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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, and PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS, Intervenor-Defendant.	No. 2022-c-1849

PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS' POST-HEARING BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

As the October 7 hearing demonstrated, Plaintiffs continue to rely on a non-existent cause of action that appears nowhere in their Complaint, recycle a widely debunked "vote dilution" legal theory that courts have consistently rejected, and fail to present evidence that is a prerequisite for injunctive relief. Specifically, Plaintiffs suggest that their fundamental right to vote is in jeopardy, but they still have not identified any authority for courts to rewrite election policies to mitigate the hypothetical specter of fraud. Similarly, Plaintiffs allege that Defendants are violating the Pennsylvania Election Code, but they have never cited any statutory provision that Defendants have neglected to follow. Additionally, Plaintiffs have not identified a single case under state or federal law where a court recognized a voter's right to sue before an election to require more stringent election security measures. To the contrary, these very claims have consistently been rejected, including by federal courts in Pennsylvania. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 396-97 (W.D. Pa. 2020). In addition to these fatal legal errors, Plaintiffs failed to present any evidence or argument on factors that they are required to satisfy to receive injunctive relief. Instead, Plaintiffs lob policy argument after policy argument, exhorting this Court to upset Defendants' carefully considered election plans in the final hours of preparation. Because the General Assembly entrusted these details of election administration to the county boards of elections, this is entirely inappropriate. The requested relief should be denied.

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I. Plaintiffs have failed to identify any legal right.

Plaintiffs' action was fatally defective from the moment it was filed: neither the Complaint nor the Motion for Preliminary Injunction name the source of law that authorizes their suit. Plaintiffs have never suggested they have statutory rights at stake, and their belated attempts to latch onto state and (unspecified) federal constitutional provisions necessarily fail. *See* Alliance

Mem. in Opp. to Prelim. Inj. at 12-13; Alliance Proposed Conclusions of Law ¶¶ 99-110. Plaintiffs' failure to identify the source of their right is more than a technical oversight—the nature of Plaintiffs' right is what defines the scope of Defendants' obligations. Precisely because Plaintiffs cannot ground their policy demands in any legal text, those demands represent mere personal preferences rather than actionable claims.

There are logical, in addition to legal, problems with Plaintiffs' contention. The essence of their theory is that Defendants are obligated to reduce the speculative possibility of a private individual's violation of the Pennsylvania Code to zero. The law never requires that. It is always possible, for example, that a motorist will drive recklessly; that a taxpayer will underreport income; that a prescription will be illicitly resold. But even where undetected criminal behavior can be life threatening, members of the public may not sue to "procur[e] obedience to the law." *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). Short of totalitarian government control, complete legal compliance by the general citizenry is neither possible nor expected. Instead, government officials seek to bolster compliance through multifaceted efforts including signage, public education, sworn declarations, electronic surveillance, official investigations, and referrals to law enforcement. Here, Defendants have deployed *all of these measures* to deter and mitigate unauthorized third-party ballot return. No more is required.

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Even Plaintiffs' own requested relief would fail the demanding test they seek to impose on Defendants. There is no reason to expect that limiting drop box hours and requiring in-person monitors would eliminate the risk of unauthorized third-party ballot return. Monitors would have no authority to detain and interrogate individuals depositing multiple ballots. And it would be impossible to monitor every USPS mailbox where multiple ballots could be returned, especially given that voters may return mail-in ballots in mailboxes outside of Lehigh County. District

Attorney Martin—Plaintiffs' lone affirmative witness—recognized the obvious problem with Plaintiffs' claim:

> [Because] anyone employing the United States Mail as a method of delivery to the Voters Registration Office was under no surveillance at all . . . the opportunity to violate the statutory requirement of mailing or dropping off only one's own ballot is abundant! It would appear that the only way to ensure that the statute is not violated in this manner is to require that an election official receive the ballot directly from the elector. This of course would end 'no excuse mail-in voting' and would erase the necessity of drop-boxes, a measure I would personally support but over which I have no control.

Pls.' Ex. 1 at 7. [1] Plaintiffs know they could not sue to eliminate drop boxes. *See* Pls.' Reply Br. at 3 ("The option to use drop boxes is settled law."). They must not be permitted to pursue indirectly what they are precluded from seeking directly. If Plaintiffs' legal claim were legitimate, it would require the elimination not only of drop boxes, but—as District Attorney Martin admits—of mail-in voting altogether. Because mail-in voting is not unconstitutional merely because improper ballot return is conceivable, Plaintiffs are not entitled to any remedy.

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II. Plaintiffs have failed to identify any legal violation.

Plaintiffs continue to press a case that is untethered to their requested relief. What Plaintiffs really intend to prove, it appears, is that Pennsylvania law prohibits unauthorized third-party ballot return. The lone statutory citation in Plaintiffs' motion for a preliminary injunction and accompanying memorandum of law is the instruction that voters are to deliver their mail-in ballots "in person." *See* Pls.' Mot. for Prelim. Inj. at 4 (citing 25 P.S. § 3150.16(a)); Pls.' Mem. of Law in Support of Mot. for Prelim. Inj. at 5 (same). Similarly, the sparse judicial precedent Plaintiffs marshal is offered for the point that third-party ballot return is restricted. *See, e.g.*, Pls.' Mem. of Law in Support of Mot. for Prelim. Inj. at 6 (collecting cases). Even many of the exhibits Plaintiffs introduced at the October 7 hearing showed nothing more than that individuals are to complete an

[1] References to "Pls. Ex. __" refer to Plaintiffs' exhibits that were introduced at the Hearing on October 7, 2022.

authorization form before returning another voter's ballot. *See* Pls.' Exs. 5, 6, 7. To their credit, Plaintiffs are not wrong: unauthorized ballot return is, indeed, unauthorized. But this restriction is imposed on *private individuals*, not on *Defendants*.

Because only private individuals can violate Pennsylvania's third-party ballot return rules, Plaintiffs focused their case on alleged violations by private individuals in the 2021 general election. Even on this irrelevant point—the County's procedures were different in 2021 than they are now—Plaintiffs were unsuccessful. District Attorney Martin merely relayed out-of-court statements by an unnamed detective that some individuals appeared to deposit between two and five ballots in drop boxes during that election. *See* Test. of J. Martin; Pls.' Ex. 1. But not all third-party ballot return is unlawful. The Election Code expressly permits an authorized individual to deposit an emergency absentee elector's ballot, 25 P.S. § 3146.2a(a.3)(4), and "[m]ultiple people qualified under this subsection may designate the same person, and a single person may serve as the authorized representative for multiple qualified electors." *Id.* § 3146.2a(a.3)(5). Likewise, Pennsylvania courts have established that a disabled voter may "appoint a person of his or her choice to . . . deliver the completed ballot either to the mail box or to the [Election] Board." *Dipietrae v. City of Philadelphia*, 666 A.2d 1132, 1135 (Pa. Cmwlth. 1995). Notably, *nothing in the Election Code requires voters to submit a completed authorization form to election officials*, and Pennsylvania law certainly does not void a disabled voter's ballot if a duly authorized agent neglects to submit the completed form. *See In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020) (recognizing the Election Code must be construed "liberally in favor of the right to vote"); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) ("Our goal must be to enfranchise and not to disenfranchise."); *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Cmwlth. 2022),

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appeal denied, 273 A.3d 508 (Pa. 2022) ("[V]oters should not be lightly disenfranchised where there is no real question raised that the ballot is the genuine vote of the elector[.]"). Because there is no evidence whether individuals who may have deposited multiple ballots in 2021 were authorized agents, Plaintiffs' conclusions about void ballots are constructed on an unproven premise.

As noted, the 2021 election is also the wrong reference point, both factually and legally, for Plaintiffs' claim. It is wrong as a matter of fact because Defendants employed different procedures in 2021 than they do in 2022. At District Attorney Martin's recommendation, Defendants adopted new and more conspicuous signage for the 2022 primary elections, which District Attorney Martin credits for reducing the delivery of multiple ballots in that election. *See* Pls.' Ex. 4 at 1. In fact, District Attorney Martin concluded that incidents of multiple-ballot deposits in the 2022 primary election "were very few; and, it could not be determined with 100% certainty" that *any* individual returned multiple ballots, even when the drop boxes were not monitored in-person by a detective. *Id.* at 1-2. Because the problem motivating Plaintiffs' complaint has been effectively mitigated—and possibly even eliminated—by procedures that will remain in place for the 2022 general election, Plaintiffs cannot be entitled to any relief.

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Ultimately, however, the deficiencies in Plaintiffs' action go much deeper than the election year chosen for investigation. Pennsylvania's ballot return rules simply do not prescribe which policies local election administrators must adopt to achieve some unspecified threshold of compliance. And because elected policymakers have not imposed specific duties on county boards of elections, courts are not authorized to micromanage those decisions themselves. Rejecting a virtually identical claim two years ago, a federal judge in Pennsylvania cautioned against the judicial policymaking that Plaintiffs seek to compel: "Plaintiffs essentially ask this Court to

second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan. Perhaps Plaintiffs are right that guards should be placed near drop boxes . . . . But the job of [a judge] isn't to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 343 (W.D. Pa. 2020).

The General Assembly weighed competing policy arguments when it chose to authorize absentee and mail-in voting, and ultimately accepted that increased voter accessibility merited a marginal risk of irregularities. In the same way, Defendants weighed competing policy arguments when they chose to provide drop boxes in the manner that Plaintiffs challenge. Defendants balanced the security-first views of law enforcement officials like District Attorney Martin with the needs of voters like Jody Weinreich and Barbara Kremp who find it difficult to vote in person or to rely on the postal service. There is no way to perfectly reconcile the many divergent and at-times contradictory interests in election administration, but Defendants' chosen approach is fair and reasonable. No more is required for it to be lawful.

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III. Plaintiffs have failed to carry their burden to warrant a preliminary injunction.

The six mandatory preliminary injunction factors appear to be an afterthought in Plaintiffs' briefing and argument. Their opening brief devotes only a few sentences each to five of the factors, and their reply brief ignores them altogether. Because courts must deny preliminary injunctive relief when plaintiffs fail to satisfy *any* of the six prerequisites, *see Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004), Plaintiffs' failure to contest at all the evidence on the third factor—the requested injunction will not restore any status quo ante because, as Mr. Timothy Benyo testified, Lehigh County has never limited all its drop boxes to regular business hours under the watch of in-person monitoring—the injunction may be rejected on this basis alone. *Williams v. City of*

Phila., 164 A.3d 576, 596 (Pa. Cmmw. Ct. 2017) ("Because the grant of a preliminary injunction is an extraordinary remedy, the failure to establish a single prerequisite requires the denial of the request for an injunction.").

In fact, *all six of the prerequisites* are lacking, for the reasons explained in the Alliance's Memorandum of Law in Opposition to Petitioners' Motion for Preliminary Injunction and in the Alliance's Proposed Findings of Fact and Conclusions of Law.

First, Plaintiffs have not established any harm, or even a violation of law, so the injunction is definitionally unnecessary to prevent "immediate and irreparable harm." *See supra* at 2-7; *see also* Alliance's Proposed Findings of Fact & Conclusions of Law ("Alliance FOF & COL") ¶¶ 114-127. A speculative fear of future private noncompliance with election rules is not cognizable. *See Trump for President, Inc.*, 493 F. Supp. 3d at 396-97.

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Second, Plaintiffs' requested relief would significantly burden Defendants, the Alliance, and voters, particularly because it comes while the election is already well underway. It would burden Defendants by requiring them to scramble to reconfigure their election plans and to locate, hire, and train monitors for drop boxes—a burden so onerous it would likely force the elimination of drop boxes entirely. Alliance FOF & COL ¶ 130. It would also harm voters and the Alliance by making voting more difficult and confusing, potentially resulting in disenfranchisement. *Id.* ¶¶ 131-133. And it would force the Alliance to divert its limited resources at the eleventh hour to educate its members about the new election rules. *Id.* ¶ 134.

Third, "[r]ather than preserve the status quo the injunctive relief granted would destroy it." *Herman v. Dixon*, 393 Pa. 33, 38 (Pa. 1958); *see also supra* at 7-8; Alliance FOF & COL ¶¶ 136-139. As discussed above, this factor is uncontested.

Fourth, Plaintiffs are unlikely to prevail on the merits because Defendants' extensive efforts to ensure voters comply with the Elections Code have been reasonable; Plaintiffs lack standing because they are not "aggrieved" in a substantial, direct, and immediate way; and Plaintiffs' Complaint and Motion for Preliminary Injunction are fatally deficient, failing to identify a legal cause of action. *See supra* at 4-7; *see also* Alliance FOF & COL ¶¶ 94-98 (standing), 99-110 (deficiency of Complaint and Motion), 143 (reasonableness of County's conduct).

Fifth, Plaintiffs' requested relief is not reasonably suited to abate the offending activity because Plaintiffs have not offered any actual proof of offending activity. Alliance FOF & COL ¶ 146 (citing *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)). And even if there were offending activity, Plaintiffs' requested injunction is not the least restrictive means of ensuring that Defendants do not count ballots unlawfully delivered by third parties because it is overbroad and unduly burdensome, and because less drastic alternatives are available, such as the use of conspicuous signage and similar public education efforts that have already proven effective. *Id.* ¶¶ 145-50.

Sixth, granting Plaintiffs' requested injunction would adversely affect the public interest by unduly burdening Defendants, injecting chaos into election administration, and potentially disenfranchising voters—all mere weeks before election day, when mail ballots have already been sent to voters *Id.* ¶¶ 151-53.

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CONCLUSION

This Court should deny Plaintiffs' Motion for a Preliminary Injunction.[2]

Dated: October 12, 2022

Respectfully submitted,

By: _/s/ Claire Blewitt Ghormoz_

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[2] The Alliance refers to the request for injunctive relief as a "Motion" because Plaintiffs have so styled it, though such requests are not properly raised by motion but instead by petition. *See* Pa. R. Civ. P. 208.1(b)(1)(iii).

CERTIFICATE OF SERVICE

I, Claire Blewitt Ghormoz, hereby certify that on October 12, 2022, I caused the foregoing Post-Hearing Brief to be served via the Lehigh County Court of Common Pleas' electronic filing system upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE

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

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