

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**Docket No. 1135 CD 2020**

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**SEAN GILL, et al.,**

**Appellants,**

**v.**

**LEHIGH COUNTY BOARD OF ELECTIONS, et al.,**

**Appellees.**

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**Appeal from Order entered October 18, 2022, of the Court of Common  
Pleas of Lehigh County, No. 2022-c-1949**

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**OPPOSITION OF PENNSYLVANIA ALLIANCE  
FOR RETIRED AMERICANS TO APPELLANTS' MOTION FOR STAY  
AND INJUNCTION PENDING APPEAL**

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## INTRODUCTION

Through their motion for stay and injunction pending appeal, four Allentown voters (“Plaintiffs”) ask this Court to rewrite the Lehigh County Board of Elections’ lawful drop box policies while voting is already underway. As the Court of Common Pleas of Lehigh County appropriately found, “Plaintiffs are not entitled to such extraordinary relief.” Opinion of Oct. 18, 2022 (“Op.”), at 2. In fact, the trial court found that Plaintiffs failed to satisfy even *a single one* of the prerequisites for preliminary injunctive relief. These deficiencies remain fatal on appeal, where Plaintiffs inappropriately ask this Court to issue a mandatory injunction that is even “broader than the relief sought before the lower court.” Order of Oct. 20, 2022, at 1 n.1. That court appropriately denied Plaintiffs’ narrower request, and this Court should similarly deny Plaintiffs’ new request for an even broader injunction on appeal.

Here, as in the Court of Common Pleas, Plaintiffs cannot make the mandatory “strong showing” that they are likely to prevail on the merits. They have no legal right to use the judiciary to commandeer county elections officials and burden them with the new duties and expenses of in-person drop box monitoring, let alone to suspend the use of drop boxes entirely. Nor can Plaintiffs show that they are at risk of irreparable injury—as a federal court in Pennsylvania ruled just two years ago, Plaintiffs’ “vote dilution” theory of harm is not cognizable in this context. *See*

*Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 380-81 (W.D. Pa. 2020). And as the Court of Common Pleas has found, based on the evidence presented by the parties, Plaintiffs’ requested relief will substantially harm other interested parties and the public interest. The Lehigh County Board of Elections and its members and staff (the “County”) will be unable to provide the in-person drop box monitoring that Plaintiffs demand, and “the injunctive relief sought at this late date is likely to create confusion and uncertainty around the election, further eroding the public’s confidence in our election process, particularly when mail-in ballots have already been sent to voters[.]” Op. at 13.

Plaintiffs’ requested stay and request for injunction pending appeal should be expeditiously denied.

## **BACKGROUND**

### **I. Factual Background**

In 2019, the General Assembly enacted Act 77, which—among other provisions—supplemented Pennsylvania’s limited absentee voting opportunities by introducing no-excuse mail-in voting. *See* 25 P.S. § 3150.11. To enable voters to return their absentee and mail-in ballots in a timely and secure manner, in 2020 Lehigh County began offering five ballot “drop boxes”—secure receptacles in which voters can deposit their absentee or mail-in ballot before and on election day, eliminating the need for voters to rely on postal service delivery. *See* Op. at 6. In

August 2020, the Department of State issued “Absentee and Mail-In Ballot Return Guidance” advising counties to make drop boxes available outside of normal business hours, “including weeknights or weekend hours to ensure maximum flexibility and convenience to voters.” *See id.* at 8.<sup>1</sup> Consistent with this guidance, the County has ensured that one drop box location, at the Lehigh County Government Center, is available 24 hours per day during the weeks before the election. *Id.* at 6. Also consistent with the Department of State’s guidance, the County monitors the drop boxes with video surveillance and mounts signage near the drop boxes explaining the restrictions on third-party ballot delivery. *See id.* at 5.

After the 2021 general election, Lehigh County District Attorney James Martin tasked a detective with investigating the possibility that unauthorized third parties deposited ballots into drop boxes. *Id.* at 3-4. The detective purportedly identified some instances where an individual appeared to deposit between two and five ballots into the drop box, but there was no evidence that any individuals returned multiple ballots unlawfully. *See id.* at 4.<sup>2</sup>

Following the 2021 general election, at D.A. Martin’s suggestion, the County

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<sup>1</sup> This guidance, admitted into evidence as Intervenor’s Exhibit C, is available at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotReturn\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf).

<sup>2</sup> While voters are ordinarily required to return their own ballot, individuals casting an “emergency absentee ballot” and disabled voters have long been permitted to authorize a third-party to return their marked ballot. *See* 25 P.S. § 3146.2(4) (emergency absentee voters); *DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1133 (Pa. Cmwlth 1995), *aff’d*, 673 A.2d 905 (Pa. 1996) (disabled voters).

implemented new, more conspicuous signage at drop box locations, indicating that unauthorized third-party depositing of ballots is impermissible. *See id.* at 5. After the 2022 primary election, the detective’s review of drop box security footage revealed at most “very few” instances of individuals dropping off multiple ballots, and again the detective could not confirm any instances of unauthorized third-party ballot drop-off. *See id.* D.A. Martin credited the newly conspicuous signage for reducing—and possibly eliminating—incidents of perceived unauthorized third-party ballot return. *Id.* at 5-6.

## **II. Procedural History**

On September 1, 2022, Plaintiffs filed a complaint and simultaneously moved for a preliminary injunction, seeking to require the County to limit drop box availability to regular business hours and to provide in-person monitors for every drop box. At a hearing held on October 7, the court granted the application of the Pennsylvania Alliance for Retired Americans (the “Alliance”) to intervene as a defendant. On the preliminary injunction, the court accepted testimony from two voters, who described the importance of drop boxes; from D.A. Martin, who described the possible but unconfirmed unauthorized third-party ballot delivery in the 2021 general election, and that this issue appeared to have been resolved in the 2022 primary election; and from Timothy Benyo, the County’s Chief Clerk and Director of Elections, who testified about the many steps the County takes to ensure

drop boxes are provided consistently with Pennsylvania law, and about the practical impossibility of recruiting, hiring, and training in-person drop box monitors in advance of the 2022 general election.

On October 18, the court denied the requested injunction, finding that Plaintiffs failed to satisfy any of the prerequisites for injunctive relief, and on October 20 the court denied Plaintiffs' motion for stay and injunction pending appeal.

### **LEGAL STANDARD**

A stay pending appeal is not warranted unless each of four prerequisites is satisfied:

1. The petitioner makes a strong showing that he is likely to prevail on the merits.
2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
4. The issuance of a stay will not adversely affect the public interest.

*Pa. Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983). Even where an applicant has made a substantial case on the merits, the applicant must also establish that each of the second, third, and fourth factors “*strongly* favor interim relief” before a stay may be granted. *Id.* at 809 (quotation omitted).

## ARGUMENT

Plaintiffs have failed to meet the high standard required to warrant a stay.

### **I. Plaintiffs failed to show they are likely to prevail on the merits.**

A party seeking a stay must “make a strong showing that he is likely to prevail on the merits.” *Young J. Lee, Inc. v. Commonwealth, Dep’t of Revenue, Bureau of State Lotteries*, 474 A.2d 266, 272 (Pa. 1983) (holding that Commonwealth Court abused its discretion in granting stay). To succeed on the merits of their appeal and obtain a preliminary injunction, Plaintiffs would have to show that the trial court erred on *every* prerequisite for injunctive relief that it found to be lacking. *Warehime v. Warehime*, 860 A.2d 41, 46-47 (Pa. 2004). Notably, a mandatory injunction commanding the performance of affirmative acts, as Plaintiffs seek here, is “the rarest form of injunctive relief and is often described as an extreme remedy.” *Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 582 (Pa. Cmwlth. 2012). Plaintiffs seeking a mandatory injunction must establish a “clear right to relief.” *Roberts v. Bd. of Dirs. of the Sch. Dist. of Scranton*, 341 A.2d 475, 478 (Pa. 1975). Plaintiffs cannot do so, as they failed to establish each of the six requirements for preliminary injunctive relief. *See Warehime*, 860 A.2d at 46-47.

On the *first* prerequisite—the injunction must be necessary to prevent immediate and irreparable harm—Plaintiffs have not established any harm, or even a violation of law. As a federal court in Pennsylvania held just two years ago, the

very “harm” alleged here (that individuals may misuse drop boxes in future elections) is entirely speculative and noncognizable. *See Trump for President, Inc.*, 493 F. Supp. 3d at 380-81, 396-97.

On the *second* prerequisite—the injunction must not substantially harm other interested parties—Plaintiffs’ requested relief would significantly burden the County, the Alliance, and voters, particularly because it comes while the election is already well underway. The injunction would burden the County by requiring it to scramble to reconfigure its 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. *See Op.* at 7, 14. It would also harm voters and the Alliance by making voting more difficult and confusing, potentially resulting in disenfranchisement. *Id.* at 13-14.

On the *third* prerequisite—the injunction must properly restore parties to their status as it existed immediately prior to the wrongful conduct—Plaintiffs’ requested relief would “destroy” the status quo by requiring new policies and limitations that Lehigh County has never previously used. *Herman v. Dixon*, 141 A.2d 576, 578 (Pa. 1958); *see Op.* at 12.

On the *fourth* prerequisite—Plaintiffs must be likely to prevail on the merits of their claims—the County needed only to show 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). It did both. The County has implemented many procedures to mitigate the unauthorized third-party ballot return that Plaintiffs fear, including video monitoring and conspicuous signage, and Plaintiffs' lone affirmative witness—D.A. Martin—testified that these measures have proven effective. Op. at 5-6. Additionally, the County has multiple defenses. Plaintiffs lack standing because they assert only a generalized interest in “procuring obedience to the law,” which the Pennsylvania Supreme Court has held to be insufficient. *In re Hickson*, 821 A.2d 1238, 1242 (Pa. 2003). And Plaintiffs never identified a cause of action—they failed altogether to allege the source of law that authorizes suits to compel county election officials to adopt more stringent election security measures.

On the *fifth* prerequisite—Plaintiffs' requested relief must be reasonably suited to abate the offending activity—the trial court correctly found that in-person drop box monitoring would be “superfluous” to measures the County has already implemented. Op. at 13.

On the *sixth* prerequisite—Plaintiffs' requested injunction must not adversely affect the public interest—the trial court correctly found that the requested relief “may unduly interfere with voters lawfully returning their ballots to the drop box,” and that “the injunctive relief sought at this late date is likely to create confusion and uncertainty around the election, further eroding the public's confidence in our election process[.]” *Id.*

Plaintiffs' failure to establish all six of these factors—let alone a single one of them—required the denial of injunctive relief. *See Warehime*, 860 A.2d at 46. Thus, Plaintiffs cannot make the required “strong showing” that they are likely to prevail on the merits of their appeal.

**II. Plaintiffs have not shown that they will suffer irreparable injury absent the requested relief.**

Plaintiffs must also establish irreparable harm to obtain a stay. *See Young J. Lee, Inc.*, 474 A.2d at 267-68 (reversing Commonwealth Court and dissolving stay because appellees failed to demonstrate irreparable harm). As the court below recognized, Plaintiffs have not identified *any* cognizable harm. *See Op.* at 11; Order at 2 n.1; *Donald J. Trump for President, Inc.*, 493 F. Supp. 3d at 380-81.

**III. Issuance of a stay would substantially harm interested parties.**

Plaintiffs' application further fails because they cannot show—as they must—that “other interested parties in the proceedings” will not be “substantially harm[ed]” by the stay. *Pa. Pub. Util. Comm’n*, 467 A.2d at 809. The County lacks the staffing capacity to restructure its election administration while voting is already underway, *see Op.* at 7, 14, and so the injunction requested below, “particularly at this late date, would adversely affect the public interest and harm the rights of interested parties.” *Id.* at 14.

**IV. Issuance of a stay would adversely affect the public interest.**

Finally, a stay would adversely affect the public interest. As the trial court

recognized in its Order denying Plaintiffs' application for stay and injunction pending appeal, Plaintiffs now seek to suspend the County's use of drop boxes altogether, which is "broader than the relief sought before the lower court." Order at 1 n.1. Plaintiffs have never presented "any evidence, brief[ing], or argu[ment]" on this issue, and the requested relief is therefore waived. *Id.* "Most importantly," the trial court continued, "many Lehigh County voters" rely on drop boxes to "securely and timely deliver their ballots." *Id.* at 2 n.1. "Accordingly, significant public interest factors would certainly be affected by the elimination of drop boxes, and such action would be contrary to the permitted actions of the Board." *See id.* (citing *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (holding the Election Code authorizes counties to use drop boxes). The trial court was correct: any disruption to drop box availability now would be catastrophic for the voters who rely on them.

### **CONCLUSION**

The Court should deny Plaintiffs' application for a stay and injunction pending appeal.

Dated: October 20, 2022

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