpret the applicable law and determine the merits of the claim.” *Calandra by Calandra v. State Coll. Area Sch. Dist.*, 512 A.2d 809, 811 (Pa. Commw. Ct. 1986) (citations omitted).

On the merits, Plaintiffs seek a declaration by this Court of their rights and Defendant’s obligation under Section 1404 of the Election Code, which states the following:

The county board shall, at nine o’clock A. M. on the third day following the primary or election, *at its office or at some other convenient public place at the*

*county seat*, of which due notice shall have been given as provided by section 1403, **publicly commence** the computation and canvassing of the returns, and continue the same from day to day until completed, in the manner hereinafter provided.

25 P.S. § 3154(a) (emphasis added). The **only question** in this case is whether that provision contemplates that members of the public (including representatives of non-partisan organizations) be permitted to attend and observe this election administration proceeding. Put differently, do the phrases “publicly commence” and “public place” in the Election Code have a plain-language, commonsense definition—which implies a right access by the general public—or can it be interpreted to carry the alternative meaning assigned by Defendant that such proceedings are restricted only to partisan representatives?

In resolving a question of statutory interpretation under Pennsylvania law, the court’s objective is to “ascertain and effectuate the intent of the General Assembly.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). It is well-established that “the best indication of legislative intent is the plain language of the statute,” which requires courts to consider the words “in context and give words and phrases their ‘common and approved usage.’” *Id.* (quoting *Crown Castle NG E. v. Pennsylvania Pub. Util. Comm’n*, 234 A.3d 665, 674 (Pa. 2020)). When the words of a statute are “free and clear of all ambiguity,” that is the best indicator legislative intent, and thus courts “cannot disregard the letter of the statute under the pretext of pursuing its spirit.” *Id.* (quoting *Fletcher v. Pennsylvania Prop. & Casualty Ins. Guar. Ass’n*, 985 A.2d 678, 684 (Pa. 2009)).

The plain language meaning of the phrases “publicly commence” in a “convenient public place” is clear and unambiguous. The word “public” is defined in Black’s Law Dictionary as: “(1) Of, relating to, or involving an entire community, state, or country. (2) Open or available **for all** to use, share, or enjoy.” *Public*, BLACK’S LAW DICTIONARY, (11<sup>th</sup> ed. 2019). *See also Public*

*Definition*, MERRIAM-WEBSTER (Apr. 20, 2024), <https://www.merriam-webster.com/dictionary/public> (“exposed to general view; of, by, for, or directed to the public; accessible to or shared by all members of the community”). As an adverb, the Oxford English Dictionary defines “publicly” as: “In a public manner; in the presence or with the knowledge of people generally; in public; openly; without concealment.” *Publicly*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1979); *see also Publicly*, MERRIAM-WEBSTER (Apr. 16, 2024), <https://www.merriam-webster.com/dictionary/publicly> (“in a manner observable by or in a place accessible to **the public**,” defined as “the people as a whole”). Defendant can offer no reason for the Court to deviate from the plain language, “common and approved usage” of these words, nor do they explain why “public” *does not* mean “public” in this context. The analysis should end there.

Should the Court go further to examine these phrases in context, it will find additional evidence that the General Assembly intended for this procedure to be observed by members of “the public” — “the people as a whole”—and not only partisan “watchers.” Section 1404 of the Election Code, titled “Computation of returns by county board,” prescribes a specific process for the official canvassing of election returns. *See* 25 P.S. § 3154. The word “‘return’ when used in the [Election] Code . . . refers to a sheet showing the total individual votes cast for all candidates at that polling place or district.” *In re Gen. Election for Twp. Supervisor of Morris Twp., Washington Cnty.*, 620 A.2d 565, 568 (Pa. Commw. Ct. 1993). The Board must not only “publicly commence” the computation and canvassing of returns, but also announce the official results in accordance with the procedures set forth in 25 P.S. § 3154(c). First, the board “shall . . . **publicly account** for all extra official ballots” that were printed in advance of the election. Section 1404(c) of the Election Code, 25 P.S. § 3154(c). Second, “[t]he general returns . . . from



the various election districts shall then be read . . . **slowly and audibly**, by one of the clerks” who has “charge of the records of the county board,” identifying the total number of ballots “issued, spoiled and cancelled, and cast” within each voting district. *Id.* These returns “shall” be “**publicly** announce[d].” *Id.* Third, in the event there are any “discrepancies,” the Code provides that “no further returns shall be read” until such inconsistency is “explained to the satisfaction of the county board.” Section 1404(c) of the Election Code, 25 P.S. § 3154(c). Finally, “[a]fter the completion of the computation of votes,” the board submits the unofficial returns to the Secretary of the Commonwealth. Section 1404(f) of the Election Code, 25 P.S. § 3154(f). As the foregoing statutory language makes clear, the entire process is intended to be open to the public.

Case law confirms this point. The Commonwealth Court has “stress[ed] the public nature of the Commonwealth’s election procedures, *including the computation and canvassing of ballots*” pursuant to Section 1404(a) of the Election Code, noting that such public election procedures “provide the opportunity to obtain evidence of fraud or error” in the computation of votes cast “when it exists.” *In re: Petitions to Open Ballot Box Pursuant to 25 P.S. §3261(A)*, 295 A.3d 325, 339 (Pa. Commw. Ct. 2023) (emphasis added). Other cases referencing this provision have uniformly highlighted its “public” nature. *See, e.g., Rinaldi v. Ferrett*, 941 A.2d 73, 75 (Pa. Commw. Ct. 2007) (“Three days after the election . . . as called for in Section 1404 of the Code, . . . employees at the County Voter Registration Office publicly computed and canvassed the election returns.”); *Appeal of Antonelli*, 174 A.2d 107, 110 (Pa. 1961) (“This is not an action between the candidates involved but a proceeding in which the public is involved, to canvass and compute the votes cast” in the election); *Petition to Open Ballot Box of Oneida Dist. in E. Union Twp.*, 103 A.2d 652, 653 (Pa. 1954) (“As required by Section 1404(a) of the Election Code . . . the Board of Elections of Schuylkill County on November 6th publicly commenced its

canvass and computation of the returns of the votes cast in the county”). Because the canvassing process is an inherently “public[]” undertaking, members of the public have a statutory right to “witness[] the computation” and “observe[]” the Board’s official announcement of the election results. *Rinaldi*, 941 A.2d at 75.

Defendant’s arguments do not address any of the plain language definitions of the word “public,” or the related phrases “publicly commence” and “publicly announce.” Nor does Defendant explain why the references in case law should not be taken literally. Instead, Defendant points to a series of *other* Election Code provisions that “confer[] specific rights upon authorized individuals” to observe election administration procedures before concluding, without citation, that these sections must be “read together” to understand the “limited, statutory means by which the canvass process is made public.” Def.’s Br. at 5.

For instance, the Election Code permits political parties to appoint partisan “watchers” at “any computation and canvassing of returns.” 25 P.S. § 2650. *See also* 25 P.S. § 2687(b) (“Each watcher shall be provided with a certificate from the county board of elections, stating . . . the name of the candidate, party or political body he represents”). Similarly, Section 1403, requires the board to provide “adequate accommodations for the watchers and attorneys” that are present for the “computation and canvassing of the returns.” 25 P.S. § 3153(a). None of these provisions are relevant to the case at hand. Plaintiffs do not dispute that watchers and attorneys are authorized to participate in these procedures on behalf of political parties and candidates. But the special recognition the Election Code provides to partisan representatives in one provision does not negate the clear statutory requirement in another that the procedure be accessible to the public at large. The Board is required to allow partisan attorneys and watchers—and provide “adequate accommodations” for their participation—but not to the exclusion of the general

public. Rather, the Election Code provides a “floor” for who *must* be permitted entry; it does not set a “ceiling” that denies the public’s right to access and observe the proceedings.

Defendant’s reference to “another statutory remedy” under 25 P.S. § 3506 is also irrelevant to the case at hand. Def.’s Br. at 6. This provision lays out criminal penalties for an election official who “refuse[s] to permit” a “watcher, attorney or candidate” to attend the specified election procedures. 25 P.S. § 3506. Again, the fact that watchers and other party-affiliated representatives are granted special privileges and remedies under the Election Code does not negate the clear statutory requirement that the proceeding in Section 1404 take place in “public” view. Moreover, litigants frequently ask courts to resolve uncertainty or ambiguity in the Election Code by issuing declaratory judgments—and corresponding injunctive relief to enforce the resulting interpretation. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 355 (Pa. 2020) (adjudicating Petitioner’s requested relief “in the form of declarations of law regarding Act 77 pursuant to the Declaratory Judgments Act”); *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020) (granting petition for declaratory relief to interpret mail ballot requirements under the Election Code and prohibiting county boards of election from rejecting mail ballots based on signature comparison).<sup>3</sup>

Defendant’s reference to *In re Canvassing Observation* actually supports Plaintiffs’ argument. There, a candidate’s representative sought a closer view of the mail-ballot canvass activities undertaken by the Philadelphia Board of Elections employees pursuant to 25 P.S. § 3146.8. The court analyzed the relevant statute, which required only that an authorized representative “be permitted to *remain in the room*” where mail-in ballots are pre-canvassed and

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<sup>3</sup> Defendant’s somewhat bizarre “jurisdiction” objection must be rejected for much the same reason. Defendant’s suggestion that the Court has no “equity jurisdiction” to resolve disputes over the meaning of Election Code provisions is belied by these and many other examples of Pennsylvania courts adjudicating such disputes outside the context of an “election dispute.”

canvassed, but did not say anything about the “minimum distance” between such representatives and the canvassing activities. *In re Canvassing Observation*, 241 A.3d at 350. (emphasis in original).

Defendant cites this case for the proposition that the General Assembly, “had it so desired, could have easily established such parameters” and that 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.” Def.’s Br. at 5 (quoting *In re Canvassing Observation*, 241 A.3d at 350). Plaintiffs wholeheartedly agree with that premise. Section 1404 of the Election Code does not provide “parameters” for *how* the Board must make the Official Canvass and Computation “publicly” observable. Instead, what Plaintiffs seek is equivalent to that case’s “remain in the room” language.<sup>4</sup> It would be “improper” for the court to “judicially rewrite” Section 1404 by limiting the word “public” to Defendant’s contorted reading where the legislature has deliberately—in the interest of transparency in election administration—not seen “fit” to do so.

Finally, Defendant’s two-sentence argument that the request for injunctive relief must be dismissed fails for all of the same reasons stated above. Defendant simply parrots the elements of an injunction claim and states that an injunction cannot issue here because the “Election Code is

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<sup>4</sup> Plaintiffs do not purport to claim that the Board cannot impose reasonable limitations on the public’s right of access to the procedure. Some counties do impose such limitations by designating specific areas for public observers, limiting the number of chairs because of space requirements, or providing a livestream of the canvassing proceedings. Plaintiffs recognize that Boards will develop systems in response to the particular needs and circumstances in each county. See *In Re Canvassing Observation*, 241 A.3d at 350 (“the absence of proximity parameters” in the pre-canvassing statute “reflect[s] the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections”). But what Boards *cannot* do under Section 1404 is forbid the public altogether, and develop a process in which only partisan “watchers” are permitted to attend. This violates the plain terms of the statute, the spirit of the Election Code, and the Supreme Court’s holding in *In re Canvassing Observation*.

clear that” there is “no right to observe canvassing” and thus “there is no injured right to be relieved.” Def.’s Br. at 7. This statement appears to be addressed only at the first element of the permanent injunction standard—*i.e.*, that the right to relief must be clear. *Id.* at 6-7 (citing *P.J.S. v. Pa. State Ethics Com’n*, 669 A.2d 1105, 1113 (Pa. Commw. Ct. 1996)). As established above, however, the law on this point clearly favors an interpretation of the Election Code to mean that members of the “public”—including volunteers from non-partisan organizations—are permitted to observe, and thus a request for injunctive relief is appropriate to ensure the Board’s compliance with that declaration at future proceedings.

### **C. THE DECLARATORY JUDGMENT ACT AUTHORIZES THE COURT TO INTERPRET THE ELECTION CODE**

Defendant asserts a preliminary objection that this Court somehow lacks the jurisdiction to address Plaintiffs’ claims in equity because the Election Code provides a statutory mechanism for resolving “election disputes.” Def.’s Br. at 7 (quoting *Rinaldi*, 941 A.2d at 78). To be sure, the Election Code contains specific procedures for lodging disputes over the results of an election, for disputing the decision of a county board to count or not count particular votes, or for seeking recounts. *See* 25 P.S. § 3157. *See e.g. Rinaldi*, 941 A.2d at 76-78 (noting “the procedures and associated requirements provided in the Election Code for challenging the accuracy of a vote count . . .”).

However, this is not a case about the results of any election or the counting of any votes; it is a declaratory judgment action seeking the Court’s ruling on what procedures are required under the terms of the Election Code.<sup>5</sup> *Cf. Pennsylvania Democratic Party v. Boockvar*, 238

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<sup>5</sup> The cases cited by Defendant in support of its jurisdiction objection are inapposite, as each of those cases involved the type of “election dispute” or “election contest” that is governed by a specific procedure found under the Election Code and not a declaratory judgment action seeking a judicial interpretation of the Election Code’s provisions.

A.3d 345, 355 (Pa. 2020) (adjudicating Petitioner’s requested relief “in the form of declarations of law regarding Act 77 pursuant to the Declaratory Judgments Act”); *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020) (granting petition for declaratory relief to interpret mail ballot requirements under the Election Code and prohibiting county boards of election from rejecting mail ballots based on signature comparison).

In this context, the Declaratory Judgment Act supplies the cause of action over which the Court of Common Pleas has jurisdiction. *See Robinson Twp., Washington Cnty. v. Com.*, 83 A.3d 901 (2013) (declaratory judgment action lied for a facial challenge to the Eminent Domain Code; rejecting argument that procedures outlined in the code were the exclusive means of seeking relief); *see also, e.g., Keystone ReLeaf LLC v. Pennsylvania Dep’t of Health*, 186 A.3d 505, 517 (Pa. Commw. Ct. 2018) (quoting *Empire Sanitary Landfill, Inc. v. Commonwealth Dep’t of Env’t Res.*, 684 A.2d 1047, 1055 (Pa 1996)) (“Only the courts of the Commonwealth have ‘the power to grant declarations and injunctive relief pursuant to the Declaratory Judgments Act’”); *Com., Off. of Governor v. Donahue*, 98 A.3d 1223, 1234 (Pa. 2014) (quoting 42 Pa.C.S. § 7541(a)) (“It is precisely under such circumstances, where a party is in need of relief from ‘uncertainty and insecurity with respect to rights, status, and other legal relations’, and where a legal or administrative remedy is inadequate, that declaratory relief is warranted.”). Therefore, this Court has jurisdiction to hear Plaintiffs’ claim seeking an interpretation of the Election Code, pursuant to the Declaratory Judgment Act, and the Preliminary Objection should be overruled.

#### **D. PLAINTIFFS’ CLAIMS ARE NOT BARRED BY LACHES**

The Defendant’s final Preliminary Objection states that this action should be barred by the doctrine by laches because Plaintiffs were “not diligent in bringing this Action by delaying nearly four (4) months.” Def.’s Br. at 8. This assertion is absurd. As set forth in the Complaint

and the exhibits thereto, the short delay between November 10 and the commencement of this case in March was due to the Defendant's *own delay* and unwillingness to discuss any reasonable modifications to their procedures, despite Plaintiffs' extensive pre-litigation communications. *See* Compl. ¶¶ 28-30, Ex. C; *see also* Resp. to Prelim. Obj., Ex. A-C. As an initial matter, a defendant whose "own conduct was the primary cause of the delay" cannot be heard to assert a laches defense. *In re Est. of Moskowitz*, 115 A.3d 372, 375, 383 (Pa. Super. Ct. 2015). In any event, there was no substantial delay in filing this case a mere four months after the offending conduct, and the standard for a laches affirmative defense simply is not met here.

Laches bars relief when "there has been a delay arising from the [Plaintiff's] failure to exercise due diligence in instituting an action, and such delay has resulted in prejudice to the other party." *Sernovitz v. Dershaw*, 127 A.3d 783, 789 (Pa. 2015). Typically, laches is an affirmative defense that is properly raised as a responsive pleading in the Defendant's Answer under the "New Matter" heading. Pa.R.C.P. 1030(a). Pennsylvania is a "fact-pleading jurisdiction," and the New Matter section provides an opportunity for the Defendant to disclose the material facts upon which a laches defense is based. *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1029 (Pa. 2018) (citing Pa.R.C.P. 1019(a)). *See also Farrell Area Sch. Dist. v. Deiger*, 490 A.2d 474, 477 (Pa. Commw. Ct. 1985) ("The question of laches is factual and is determined by examining the circumstances of each case"). Instead, Defendant has asserted laches as a Preliminary Objection because it is "clear on the face of the record." Def.'s Br. at 8.

This sleight-of-hand ignores the extensive back-and-forth discussions that took place between the Board's representatives and ACLU-PA prior to the filing of this lawsuit—and obscures the Defendant's *own role* in causing the delay. A brief review of the timeline is

warranted: On January 11, 2024—shortly after Ms. Kurian was denied access to the Official Canvass—ACLU-PA sent a three-page letter to Assistant Solicitor Deirdre Sullivan. *See* Compl. ¶ 28, Ex. B. The letter, which is attached to the Complaint, informed York County about Ms. Kurian’s experience on November 10<sup>th</sup>, provided the Plaintiff’s legal position regarding the requirements of 25 P.S. § 3154(a), and requested that York County “modify[] its policy for the 2024 primary and general elections” to permit members of the public to observe. The ACLU-PA offered to “discuss this matter” and requested a response within two weeks. *Id.*

On January 22, ACLU-PA received a response letter from the “newly appointed Solicitor” for York County, Jonelle Eshbach, which stated that she would be unable to meet the January 26 proposed deadline “owing to many other pressing matters and [her] recent taking of the helm” at that office. Resp. to Prelim. Obj., Ex. A. York County requested an additional two weeks to respond, and ACLU-PA responded the same day and agreed to the proposed extension. Resp. to Prelim. Obj., Ex. A, B. On February 9, Ms. Eshbach responded to ACLU-PA’s letter and stated York County’s position that its procedures were compliant with the Election Code. Compl. ¶ 29, Ex. C. On February 26, ACLU-PA responded:

It is unfortunate that, despite the authority we have cited to you, the Board still plans to prevent non-partisan public access to the official canvass. Please be advised that the ACLU-PA intends to initiate a declaratory judgment action against York County for failing to comply with the Election Code in this regard.

Resp. to Prelim. Obj., Ex. C. This complaint was filed *the next week*, on March 5.

Plaintiffs cannot be said to have “fail[ed] to exercise due diligence in instituting [this] action,” *Sernovitz v. Dershaw*, 127 A.3d 783, 789 (Pa. 2015), where ACLU-PA (1) sent a pre-litigation letter laying out its position and offering to “discuss this matter”; (2) agreed to Defendant’s request for additional time to respond; (3) provided notice of its intent to file a lawsuit absent further discussions; and (4) filed within a week after those discussions concluded,



with substantial time remaining before the next election and Official Canvass. The only reason this lawsuit was filed four months after the incident in question was due to the Defendant's own delay and unwillingness to discuss reasonable alternatives that would ensure compliance with the clear mandates of the Election Code.

The second requirement to satisfy the doctrine of laches—that the Plaintiff's delay resulted in prejudice to the other party—is simply not present here. Here again, Defendant's own part in the purported delay is significant. Where a defendant's "own conduct was the primary cause of the delay in the proceedings," it "cannot now claim they were unduly prejudiced, when the [plaintiff] brought its claims against [defendant] as soon as it could." *In re Est. of Moskowitz*, 115 A.3d at 383. In any event, prejudice may only be found "where a change in the condition or relation of the parties occurs during the time the complaining party failed to act." *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004). The party asserting laches as a defense "must present evidence demonstrating prejudice from the lapse of time," such as the death of a witness, the destruction of important records, "or if the defendant changed his position based on the expectation that plaintiff did not intend to pursue the claim." *Fulton v. Fulton*, 106 A.3d 127, 131-35 (Pa. Super. Ct. 2014).

The Defendant has not been prejudiced under this standard. Defendant's insinuations about the lawsuit being "seven weeks before the upcoming Primary election" and its statement that the Board would be prejudiced because it has "already established policies and procedures in preparation for this upcoming Primary election," Def.'s Br. at 8-9, are unavailing.<sup>6</sup> Based on the parties' ongoing communications, Defendant never could have relied on the purported delay to

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<sup>6</sup> These statements are also a red herring. The only "policy and procedure" that could change as a result of this lawsuit is that the Board will have to allow interested members of the public to passively observe proceedings already being conducted by election workers. Nothing about this case seeks to change anything about how those proceedings are conducted or how the election workers will do their jobs.

think Plaintiffs would forego suit in this case. The Board was aware of ACLU-PA's position in January and its intent to file this enforcement action to ensure compliance with the law.

The case cited by Defendant confirms the point. In *Maddox v. Wrightson*, the court found that Plaintiffs seeking to appear on the ballot as independent candidates were barred by laches because they "made no effort to qualify their party for ballot status" under the applicable state laws, filed the lawsuit close to the election despite being "aware of ballot access difficulties" nearly two months prior, and in the interim, "the last column on voting machines . . . ha[d] been occupied." 421 F. Supp. 1249, 1252 (D. Del. 1976). As a result, the court concluded that requiring the Defends to place Plaintiffs on the ballot "would risk substantial disruption of the electoral process." *Id.*

That is nothing like the case at hand. Plaintiffs' position on what the Election Code requires has been clearly stated and unchanged since the moment Ms. Kurian attempted to observe the Official Canvass in November. ACLU-PA has remained eager and willing to discuss protocols that York County can implement to both ensure the public's right to attend under the Election Code and address the Board's concerns about "space limitations and security risks." Compl. Ex. C. But whether the Defendant is inconvenienced by having to follow the Election Code's statutory requirements by merely allowing the public to enter the room where the "Official Canvass" is taking place does not constitute prejudice to satisfy the doctrine of laches.

Defendant's final argument points to an Election Code provision that requires a "person aggrieved by any order or decision" of the county board "regarding the computation or canvassing of the returns" to appeal within two days of "such order or decision." 25 P.S. § 3157. As explained previously, a declaratory judgment is the appropriate means for a Plaintiff seeking an interpretation under the Election Code. But to the extent this Court is curious about the

contours of 25 P.S. § 3157, that statute applies to decisions regarding how votes should be counted ahead of certification. *See In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044, 1046 (Pa. Commw. Ct. 2003) (citing 25 P.S. § 3157 as evidence of the General Assembly’s “clear intention . . . to expeditiously resolve election disputes and provide for the prompt certification of the vote”). *Petition of Jones*, 346 A.2d 260, 262–63 (Pa. 1975) (The legislature provided this appeal procedure to “expeditiously dispose of objections” and allow for “prompt certification” because the integrity of the election process “requires immediate resolution of disputes that prevent certification.”).

Additionally, the election official’s denial of entry to a non-partisan volunteer *in the hallway outside the meeting* is surely not the type of “order or decision” of the Board that is contemplated under this statute. *See In re Northampton Borough Election*, 79 Pa. D. & C. 481, 486-87 (Com. Pl. 1952) (such appeals “contemplate[] controversial matters arising during the computation which require an ‘order or decision.’”). *See also* 25 P.S. § 3157(b) (The court on appeal shall have authority to hear “all matters pertaining to any fraud or error committed in any election district to which such appeal relates”).

Ultimately, Laches is not an appropriate defense where Plaintiff did not delay in bringing the action and Defendant has not presented any evidence that it was prejudiced by the timing of the lawsuit and Plaintiffs’ straightforward request to allow the public to enter the room where the Official Canvass is taking place. The fourth preliminary objection should be denied.

## VI. CONCLUSION

The Preliminary Objections should be overruled and the court should rule on the merits. The material facts are undisputed: Plaintiff’s volunteer attempted to attend the “Official Canvass,” and was denied entry because the Board disagrees with Plaintiff’s plain-language

interpretation of what the Election Code requires. Both Plaintiffs are negatively impacted by the Board's violation of the Election Code, conferring on each the standing to bring this suit. This Court has both the jurisdiction and power to remedy the Board's violation through equitable relief, by interpreting the Election Code provision at issue. Thus the only question that remains in this lawsuit is whether the word "public"—and its variations "publicly commence" and "publicly announce" as used in Section 1404 of the Election Code—requires the Board to permit Plaintiffs and other members of the public to attend and observe the "Official Canvass" procedure laid out at 25 P.S. § 3154. Plaintiffs respectfully urge this Court to overrule the Preliminary Objections and in doing so, rule as a matter of law that the Election Code requires a "public" right of access to the "Official Canvass" procedure.

Respectfully submitted,

Dated: April 22, 2024

**ACLU OF PENNSYLVANIA**

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