Uzoma N. Nkwonta*
Noah Baron**
Marilyn Gabriela Robb**
Jacob D. Shelly**
**ELIAS LAW GROUP LLP**
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
unkwonta@elias.law
nbaron@elias.law
mrobb@elias.law
jshelly@elias.law

Adam C. Bonin
**THE LAW OFFICE OF ADAM C. BONIN**
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Timothy J. Ford (Pa. Id. No. 325290)
Claire Blewitt Ghormoz (Pa. Id. No. 320816)
**DILWORTH PAXSON LLP**
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Telephone: (215) 575-7000
Facsimile: (215) 575-7200
tford@dilworthlaw.com
cghormoz@dilworthlaw.com

**Motion for Admission Pro Hac Vice Pending*
***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,<br><br>Plaintiffs,<br><br>v.<br><br>LEHIGH COUNTY BOARD OF ELECTIONS, PHILLIPS ARMSTRONG, JENNIFER ALLEN, DENNIS NEMES, TIMOTHY A. BENYO and DIANE GORDIAN,<br><br>Defendants,<br><br>and<br><br>PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS,<br><br>[Proposed] Intervenor-Defendant. | Case No. 2022-c-1849 |

**PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS' OPPOSITION TO PLAINTIFFS' EMERGENCY PETITION FOR SPECIAL INJUNCTION**

Proposed Intervenor-Defendant Pennsylvania Alliance for Retired Americans (the "Alliance") submits this Opposition to Plaintiffs' Emergency Petition for Special Injunction.

## INTRODUCTION

Four Allentown voters ask this Court to rewrite the Lehigh County Board of Elections' drop box policies. Specifically, they seek to prohibit the Board and its staff ("Defendants") from making drop boxes available outside of weekday business hours, and they demand that this Court issue a mandatory injunction requiring the Board to supply in-person monitoring of all drop boxes in the county.



Most conspicuous about Plaintiffs' petition is what it omits. While they purport to seek compliance with the Election Code, they nowhere mention any provision of that Code that limits drop box hours or requires around-the-clock staffing. Nor do they ever identify a cause of action authorizing their claim. Instead, they ask this Court to impose policy and logistical decisions that the General Assembly has entrusted to Defendants' discretion. Plaintiffs broadly reference their "fundamental right to vote," but fail to ground their alleged injury in any state or federal law. Notably, a federal court in Pennsylvania recently rejected a similar argument that the federal Constitution requires in-person drop box monitoring, holding that the same alleged "vote dilution" injury Plaintiffs rely on here was entirely speculative and insufficient to override Pennsylvania's reasonable election procedures. *Donald J. Trump for President, Inc. v. Boockvar* ("*DJT II*"), 493 F. Supp. 3d 331, 382 (W.D. Pa. 2020).

That same logic applies here, where Plaintiffs fail all six of the prerequisites for a preliminary injunction. *First*, Plaintiffs provide no evidence of immediate and irreparable harm, and instead offer pure speculation about drop box use in future elections. *Second*, Plaintiffs'

requested injunction would directly harm Defendants by requiring them to divert scarce resources to monitoring drop boxes. The harm to the Alliance, its members, and other Lehigh County voters would also be severe, as voters' lone opportunity to submit their ballot in a drop box outside of regular business hours would be eliminated. *Third*, Plaintiffs seeks a mandatory injunction that would upset the status quo without providing the requisite extraordinary justification. *Fourth*, Plaintiffs have no right to relief on the merits, as they have failed to identify any actionable legal violation. *Fifth*, the requested injunction is poorly tailored to the alleged harm. And *sixth*, the requested injunction would adversely affect the public interest by restricting valid means that Defendants have provided for voters to cast lawful votes. The motion for special injunction should be denied.



## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege that Defendants offer five indoor drop boxes that are monitored by video, one of which is available 24 hours a day, seven days a week. *See* Pls.' Mot. for Prelim. Inj. ("Mot.") ¶¶ 5-8, 12. Plaintiffs further allege that Defendants have provided bolded guidance instructing voters that absentee and mail ballots must be delivered in person or by mail, with special exceptions for overseas voters and voters with a disability. *Id.* ¶ 4. Dissatisfied with Defendants' chosen policies, Plaintiffs moved for a preliminary injunction, and subsequently petitioned for a special injunction, that would require Defendants to restrict drop box availability to weekday business hours and to provide in-person monitoring of each drop box while the drop boxes are available. The Alliance moved to intervene on September 9, 2022, and a hearing on this matter is scheduled for September 12.

## LEGAL STANDARD

Plaintiffs seek a mandatory injunction compelling Defendants to perform further acts, which courts may grant only where plaintiffs establish a "clear right to relief." *Roberts v. Bd. of*

*Dirs. of the Sch. Dist. of Scranton*, 341 A.2d 475, 478 (Pa. 1975). A mandatory injunction is "an extraordinary remedy that should be utilized only in the rarest of cases." *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1005 n.13 (Pa. 2003). The injunction is improper if defendants show that their "conduct was reasonable or that a defense exists to the plaintiff's claim." *Sovereign Bank v. Harper*, 674 A.2d 1085, 1092 (Pa. Super. Ct. 1996).

A party seeking a preliminary injunction must establish every one of the following six prerequisites: 1) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) greater injury would result from refusing an injunction than from granting it, and concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) plaintiffs are likely to prevail on the merits; 5) the injunction plaintiffs seek is reasonably suited to abate the offending activity; and 6) a preliminary injunction will not adversely affect the public interest. *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004). A court should deny injunctive relief when any one of these following "essential prerequisites for a preliminary injunction is not satisfied." *Id.* at 46.



## ARGUMENT

### I. Injunctive relief is not necessary to prevent immediate and irreparable harm.

Plaintiffs are not entitled to a preliminary injunction because they are unable to demonstrate, through "concrete evidence," that such relief is necessary to prevent immediate and irreparable harm. *Kiddo v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 239 A.3d 1141, 2020 WL 4431793, at *9 (Pa. Cmwlth. 2020) (quoting *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001-02 (Pa. 2003), and citing *Novak v. Commonwealth*, 523 A.2d

318, 320 (Pa. 1987)); *Reed v. Harrisburg City Council*, 927 A.2d 698, 706 (Pa. Cmwlth. 2007) (requiring "*actual proof* of irreparable harm") (emphasis in original). Likewise, "the harm [must] not [be] speculative in nature." *Kiddo*, 2020 WL 4431793, at *109; *accord Reed*, 927 A.2d at 706 ("[S]peculation and conjecture will not suffice.").

Plaintiffs allege two harms, both purely speculative. First, Plaintiffs allege that "defendants are receiving and counting void ballots in violation of the Election Code," and that this statutory violation is sufficient to establish immediate and irreparable harm. Pls.' Mem. in Supp. of Mot. for Prelim. Inj. ("Mem.") at 5. A statutory violation, however, may constitute irreparable harm only where such a violation is certain. *See SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 508-09 (Pa. 2014) (finding immediate and irreparable harm where it was "undisputed" that defendant planned to take an action that would "direct[ly contravene[e] . . . the plain language of [a statute]"). Plaintiffs here do not even allege that Defendants have violated the Election Code. To the contrary—as Plaintiffs themselves acknowledge—Defendants have published guidance making clear that they will not accept mail ballots delivered by third parties unless authorized on behalf of a voter with a disability. *See* Mem. at 6. Nothing in the Election Code requires drop boxes to be limited to weekday business hours or monitored in-person.



Second, Plaintiffs allege that they will suffer irreparable harm because their "valid ballots" will be commingled with "void ballots" delivered by third parties, Mem. at 7, but this too is mere speculation. Plaintiffs have adduced no evidence that "void ballots" will be delivered by third parties; they suggest only that some people have deposited multiple ballots in the drop box in the past. But the mere deposit of multiple ballots is not inherently illegal and does not automatically render all such ballots void. Pennsylvania law explicitly permits an "authorized representative" to deposit an absentee ballot; in fact, the law allows "[m]ultiple people" to "designate the same

person." 25 P.S. § 3146.2a(a.3)(4), (5). Plaintiffs make no mention of this; instead, they ask the Court to simply presume that hundreds of voters violated state law in the past and then extrapolate that voters will therefore violate state law in the future.

This alleged harm "rel[ies] on a chain of theoretical events," which courts have consistently rejected. *DJT II*, 493 F. Supp. 3d at 377. First, Plaintiffs assume that Defendants lack of in-person monitoring of drop boxes creates a risk of illegal voting through unlawful third-party ballot delivery. And if that happens, Plaintiffs surmise that their votes will be diluted in violation of some unspecified right. *Cf. id.* Such speculation and conjecture is insufficient to demonstrate immediate and irreparable harm. *See Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (rejecting speculative considerations as legally insufficient to support preliminary injunction); *Sameric Corp. of Mkt. St. v. Goss*, 295 A.2d 277, 279 (Pa. 1972) (same); *Kiddo*, 2020 WL 4431793 at *13 (Pa. Cmwlth. 2020) (reversing trial court's grant of preliminary judgment because plaintiffs' alleged harm was speculative).

A federal district court rejected a similar theory of harm in *Donald J. Trump for President, Inc. v. Boockvar* ("*DJT I*"), No. 2:20-CV-966, 2020 WL 5407748, at *3 (W.D. Pa. Sept. 8, 2020). There, the plaintiffs sought an injunction based in part on the supposed harm flowing from the risk that unmonitored mail-in voting could lead to the casting and counting of unlawful votes, thus diluting lawful votes. *Id*. Denying injunctive relief, the court held that "the harm Plaintiffs fear has not yet materialized in any actualized or imminent way." *Id.* at *1. The court explained that the plaintiffs had failed to show irreparable harm because they did not present evidence that county officials were "likely to disobey the unambiguous election code or the Secretary's clarifying guidance forbidding third-party delivery." *Id.* at *9. In the same way here, Plaintiffs have not

presented any evidence that anyone—let alone any Defendant—is likely to disobey the unambiguous Election Code or the Defendants' clear warnings about third-party ballot delivery.

The limited legal authority Plaintiffs provide is also lacking. *Pierce v. Allegheny County Board of Elections*, 324 F. Supp. 2d 684 (W.D. Pa. 2003), which Plaintiffs cite for the proposition that injunctive relief is necessary to preserve any future challenge to void ballots, does not help them. In that case, the court found the Allegheny County Board of Elections ("Allegheny Board") adopted three inconsistent policies regarding third-party delivery of absentee ballots, and that the Allegheny Board "failed to publish its three policies in a manner likely to notify the general public of its existing policies and policy changes." *Id.* at 690. Additionally, two of the Allegheny Board's three policies expressly violated the Election Code: the first allowed unrestricted third-party ballot delivery, despite the Election Code's limitations, and the second prevented even authorized agents of disabled voters from delivering another person's ballot. *Id.* at 689-90. Under those peculiar facts, the court ordered the Allegheny Board to set aside any ballots that were hand-delivered for later adjudication. *Id.* at 709.



The facts here are much simpler. Defendants have adopted only one policy limiting third-party ballot delivery to authorized agents; that policy perfectly tracks the Election Code's requirements; and the policy has been publicized without any confusion. Because Plaintiffs are unable to provide any evidence—let alone the requisite "concrete evidence," *Kiddo*, 2020 WL 4431793, at *9—that ballots will be cast or accepted contrary to state law, they cannot demonstrate that their requested relief is necessary to preserve a challenge to void ballots that do not exist and may never exist. *See DJT I*, 2020 WL 5407748, at *1 (declining to order injunctive relief to prevent comingling of ballots to preserve challenge to harm that "has not yet materialized in any actualized or imminent way"); *see also New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1384 (Pa.

1978) (reversing grant of preliminary injunction); *Credit All. Corp. v. Phila. Minit–Man Car Wash Corp*., 301 A.2d 816, 818 (Pa. 1973) (finding trial court properly denied preliminary injunction where no showing made of necessity to avoid immediate and irreparable harm).

## II. Issuance of an injunction would disenfranchise voters, impose new burdens on election officials, and wreak havoc on get-out-the-vote efforts, causing greater injury than refusing the injunction.

Because Plaintiffs provide no evidence of any actual harm, *any* injury from granting the injunction is definitionally greater than the harm from refusing it. Indeed, substantial harm would flow from Plaintiffs' requested relief, manifesting in three different but related ways.

*First*, the injunction sought would impose additional burdens on the right to vote for voters in Lehigh County, including members of the Alliance; that burden is all the more acute in light of the imminent election. *Cf. Hackett v. President of City Council of City of Phila.*, 298 F. Supp. 1021, 1028 (E.D. Pa. 1969) (denying writ of election in part due to proximity to election as it "could result in the disenfranchisement of some persons entitled to vote by absentee ballots."). For example, limiting the availability of drop boxes to Monday through Friday from 9:00 a.m. to 5:00 p.m. will preclude a substantial number of voters from using the drop boxes at all. Furthermore, Plaintiffs' demands that the drop boxes be "physically monitored in-person" may impose costs substantial enough that Defendants will reduce or eliminate the use of drop boxes entirely. Taken together, these restrictions are likely to result in the disenfranchisement of at least some voters.

*Second*, the drop box restrictions would harm county election officials by requiring them, at this late date, to quickly reconfigure their plans for administering the election, all while they work around the clock to send out mail-in ballots and prepare for the upcoming election. *Cf. Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992) (noting "strong public interest in an orderly primary [election] less than three weeks away"). For example, Defendants would need to adjust decisions about the location and number of drop boxes, assignment and placement of staff, and budgeting to

account for the proposed in-person monitoring requirement. Plaintiffs' conclusory assertion that there is no risk of administrative chaos ignores reality. *See* Mem. at 7.

*Third*, Plaintiffs' proposed restrictions on drop-boxes, which comes just a few short weeks before voters begin returning mail ballots, would inject chaos into get-out-the-vote operations. *See id.* (noting importance of "adequately . . . consider[ing] the impact of" issuance of injunction on "the media efforts and campaign strategies of other candidates").

Plaintiffs' speculation pales in comparison to each of these substantial harms. As a result, this element precludes Plaintiffs' requested relief.

## III. Plaintiffs' requested mandatory injunction will not restore the status quo ante.

Far from seeking to restore any status quo ante, Plaintiffs seek a mandatory injunction that would impose new responsibilities on Defendants and impose an unprecedented (as far as one can tell from Plaintiffs' allegations) change in drop box availability. A mandatory injunction "alter[s] the status quo by commanding some positive act or [] provide[s] the moving party with 'substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.'" *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 358 (M.D. Pa. 2020). Defendants have never previously been required to station a county employee at every drop box for every minute that they are available. Nor has there ever been a requirement—or, according to the record, even a practice—of restricting the availability of the drop box at the Lehigh County Government Center to weekday business hours. If Defendants are required to redirect staffing from election preparation to in-person monitoring of each drop box in the county, those resources will have been permanently squandered even if Defendants prevail on the merits. And if Defendants choose to conserve these resources by eliminating drop boxes, voters will be deprived of critical

opportunities that cannot be restored retroactively. In short, "[r]ather than preserve the status quo the injunctive relief [if] granted would destroy it." *Herman v. Dixon*, 141 A.2d 576, 578 (Pa. 1958).

## IV. Plaintiffs are unlikely to prevail on the merits.

Plaintiffs lack any right to relief—indeed, they never even identify the basis for any relief. It is Plaintiffs' burden to establish that "the activity it seeks to restrain is actionable, that [their] right to relief is clear, and that the wrong is manifest." *Warehime*, 860 A.2d at 46-47. Plaintiffs are unable to do so. They purport to "seek an injunction to assure that the Lehigh County Board of Elections receives and counts votes consistent with Pennsylvania law," Mem. at 2, but they conspicuously fail to specify their cause of action. They do not identify any authority for private citizens to demand judicial remedies for technical noncompliance (let alone speculative future noncompliance) with the Election Code, and instead gesture vaguely at their "fundamental right to vote." Mot. ¶¶ 35, 39. But Plaintiffs offer no indication whether they intend to vindicate statutory or constitutional rights, or whether those rights arise under state or federal law. Because the nature of the right will determine the legal test to be applied, Plaintiffs' total failure to elucidate any of this is fatal to their action. The Court cannot adjudicate a claim that has never been identified.



Even if the Court were to litigate Plaintiffs' case for them and assume they intend to assert individual constitutional rights, Plaintiffs would not be entitled to relief. A federal court adjudicated nearly identical arguments just two years ago and determined that Pennsylvania voters lack a right to require all drop boxes to be monitored in person. *DJT II*, 493 F. Supp. 3d at 382. The court also recognized that county boards of elections have "important and precise interests in regulating elections" in the manner that they deem appropriate. *Id.* at 385.

## V. The injunctive relief Plaintiffs seek is not reasonably suited to abate the allegedly offending activity.

The relief requested by Plaintiffs is not reasonably suited to abate the offending activity, as required to receive preliminary injunctive relief, because—again—Plaintiffs have not demonstrated the existence of any offending activity. *See Red Oak Water Transfer NE, LLC v. Countrywide Energy Servs., LLC*, No. GD 11-17598, 2012 WL 13118519, at *13 (Pa. Ct. Com. Pl. Civil Div. July 20, 2012) (injunctive relief not reasonably suited to abate an offending activity where plaintiffs failed to demonstrate existence of any offending activity).

But even if Plaintiffs were able to demonstrate that Defendants will, sometime in the future, count ballots delivered to drop boxes by unauthorized third parties, Plaintiffs' subjective and highly restrictive policy preferences about the availability and monitoring of drop boxes are not the least restrictive means of ensuring that Defendants do not count any ballots unlawfully delivered by third parties. *See Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1144–45 (Pa. Cmwlth. 2008); *Red Oak Water Transfer NE,* 2012 WL 13118519, at *13 (denying preliminary injunction in part because requested relief was "overbroad and unduly restrictive"). According to Plaintiffs' own allegations, Defendants have published bolded guidance about third-party ballot delivery rules, and they provide video monitoring of drop boxes in use. *See* Mot. ¶¶ 4, 12. Because these are reasonable methods to mitigate improper delivery, Plaintiffs' motion must be denied. *See Harford Penn-Cann Serv., Inc. v. Zymblosky*, 549 A.2d 208, 210 (Pa. Super. Ct. 1988) (reversing grant of injunctive relief where relief was overly broad and less "drastic" alternatives may have addressed the harm to Plaintiffs); *see also DJT I* , 2020 WL 5407748, at *9 (denying preliminary injunction where plaintiffs were unable to show that requested relief was "the *only* way of protecting [them] from harm" in this instance.") (quoting *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 91 (3d Cir. 1992) (emphasis in original)).

## VI. Issuance of a preliminary injunction would harm the public interest by restricting the ability to vote and creating chaos in election administration.

Finally, issuance of the requested preliminary injunction would conflict with and harm the public interest. As discussed *supra*, the relief Plaintiffs seek would wreak havoc on election administration and necessarily result in the disenfranchisement of voters; these unacceptable outcomes are contrary to the public interest. *See Green Party of Pa. v. Aichele*, 103 F. Supp. 3d 681, 693 (E.D. Pa. 2015) (noting "[t]he Commonwealth's interest in orderly elections that do not accidentally disenfranchise some portion of the electorate"); *cf. In Re: Recount of Ballots*, 325 A.2d 303, 308 (Pa. 1974) ("Unreasonable impairment or unnecessary restrictions upon this right [to vote] cannot be tolerated[.]"). And the potential harm that would result from Plaintiffs' proposed relief is only exacerbated by the proximity of the upcoming election and the attendant chaos that accompanies substantial restrictions in voting access so close to Election Day. *See Valenti*, 962 F.2d at 301 (noting "strong public interest in an orderly primary [election] less than three weeks away").



These harms to the public interest are unabated by the speculative benefits to the public interest Plaintiffs recite without either authority or evidence. *See* Mem. at 7. Plaintiffs' incantations of "election fraud (real or perceived)" and "integrity of elections" do not by mere recitation justify the requested relief. As movants, the onus is on Plaintiffs to make the requisite showing not only that there exists evidence of election fraud, but also that these specific measures are narrowly tailored to effectively reduce fraud. *Warehime*, 860 A.2d at 47. They have failed to do so.

## CONCLUSION

This Court should deny Plaintiffs' Emergency Petition for a Special Injunction.

Dated: September 11, 2022

Respectfully submitted,

By: /s/ *Timothy J. Ford*

Timothy J. Ford (Pa. Id. No. 325290)
Claire Blewitt Ghormoz (Pa. Id. No. 320816)
**DILWORTH PAXSON LLP**
1500 Market Street, Suite 3500E
Philadelphia, PA 19102
Telephone: (215) 575-7000
Facsimile: (215) 575-7200
tford@dilworthlaw.com
cghormoz@dilworthlaw.com

Adam C. Bonin
**THE LAW OFFICE OF ADAM C. BONIN**
121 South Broad Street, Suite 400
Philadelphia, PA 19107
Telephone: (267) 242-5014
Facsimile: (215) 827-5300
adam@boninlaw.com

Uzoma N. Nkwonta*
Noah Baron**
Marilyn Gabriela Robb**
Jacob D. Shelly**
**ELIAS LAW GROUP LLP**
10 G St. NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
unkwonta@elias.law
nbaron@elias.law
mrobb@elias.law
jshelly@elias.law

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

**Motion for Admission Pro Hac Vice Pending*
***Motions for Admission Pro Hac Vice Forthcoming*