

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

**Admitted Pro Hac Vice
Attorneys for 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,

and

PENNSYLVANIA ALLIANCE FOR RETIRED
AMERICANS,

Intervenor-Defendant.

No. 2022-c-1849

**PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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PROCEDURES AND PRELIMINARY MATTERS

A hearing on Plaintiffs' Preliminary Injunction Motion was held before this Court on October 7, 2022. Plaintiffs Sean Gill, Robert Smith, Tim Ramos, and Jackie Rivera were represented by Walter S. Zimalong and James Fitzpatrick of Zimalong, LLC, and Nicolas Barry of America First Legal Foundation. Defendants Lehigh County Board of Elections, Phillips Armstrong, Jennifer Allen, Dennis Nemes, Timothy A. Benyo and Diane Gordian were represented by Sarah Murray of the County of Lehigh Department of Law. Intervenor-Defendant the Pennsylvania Alliance for Retired Americans (the "Alliance") was represented by Uzoma Nkwonta, Jacob Shelly, Noah Baron, and Marilyn Robb of Elias Law Group LLP, Adam Bonin of the Law Office of Adam C. Bonin, and Timothy Ford of Dilworth Paxson LLP. Numerous exhibits were offered and admitted.

Having heard the evidence and reviewed the proposed Findings of Fact and Conclusions of Law of all Parties, the Court now makes the following:

FINDINGS OF FACT

I. Plaintiffs

1. Plaintiffs Sean Gill, Robert Smith, Tim Ramos, and Jackie Rivera are Lehigh County voters. They did not testify at the October 7, 2022 hearing.

II. Defendants and Intervenor-Defendants

2. Defendants in this action are the Lehigh County Board of Elections; Lehigh County Board of Elections members Phillips Armstrong, Jennifer Allen, and Dennis Nemes; and the Lehigh County Board of Elections Chief Clerk Timothy A. Benyo and Deputy Clerk Diane Gordian (collectively, "the County"). Of the Defendants, only Mr. Benyo testified at the October 7, 2022, hearing.

3. The Alliance is a nonprofit organization, primarily composed of retirees, that engages in political efforts to support programs that are important to older Americans. Its president, Brenda “Jody” Weinreich, and one of its members, Barbara Kremp, testified at the October 7, 2022, hearing. *See infra* at ¶ 5. The Court granted the Alliance’s petition to intervene as a defendant at the October 7, 2022 hearing.

III. Witnesses

4. Brenda “Jody” Weinreich, President of the Pennsylvania Alliance for Retired Americans, testified about challenges the Alliance’s members face voting. She testified that most of the Alliance’s members are retirees, most over the age of 65, and that there are over 8,700 Alliance members in Lehigh County. She testified that retirees, including the Alliance’s members, tend to be consistent voters, but that some struggle with medical conditions or mobility challenges. These conditions and challenges, Ms. Weinreich explained, make it hard to vote in person on election day because the individuals may not be able to wait in line for long periods, navigate staircases, or access the polling place. Additionally, she testified that some Alliance members rely on transportation and assistance from people who work during regular business hours. For these reasons, Ms. Weinreich explained that many Alliance members rely on drop boxes to vote, including outside of weekday business hours. She testified that some Alliance members distrust the mail and prefer not to mail their ballots through the U.S. mail because they fear their ballots may not arrive in time to be counted. She explained that many Alliance members have expressed concern that if drop box hours become limited, the members may not be able to vote at all. Ms. Weinreich testified competently and credibly.

5. Barbara Kremp, an Alliance member and Lehigh County resident, testified that she has relied on drop boxes to vote in Lehigh County ever since she learned of their availability. She

is the primary caretaker of her elderly mother, who is unable to vote in person on election day because of medical conditions that make standing in line not possible. Ms. Kremp also testified that she prefers to vote via mail ballot so she can take time to research the candidates and issues on the ballot before casting her vote. She testified that she has voted via drop box after 5:00 p.m. at least once before, and that, because of the unpredictability of her caretaking responsibilities, she may not be able to vote via drop box in the future if drop box hours were limited. Ms. Kremp testified that she prefers voting via drop box to voting via U.S. mail because she is familiar with news stories about the U.S. Postal Service losing mail ballots or delivering them too late to be counted, and Ms. Kremp does not trust the U.S. Postal Service to timely deliver her ballot. Ms. Kremp also testified that she prefers to take her time to learn about candidates through the local newspaper and to leave time to decide her vote in response to late-breaking developments in the days before election day, when it would be too late to return a ballot through the postal service. Ms. Kremp testified that she may be intimidated by people physically monitoring drop boxes. Ms. Kremp testified competently and credibly.

6. District Attorney James Martin testified about his investigation into and report about ballot delivery into Lehigh County's five drop boxes based on his deputy's review of drop box video surveillance between October 18 and November 2, 2021. District Attorney Martin testified that his deputy spent eight work days (about 60 hours) reviewing almost 15 full days (approximately 356 hours) of footage from the Lehigh County Government Center drop box, which was offered for 24 hours a day, seven days a week, between October 18 and November 2, and some sporadic footage from the other four drop boxes, but that he was not sure how his deputy reviewed all of that footage in a condensed time period. He testified that the County accepted some but not all of his suggestions about drop box security, and that the County's postage of new signage

near drop boxes at his suggestion was “very effective” in reducing instances of third-party ballot delivery. District Attorney Martin testified that he has found no fraud in connection with drop boxes or third-party ballot delivery. District Attorney Martin testified competently and credibly.

7. Timothy Benyo, Chief Clerk of the Lehigh County Board of Elections, testified about the County’s policy decisions regarding the availability and security of drop boxes. He testified that the County has offered five drop boxes since the November 2020 general election, including a drop box that is available 24 hours, seven days a week at the Lehigh County Government Center in the two weeks before the election. He testified that drop boxes provide an important opportunity for voters to cast their ballots, and that voters have responded with appreciation for their availability. Mr. Benyo testified that the County has never previously deployed in-person monitors at drop boxes and has never previously limited drop box availability to regular business hours. He testified about the steps that the Commonwealth and the County take to ensure that ballots cannot be forged, and that he is unaware of any evidence of forgery or fraud associated with drop boxes or third-party ballot delivery. Mr. Benyo testified about everything that the County does to educate voters about election rules and to prevent unauthorized third-party ballot delivery. Mr. Benyo testified that the County would likely not be able to locate and hire enough people to monitor every drop box in person during all hours that they are available beginning October 24, 2022—the day the County intends to make drop boxes available for the 2022 general election. Mr. Benyo further testified that if the County were required to provide in-person monitoring of all drop boxes, the County would not be able to offer drop boxes to voters for the November election. Mr. Benyo testified competently and credibly.

IV. Plaintiffs do not face immediate, irreparable injury.

8. The only evidence of Plaintiffs' interests in this lawsuit is the stipulation that Plaintiffs are registered Lehigh County voters who intend to vote in the 2022 general election. There is no record evidence that Plaintiffs' interests differ in any way from the interests of other voters.

9. Plaintiffs have presented no credible evidence that they face immediate, irreparable injury—or any injury at all.

10. After the 2021 general election, District Attorney Martin investigated the possibility that unauthorized third parties deposited ballots into ballot drop boxes in Lehigh County. *See* Test. of J. Martin.

11. The District Attorney's investigation entailed a detective reviewing the security footage of some of the drop boxes. As to the Government Center drop box, the detective reviewed two weeks of footage (over 300 hours) over the course of eight standard workdays (under 60 hours). *See* Test. of J. Martin.

12. District Attorney Martin's investigation made no effort to determine whether the persons the detective believed to have dropped off multiple ballots were asked to do so by a disabled or emergency absentee voter. *See* Test. of J. Martin.

13. Following the 2021 general election, at District Attorney Martin's suggestion, the County implemented new, more conspicuous signage at drop box locations, indicating that unauthorized third-party depositing of ballots is impermissible. *See* Test. of J. Martin; Test. of T. Benyo; *see infra* at ¶¶ 60, 65-71.

14. During the 2022 election, District Attorney Martin again created a report relating to unauthorized third-party ballot drop-offs. *See* Test. of J. Martin.

15. The report relied upon (1) information provided by plainclothes detectives posted “from time to time” at different drop box locations and (2) a detective’s review of “samples” of security camera footage. *See id.*; Pls.’ Ex. 4.¹

16. The plainclothes detectives reported that they observed no instances of persons depositing multiple ballots while they were present at the drop box locations. *See* Test. of J. Martin; Pls.’ Ex. 4.

17. The plainclothes detectives were not identifiable as law enforcement officers, Test. of J. Martin.

18. The detective who reviewed the security footage reported seeing “very few” instances of individuals dropping off multiple ballots during the 2022 primary election, and “it could not be confirmed with 100% certainty” that *any* individuals returned multiple ballots. *Id.*; Pls.’ Ex. 4.

19. District Attorney Martin’s investigation did not confirm any cases of unauthorized third-party ballot drop-off during that election. *See* Test. of J. Martin.

20. Pennsylvania’s Department of State and the County take a number of steps, including the use of individualized ballot bar codes, to mitigate the risk of fraudulent ballots. *See* Test. of T. Benyo; Defs.’ Ex. 1 (demonstrative ballot).

21. There is no evidence of fraudulently marked ballots in connection to drop boxes or third-party ballot delivery in any election that drop boxes have been in use. *See* Test. of J. Martin (testifying that his investigation revealed no evidence of fraud).

22. There is no evidence that Plaintiffs’ votes will be diluted in the 2022 general election.

¹ References to “Pls. Ex. ___” refer to Plaintiffs’ exhibits that were introduced at the Hearing on October 7, 2022.

23. The County reviewed the Election Code and Department of State guidance to ensure its drop box policies were in compliance. *See* Test. of T. Benyo. There is no evidence that the County violated any law in connection with the use of drop boxes.

24. As a result, there is no evidence in the record to establish that unauthorized ballot return—if it does occur—would tend to dilute or cancel out Plaintiffs’ votes.

V. Greater injury would result from granting an injunction.

A. Injury to Plaintiffs

25. For the reasons stated above, there is no evidence that Plaintiffs would be injured if drop box availability is not limited to regular business hours or if drop boxes are not subject to constant in-person monitoring.

B. Injury to the County

26. An obligation to secure in-person monitors for all drop boxes would impose significant—if not impossible—burdens on the County.

27. The County would have to secure multiple monitors for each drop box. Specifically, the County would need monitors representing each of the two major political parties, and at least one Spanish-speaking monitor, during all times that drop boxes are available between October 24 and November 8, 2022. And to ensure that monitors could take regular breaks, multiple monitors from each constituency would be required for each drop box. *See* Test. of T. Benyo.

28. The County does not currently have enough employees to provide this staffing. *See id.*

29. The County does not currently have a contract with any temporary employment agency that could provide monitoring services. Any new contract would need to be put out for bidding. *See id.*

30. The County is worried about its ability to secure the requisite number of qualified individuals to serve as drop box monitors before drop boxes are scheduled to become available on October 24, 2022. *See id.*

31. Even if the County were able to secure the requisite number of qualified individuals to serve as drop box monitors, the County would need to devote additional time and resources to develop training for, and train, each prospective monitor. *See id.*

32. The County would also need to arrange funding to compensate the drop box monitors. While there is some money available from the state to implement mail-in voting, the County could use this money for other purposes. *See id.*

33. Given these staffing, timing, and resource constraints, it is unlikely that the County would be able to provide in-person monitoring at its drop boxes if ordered to do so. *See id.*

34. If the County is ordered to provide in-person monitoring at its drop boxes for the full time period that drop boxes are scheduled to be available, it would have to eliminate drop box availability to comply with the order. *See id.*

C. Injury to the Alliance and its members

35. Plaintiffs' requested relief would also impose significant burdens on the Alliance, the Alliance's members, and other Lehigh County voters.

36. Thousands of Lehigh County voters, including the Alliance's members, rely on drop boxes to vote. *See* Test. of T. Benyo; Test. of J. Martin; Test. of J. Weinreich; Test. of B. Kremp.

37. Some of these voters are unable to vote in person on election day, such as voters who are unable to wait in long lines because of a disability or limited mobility. *See* Test. of J. Weinreich; Test. of B. Kremp.

38. Some of these voters return their mail ballot via drop box to avoid U.S. Postal Service delays that could prevent their ballots from being delivered on time. *See* Test. of J. Weinreich; Test. of B. Kremp; *cf.* Test. of T. Benyo (explaining that the County has historically received mail ballots after election day and could not count them).

39. Other voters wait until election day or the days immediately prior to cast their ballot so they can gain more information about the candidates. *See* Test. of B. Kremp. These voters are not able to vote via U.S. mail. *See* Test. of T. Benyo (explaining mail ballots received after election day are not counted). A voter who misses the U.S. mail cutoff but is unable to physically vote in person can only vote via drop box.

40. If Lehigh County had to eliminate the availability of drop boxes because they were unable to comply with an order requiring in-person monitoring, *see* ¶ 34, these voters would lose access to this valuable voting method.

41. An order requiring Lehigh County to provide in-person monitoring of drop boxes would burden these voters and would likely lead to some voters becoming disenfranchised, such as voters who are unable to vote in person and voters who miss the deadline to return their mail ballot via U.S. mail.

42. Voters who are forced to mail their ballot sufficiently early to ensure it is delivered by 8:00 p.m. on Election Day would be deprived of the ability to decide their vote based on late-breaking developments in a race. *See* Test. of B. Kremp.

43. Additionally, some Lehigh County voters rely on drop boxes to vote outside of regular business hours. *See* Test. of J. Martin; Test. of J. Weinreich; Test. of B. Kremp.

44. Some of these voters are unable to access drop boxes during regular business hours. For example, some voters, including some of the Alliance's members, rely on transportation and

other assistance from people who are unable to provide such assistance during regular business hours. *See* Test. of J. Weinreich. Other voters—again, including some of the Alliance’s members—may have obligations that prevent them from accessing the drop boxes during regular business hours. *See* Test. of B. Kremp.

45. An order limiting drop box availability to weekday business hours would burden these voters and would likely lead to some voters becoming disenfranchised. *Cf. id.* (explaining that her responsibilities of caring for her mother may prevent her from voting within normal business hours).

46. Ordering Plaintiffs’ requested relief would also burden the Alliance.

47. If Plaintiffs’ requested relief were granted, the Alliance would need to divert staff, time, and funds away from other programs to address the law’s impact on its members who rely on drop boxes to vote and to assist its members in finding other avenues to cast their ballots. *See* Test. of J. Weinreich.

48. As a result, the Alliance would have fewer resources to educate its members and legislators on other public policy issues critical to the Alliance’s members, such as the pricing of prescription drugs and the protection of Social Security, Medicare, and Medicaid benefits. *See id.*

VI. An injunction would not restore parties to any status quo ante.

49. In each election since ballot drop boxes were permitted, the drop box at the Lehigh County Government Center has been offered for 24 hours a day, seven days a week. *See* Test. of T. Benyo.

50. The County has never before been required to limit drop box hours. *See id.*

51. The County has never before provided in-person monitoring of any drop boxes. *See id.*

52. The County has never before been required to provide any kind of in-person monitoring of drop boxes. *See id.*

VII. Plaintiffs are not likely to prevail on the merits.

53. County officials reviewed legal authorities and Department of State guidance to ensure the drop box policies complied with Pennsylvania law. *See* Test. of T. Benyo.

54. According to guidance from the Pennsylvania Department of State, “Business hours for [ballot return] sites do not have to be limited to weekdays or normal business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience to voters.” Interv. Ex. C (Pennsylvania Absentee and Mail-in Ballot Return Guidance). Drop boxes are ballot return sites. *See* Testimony of T. Benyo.

55. Consistent with this guidance, the County chose policies, such as placing one drop box in each district in the County and keeping one of these drop boxes open on weeknights and weekends, that were intended to maximize accessibility and opportunities for all voters. *See* Testimony of T. Benyo.

56. There is insufficient evidence to determine whether, during the 2021 general election, any ballots were deposited by a third party in a drop box without authorization. In fact, there were multiple third-party authorization forms on file with the County. Pls.’ Ex. 1 (District Attorney report on use of drop boxes in 2021 general election).

57. There is no evidence that any ballots cast in the 2021 general election were fraudulently marked. *See* Test. of J. Martin.

58. There is no evidence of any fraud related to the use of drop boxes in the 2021 general election. *See id.*

59. There is no evidence that any ballots cast in the 2021 general election were fraudulently marked. *See id.*

60. After the 2021 general election, and at District Attorney Martin's recommendation, the County adopted new and more conspicuous signage near drop boxes instructing voters about the rules for third-party ballot delivery. *See* Test. of T. Benyo; Test. of J. Martin.

61. After the 2022 primary election, District Attorney Martin identified "very few" incidents where an individual appeared to deposit multiple ballots in a drop box, and "it could not be determined with 100% certainty" whether there were any instances of multiple ballots being returned. *See* Pls.' Ex. 4 (Sept. 12, 2022 Letter from D.A. Martin to County).

62. Drop boxes in Lehigh County are not scheduled to become available for the 2022 general election until October 24. Therefore, voters have not yet deposited any ballots in drop boxes in the 2022 general election, and there cannot exist any evidence of unauthorized third-party ballot delivery in the 2022 general election.

VIII. The injunction Plaintiffs seek is not reasonably suited to abate the offending activity.

A. The County is already taking reasonable steps.

63. Lehigh County has already adopted many policies that support open and accessible voting while also promoting voter compliance with the Election Code's third-party delivery rules, and it refined these policies in response to D.A. Martin's investigation.

64. These policies are reasonable and effective.

i. Signage

65. Adjacent to the drop box at the Government Center is a large sign in bright red font with instructions on third party ballot return. *See* Test. of T. Benyo; Interv. Ex. A (image of Lehigh

County Government Center drop box); Interv. Ex. B (image of sign located at Lehigh County Government Center drop box).

66. The instructions are in English and Spanish. *See* Test. of T. Benyo; Interv. Ex. B.

67. The County made the sign even bigger and more conspicuous after D.A. Martin's report. *See* Test. of T. Benyo; Test. of J. Martin.

68. The sign says, "Third-Party return of ballots is prohibited unless assisting a disabled voter or an emergency absentee voter. Such assistance requires a signed declaration by the voter and the person rendering assistance." Interv. Ex. B; Test. of T. Benyo.

69. This language is copied directly from Department of State guidance. *See* Test. of T. Benyo; Interv. Ex. C (Pennsylvania Absentee and Mail-in Ballot Return Guidance).

70. The other four drop boxes in the County are accompanied by similar signs. *See* Test. of T. Benyo.

71. The signage has successfully reduced incidents of perceived unauthorized third-party ballot return. *See* Test. of J. Martin; *see also* Pls.' Ex. 4 (Sept. 12, 2022 Letter from D.A. Martin to County).

ii. County website

72. The Lehigh County webpage on mail voting provides warnings about unauthorized third-party ballot delivery and instructions about how a disabled voter may designate an authorized agent. *See* Interv. Ex. D.

iii. State website

73. The Department of State webpage on mail voting provides warnings about unauthorized third-party ballot delivery and instructions about how a disabled voter may designate an authorized agent. *See* Test. of T. Benyo.

iv. Ballot instructions

74. The vote by mail instructions that are provided with every absentee and mail-in ballot explain the rules for third-party ballot delivery, including that such delivery is prohibited without authorization from a disabled or emergency absentee voter. *See* Interv. Ex. G.

75. The County has made these rules even more clear and conspicuous for the 2022 elections. *See* Test. of T. Benyo.

v. Authorization form

76. The official form that disabled voters may use to designate an authorized agent includes instructions about who may use the form and who may serve as a designated agent. *See* Interv. Ex. F.

vi. Video monitoring

77. Each drop box in the County is under conspicuous and functional electronic surveillance. *See* Test. of T. Benyo; *see also* Interv. Ex. A (image of Lehigh County Government Center drop box).

78. The drop box at the Lehigh County Government Center—the only drop box accessible from the outside—is monitored by two video cameras: one outside the building monitoring the mail slot, and one inside the building monitoring the box containing the ballots. *See* Test. of T. Benyo; Interv. Ex. A.

vii. Criminal penalties

79. The County provides evidence of potentially unauthorized third-party ballot return to D.A. Martin for further investigation and potential prosecution. *See* Test. of T. Benyo; Test. of J. Martin.

B. Limiting drop box hours and requiring in-person monitoring is not the least restrictive means to abate unauthorized third-party ballot delivery.

80. Stationing in-person monitors at all five drop boxes for the entire period they are available is an exceptional burden. *See* Test. of T. Benyo (expressing doubt that County would be able to provide such in-person monitoring); *cf.* Test. of J. Martin (explaining the prohibitive burden of stationing employees at every drop box).

81. Furthermore, Plaintiffs have introduced no concrete evidence that either reduced hours or County monitors would reduce the likelihood that unauthorized third parties will deposit ballots in the drop boxes.

82. If there is any risk of unauthorized third parties depositing mail ballots in drop boxes, there are other, more effective and less drastic ways to reduce that risk. For example, prominent signage, such as that deployed prior to the 2022 primary election, has proven effective.

IX. A preliminary injunction would adversely affect the public interest.

83. Drop boxes provide an important opportunity for voters who are unable to vote in person. This is especially true for those who need to vote outside of regular business hours and for voters who do not trust the postal service to timely deliver their ballots, or who are casting a ballot too close to election day to cast their ballot via mail. *See* Test. of T. Benyo; *see also* Test. of B. Kremp.

84. In previous elections there have been problems with voters returning ballots by mail that are received after the election and therefore cannot be counted. Thus, drop boxes are likely to be especially essential in the days before the election. *See* Test. of T. Benyo.

85. Voters have responded to the County with gratitude for the availability of drop boxes. *See id.*

86. Thousands of Lehigh County voters rely on drop boxes to vote, and many rely specifically on the availability of drop boxes outside of regular business hours. *See* Test. of J. Weinreich; Test. of B. Kremp; Test. of J. Martin.

87. If the drop boxes were eliminated, voters would face greater difficulty voting. *See* Test. of J. Weinreich; Test. of B. Kremp.

88. Training for Lehigh County election workers began October 8, 2022. Test. of T. Benyo.

89. Because of the burdens associated with recruiting, hiring, training, and compensating drop box monitors, an order requiring the County to provide in-person monitoring of drop boxes would likely compel the County to eliminate drop boxes altogether. *See id.*

PROPOSED CONCLUSIONS OF LAW

90. Plaintiffs are not entitled to relief for at least three reasons.

91. *First*, Plaintiffs lack standing because they have no “substantial, direct and immediate interest” in this litigation. *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003).

92. *Second*, Plaintiffs have no valid cause of action. In fact, Plaintiffs have alleged *no* cause of action: their Complaint asserts only a violation of the Election Code, which of itself is not a cause of action. Plaintiffs’ belated attempts to add constitutional claims through briefing are impermissible. And their constitutional claims fail in any event

93. *Third*, Plaintiffs have failed to establish each of the six prerequisites of a preliminary injunction. *See Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004) (explaining that injunctive relief must be denied when any one of the six prerequisites are not met).

I. Plaintiffs lack standing.

94. Courts may not adjudicate any matter unless it is brought by a party with standing. *See, e.g., J.L.B. v. J.B., No. 14 WDA 2014*, Nos. 2032 WDA 2013, 14 WDA 2014, 2014 WL 10588458, at *2–3 (Pa. Super. Ct. Sept. 9, 2014) (reversing and vacating where trial court incorrectly found that complainants had standing).

95. No evidence in the record establishes that Plaintiffs are “aggrieved” as required to establish standing under state law. To be aggrieved, a plaintiff must “show that he has a substantial, direct and immediate interest in the outcome of the litigation[.]” *Hickson*, 821 A.2d at 1243. Plaintiffs’ interests are not “substantial,” “direct,” or “immediate.”

96. Plaintiffs do not have a “substantial” interest because their “interest in the outcome of the litigation” does not “surpass[] the common interest of all citizens in procuring obedience to the law.” *Id.* at 1243. Plaintiffs’ intention to vote does not render their interest in this matter materially different than the interests of all citizens.

97. Plaintiffs also do not have a “direct” interest in the litigation because they cannot show that “the matter complained of caused harm to [their] interest.” *Id.* They have not suffered harm—and cannot reasonably expect to suffer harm—because there is no concrete evidence that unauthorized third-party ballot return will occur in the 2022 general election.

98. Additionally, Plaintiffs lack an “immediate” interest because there is no “causal connection between the action complained of and the injury to the party challenging it.” *Id.* Because there were no confirmable cases of unauthorized third-party ballot return in the 2022 primary election after the County implemented more conspicuous signage, there is no basis to expect unauthorized third-party ballot delivery in the 2022 general election. “But even assuming the evidence [of previous unauthorized ballot delivery] 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.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 378 (W.D. Pa. 2020) (finding plaintiffs lacked standing because alleged harm was too speculative).

II. Plaintiffs do not have a valid cause of action.

99. The Pennsylvania Rules of Civil Procedure require plaintiffs to state each cause of action in the complaint. Pa.R.C.P. 1019(a); 1020(a).

100. The purpose of the pleadings is to place defendants on notice of the specific claims against which they will have to defend. *See City of New Castle v. Uzamere*, 829 A.2d 763 (Pa. Cmwlth. 2003) (citing Pa.R.C.P. 1019(a)).

101. A complaint must give defendants notice of what the plaintiffs’ specific claims are, as well as the grounds upon which they rest. *See Unifund v. Sheridan*, No. 2012 CV 4944, 2013 WL 10253095, at *3 (Pa. Com. Pl. June 24, 2013).

102. Complaints that fail to properly identify a cause of action as required by the Rules must be dismissed. *See Bouchon v. Citizen Care, Inc.*, 2017 PA Super 379, 176 A.3d 244, 262 (2017) (affirming trial court’s dismissal of complaint for “failure to present an understandable and sufficiently pled complaint under the rules of court” where complaint failed to properly plead causes of action under Rules 1019(a) and 1020(a)).

103. Plaintiff’s Complaint does not identify a cause of action, and therefore must be dismissed on that basis. *See id.* at 262; *Catanzaro v. Pennell*, 238 A.3d 504, 507 (Pa. Super. Ct. 2020) (explaining complaint is not “legally sufficient” if it fails to “give the defendant notice of what the plaintiff’s claim is and the grounds upon which it rests”).

104. For the first time in their reply brief, Plaintiffs suggested they are moving to vindicate rights under the federal and state constitutions. *See Reply of Pls. to Defs.’ Response in*

Opp. to Pet. for Special & Prelim. Inj. at 4-5. This belated attempt to amend their pleadings is impermissible: as the Pennsylvania Supreme Court has made clear, “a reply brief is not an appropriate vehicle to raise a new claim.” *Commonwealth v. Colavita*, 993 A.2d 874, 893 (Pa. 2010). Plaintiffs failed to provide sufficient “notice of what [Plaintiffs’] claim is and the grounds upon which it rests.” *Catanzaro*, 238 A.3d at 507.

105. Even if Plaintiffs were permitted to raise a claim under the federal Constitution, they still have not identified which provision they seek to litigate. Plaintiffs cite only to *Reynolds v. Sims*, 377 U.S. 533 (1964), a redistricting case where the U.S. Supreme Court held that voters who resided in state legislative districts that were grossly overpopulated relative to other state legislative districts stated a claim for vote dilution under the Equal Protection Clause.

106. Unlike in *Reynolds*’s malapportionment context, Plaintiffs cannot identify any differential treatment in Lehigh County that would implicate the Equal Protection Clause. Indeed, a federal court in Pennsylvania has already *rejected* the claim that the Equal Protection Clause requires drop boxes in Pennsylvania to be monitored in-person. *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 382-96.

107. During argument, Plaintiffs cited *Reynolds* for its recognition in passing that the right to vote may not be “diluted by ballot-box stuffing.” *Reynolds*, 377 U.S. at 555. Because *Reynolds* did not concern ballot-box stuffing, this line was mere dicta. And more critically, *Reynolds* did not purport to recognize a freewheeling claim for voters to seek prophylactic relief from irregularities under state election law. *See Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 394 (“‘Garden variety’ election irregularities, let alone the ‘risk’ of such irregularities, are simply not a matter of federal constitutional concern ‘even if they control the outcome of the vote or election.’”). Instead, *Reynolds* cited two cases that upheld criminal penalties—which are not at

issue here—against election rigging. *See* 377 U.S. at 555 (citing *United States v. Saylor*, 322 U.S. 385 (1944), and *Ex parte Siebold*, 100 U.S. 371 (1879)).

108. To the extent Plaintiffs intend to allege state constitutional rights, the Free and Equal Elections Clause—which requires that elections be kept unrestricted to the greatest degree feasible—cannot be used as a cudgel to impose further restrictions on the franchise. *See League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018) (“In accordance with the plain and expansive sweep of the words ‘free and equal,’ we view them as indicative of the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth[.]”).

109. As Plaintiffs recognize, this Clause requires “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *Id.* at 804. A provision that requires open and unrestricted voting opportunities cannot require *closing* drop boxes and imposing *more* restrictions on voting opportunities.

110. 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.*, 493 F. Supp. 3d at 396-97.

III. Plaintiffs fail to satisfy any of the preliminary injunction prerequisites.

111. 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). Plaintiffs fail to satisfy this demanding standard.

112. Plaintiffs also fail to satisfy each of the six prerequisites for preliminary injunctive relief: 1) the injunction is not necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) greater injury would not result from refusing an injunction than from granting it, and concomitantly, issuance of an injunction will substantially harm other interested parties in the proceedings; 3) a preliminary injunction will not properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) Plaintiffs are not likely to prevail on the merits; 5) the injunction Plaintiffs seek is not reasonably suited to abate the offending activity; and 6) a preliminary injunction will adversely affect the public interest. *Warehime*, 860 A.2d at 46-47.

113. A court must deny injunctive relief when any one of these “essential prerequisites for a preliminary injunction is not satisfied.” *Id.* at 46 (quotation omitted).

A. Plaintiffs do not face immediate, irreparable injury.

114. Plaintiffs fail to satisfy the first element of injunctive relief for the same reason they lack standing: they have failed to allege and establish a cognizable injury.

115. Plaintiffs anticipate that their votes may be “diluted” by ballots returned by unauthorized third parties, but Plaintiffs have failed to adduce “concrete evidence,” *Kiddo v. Am. Fed’n of State*, 239 A.3d 1141, 2020 WL 4431793, at *9 (Pa. Cmwlth. 2020), or “actual proof of irreparable harm” as required to warrant a preliminary injunction. *Reed v. Harrisburg City Council*, 927 A.2d 698, 706 (Pa. Cmwlth. 2007) (dissolving preliminary injunction issued by trial court in part because plaintiff failed to offer “actual proof of irreparable harm”).

116. *First*, as a threshold matter, “[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” (cleaned up)).

117. *Second*, the evidence of past unauthorized ballot return is “scant.” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 378.

118. District Attorney Martin’s conclusion that individuals returned multiple ballots in the 2021 general election without authorization forms “on file” with the County is not evidence of wrongdoing because the Election Code does not require completed authorization forms to be filed with the County.

119. The Election Code permits an authorized individual to deposit an emergency absentee elector’s ballot. 25 P.S. § 3146.2a(a.3)(4). Furthermore, “[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.*

120. Likewise, though the Election Code is silent as to the authorization process for depositing a regular absentee or mail-in ballot on behalf of a disabled voter, 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).

121. District Attorney Martin made no effort in his investigation to determine whether the individuals who deposited multiple ballots were doing so with authorization. Instead, he relied wholly on the absence of authorization forms filed with the County.

122. Neither the Election Code nor *Dipietrae* suggest that either the elector or the depositor must file anything with the County for the vote to be valid. The Code merely requires that the authorized representative be “designated in writing by the elector”; it makes no mention of any requirement that the authorization be filed with any government agency. 25 P.S. § 3146.2a(a.3)(4). And the trial court order affirmed by *Dipietrae* made no mention of *either* requiring a written authorization *or* depositing such an authorization with the County. 666 A.2d at 1133.

123. Because the Election Code does not include any filing requirement for authorization forms, the provision must be construed “liberally in favor of the right to vote.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062 (Pa. 2020) (quoting *Appeal of James*, 105 A.2d 64, 65-66 (1954)). *Dipietrae* does not alter that for disabled voters; it is similarly silent, so the exception it established must also be construed not to disenfranchise voters for failure to deposit an authorization form with the County. *Cf. In re Luzerne Cnty. Return Bd.*, 447 Pa. 418, 420 (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.), *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[.]”).

124. Accordingly, a ballot is not invalid solely because either the voter or the depositor retained the authorization rather than filing it with the County—and the absence of such filings is no indicator of unauthorized third-party ballot deposits.

125. Even if there were evidence of unauthorized ballot delivery in the 2021 general election, Plaintiffs’ attempt to rely on any such irregularities as probative for the 2022 general

election would still fail. There was no evidence of unauthorized ballot return in the 2022 primary election, when the County implemented new safeguards that will also be in place for the 2022 general election.

126. *Finally*, Plaintiffs have presented no “evidence of a certainly impending illegal practice *that is likely to be prevented by the precautions they seek.*” *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 379 (emphasis added).

127. Because Plaintiffs have presented no evidence at all that limiting the hours during which drop boxes are available or requiring in-person drop box monitors will impact the incidence of unauthorized third-party ballot drop-offs, the requested injunction is not warranted.

B. Greater injury would not result from refusing an injunction than from granting it.

128. Plaintiffs have not demonstrated that any harm would flow from the refusal to issue a preliminary injunction.

129. Conversely, granting Plaintiffs’ requested injunction would injure the County, Lehigh County voters, and the Alliance.

130. Plaintiffs’ requested injunction would burden the County 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”). Plaintiffs’ requested relief is so burdensome that, as Mr. Benyo testified, the County would not be able to comply with an order requiring in-person monitoring of drop boxes during regular business hours. To attempt to comply, the County would need to spend time and resources recruiting, training, compensating, and supervising drop box monitors. Further, the County would need to adjust decisions about the location, number, and

availability of drop boxes, assignment and placement of staff, and budgeting to account for the proposed in-person monitoring requirement. Such requirements—and the administrative chaos that would ensue from imposing these never-before-implemented requirements into a process that is already complicated and unpredictable—would constitute a significant burden on the County. *See id.*

131. Plaintiffs’ requested injunction would also injure Lehigh County voters. Thousands of Lehigh County voters rely on drop boxes to vote, many outside of normal business hours. As a result, changes to drop box availability—especially this close to the election— invites voter confusion and upsets voters’ plans for casting a ballot. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 370 (Pa. 2020) (observing “orderly and efficient election process” may be “crucial to the protection of a voter’s participation in that process”).

132. Furthermore, limiting the availability of drop boxes to “normal business hours,” such as 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. If the County is forced to limit drop box availability further—or to eliminate drop boxes altogether, because it is unable to comply with a court order mandating in-person monitoring—some voters may not be able to cast a ballot. This is especially true in light of the proximity of the election and the clear record evidence that some voters are unable to vote in person on election day, and that ballots mailed via U.S. mail on election day or during the days immediately prior may not arrive in time to be counted. Reduction or elimination of drop box availability would injure voters by resulting in the disenfranchisement of at least some Lehigh County voters. *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”).

133. An injunction would also injure the Alliance. Because many Alliance members rely on drop boxes to vote, and some rely on drop boxes outside of normal business hours, an injunction threatens the disenfranchisement of some Alliance members. Such disenfranchisement would harm both those members and the Alliance's interests in ensuring its members are civically engaged and able to support its policy initiatives.

134. Additionally, if drop box availability were reduced or eliminated, the Alliance would need to divert resources from other initiatives to devote time and money to educate their members about drop box availability and help them cast a ballot. Injunctive relief would therefore injure the Alliance.

135. In light of the evidence that Plaintiffs' requested injunction would injure the County and the Alliance, and the lack of evidence that refusing the injunction would harm Plaintiffs, injunctive relief is improper. *See Herman v. Dixon*, 393 Pa. 33, 38, 141 A.2d 576, 578 (1958) (holding injunctive relief improper, and reversing trial court's grant of preliminary injunction, where record supported conclusion that defendants would suffer the greater injury if relief were granted).

C. An injunction would not restore parties to any status quo ante.

136. Plaintiffs have failed to establish that injunctive relief "will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct." *SPTR, Inc. v. City of Philadelphia*, 150 A.3d 160, 166 (Pa. Cmwlth. 2016). The purpose of a preliminary injunction is to place the parties in the position they occupied before the acts complained of, until the merits of the controversy can be fully heard. *See Weeks v. Dep't of Hum. Servs.*, 255 A.3d 660, 666 (Pa. Cmwlth. 2021). "The status quo is the factual, not the legal, state of affairs between the parties." *Cole v. Zwergel*, 273 A.3d 1047, 2022 WL 420082, *4 (Pa. Super. Ct. 2022).

137. An order requiring the County to monitor drop boxes in-person would create a new status quo because the County has never previously conducted any in-person monitoring of drop boxes.

138. An order requiring the County to limit drop box availability to regular business hours on weekdays would create a new status quo because the County has never previously limited the availability of all of its drop boxes to regular business hours on weekdays.

139. Because Plaintiffs' requested relief would not restore the parties to any status quo, and instead would impose brand new requirements on the County, the requested injunction is impermissible. *See United Union of Roofers, Waterproofers, & Allied Workers, Loc. Union No. 37 v. N. Allegheny Sch. Dist.*, No. 2392 C.D. 2015, 2017 WL 1382227, at *5 (Pa. Cmwlth. Apr. 18, 2017) (reversing trial court's grant of preliminary injunction because, rather than preserving the status quo ante, the injunction imposed new requirements and revised defendants' practices).

D. Plaintiffs are not likely to prevail on the merits.

140. The preliminary injunction should also be denied because Plaintiffs are not likely to prevail on the merits.

141. Essentially, Plaintiffs "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." *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 343.

142. Plaintiffs' requested injunction is improper because the County has shown that its "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).

143. First, Defendants' conduct was reasonable because they have undertaken extensive efforts to address the possibility that unauthorized third parties might deposit ballots in the drop boxes.

144. Second, as set forth above, Plaintiffs lack standing and their Complaint is fatally deficient because it fails to allege a cause of action.

E. The injunction Plaintiffs seek is not reasonably suited to abate the offending activity.

145. The Court should also deny Plaintiffs' requested relief because it is not narrowly tailored. *See Crowe ex rel. Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Cmwlth. 2002) (injunctive relief "must be narrowly tailored to address the wrong plead[ed] and proven").

146. Plaintiffs cannot show that their relief is narrowly tailored because they have not demonstrated the existence of any offending acts committed by the County. *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).

147. Additionally, 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 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").

148. Because the County's multifaceted efforts to mitigate improper delivery—including improved, more conspicuous signage—are reasonable and, as D.A. Martin admitted, "very effective," 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 Donald J. Trump for President Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, *9 (Sept. 8, 2020) (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)).

149. It is unlikely that adding in-person monitoring or limiting drop box hours to “normal business hours” will accomplish anything these extensive efforts have not already achieved.

150. In fact, Plaintiffs have failed to demonstrate that posting monitors at drop boxes is likely to abate unauthorized third-party ballot drop-offs, particularly where there were no observed instances of third-party ballot delivery in the 2022 primary election, during which larger signs were posted but continuous in-person monitors were not present.

F. A preliminary injunction would adversely affect the public interest.

151. Finally, the preliminary injunction should not be granted because it would be adverse to the public interest: it would unduly burden the County, inject chaos into the administration of an election already well under way, and potentially disenfranchise voters.

152. These unacceptable outcomes are contrary to the public interest. *See Pa. Democratic Party*, 238 A.3d at 370 (observing “orderly and efficient election process” may be “crucial to the protection of a voter’s participation in that process”); *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[.]”).

153. 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 even as voters have already begun to request and return mail ballots. *See Valenti*, 962 F.2d at 301 (noting “strong public interest in an orderly primary [election] less than three weeks away”).

PROPOSED ORDER DENYING INJUNCTIVE RELIEF

154. Because Plaintiffs have failed to establish that they are entitled to a preliminary injunction, the Motion for Preliminary Injunction is DENIED.

Dated: October 12, 2022

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 Intervenor-Defendant
Pennsylvania Alliance for Retired
Americans*

**Admitted Pro Hac Vice*

Respectfully submitted,

By: /s/ Claire Blewitt Ghormoz

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

* *Admitted Pro Hac Vice*

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

*Attorneys for 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,

and

PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS,

Intervenor-Defendant.

No. 2022-c-1849

ENTRY OF APPEARANCE

TO THE CLERK OF JUDICIAL RECORDS:

Kindly enter my appearance as counsel on behalf of Intervenor-Defendant the Pennsylvania Alliance for Retired Americans in the above-captioned matter. It is requested that notice of all papers filed in this matter be served electronically upon the e-mail address of cghormoz@dilworthlaw.com and at the address set forth below.

/s/ Claire Blewitt Ghormoz

Claire Blewitt Ghormoz (PA ID No. 320816)

DILWORTH PAXSON LLP

1500 Market St., Suite 3500E

Philadelphia, PA 19102

(215) 575-7000 (phone)

(215) 575-7200 (facsimile)

cghormoz@dilworthlaw.com

Attorney for Intervenor-Defendant

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CERTIFICATE OF SERVICE

I, Claire Blewitt Ghormoz, hereby certify that on October 11, 2022, I caused the foregoing Proposed Findings of Fact and Conclusions of Law to be served via the Lehigh County Court of Common Pleas' electronic filing system upon the following counsel of record:

Sarah M. Murray, Esq., No. 203206
Deputy County Solicitor
Lehigh County Government Center
Department of Law – Room 440
17 South 7th Street
Allentown, PA 18101
T: (610) 782-3180

Joshua S. Mazin, Esq., No. 87680
108 East Center Street
Nazareth, PA 18064
T: (610) 365-2670

*Attorneys for Defendants Jennifer Allen, Phillips Armstrong,
Timothy Benyo, Diane Gordian, Dennis Nemes, and
Lehigh County Board of Elections*

Walter S. Zimolong, III, Esq., No. 89151
Zimolong LLC
PO Box 552
Villanova, PA 19085
T: (609) 932-8836

Nicholas R. Barry
America First Legal Foundation
Nicholas.barry@aflegal.org
611 Pennsylvania Avenue SE #231

*Attorneys for Plaintiffs Sean Gill, Robert Smith,
Tim Ramos and Jackie Rivera*

/s/ Claire Blewitt Ghormoz
Claire Blewitt Ghormoz

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.

Submitted by: Attorney for Intervenor-Def.

Signature: /s/ Claire Blewitt Ghormoz

Name: Claire Blewitt Ghormoz

Attorney No. (if applicable): 320816

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