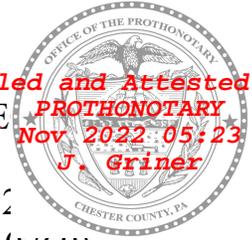


Filed and Attested by
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16 Nov 2022 05:23 PM
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**IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY
CIVIL DIVISION**

JAMES C. ROMINE et al.,

Plaintiffs,

v.

CHESTER COUNTY BOARD OF ELECTIONS et
al.,

Defendants.

NO. 2022-07093-IR

**DEFENDANTS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS
TO PLAINTIFFS' COMPLAINT IN EQUITY AND MANDAMUS**

2022-07093-IR

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Defendants Chester County Board of Elections, Karen Barsoum, in her official capacity as Director of the Chester County Department of Voter Services; Josh Maxwell, in his official capacity as the Chair of the Chester County Board of Elections¹; Marian Moskowitz, in her official capacity as a member of the Chester County Board of Elections; and Michelle Kichline, in her official capacity as a member of the Chester County Board of Elections (collectively, “Defendants” or the “Board”), hereby submit this Brief in Support of their Preliminary Objections to Plaintiffs’ Complaint in Equity and Mandamus (“Compl.”).²

I. INTRODUCTION

Plaintiffs’ Complaint seeks a mandatory injunction requiring the Board to staff all drop boxes in the November 2022 election. Despite the lack of a legal requirement to do so, the Board exercised its discretionary authority under the Pennsylvania Election Code to decide that each of the voter drop boxes across the County would be and were staffed and video monitored and open for only a limited amount of time each day. The Board’s independent decisions and actions have thus given Plaintiffs everything they requested, and their Complaint is admittedly moot.

¹ The Complaint identifies Josh Maxwell as a “member of the Chester County Board of Elections.” Compl. ¶ 8.

² A copy of the Complaint (without exhibits) is attached as Exhibit A to Defendants’ Preliminary Objections.

In fact, during the hearing on Plaintiffs’ request for a preliminary injunction, which the Court denied, the Court indicated that it did not appear that Plaintiffs had any live request for relief left in their Complaint—a conclusion with which Plaintiffs’ counsel agreed.³ Hr’g Tr. at 33-34, *Romine v. Chester Cnty. Board of Elections*, No. 2022-07093-IR, at 33-34 (C.P. Chester Cnty. Oct. 17, 2022, P.M. session) (Preliminary Injunction Hearing Transcript). Accordingly, the Board asked Plaintiffs to dismiss their Complaint voluntarily. Regrettably, Plaintiffs have refused to do so. As a result, the Board files this Brief to explain why Plaintiffs’ Complaint must be dismissed:

First, as indicated, Plaintiffs’ claims are moot. Plaintiffs ask the Court to require the Board “to use the 2 unmanned drop boxes in the same manner that it use[d] the other 11 drop boxes” during the primary election earlier this year. Compl. ¶ 59. However, the election at issue in this litigation has already occurred. And the Board independently elected to operate the two previously unstaffed voter drop boxes in the same manner as the other eleven drop boxes located throughout

³ See Hr’g Tr. at 33-34, *Romine v. Chester Cnty. Board of Elections*, No. 2022-07093-IR, at 33-34 (C.P. Chester Cnty. Oct. 17, 2022, P.M. session):

MR. WIYGUL: ... Can we stipulate that the complaint has been voluntarily withdrawn or dismissed?

MR. ZIMOLONG: I can’t make that representation right now.

THE COURT: Yeah, but I don’t know what else you got.

MR. ZIMOLONG: Yeah, I know.

THE COURT: I don’t know what else you have in this....

the County. As a result, there is no live case or controversy left for this Court to decide.

Second, Plaintiffs lack standing to assert their claims because they have failed to allege facts showing that they have a substantial interest in this matter, and have failed to plead any concrete, non-speculative basis for the mandatory injunctive relief they seek.

Third, Plaintiffs' claims are foreclosed by their previously filed Praecipe to Discontinue. Satisfied with the drop box procedures that Chester County implemented for the 2022 general election, Plaintiffs filed a Praecipe to Discontinue this matter on October 7, 2022. Particularly now that the Court appears satisfied—as indicated on the record at the preliminary injunction hearing—that Plaintiffs' claims are moot, Plaintiffs' decision to file the Praecipe should be enforced, and their claims should, at a minimum, be dismissed without prejudice.

Fourth, putting aside these procedural obstacles, Plaintiffs' claims fail as a matter of law. Plaintiffs' complaint, at heart, is that unidentified third parties might violate the Election Code. Plaintiffs, however, do not identify any statute, constitutional provision, or rule of law that *the Board* has violated. In the absence of such a violation, Plaintiffs fail to state a cognizable claim.

II. QUESTIONS PRESENTED

A. Should this Court sustain Defendants' Preliminary Objection and enter an order dismissing the Complaint as moot under Pa. R. Civ. P. 1028(a)(1) in light of the Board's independent decision to implement the very voter drop box procedures that Plaintiffs request in their Complaint leading up to, and during, the general election that was held on November 8, 2022?

Suggested Answer: Yes.

B. Should this Court sustain Defendants' Preliminary Objection and enter an order dismissing the Complaint for lack of standing under Pa. R. Civ. P. 1028(a)(5) in light of Plaintiffs' failure to show that they have any substantial interest in this matter exceeding that of all voters, and their failure to plead any non-speculative basis for the mandatory injunctive relief that they seek?

Suggested Answer: Yes.

C. Should this Court sustain Defendants' Preliminary Objection and enter an order dismissing the Complaint under Pa. R. Civ. P. 1028(a)(4) in light of the Praecipe to Discontinue filed by Plaintiffs requesting that this Court dismiss this matter without prejudice?

Suggested Answer: Yes.

D. Should this Court sustain Defendants' Preliminary Objection and enter an order dismissing the Complaint for legal insufficiency under Pa. R. Civ. P.

1028(a)(4) in light of Plaintiffs’ failure to allege that the Board violated any statute, constitutional provision, or other rule of law?

Suggested Answer: Yes.

III. HISTORY OF THE CASE

A. The County Has Discretionary Authority Regarding the Implementation of Election Procedures

“Pennsylvania’s Election Code, first enacted in 1937, established a county-based system for administering elections.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 351 (W.D. Pa. 2020); *see also* 25 P.S. § 2641(a) (“There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code].”).

“The Election Code vests county boards of elections with discretion to conduct elections and implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania’s election.” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 351; *see, e.g.*, 25 P.S. § 2642(f) (authorizing boards of elections “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, election officers and electors”).

B. The Election Code Permits the Establishment of Voter Drop Boxes

“On October 31, 2019, the Pennsylvania General Assembly passed ‘Act 77,’ a bipartisan reform of Pennsylvania’s Election Code.” Among other things, Act 77 provides that “[a] qualified mail-in elector shall be entitled to vote by an official mail-in ballot in any primary or election held in this Commonwealth in the manner provided under this article.” 25 P.S. § 3150.11. Furthermore, the Election Code provides that qualified absentee electors are “entitled to vote by an official absentee ballot in any primary or election held in” Pennsylvania. 25 P.S. § 3146.1.

The Election Code sets forth a defined procedure for the return of ballots completed by mail-in and absentee electors. A qualified mail-in elector must return his or her ballot “by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” 25 P.S. § 3150.16(a). Similarly, an absentee elector must return his or her ballot “by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” 25 P.S. § 3146.6(a).

The Pennsylvania Supreme Court has determined that “the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 361 (Pa. 2020), cert.

denied sub nom. Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732 (2021).

However, “the election code forbids third-party ballot delivery,” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 351, with the exception of voters who are disabled, who may designate an agent to deliver his or her absentee or mailed ballot. *See DiPietrae v. City of Philadelphia*, 666 A.2d 1132 (Pa. Commw. Ct. 1995), *aff’d*, 673 A.2d 905 (Pa. 1996) (concluding that, with respect to disabled voters, federal law—specifically, the Americans with Disabilities Act and Voting Rights Act—preempts the Election Code’s prohibition of third-party ballot delivery).

C. Chester County Implements Security Measures at All Thirteen Drop Boxes During the May 2022 Primary Election

“In the May 2022 primary election, the [Chester County] Board of Elections authorized 13 drop boxes.” Compl. ¶ 22. Eleven of those drop boxes were monitored by “voter services staff members,” and were accessible only from 9 a.m. to 6 p.m. on Monday through Friday, and from 10 a.m. to 2 p.m. on Saturday and Sunday. Compl. ¶¶ 24-25. Chester County also offered two drop boxes that were available to voters 24 hours a day. *See* Compl. ¶ 26. These drop boxes were “recorded with security cameras,” Compl. ¶ 28, and displayed the following statement:

!!PLEASE READ!!

You must only return **your own ballot**.

You are prohibited from delivering or returning any else's ballot, even if that person is your spouse, parent, child, grandparent, other relative, neighbor or friend.

If a voter has a disability or is voting by emergency absentee ballot, the voter may have someone deliver their ballot, **only if both parties have signed an official written authorization**.

Counterfeiting, forging, tampering with, or destroying ballots is a second-degree misdemeanor pursuant to sections 1816 and 1817 of the Pennsylvania Election Code (25 P.S. §§ 3516 and 3517).

Notify the **CHESTER COUNTY** election office immediately in the event that this receptacle [sic] is full, not functioning, or is damaged in any fashion.

Compl. ¶ 21.

Plaintiffs allege that security footage depicts voters depositing multiple ballots into one of the unmanned 24-hour drop boxes during the 2022 Primary Election. *See* Compl. ¶ 31.

D. Chester County Implements the Very Security Measures Plaintiffs Have Requested for the 2022 General Election

Plaintiffs' Complaint seeks an order directing the Board "to use the 2 unmanned drop boxes in the same manner that it uses the other 11 drop boxes, to assure that the ballot is delivered to the drop box only by the person to whom it

belongs, and to operate the drop boxes in a manner otherwise consistent with the Election Code.” Compl. ¶ 59.

However, the Chester County Board of Elections has done just that. Leading up to, and during, the general election that was held on November 8, 2022, *each* of the voter drop boxes in Chester County were open for only a limited amount of time each day, and were physically monitored. *See* Chester County Board of Elections, *October 6, 2022 Board of Elections Meeting*, <https://www.chesco.org/CivicMedia?VID=191>, 39:30–40:20; *see also* Chester County Board of Elections, *Mail-In and Absentee Ballot Drop Off Locations*, <https://www.chesco.org/4758/Ballot-Drop-Off-Locations>; *Romine v. Chester Cnty. Board of Elections*, No. 2022-07093-IR, at 1 n.1 (C.P. Chester Cnty. Oct. 19, 2022) (Order denying Preliminary Injunction) (noting measures County implemented in advance of 2022 general election).⁴

⁴ It is proper for the Court to take judicial notice of both the video recording of the Chester County Board of Elections’ October 6, 2022, meeting, and the Chester County Board of Elections’ website’s display of the times at which drop boxes across Chester County were open. *See J.S.C. v. Pennsylvania Dep’t of Hum. Servs.*, No. 678 M.D. 2019, 2021 WL 57860, at *2 n.6 (Pa. Commw. Ct.), *aff’d sub nom. J.S.C. v. Dep’t of Hum. Servs.*, 263 A.3d 551 (Pa. 2021) (“This Court may take judicial notice of official court records and public documents at the preliminary objection stage.”); *Urey v. Zoning Hearing Bd. of City of Hermitage*, 806 A.2d 502, 507 (Pa. Commw. Ct. 2002) (taking judicial notice of a “copy of the Board of Commissioners’ January meeting [minutes]”); *Jennings v. Pennsylvania Dep’t of Corr.*, No. 522 M.D. 2015, 2016 WL 6994974, at *5 (Pa. Commw. Ct. Nov. 30, 2016) (“[The Court] may take judicial notice of the Department’s policies which appear on its website.”).

IV. LEGAL ARGUMENT

A. Plaintiffs' Claims Are Moot (Pa. R. Civ. P. 1028(a)(1))

“Under the mootness doctrine, an actual case or controversy must exist at all stages of review, not just when the complaint is filed. The existence of a case or controversy requires a real and not a hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for reasoned adjudication.” *Finn v. Rendell*, 990 A.2d 100, 104-105 (Pa. Commw. Ct. 2010) (citations and internal quotation marks omitted).

Mootness thus “stands for the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect.” *Lenhart v. Cogan House Twp.*, No. 409 C.D. 2021, 2022 WL 2342342, at *4 (Pa. Commw. Ct. June 29, 2022) (internal quotation marks omitted). As a result, once “[t]he relief that petitioners seek has already occurred ... the matter becomes moot.” *Goldsborough v. Com., Dep’t of Educ.*, 586 A.2d 997, 1000 (Pa. Commw. Ct. 1991). “Where the issues in a case are moot, any opinion issued would be merely advisory and, therefore, inappropriate.” *Stuckley v. Zoning Hearing Bd. of Newtown Twp.*, 79 A.3d 510, 516 (Pa. 2013).

Plaintiffs seek an order from this Court requiring the Board “to use the 2 unmanned drop boxes in the same manner that it uses the other 11 drop boxes, to

assure that the ballot is delivered to the drop box only by the person to whom it belongs, and to operate the drop boxes in a manner otherwise consistent with the Election Code.” Compl. ¶ 59.

The Board independently decided, in the exercise of its discretionary authority, to implement the measures that Plaintiffs request. The election at issue in this litigation has already occurred. And, as was the case with the eleven “manned” voter drop boxes during the 2022 primary election, during the general election, *each* of the voter drop boxes in Chester County were open for a limited amount of time each day, and were staffed and video monitored. *See* Chester County Board of Elections, *October 6, 2022 Board of Elections Meeting*, <https://www.chesco.org/CivicMedia?VID=191>, 39:30-40:20; *see also* Chester County Board of Elections, *Mail-In and Absentee Ballot Drop Off Locations*, <https://www.chesco.org/4758/Ballot-Drop-Off-Locations>; *Romine v. Chester County Board of Elections*, No. 2022-07093-IR, at 1 n.1 (C.P. Chester Cnty. Oct. 19, 2022) (Order denying Preliminary Injunction) (noting measures County implemented in advance of 2022 general election).

Because the relief Plaintiffs requested was already in place, there is no longer any “actual case or controversy[.]” left for this Court to decide. *Finn*, 990 A.2d at 104. In the absence of such a case or controversy, Plaintiffs’ claims must be dismissed as moot. *See Henderson v. Wetzel*, No. 86 M.D. 2018, 2018 WL

4924846, at *4 (Pa. Commw. Ct. Oct. 11, 2018) (“As there is no meaningful relief left for this Court to grant, the Petition is moot and will be dismissed as such.”).

B. Plaintiffs Lack Standing to Assert Their Claims (Pa. R. Civ. P. 1028(a)(5))

“In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases). To satisfy the standing requirement, a litigant must have a “substantial, direct, and immediate interest in the matter.” *Id.*

“To have a substantial interest, the concern in the outcome of the challenge must surpass ‘the common interest of all citizens in procuring obedience to the law.’” *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). This means that “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

To satisfy the criterion of directness, a litigant must “demonstrat[e] that the matter caused harm to the party’s interest.” *Markham*, 136 A.3d at 140 (internal quotation marks omitted).

“Finally, the concern is immediate if that causal connection is not remote or speculative.” *Id.* (internal quotation marks omitted).

“If a petition contains only ‘general averments’ or allegations that ‘lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,’ standing will not be found.” *Open PA Schools v. Dep’t of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (quoting *Pa. State Lodge, Fraternal Ord. of Police v. Dep’t of Conservation & Nat. Res.*, 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)). “Moreover, the harm asserted must be actual; an allegation of only a potential harm does not give rise to standing to bring a lawsuit.” *Id.*

1. Plaintiffs Have Not Identified Any Substantial Interest in This Matter

Plaintiffs allege that they “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 under the United States Constitution and their right to a free and fair election under the Pennsylvania Constitution.” Compl. ¶ 49.

Courts—in Pennsylvania and elsewhere—have repeatedly and consistently rejected this “vote dilution” theory of standing, recognizing that it asserts only a generalized grievance and fails to identify any particularized injury.

For example, in *Kauffman v. Osser*, the Pennsylvania Supreme Court held that plaintiff electors challenging statutes allowing certain categories of electors to vote absentee lacked standing because they were not concretely injured by

counting the at-issue ballots: “the interest which [the plaintiffs] claim[ed] [was] nowise peculiar to them but rather [was] an interest common to that of all other qualified electors.” 271 A.2d 236, 240 (Pa. 1970).

In *Bognet v. Secretary Commonwealth of Pennsylvania*, the U.S. Court of Appeals for the Third Circuit similarly rejected Plaintiffs’ vote dilution theory of standing. 980 F.3d 336, 355 (3d Cir. 2020), *vacated on mootness grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). The Third Circuit held:

The logical conclusion of the Voter Plaintiffs’ theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state’s legislatively enacted election code, there is a particularized injury in fact sufficient to confer Article III standing on every other voter ... Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the “proper application of the Constitution and laws”—a proposition that the Supreme Court has firmly rejected.

Bognet, 980 F.3d at 360.

Similarly, in *Wood v. Raffensperger*, the Eleventh Circuit Court of Appeals held that a plaintiff could not claim injury by asserting that “the inclusion of unlawfully processed absentee ballots diluted the weight of his vote.” 981 F.3d 1307, 1314 (11th Cir. 2020).

In the same vein, in *Election Integrity Project Cal., Inc. v. Weber*, the Central District of California held: “[A]s our sister courts have found, a vote cast

by fraud, mailed in by the wrong person, or otherwise compromised during the elections process has an impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged. Therefore, Plaintiffs fail to show that the injury was ‘concrete and particularized’” and thus lack standing. No. 21-32, 2021 WL 4501998, at *4 (C.D. Cal. June 14, 2021).

In sum, because “[n]othing is preventing [Plaintiffs] from voting, and their votes are not otherwise disadvantaged relative to those of the entire population of Pennsylvania,” their status as voters does not confer standing to challenge allegedly unlawful election procedures. *Toth v. Chapman*, No. 22-208, 2022 WL 821175, at *7 (M.D. Pa. Mar. 16, 2022) (three-judge court) (“[T]he mere fact that an individual has a right to vote does not confer standing to challenge any and all voting laws and regulations.”).

Plaintiffs next attempt to establish a substantial interest in this matter by arguing that “[s]tatutory violations are sufficiently injurious to constitute irreparable harm,” Compl. ¶ 51 (quoting *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa. Commw. Ct. 2000)), and alleging that they will “suffer irreparable harm because the Chester County Board of Elections will be conducting an election in contravention of the Pennsylvania election code.” Compl. ¶ 51.

Such allegations fail to establish standing. Plaintiffs here “have conflated the ‘harm’ that is needed to have standing with the ‘harm’ that must be demonstrated

in order to obtain an injunction, a lower standard in which mere violation of a law may be sufficient.” *Open PA Schools v. Dep’t of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *7 (Pa. Commw. Ct. Jan. 14, 2021) (en banc). “The standard of harm required to achieve standing requires a would-be plaintiff to show more: a direct, substantial, immediate interest and sufficient averment of facts showing the party is aggrieved.” *Id.* Plaintiffs, who assert only a harm that would be shared by *all* voters in the event that the Election Code was violated, fail to make such a showing here. In the absence of that showing, Plaintiffs have failed to adequately allege the substantial interest necessary to establish standing under Pennsylvania law.

2. Plaintiffs Have Not Identified Any Immediate Harm

In addition to the fatal deficiencies in their vote-dilution theory of standing, Plaintiffs have failed to plead facts establishing a likelihood of immediately impending wrongdoing. In the absence of such allegations, injunctive relief is unavailable. Accordingly, even if their vote-dilution theory had merit, Plaintiffs lack standing to obtain the relief they seek.

Plaintiffs assert that “over 300 individuals deposited void and invalid ballots at the drop box that was not physically monitored located at 601 Westtown Road, West Chester[]” during the 2022 Primary Election. Compl. ¶ 31. Specifically, Plaintiffs allege that video evidence showed that these “individuals ignored the

plain and unambiguous instructions of the Board of Election that (a) ‘you must only return your own ballot’ and (b) ‘you are prohibited from delivering or returning anyone else’s ballot, even if that person is your spouse, parent, child, grandparent, other relative, neighbor, or friend.’” Compl. ¶ 32 (sic). Based upon these allegations, Plaintiffs contend that “like in the primary, individuals will delivery ballots that do not belong to them.” Compl. ¶ 42 (sic).

However, it is black-letter law that “[i]t is difficult—and ultimately speculative—to predict future injury from evidence of past injury.” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 378; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.” (citations and internal quotation marks omitted)); *Open PA Sch.*, 2021 WL 129666, at *6 (“[T]he harm asserted must be actual; an allegation of only a potential harm does not give rise to standing to bring a lawsuit.”).

Indeed, the *Donald J. Trump* court squarely considered—and rejected—the argument that “photographs and video stills ... of individuals who appear to be delivering more than one ballot to a drop box during the [2020] primary election” created the impending risk that “third party ballot delivery would also occur in the general election.” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 378.

There, the Western District of Pennsylvania held:

[E]ven assuming the [video and photographic] evidence were more substantial, it would still be speculative to find that third-party ballot delivery will also occur in the general election. It may; it may not. Indeed, it may be less likely to occur now that the Secretary issued her September 28, 2020, guidance, which made clear to all county boards that for the general election, third-party ballot delivery is prohibited. ... It is difficult—and ultimately speculative—to predict future injury from evidence of past injury. This is why the Supreme Court has recognized that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.”

Id. at 378-79 (quoting *Lujan*, 504 U.S. at 564).

Here too, Plaintiffs rely solely on video surveillance footage depicting third-party ballot delivery in the primary election to support their assertion that improper third-party ballot delivery would occur in the general election. *See* Compl. ¶¶ 36-42. As Plaintiffs allege, however, during the primary election, “2 of the drop boxes [in Chester County] were accessible 24 hours per day[,]” Compl. ¶ 26, and “were not physically staffed in person and monitored by voter services staff members.” Compl. ¶ 27.

Conversely, leading up to, and during, the general election that was held on November 8, 2022, *each* of the voter drop boxes in Chester County were physically staffed and open for limited hours daily. *See* Chester County Board of Elections, *October 6, 2022 Board of Elections Meeting*,

<https://www.chesco.org/CivicMedia?VID=191>, 39:30-40:20; *see also* Chester County Board of Elections, *Mail-In and Absentee Ballot Drop Off Locations*, <https://www.chesco.org/4758/Ballot-Drop-Off-Locations>; *Romine v. Chester Cnty. Board of Elections*, No. 2022-07093-IR, at 1 n.1 (C.P. Chester Cnty. Oct. 19, 2022) (Order denying Preliminary Injunction) (noting measures County implemented in advance of 2022 general election). Plaintiffs have not set forth allegations showing that improper third-party ballot delivery would occur in the general election despite these procedures. In fact, there are no allegations by Plaintiffs regarding the previously staffed drop boxes. In short, Plaintiffs' assertion that improper third-party ballot delivery would occur in the general election is based entirely on video evidence from a different election that was conducted using different drop box procedures. Such "speculative" harm is insufficient to establish standing under Pennsylvania law. *Markham*, 136 A.3d at 140 (internal quotation marks omitted); *see also Gill v. Lehigh Cnty. Board of Elections*, No. 2022-C-1849, slip op. at 11 (C.P. Lehigh Cnty. Oct. 18, 2022) (Opinion denying Preliminary Injunction) (attached to Preliminary Objections as Exhibit B) ("Photographs and video stills of individuals delivering more than one ballot observed in a prior election is speculative as it may not happen in the next election.").

C. Plaintiffs' Claims Are Foreclosed by Their Previously Filed Praecepto to Discontinue (Pa. R. Civ. P. 1028(a)(4))

Plaintiffs filed a Praecepto to Discontinue this matter on October 7, 2022, asking the Prothonotary to “[k]indly mark the above referenced matter discontinued and ended without prejudice.” *Romine v. Chester County Board of Elections*, No. 2022-07093-IR, at 1 (C.P. Chester Cnty. Oct. 7, 2022) (Plaintiffs’ Praecepto to Discontinue).

Rule 229(a) of the Pennsylvania Rules of Civil Procedure provides that “[a] discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff before commencement of the trial.” Pa. R. Civ. P. 229(a). A discontinuance “terminate[s] the action without an adjudication on the merits and ... place[s] the plaintiff in the same position as if the action had never been instituted.” *Kalmeyer v. Municipality of Penn Hills*, 197 A.3d 1275, 1279 (Pa. Cmwlth. Ct. 2018) (internal quotation marks omitted).

“Discontinuances are granted by leave of court only, but standard practice in this Commonwealth has been to assume such leave in the first instance.” *Fancsali v. University Health Ctr.*, 761 A.2d 1159, 1161 (Pa. 2000). “The causes which will move the court to withdraw its assumed leave and set aside the discontinuance are addressed to its discretion, and usually involve some unjust disadvantage to the defendant or some other interested party[.]” *Id.* at 1162.

Rule 229(a) provided Plaintiffs with a mechanism to discontinue their case. Satisfied with the election procedures that Chester County elected to implement, Plaintiffs elected to utilize that mechanism when filing their October 7, 2022, Praecipe to Discontinue. This, at a minimum, supports dismissal of this matter without prejudice.

Further, there is no basis to set aside the discontinuance. That is especially true now that the election has occurred, and the Court is satisfied, as indicated on the record during the preliminary injunction hearing, that the Board has already done everything that Plaintiffs requested. In fact, to the extent there is some unjust disadvantage to the Board, it would result from not recognizing Plaintiffs' discontinuance and allowing Plaintiffs to act as if it had not been filed.

D. Plaintiffs Fail to State a Claim (Pa. R. Civ. P. 1028(a)(4))

1. As a Matter of Law, Plaintiffs Are Not Entitled to Injunctive Relief

Count I of Plaintiffs' Complaint sets forth a claim for "Injunctive Relief." The Count expressly specifies that Plaintiffs seek a *preliminary* injunction. Compl. ¶¶ 45-60.

As an initial matter, this Count is foreclosed by this Court's October 19, 2022, order stating "that the Plaintiffs' request for preliminary/special injunctive relief is DENIED." *Romine v. Chester Cnty. Board of Elections*, No. 2022-07093-IR, at 1 (C.P. Chester Cnty. Oct. 19, 2022) (Order denying Preliminary Injunction).

However, to the extent that Plaintiffs' request for such relief survives the Court's October 19, 2022, order (and it does not), Count I of Plaintiffs' Complaint fails on the merits.

In order to obtain a preliminary injunction, a party must show:

1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that 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) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

Warehime v. Warehime, 860 A.2d 41, 46–47 (Pa. 2004) (internal quotation marks omitted).

Furthermore, “[a]n injunction that commands the performance of an affirmative act, a mandatory injunction, is the rarest form of injunctive relief and is often described as an extreme remedy. The case for a mandatory injunction must be made by a very strong showing, one stronger than that required for a restraining-type injunction.” *Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 582 (Pa.

Commw. Ct. 2012) (citation and internal quotation marks omitted); *see also Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1005 n.13 (Pa. 2003) (“[A] mandatory preliminary injunction [is] an extraordinary remedy that should be utilized only in the rarest of cases.”).

Plaintiffs’ failure to show that the “activity [they] seek[] to restrain is actionable” is dispositive of their request for injunctive relief. Plaintiffs’ request for such relief is not itself a cause of action. Rather, to be entitled to an injunction, Plaintiffs must identify some substantive legal right or obligation that the Board is violating. *See Neel v. Allegheny Cnty. Memorial Park*, 137 A.2d 785, 787 (Pa. 1958) (affirming denial of preliminary injunction where “the pleadings, together with the evidence introduced at the hearing on the preliminary injunction, failed to make out a cause of action”).

The Complaint asserts that unnamed third parties may have violated the Election Code during the 2022 primary election by returning other voters’ ballots to unmanned Chester County voter drop boxes. Plaintiffs fail, however, to allege that *the Board* has violated, or will violate, any state or federal statute, constitutional provision, or other rule of law. *See Gill v. Lehigh Cnty. Board of Elections*, No. 2022-C-1849, slip op. at 10 (C.P. Lehigh Cnty. Oct. 18, 2022) (Opinion denying Preliminary Injunction) (rejecting request for preliminary

injunction where “Petitioners ... seek to mandate policies and actions by the Board that are not specifically required under the law, or the Election Code”).

To the contrary, Plaintiffs concede that the Board has implemented measures to *prevent* improper third-party ballot delivery. Plaintiffs acknowledge, for example, that the two drop boxes that were not “physically staffed” during the 2022 primary election were “recorded with security cameras.” Compl. ¶¶ 27-28. Plaintiffs also admit that these drop boxes contained cautionary language, stating, *inter alia*, that: “(a) you must only return your own ballot and (b) you are prohibited from delivering or returning anyone else’s ballot, even if that person is your spouse, parent, child, grandparent, other relative, neighbor, or friend.” Compl. ¶ 32 (internal quotation marks omitted).

The Complaint thus amounts to a demand that the Board implement measures making it physically impossible for third-parties to improperly deliver others’ ballots. However, nothing in the Election Code—or, for that matter, the non-binding Pennsylvania Absentee and Mail-in Ballot Return Guidance issued by the Pennsylvania Department of State—requires county boards to implement such measures. *See* Exhibit C.⁵ And Courts within this Commonwealth have squarely rejected litigants’ attempts to obtain the very relief that Plaintiffs seek, holding that

⁵ The Pennsylvania Absentee and Mail-in Ballot Return Guidance is attached to Defendants’ Preliminary Objections as Exhibit C.

“the attenuated ‘burden’ Plaintiffs have identified—an increased risk of vote dilution created by the use of unmanned drop boxes—is more than justified by Defendants’ important and precise interests in regulating elections.” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 385.

In the absence of any showing that “that the activity it seeks to restrain is actionable,” *Warehime*, 860 A.2d at 46-47, Plaintiffs’ request for injunctive relief amounts to a demand for judicial imposition of Plaintiffs’ preferred policies. Such a demand is plainly insufficient to satisfy the standard for preliminary injunctive relief.

2. As a Matter of Law, Plaintiffs Have Not Pled an Entitlement to Mandamus Relief

Count II of the Complaint asserts an “Action in Mandamus[.]” Compl. ¶¶ 61-66. Under Pennsylvania law, “[m]andamus is an extraordinary writ that will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate or adequate remedy. It may be used to compel performance of a ministerial duty, or to compel action in a matter involving judgment or discretion. However, it may not be used to direct the exercise of judgment or discretion in a particular way, or to direct the retraction or reversal of an action already taken.” *Chanceford Aviation Props., L.L.P. v.*

Chanceford Twp. Bd. of Supervisors, 923 A.2d 1099, 1107-1108 (Pa. 2007)

(citation omitted).

Plaintiffs’ action in mandamus fails because they have not identified any ministerial act or mandatory duty that the Board has neglected to perform. “A ministerial act has been defined as one which a public officer is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority.” *Morgan v. Bucher*, 276 A.2d 523, 525 (Pa. 1971). Furthermore, “[t]he petitioner’s right to performance of a mandatory duty must be well-defined, clear, and specific; where any doubt exists, mandamus relief will not lie.” *Kegerise v. Delgrande*, 183 A.3d 997, 1004 (Pa. 2018).

Plaintiffs have not identified—and cannot identify—any source of law imposing a mandatory duty requiring the Board to staff drop boxes, or to implement measures making it impossible for third parties to violate the Pennsylvania Election Code. In light of Plaintiffs’ inability to point to any ministerial act or mandatory duty the Board has failed to perform, mandamus relief is unavailable.

Furthermore, even if Plaintiffs were able to point to some ministerial act or mandatory duty that the Board has failed to perform, mandamus relief would still be unavailable because Plaintiffs have not demonstrated a “clear legal right in the plaintiff.” *Chanceford Aviation Props., L.L.P.*, 923 A.2d at 1107 (citation omitted).

Indeed, as described above, *supra* at 13-16, Plaintiffs have not identified any legal right *specific to themselves* that would require the Board to implement any additional measures. Mandamus is thus unavailable for this additional reason.

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V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court sustain their Preliminary Objections and enter an order dismissing the Complaint with prejudice.

Respectfully submitted,

Dated: November 16, 2022

HANGLEY ARONCHICK SEGAL
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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 16, 2022

/s/ Robert A. Wiygul

Robert A. Wiygul

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