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**Motions for Admission Pro Hac Vice Forthcoming*

*Attorneys for Proposed Intervenor-Defendant
Pennsylvania Alliance for Retired Americans*

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

CIVIL DIVISION

SEAN GILL, ROBERT SMITH, TIM RAMOS and
JACKIE RIVERA,

Plaintiffs,

v.

LEHIGH COUNTY BOARD OF ELECTIONS,
PHILLIPS ARMSTRONG, JENNIFER ALLEN,
DENNIS NEMES, TIMOTHY A. BENYO and
DIANE GORDIAN,

Defendants.

Case No. 2022-c-1849

PROPOSED ANSWER

Intervenor-Defendant Pennsylvania Alliance for Retired Americans (the “Alliance”), by and through its attorneys, submits the following Answer to Plaintiffs’ Complaint in Equity and Mandamus.

1. Plaintiff, Sean Gill, is a resident of Allentown and a registered voter. Gill intends to vote in the upcoming November 8, 2022, general election.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 1.

2. Plaintiff, Robert Smith, is a resident of Allentown and a registered voter. Smith intends to vote in the upcoming November 8, 2022, general election.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 2.

3. Plaintiff, Tim Ramos, is a resident of Allentown and a registered voter. Ramos intends to vote in the upcoming November 8, 2022, general election.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 3.

4. Plaintiff, Jackie Rivera, is a resident of Allentown and a registered voter. Rivera intends to vote in the upcoming November 8, 2022, general election.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 4.

5. Defendant, Lehigh County Board of Elections is a county board of elections organized and existing under 25 P.S. § 2641. The Board is responsible for conducting primary and general elections in Lehigh County. Among other duties, the Board has a statutory duty to select

and equip polling places, 25 P.S. § 2642(a), make rules, regulations, and instructions consistent with the Pennsylvania election code for the conducting of elections, 25 P.S. § 2642(f), to investigate fraud, irregularities, and violations of the election code and report the same to the District Attorney, 25 P.S. § 2642(i), and to receive, canvass, and compute ballots and to certify election results to the Secretary of the Commonwealth, 25 P.S. § 2642(k).

Response: Paragraph 5 contains mere characterizations, legal contentions, and conclusions, to which no response is required.

6. Defendant, Phillips Armstrong, is a member of the Lehigh County Board of Elections and is sued in his official capacity.

Response: The Alliance admits the allegations in Paragraph 6.

7. Defendant, Jennifer Allen, is a member of the Lehigh County Board of Elections and is sued in her official capacity.

Response: The Alliance admits the allegations in Paragraph 7.

8. Defendant, Dennis Nemes, is a member of the Lehigh County Board of Elections and is sued in his official capacity.

Response: The Alliance admits the allegations in Paragraph 8.

9. Defendant, Timothy A. Benyo, is the chief clerk of the Lehigh County Board of Elections and is sued in his official capacity.

Response: The Alliance admits the allegations in Paragraph 9.

10. Defendant, Diane Gordian, is the deputy chief clerk of the Lehigh County Board of Elections and is sued in her official capacity.

Response: The Alliance admits the allegations in Paragraph 10.

11. The Pennsylvania Election Code requires that mailed and absentee ballots must be returned either by mail or in person by the person to whom the ballot belongs.

Response: Paragraph 11 purports to characterize the Pennsylvania Election Code, which speaks for itself, and no response is required.

12. Regarding the return of a mailed ballot, 25 P.S. § 3150.16(a) states “[s]uch envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”

Response: Paragraph 12 purports to quote from the cited statute, which speaks for itself, and no response is required.

13. Regarding the return of an absentee ballot, 25 P.S. § 3146.6(a) states the same: “Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”

Response: Paragraph 13 purports to quote from the cited statute, which speaks for itself, and no response is required.

14. Mailed or absentee ballots returned by someone other than the voter are void, invalid, and should not be counted. *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223 (2004) (“[the] “in person” delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void.”); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5407748, at *9 (W.D. Pa. Sept. 8, 2020) (“everyone now agrees that the election code forbids thirdparty ballot delivery.”); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003) (entering preliminary injunction voiding and barring the counting of 937 absentee ballots delivered by third parties.).

Response: Paragraph 14 contains mere characterizations, legal contentions, and conclusions, to which no response is required.

15. The Lehigh County Board of Elections understands this well-settled rule:

“**Important Information for All Absentee/Mail-In Voters: With the exception of absentee voters who have a disability or who are overseas, **all Ballots must be delivered to the County Board of Elections either in person by the voter themselves or through the U.S. Postal Service. Ballots delivered by any other means for absentee/mail-in voters who don't have a disability will not be accepted by the County Board of Elections.** Absentee Ballots delivered for voters who do have a disability may be delivered by a third-party who has written authorization from the disabled absentee. Absentee Ballots delivered for an absentee voter who is overseas on Election Day may be made by an overseas delivery service.”

<https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-InBallot> (last visited August 3, 2022) (emphasis added).

Response: Paragraph 15 purports to quote from the Lehigh County website, which speaks for itself, and no response is required.

16. The Lehigh County Board of Elections authorizes the use of ballot drop boxes.

Response: The Alliance admits the allegations in Paragraph 16.

17. The Board of Elections has traditionally established five ballot drop box locations for the upcoming general election: (1) Whitehall Township Municipal Building, (2) Lehigh County Authority (LCA) lobby, (3) Fountain Hill Borough Building, (4) Lehigh County Government Center, and (5) Macungie Borough Building. <https://www.lehighcounty.org/Departments/Voter-Registration> (last visited August 3, 2022).

Response: The Alliance admits that drop boxes have been established in the asserted locations for prior elections. The Alliance is without sufficient information or knowledge with which to form an opinion about the location of drop boxes in upcoming elections.

18. While all drop boxes were inside the buildings where they are located, the defendants do not maintain any measures to assure that a voter delivers only his or her own ballot.

Response: The Alliance denies the allegations in Paragraph 18.

19. At least one location, the Lehigh County Government Center, is open 24 hours a day 7 days a week. *Id.*

Response: The Alliance admits that the drop box at the Lehigh County Government Center has offered 24-hour access for previous elections. The Alliance is without sufficient information or knowledge with which to form an opinion about the availability of the drop box in future elections.

20. On January 20, 2022, the Lehigh County Republican Committee raised concerns that third parties were depositing (void) ballots in the County's drop boxes in previous elections and that it would likely occur again in upcoming elections.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 20.

21. Indeed, the party alleged that there were at least 300 more ballots deposited into the drop boxes than there were individuals that visited the drop boxes.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 21.

22. Based on those concerns, the Lehigh County District Attorney investigated whether votes delivered by third-parties were being deposited into drop boxes in Lehigh County. A copy of the Lehigh County District Attorney's report is attached at Exhibit "1".

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 22.

23. His office reviewed surveillance video of drop boxes from the 2021 general election. *Id.*, 4.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 23.

24. His conclusion was that invalid and void votes were deposited into the drop boxes.

Id.

Response: Paragraph 24 purports to characterize the District Attorney's report, which speaks for itself, and no response is required.

25. A county detective was able to confirm 186 instances where more than one ballot was dropped by an individual. *Id.*

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 25.

26. His office also concluded that 3,695 ballots were placed into the drop boxes.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 26.

27. But the surveillance video showed only 2,756 persons dropping ballots into the boxes. *Id.*

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 27.

28. The report concludes "it is also abundantly clear that those provisions of the law [prohibiting ballot harvesting] are being breached by large numbers of voters." *Id.*, 6.

Response: The allegations in Paragraph 28 purport to quote from the Lehigh County District Attorney's report, which speaks for itself, and no response is required.

29. The Lehigh County Republican Committee demanded that the Lehigh County Board of Elections establish safeguards to prevent the third-party delivery of mailed ballots to drop boxes.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 29.

30. The Board of Elections officials refused.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 30.

31. However, the Lehigh County District Attorney announced he would position detectives at the drop boxes and charge any person that violated the Election Code by delivering more than one ballot. Katherine Reinhard, *Lehigh County DA to monitor ballot drop-off boxes for violators*, Pennsylvania Capital Star, April 27, 2022, <https://www.penncapital-star.com/election-2022/lehigh-county-da-to-monitor-ballotdrop-off-boxes-for-violators/>.

Response: The Alliance is without sufficient information or knowledge with which to form an opinion about the allegations in Paragraph 31.

32. In response to that plan, the Pennsylvania Secretary of State wrote to the District Attorney and expressed concern that the plan might violate the Pennsylvania Election Code and deter voters from delivering a ballot. See letter from Leigh Chapman to the Honorable James B. Martin, May 5, 2022, at Exhibit 2.

Response: Paragraph 32 purports to characterize the cited letter, which speaks for itself, and no response is required.

33. The Secretary suggested the District Attorney's plans amounted to "voter intimidation," and requested that he "not station law enforcement outside of ballot drop boxes in Lehigh County." *Id.*

Response: Paragraph 33 purports to quote from the cited letter, which speaks for itself, and no response is required.

34. She concluded by urging the District Attorney to shift his focus to "voter education." *Id.*

Response: Paragraph 34 purports to quote from the cited letter, which speaks for itself, and no response is required.

35. Additionally, the American Civil Liberties Union sent a letter to the District Attorney. See letter from Marian K. Schneider to James D. Martin, May 5, 2022, at Ex. 3.

Response: The Alliance admits the allegations in Paragraph 35.

36. The ACLU stated that the District Attorney's plan "cross[es] the line into unlawful harassment and intimidation of voters, which is prohibited under both federal and Pennsylvania law." *Id.*

Response: Paragraph 36 purports to quote from the cited letter, which speaks for itself, and no response is required.

37. The ACLU described the District Attorney's plan as legally flawed and demanded he cease and desist implementation of the plan. *Id.*

Response: Paragraph 37 purports to characterize the cited letter, which speaks for itself, and no response is required.

38. Despite these demands, the District Attorney implemented his plan and it achieved its goal as there were no reported cases of third-party delivery of ballots.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 38.

39. Although both the Secretary and the ACLU hinted at litigation to stop the plan, no litigation ensued.

Response: The allegation that “the Secretary and the ACLU hinted at litigation” purports to characterize the Secretary’s and ACLU’s letters, which speak for themselves, and no response is required. The Alliance admits that no litigation ensued on this matter.

40. However, there is no assurance that the District Attorney will implement a similar plan for the general election.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 40.

41. Moreover, because the plan’s legality has been questioned litigation may prevent a similar plan from being used for the general election.

Response: The Alliance is without sufficient information or knowledge with which to form a belief as to the truth or falsity of the allegations in Paragraph 41.

42. So, there is no assurance that the County’s drop boxes will be utilized in a manner that is permitted under the Election Code.

Response: The Alliance denies the allegations in Paragraph 42.

COUNT I

43. Plaintiffs incorporate the previous paragraphs by reference.

Response: The Alliance incorporates the previous responses by reference.

44. A special and preliminary injunction is necessary to prevent the Lehigh County Board of Elections from receiving void and invalid ballots that are delivered by third-parties and then commingling those ballots with validly cast ballots.

Response: Paragraph 44 contains mere characterizations, legal contentions, and conclusions to which no response is required. The Alliance denies that Plaintiffs are entitled to an injunction.

45. The five elements for the issuance of a preliminary injunction are (1) the injunction is necessary to prevent immediate and irreparable harm, which cannot be compensated by damages; (2) greater injury would result by refusing it than by granting it; (3) an injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and (5) the plaintiff's right to relief is clear. *Kierski v. Twp. of Robinson*, 810 A.2d 196, 198 (Pa.Cmwlth. 2002).

Response: The allegations in Paragraph 45 contain mere legal contentions, to which no response is required.

46. Each of these five elements exists here.

Response: Paragraph 46 contains mere characterizations, legal contentions, and conclusions to which no response is required. The Alliance denies that Plaintiffs are entitled to an injunction.

47. First, plaintiffs will suffer irreparable harm in that the void or invalid ballots will dilute their validly cast ballots— and the validly cast ballots of other voters— thereby impinging on their fundamental right to vote.

Response: Paragraph 47 contains mere characterizations, legal contentions, and conclusions to which no response is required. The Alliance denies that Plaintiffs will suffer irreparable harm, or any harm at all.

48. As in *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003), injunctive relief is necessary to preclude the commingling of ballots delivered by third parties and “if relief is not granted, the hand-delivered ballots would be rendered unidentifiable and any practical opportunity for the ballots to be challenged would be eliminated.”

Response: Paragraph 48 contains mere characterizations, legal contentions, and conclusions to which no response is required. The Alliance denies that injunctive relief is necessary.

49. Plaintiffs will also suffer irreparable harm because the Lehigh County Board of Elections will be conducting an election in contravention of the Pennsylvania election code. *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa.Cmwlt. 2000) (“Statutory violations are sufficiently injurious to constitute irreparable harm.”).

Response: Paragraph 49 contains mere characterizations, legal contentions, and conclusions to which no response is required. The Alliance denies that Plaintiffs will suffer irreparable harm, or any harm at all.

50. Second, greater injury will result if the injunction is not entered than if it is granted.

Response: The Alliance denies the allegations in Paragraph 50.

51. If the injunction is not entered plaintiffs’ fundamental right to vote will be lost because their votes will be cancelled by invalid votes delivered by third-parties.

Response: The Alliance denies the allegations in Paragraph 51.

52. Conversely, there will be no harm to the Lehigh County Board of Elections.

Response: The Alliance denies the allegations in Paragraph 52.

53. Defendants can continue to use drop boxes provided they institute adequate procedures to assure that only the voter delivers an absentee or mailed ballot to the drop box, such

as placing the drop boxes inside and open only during normal business hours where the delivery of the ballot can be verified.

Response: The Alliance denies that Defendants may be required to institute different drop box procedures.

54. Third, the injunction will maintain the status quo because it will assure that the drop boxes do not receive invalid ballots.

Response: The Alliance denies the allegations in Paragraph 54.

55. Fourth, the requested injunction is limited to abate the harm.

Response: The Alliance denies the allegations in Paragraph 55.

56. Indeed, the preliminary injunction would not prohibit the use of ballot drop boxes. It only requires defendants to use the drop boxes in a manner that assures that the ballot is delivered to the drop box only by the person to whom it belongs and in a manner otherwise consistent with the Election Code.

Response: The Alliance denies that Plaintiffs are entitled to the preliminary injunction described in Paragraph 56. Plaintiffs' allegations regarding the requested injunction contain mere characterizations, legal contentions, and conclusions, to which no response is required.

57. Fifth, plaintiffs' right to relief is clear. District Attorney Martin's investigation showed that invalid ballots were placed into the drop boxes during the 2021 general election and there is no reason to believe that third parties will not deliver ballots belonging to voters other than themselves in the November 8, 2022 primary and elections thereafter.

Response: The Alliance denies that Plaintiffs are entitled to any relief. The remaining allegations in Paragraph 57 contain mere characterizations, legal contentions, and conclusions to which no response is required.

COUNT II

58. Plaintiffs incorporate the previous paragraphs by reference.

Response: The Alliance incorporates the previous responses by reference.

59. Defendants have a public duty to count and canvass votes according to the Pennsylvania election code and to carry out those mandatory duties under the election code.

Response: Paragraph 59 contains mere characterizations, legal contentions, and conclusions, to which no response is required.

60. Defendants have a public duty to make sure that mailed and absentee ballots delivered by third-parties are not counted or commingled with validly cast ballots.

Response: Paragraph 60 contains mere characterizations, legal contentions, and conclusions, to which no response is required.

61. Plaintiffs have an interest in assuring that Defendants only count validly cast ballots and that void ballots are not commingled with valid ballots because invalid and void ballots will cancel out their validly cast ballots.

Response: The Alliance denies the allegations in Paragraph 61.

62. Also, once invalid and void ballots are commingled plaintiffs – and any other interested citizens – can no longer challenge the ballots that were delivered by third-parties.

Response: Paragraph 62 contains mere characterizations, legal contentions, and conclusions to which no response is required.

63. Plaintiffs lack an adequate remedy at law.

Response: The Alliance admits that Plaintiffs lack a remedy at law because Plaintiffs are not entitled to any relief.

DEMAND FOR RELIEF

1. Enjoining Defendants and anyone acting through, with, or on behalf of them, from using drop boxes to receive absentee or mailed ballots unless they are placed inside a building and accessible only Monday through Friday and during normal business hours, for example from 9:00am to 5:00pm.

Response: The Alliance denies that Plaintiffs are entitled to any relief.

2. Enjoining Defendants and anyone acting through, with, or on behalf of them, from using drop boxes to receive absentee or mailed ballots unless they are physically monitored in-person to assure that the person delivering the ballot is only delivering his or her own ballot, unless the person is an authorized designated agent of a disabled voter with the proper affidavit signed by the voter and verified by the election board.

Response: The Alliance denies that Plaintiffs are entitled to any relief.

3. Enjoining Defendants and anyone acting through, with, or on behalf of them, from accepting, counting, or canvassing any mailed or absentee ballot that was delivered by a person other than the voter himself or herself, except for ballots delivered by an authorized designated agent of a disabled voter.

Response: The Alliance denies that Plaintiffs are entitled to any relief.

4. Compelling Defendants to fulfill their statutory duties to assure that void and invalid ballots are not commingled with valid ballots and not counted in the November 8, 2022, general election and all elections thereafter; and

Response: The Alliance denies that Plaintiffs are entitled to any relief.

5. Entering any other appropriate relief.

Response: The Alliance denies that Plaintiffs are entitled to any relief.

Dated: September 9, 2022

Respectfully submitted,

By: /s/ Timothy J. Ford

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