

IN THE COURT OF COMMON PLEAS, LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

SEAN GILL, ROBERT SMITH, TIM :
RAMOS, and JACKIE RIVERA, :
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 Plaintiffs : NO. :
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 v. :
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 LEHIGH COUNTY BOARD OF :
 ELECTIONS, PHILLIPS :
 ARMSTRONG, JENNIFER ALLEN, :
 DENNIS NEMES, TIMOTHY A. :
 BENYO, AND DIANE GORDIAN :
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 Defendants :
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MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs file this motion for a preliminary injunction to prohibit the Lehigh County Board of Elections, and anyone acting through it, from receiving and counting invalid and void ballots.

1. The Pennsylvania election code requires that mailed and absentee ballots must be returned either by mail or in person by the person to whom the ballot belongs.
2. Regarding the return of a mailed ballot, 25 Pa. Stat. § 3150.16(a) states “[s]uch envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.”

3. Mailed or absentee ballots returned by someone other than the voter are void, invalid, and should not be counted. *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223 (2004) (“[the] “in person” delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void.”); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5407748, at *9 (W.D. Pa. Sept. 8, 2020) (“everyone now agrees that the election code forbids third-party ballot delivery.”); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003) (entering preliminary injunction voiding and barring the counting of 937 absentee ballots delivered by third parties.)

4. The Lehigh County Board of Elections understands this well-settled rule:

“**Important Information for All Absentee/Mail-In Voters: With the exception of absentee voters who have a disability or who are overseas, all Ballots must be delivered to the County Board of Elections either in person by the voter themselves or through the U.S. Postal Service. Ballots delivered by any other means for absentee/mail-in voters who don't have a disability will not be accepted by the County Board of Elections.** Absentee Ballots delivered for voters who do have a disability may be delivered by a third party who has written authorization from the disabled absentee. Absentee Ballots delivered for an absentee voter who is overseas on Election Day may be made by an overseas delivery service.”

<https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-In-Ballot> (last visited August 3, 2022) (emphasis added)

5. The Lehigh County Board of Elections authorizes the use of ballot drop boxes.

6. The Board of Elections has established five ballots drop box locations: (1) Whitehall Township Municipal Building, (2) Lehigh County Authority (LCA) lobby, (3) Fountain Hill Borough Building, (4) Lehigh County Government Center, and (5) Macungie Borough Building.

<https://www.lehighcounty.org/Departments/Voter-Registration> (last visited August 3, 2022)

7. While all drop boxes will apparently be inside the buildings where they are located, defendants do not maintain measures to assure that a voter delivers only his or her own ballot.

8. At least one location, the Lehigh County Government Center, is open 24 hours a day 7 days a week. *Id.*

9. On January 20, 2022, the Lehigh County Republican Committee raised concerns that third parties were depositing (void) ballots in the County's drop boxes in previous elections and that it would likely occur again in upcoming elections.

10. Indeed, the party alleged that there were at least 300 more ballots deposited into the drop boxes than there were individuals that visited the drop boxes.

11. Based on those concerns, the Lehigh County District Attorney investigated whether votes delivered by third parties were being deposited into drop boxes in Lehigh County. A copy of the Lehigh County District Attorney's report is attached at Exhibit 1.

12. His office reviewed surveillance video of drop boxes from the 2021 general election. *Id.*, 4.

13. His conclusion was that invalid and void votes were deposited into the drop boxes. *Id.*

14. A county detective was able to confirm 186 instances where more than one ballot was dropped by an individual. *Id.*

15. His office also concluded that 3,695 ballots were placed into the drop boxes.

16. But the surveillance video showed only 2,756 persons dropping ballots into the boxes. *Id.*

17. The report concludes “it is also abundantly clear that those provisions of the law [prohibiting ballot harvesting] are being breached by large numbers of voters.” *Id.*, 6.

18. The Lehigh County Republican Committee demanded that the Lehigh County Board of Elections establish safeguards to prevent the third-party delivery of mailed ballots to drop boxes.

19. The Board of Elections officials refused.

20. However, the Lehigh County District Attorney announced he would position detective at the drop boxes and charge any person that violated the Election Code by delivering more than one ballot. Katherine Reinhard, *Lehigh County DA to monitor ballot drop-off boxes for violators*, Pennsylvania Capital Star, April 27, 2022, <https://www.penncapital-star.com/election-2022/lehigh-county-da-to-monitor-ballot-drop-off-boxes-for-violators/>

21. In response to that plan, the Pennsylvania Secretary wrote to the District Attorney and expressed concern that the plan might violate the Pennsylvania Election Code and deter voters from delivering a ballot. See letter from Leigh Chapman to the Honorable James B. Martin, May 5, 2022, at Ex. 2.

22. The Secretary suggested the District Attorney's plans amounted to "voter intimidation," and requested that he "not station law enforcement outside of ballot drop boxes in Lehigh County." *Id.*

23. She concluded by urging the District Attorney to shift his focus to "voter education." *Id.*

24. Additionally, the American Civil Liberties Union sent a letter to the District Attorney. See letter from Marian K. Schneider to James D. Martin, May 5, 2022, at Ex. 3.

25. The ACLU stated that the District Attorney's plan "cross[es] the line into unlawful harassment and intimidation of voters, which is prohibited under both federal and Pennsylvania law." *Id.*

26. The ACLU described the District Attorney's plan as legally flawed and demanded he cease and desist implementation of the plan. *Id.*

27. Despite these demands, the District Attorney implemented his plan and it achieved its goal as there were no reported cases of third-party delivery of ballots.

28. Although both the Secretary and the ACLU hinted at litigation to stop the plan, no litigation ensued

29. However, there is no assurance that the District Attorney will implement a similar plan for the general election.

30. Moreover, because the plan's legality has been questioned, litigation may prevent a similar plan from being used for the general election.

31. So, there is no assurance that the County's drop boxes will be utilized in a manner that is permitted under the Election Code.

32. A special and preliminary injunction is necessary to prevent the Lehigh County Board of Elections from receiving void and invalid ballots that are delivered by third parties and then commingling those ballots with validly cast ballots.

33. The five elements for the issuance of a preliminary injunction are (1) the injunction is necessary to prevent immediate and irreparable harm, which cannot be compensated by damages; (2) greater injury would result by refusing it than by granting it; (3) an injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and (5) the plaintiff's right to relief is clear. *Kierski v. Twp. of Robinson*, 810 A.2d 196, 198 (Pa.Cmwlth. 2002).

34. Each of these five elements exists here.

35. First, plaintiffs will suffer irreparable harm in that the void or invalid ballots will dilute their validly cast ballots – and the validly cast ballots of other voters – thereby impinging on their fundamental right to vote.

36. As in *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003), injunctive relief is necessary to preclude the commingling of ballots

delivered by third parties and “if relief is not granted, the hand-delivered ballots would be rendered unidentifiable and any practical opportunity for the ballots to be challenged would be eliminated.”

37. Plaintiffs will also suffer irreparable harm because the Lehigh County Board of Elections will be conducting an election in contravention of the Pennsylvania election code. *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa.Cmwlt. 2000) (“Statutory violations are sufficiently injurious to constitute irreparable harm.”)

38. Second, greater injury will result if the injunction is not entered than if it is granted.

39. If the injunction is not entered plaintiffs’ fundamental right to vote will be lost because their votes will be cancelled by invalid votes delivered by third parties.

40. Conversely, there will be no harm to the Lehigh County Board of Elections.

41. The Board can continue to use drop boxes provide it institutes adequate procedures to assure that only the voter himself delivers an absentee or mailed ballot to the drop box, such as placing the drop boxes inside and open only during normal business hours where the delivery of the ballot can be verified.

42. Third, the injunction will maintain the status quo because it will assure that the drop boxes do not receive invalid ballots.

43. Fourth, the requested injunction is limited to abate the harm.

44. Indeed, the preliminary injunction does not prohibit the use of ballot drop boxes it only requires that the Lehigh County Board of Elections use the drop

boxes in a manner that assures that the ballot is delivered to the drop box only by the person to whom it belongs.

45. Fifth, plaintiffs right to relief is clear. District Attorney Martin's investigation showed that invalid ballots were placed into the drop boxes during the 2021 general election and there is no reason to believe that third parties will not deliver ballots belonging to voters other than themselves in the November 8, 2022 general election and elections thereafter.

WHEREFORE, plaintiffs, Sean Gill, Robert Smith, Tim Ramos, and Jackie Rivera, respectfully request that the Court grant its motion for a special and preliminary injunction and entered any other appropriate relief.

Respectfully submitted,

Dated: September 1, 2022

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IN THE COURT OF COMMON PLEAS, LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

SEAN GILL, ROBERT SMITH, TIM
RAMOS, AND JACKIE RIVERA

Plaintiffs

v.

LEHIGH COUNTY BOARD OF ELEC-
TIONS, PHILLIPS ARMSTRONG,
JENNIFER ALLEN, DENNIS
NEMES, TIMOTHY A. BENYO, AND
DIANE GORDIAN

Defendants

NO. 2022-C-1849

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION**

The Pennsylvania Election Code¹ requires that mailed and absentee ballots must be returned either by mail or in person by the person to whom the ballot belongs. It flatly prohibits third parties from delivering absentee and mailed ballots and the Pennsylvania Supreme Court has held ballots delivered by third parties are void and should not be counted. The Lehigh County Board of Elections is conducting elections in a manner that permits third party delivery of ballots. It is doing that by using unmanned drop boxes for the delivery of absentee and mailed ballots. In 2022, the Lehigh County District Attorney performed an investigation that concluded that hundreds of void ballots had been deposited into these drop boxes and were subsequently

¹ 25 P.S. § 2600, et. seq.

counted by the board. Plaintiffs seek an injunction to assure that the Lehigh County Board of Elections receives and counts votes consistent with Pennsylvania law.

I. Background.

The Lehigh County Board of Elections authorizes the use of ballot drop boxes to receive delivery of absentee and mailed ballots. The Board of Elections has established five ballots drop box locations: (1) Whitehall Township Municipal Building, (2) Lehigh County Authority (LCA) lobby, (3) Fountain Hill Borough Building, (4) Lehigh County Government Center, and (5) Macungie Borough Building. <https://www.lehighcounty.org/Departments/Voter-Registration> (last visited August 3, 2022). While all drop boxes will apparently be inside the buildings where they are located, defendants do not maintain measures to assure that a voter delivers only his or her own ballot. At least one location, the Lehigh County Government Center, is open 24 hours a day 7 days a week. *Id.*

On January 20, 2022, the Lehigh County Republican Committee raised concerns that third parties were depositing (void) ballots in the county's drop boxes in previous elections and that it would likely occur again in upcoming elections. Indeed, the committee alleged that there were at least 300 more ballots deposited into the drop boxes than there were individuals that visited the drop boxes. Based on those concerns, the Lehigh County District Attorney investigated whether votes delivered by third parties were being deposited into drop boxes in Lehigh County. A copy of the Lehigh County District Attorney's report is attached at Exhibit 1.

His office reviewed surveillance video of drop boxes from the 2021 general election. *Id.*, 4. His conclusion was that invalid and void ballots were deposited into the drop boxes. *Id.* A county detective was able to confirm 186 instances where more than one ballot was dropped into a drop box by an individual voter. *Id.* His office also concluded that 3,695 ballots were placed into the drop boxes. But the surveillance video showed only 2,756 persons dropping ballots into the boxes. *Id.* The report concludes “it is also abundantly clear that those provisions of the law [prohibiting ballot harvesting] are being breached by large numbers of voters.” *Id.*, 6.

The committee demanded that the board establish safeguards to prevent the third-party delivery of mailed ballots to drop boxes. But board officials refused. However, the District Attorney announced he would position detectives at the drop boxes during the 2022 primary election and charge any person that violated the Election Code by delivering more than one ballot. Katherine Reinhard, *Lehigh County DA to monitor ballot drop-off boxes for violators*, Pennsylvania Capital Star, April 27, 2022, <https://www.penncapitalstar.com/election-2022/lehigh-county-da-to-monitor-ballot-drop-off-boxes-for-violators/>. In response to that plan, the Pennsylvania Secretary of State wrote to the District Attorney and expressed concern that the plan might violate the Pennsylvania Election Code and deter voters from delivering a ballot. *See* letter from Leigh Chapman to the Honorable James B. Martin, May 5, 2022, at Ex. 2. The Secretary suggested the District Attorney’s plans amounted to “voter intimidation,” and requested that he “not station law enforcement outside of ballot drop

boxes in Lehigh County.” *Id.* She concluded by urging the District Attorney to shift his focus to “voter education.” *Id.*

Additionally, the American Civil Liberties Union sent a letter to the District Attorney. *See* letter from Marian K. Schneider to James D. Martin, May 5, 2022, at Ex. 3. The ACLU stated that the District Attorney’s plan “cross[es] the line into unlawful harassment and intimidation of voters, which is prohibited under both federal and Pennsylvania law.” *Id.* The ACLU described the District Attorney’s plan as legally flawed and demanded that he cease and desist implementation of the plan. *Id.*

Despite these demands, the District Attorney implemented his plan, and it achieved its goal as there were no reported cases of third-party delivery of ballots in the 2022 primary. Although both the Secretary and the ACLU hinted at litigation to stop the plan, no litigation ensued. However, there is no assurance that the District Attorney will implement a similar plan for the general election. But even if he did implement a similar plan for the general election because the plan’s legality has been questioned, the Secretary, the ACLU, and others will likely sue to prevent a similar plan from being used for the general election. So, there is no assurance that the county’s drop boxes will be utilized in a manner that is permitted under the Election Code.

II. Argument.

The five elements for the issuance of a preliminary injunction are (1) the injunction is necessary to prevent immediate and irreparable harm, which cannot be compensated by damages; (2) greater injury would result by refusing it than by

granting it; (3) an injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and (5) the plaintiff's right to relief is clear. *Kierski v. Twp. of Robinson*, 810 A.2d 196, 198 (Pa.Cmwlth. 2002). Each of these five elements exists here.

A. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM.

There are two irreparable harms that satisfy plaintiffs' requirement to show irreparable harm. First, plaintiffs will suffer immediate and irreparable harm because defendants are receiving and counting void ballots in violation of the Election Code. "Statutory violations are sufficiently injurious to constitute irreparable harm." *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa.Cmwlth. 2000); *SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 508 (2014) ("[W]here the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established.") Specifically, defendants are violating the Election Code because they are knowingly permitting void ballots to be placed in drop boxes, allowing those ballots to be commingled with valid ballots, and then counting the void ballots. The Pennsylvania Election Code clearly states that mailed ballots shall be returned "[s]uch envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, **or deliver it in person to said county board of election.**" 25 P.S. § 3150.16(a)² (emphasis added)

² 25 P.S. § 3146.6(a) contains an identical provision for absentee ballots: "Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election."

Mailed or absentee ballots returned by someone other than the voter are void, invalid, and should not be counted. *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election*, 843 A.2d 1223 (2004) (“[the] “in person” delivery requirement is mandatory, and [] the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void.”); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5407748, at *9 (W.D. Pa. Sept. 8, 2020) (“everyone now agrees that the election code forbids third-party ballot delivery.”); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003) (entering preliminary injunction voiding and barring the counting of 937 absentee ballots delivered by third parties.)

The Lehigh County Board of Elections understands this well-settled rule:

“**Important Information for All Absentee/Mail-In Voters: With the exception of absentee voters who have a disability or who are overseas, **all Ballots must be delivered to the County Board of Elections either in person by the voter themselves or through the U.S. Postal Service. Ballots delivered by any other means for absentee/mail-in voters who don't have a disability will not be accepted by the County Board of Elections.** Absentee Ballots delivered for voters who do have a disability may be delivered by a third party who has written authorization from the disabled absentee. Absentee Ballots delivered for an absentee voter who is overseas on Election Day may be made by an overseas delivery service.”

[https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-In-](https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-In-Ballot)

[Ballot](#) (last visited August 3, 2022) (emphasis added) Moreover, defendants know that third parties have delivered ballots to the county’s drop boxes because the highest

25 P.S. § 3146.6

law enforcement official in the county has investigated and concluded it occurred—at least in the 2021 election.

Second, plaintiffs will suffer irreparable harm because their valid ballots will be commingled with void ballots delivered by third parties. *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 706 (W.D. Pa. 2003) (“The court finds that there would be irreparable harm to the moving party if the court fails to grant injunctive relief because it would be virtually impossible for the moving party or any other person to challenge the validity of the 937 hand-delivered absentee ballots” . . . “if relief is not granted, the hand-delivered ballots would be rendered unidentifiable and any practical opportunity for the ballots to be challenged would be eliminated.”)

Accordingly, plaintiffs have established immediate and irreparable harm.

B. GREATER INJURY WILL RESULT IF THE INJUNCTION IS NOT ENTERED.

To be clear, the injunction would not entirely prohibit the county from using drop boxes in the 2022 general election or any election thereafter. Rather, it would only require the defendants to use drop boxes in a manner consistent with the Election Code and in a way that assures only valid ballots are placed inside the drop box. So, there is little harm to the public or voters, who can still use drop boxes. In fact, the public will benefit from the injunction because it will assure integrity of elections, assure that elections are honest, fair, and free, and guard against election fraud (real or perceived). Furthermore, plaintiffs seek this injunction in sufficient advance of the general election so that it does not disrupt the election or cause confusion among voters. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

C. THE INJUNCTION WILL RESTORE THE STATUS QUO ANTE.

The injunction will restore the status quo. Before the county began using un-manned drop boxes to receive ballots, absentee ballots were delivered in person to the Lehigh County Board of Elections office. This assured that a person was only delivering one ballot, unless expressly authorized by law to deliver more than one ballot, such as when the maker of the ballot is handicapped. The injunction would require that the drop box be used in a similar manner whereby a person could verify that an individual was placing only one ballot into the drop box or otherwise had proper credentials to deliver more than one ballot.

D. THE ALLEGED WRONG IS MANIFEST AND THE INJUNCTION IS REASONABLY SUITED TO ABATE IT.

The injunction is reasonably suited to abate the harm. Plaintiffs do not request a wholesale prohibition on drop boxes. Instead, they seek limited relief that will ensure that an individual will deposit only his or her own ballot into a drop box.

E. PLAINTIFFS RIGHT TO RELIEF IS CLEAR.

Plaintiff has demonstrated a clear right to relief. To satisfy this prong of the analysis, it is not necessary that plaintiffs show they will unequivocally prevail at trial. *T.W. Phillips Gas & Oil Co. v. Peoples Nat. Gas Co.*, 89 Pa.Cmwlth. 377, 384, 492 A.2d 776, 780 (1985) (“we note that the ‘clear right to relief’ element does not impose upon the proponent of the preliminary injunction the burden of establishing an absolute right to relief on the underlying claim.”) Rather, “simply, the moving party must establish a prima facie right to relief.” *Synthes USA Sales, LLC v. Harrison*, 83 A.3d 242, 249 (Pa. Super. Ct. 2013)

District Attorney Martin's investigation showed that invalid ballots were placed into the drop boxes during the 2021 general election and there is no reason to believe that third parties will not deliver ballots belonging to voters other than themselves in the November 8, 2022 general election and elections thereafter. Permitting void ballots to be deposited into drop boxes and then commingled with valid ballots would be a clear violation of the Election Code. Defendants have knowledge of this clear violation and refuse to do anything.

Accordingly, plaintiffs right to relief is clear.

III. Conclusion.

Based on the foregoing plaintiffs respectfully request that this Court grant their motion for a preliminary injunction.

Dated: September 1, 2022

Respectfully submitted,

/s/ Walter S. Zimolong

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