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IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

Brian Frey and Jon Foley Sherman,

Plaintiffs,

vs.

**Ray D'Agostino, Joshua G. Parsons, and
John Trescot in their official capacities;
the Lancaster County Board of Elections;
and Lancaster County,**

Defendants.

CIVIL DIVISION

No. _____

BRIEF IN SUPPORT OF MOTION FOR SPECIAL AND PRELIMINARY INJUNCTION

Plaintiffs, through counsel, submit this Brief in Support of their Motion for a Special and Preliminary Injunction:

I. INTRODUCTION

Plaintiffs have brought this action, and presented a Motion for a Special and Preliminary Injunction, requesting immediate injunctive relief to protect their rights – and those of other Lancaster County residents -- under the Sunshine Act, 65 Pa. C.S. § 701, *et seq.*, which the Lancaster County Board of Elections (“Board”) violated by failing to provide advance notice that they would consider and decide at their April 13, 2022, meeting whether to retain the County’s one secure drop box at the Lancaster County Government Center. The Board’s failure to provide the public with at least 24-hours of advance notice before taking official action on the drop box is a clear Sunshine Act violation. *See* 65 Pa. C.S. § 709(c.1)(1)(i). To avoid irreparable harm to Plaintiffs and other Lancaster County residents, Plaintiffs ask this Court to void the Board’s action directing removal of the drop box from the County Government Center, reinstate the expanded lobby hours during which the drop box is accessible, and enjoin the Board from removing the drop box until and unless they comply with the Sunshine Act. Special and preliminary injunctive relief is appropriate and necessary on an emergent basis, as voting for the May 17 primary is ongoing and the drop boxes provide voters a convenient and secure means of timely delivering their ballots.

II. FACTUAL BACKGROUND

A. The Secure Ballot Drop Box

The Board considered use of drop boxes on September 23, 2020. Utilization of drop boxes and extended County Government Center lobby hours both appeared on the publicly noticed agenda for the September 23, 2020, meeting.

At that meeting, the Board discussed the placement of a secure drop box at the County Government Center, and subsequently decided to install one in that location. The Board also decided at that meeting to extend the lobby hours of the County Government Center the week

before the election to allow voters the opportunity to drop off ballots outside of normal business hours.

Lancaster County Voters have used the drop box extensively ever since. The box was used in the November 2020, May 2021 and November 2021 elections. Although the Lancaster Chief Clerk of Elections does not track data on how many ballots were deposited in the drop box, she indicated at the April 13, 2022, meeting that several thousand ballots were delivered via the drop box in 2021. In 2022, more than 22,000 Lancaster County voters had applied for a mail-in or absentee ballot as of April 13, 2022.

B. The Lancaster County Board of Elections Failed to Properly Notice the Drop Box Removal on the April 13, 2022, Agenda

The Lancaster County Board of Elections met at a regularly scheduled meeting on April 13, 2022. The only two items noted on the pre-published agenda were 1) approval of the posting of polling place changes; and 2) the report of the Chief Clerk of Elections to the Board. The Board did not identify drop-box removal on the agenda for its April 13, 2022, meeting.

At the April 13, 2022, meeting, the Board discussed and then voted on the first agenda item, namely, changes to polling-place locations. They subsequently moved to the second agenda item, a report from the Chief Clerk of Elections. Her report did not prompt any Board action. Thereafter, the Board opened the floor for public comment.

Sixteen county residents rose to share comments. Many came in response to rumors that the Board might try to remove the drop box. Even though the Board had not discussed the issue, most speakers urged the Board not only to maintain the Government Center drop box, but to install additional drop boxes around the county.

After the public comment period, Board members engaged in a wide-ranging discussion of mail-in voting generally, with two members decrying the 2019 legislative expansion of mail-

in voting. During that discussion, Defendants D'Agostino and Parsons opined that the decision to remove the drop box was "administrative action" that did not require a vote. They did not take a vote on whether to remove the County's lone drop box. Towards the end of the meeting, in response to a question from a reporter, Defendant D'Agostino asserted that the Board had decided administratively that it did not want a drop box and did not need to take a vote.

III. ARGUMENT

A. Standard For Injunctive Relief

Under Pennsylvania law, injunctive relief is appropriate if a plaintiff has demonstrated that:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and
- (6) the public interest will not be harmed if the injunction is granted.

Brayman Constr. Corp. v. Com., Dep't of Transp., 13 A.3d 925, 935 (Pa. 2011). Plaintiffs satisfy all six factors in this case, and injunctive relief is appropriate.

B. Plaintiffs Have Demonstrated A Need for Injunctive Relief.

1. An Injunction Is Necessary To Prevent Immediate And Irreparable Harm That Cannot Be Compensated By Money Damages.

If an injunction is not issued here, Plaintiffs' interests and, indeed, the interests of other Lancaster County residents, will be irreparably harmed. "[A]n agency's failure to comply with

an open government statute is sufficiently injurious to constitute irreparable harm.” *Grine v. County of Centre*, 138 A.3d 88, 101 (Pa. Commw. Ct. 2016) (*en banc*); see *Patriot-News Co. v. Empowerment Team of Harrisburg Sch. Dist. Members*, 763 A.2d 539 (Pa. Commw. Ct. 2000) (granting injunction to prevent Sunshine Act violation); *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610 (Pa. Commw. Ct. 2020) (“For purposes of injunctive relief, statutory violations constitute irreparable harm *per se*); *McGrath v. Bd. of Sch. Dirs. of Scranton*, No. 20 CV 3698, 2020 WL 5904514, at *9 (Pa.Com.Pl. Oct. 04, 2020) (plaintiff “demonstrated the requisite immediate and irreparable harm to secure preliminary injunctive relief” by establishing a violation of the Sunshine Act....” (internal citation omitted)).

The Sunshine Act was amended last year to require public agencies to publish a meeting agenda detailing the issues expected to be deliberated and voted on at public meetings on a publicly accessible Internet website at least 24 hours in advance of the meeting. 65 Pa. C.S. § 709(c.1)(1)(i). By failing to list drop box removal on the April 13 meeting agenda, the Board violated this Sunshine Act requirement. This “failure to comply with an open government statute is sufficiently injurious to constitute irreparable harm.” *Grine*, 138 A.3d at 101. This harm cannot be compensated by money damages. *Patriot-News Co.*, 763 A.2d at 547 (“[S]uch harm could not be compensated for by damages, since there is no price tag that can be placed on the public’s trust in the agencies empowered to aid it and on the public’s evaluation of the decision-making process.”).

Plaintiffs were not present at the April 13, 2022, meeting because they were not aware that the Board was planning to discuss the removal of the secure drop box or take action on it. Had they been aware that the Board was planning to remove the secure drop box, they would have attended to raise their concerns or they would have sent written comments to the Board.

Further, had they been aware that this discussion was to take place at the April 13 meeting, they would have informed other County residents who likely would have attended the meeting to voice comments. The harm Plaintiffs face is, thus, irreparable.

2. Greater Injury Results by Refusing the Injunction than from Granting it.

Any injury caused by denying the requested injunction to prevent the Lancaster County Board of Elections from removing the secure drop box as a result of a decision that violated the Sunshine Act far outweighs the nominal harm that would be done to the agency by granting it. *See McGrath*, 2020 WL 5904514, at *9 (reasoning that “greater harm would result from refusing the request for a preliminary injunction than from granting it” because a refusal would sanction a violation of the Sunshine Act while the agency could easily cure its violation if the injunction is granted).

Not only will reinstating the drop box in the County Government Center not adversely affect Defendants, the Chief Clerk of Elections testified at the April 13 hearing that removing the drop box would require her to hire a temporary staffer to collect ballots on Election Day. Thus, the injunction would reduce the cost and burden on Lancaster County’s Elections Department.

By comparison, the harm to Plaintiffs and other Lancaster County citizens is clear and irreparable. The ability of citizens to attend government-agency meetings where public business is discussed and to comment on those issues prior to an official decision is vital to the functioning of democracy. The Sunshine Act’s rights of participation and transparency are, in the words of the General Assembly, “vital to the enhancement and proper functioning of the democratic process,” because “secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society.” 65 Pa.C.S. § 702. And when citizens are not given adequate notice of the matters to be discussed at

public meetings—as is the case here—citizens’ participation rights are rendered illusory. *See Consumers Educ. and Protective Ass’n v. Nolan*, 368 A.2d 675, 681 n. 4 (Pa. 1977) (“[A]dequate notice to the public at large is an integral part of the public-meeting concept.”). This harm to Lancaster County residents far outweighs any consequence for the Board that an injunction might cause, and indeed will help streamline operations on Election Day.

3. An Injunction Will Restore the Status Quo as it Existed Before the Illegal Conduct.

Enjoining the Lancaster County Board of Elections from removing the secure drop box restores the parties to the positions they were in before the Board made the decision on April 13, in an illegal maneuver, to discontinue a vital service to Lancaster County voters. Under the status quo, the drop box should be available at the Government Center this week, and the lobby hours extended until 8 p.m. Wednesday, Thursday, next Monday and Tuesday (Primary Day), with drop off hours on Saturday from 9:00 a.m. to 2:00 p.m. *See McGrath*, 2020 WL 5904514, at *9 (noting that by granting plaintiff’s request to enjoin actions taken at a meeting that violated the Sunshine Act, “the public’s rights to witness and offer comments will be restored and the parties will maintain the status that they possessed prior to the violations of the Sunshine Act”).

4. The Activity Sought to be Enjoined is Actionable and the Plaintiffs Have Shown that They are Likely to Prevail on the Merits.

“To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties.” *SEIU Healthcare Pennsylvania v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014).

Pennsylvania’s Sunshine Act requires agencies with publicly accessible Internet websites to “post the agenda, which includes a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting, on the website no later than

24 hours in advance of the time of the convening of the meeting.” 65 Pa. C.S. § 709(c.1)(1)(i). Additionally, whenever an agency takes any “official action” as defined by the Act, it must do so “at a meeting open to the public.” *Id.* at § 704. And the agency “shall provide a reasonable opportunity” for individuals “to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action.” *Id.* at § 710.1(a).

The agenda for the April 13 meeting did not include a discussion of the drop box. Defendants D’Agostino and Parsons claimed that the drop-box-removal decision was not agency business subject to the Sunshine Act’s public meeting requirement, but that interpretation conflicts with the Sunshine Act’s plain language and is unsupported by the facts.

The Board is an “agency” subject to the Sunshine Act, and the regularly scheduled April 13, 2022, convening was a “meeting” governed by the Act. 65 Pa. C. S. § 703. The same Sunshine Act section defines “official action” to include, (2) “[t]he establishment of policy by an agency; and (3) “[t]he decisions on agency business made by an agency.” The Commonwealth Court has interpreted official action to include action “on a matter that commits the agency to a course of conduct.” *Morning Call, Inc. v. Board of School Directors of Southern Lehigh School Dist.*, 642 A.2d 619, 623 (Pa. Commw. 1994).

Here, the Board decided to discontinue a vital government service -- the availability of a drop box in the lobby of the County Government Center that is open during extended hours to facilitate voters’ ability to securely deliver ballots to the Election Board -- that thousands of Lancaster County citizens had come to rely upon for the past three election cycles. The decision by Commissioners D’Agostino and Parsons to instruct the Director of Elections to remove the drop box from the County Government “commits the agency to a course of conduct,” *id.*, and is

thus subject to Sunshine Act strictures, including advance notice to the public and vote by the Board.

D'Agostino's and Parson's attempt to evade clear law requiring advance notice and a vote by labeling the decision "administrative action" is belied by the fact that official Board action, on September 13, 2020, directed installation of the drop box and expanded access by extending the County Government Center's lobby hours. That decision was unquestionably official action.

The Sunshine Act prohibits rescinding or changing prior official action without notice, public comment, deliberation and voting by simply labeling the action "administrative." The statute defines "Administrative action" as follows: "*The execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency.* The term does not, however, include the deliberation of agency business." 65 Pa. C. S. § 703 (emphasis added). Administrative action is effectuating past policy or decisions made by the governing entity. In this case, the Board was rescinding, canceling and changing "policies relating to persons or things previously authorized or required by official action of the agency adopted at an open meeting of the agency," namely, the September 23, 2020, meeting that directed the installation of the drop box and extended lobby hours.

The reversal of the prior approval of a secure drop box at the September 23, 2020, meeting clearly is an official action that required notice, deliberation at the public meeting, opportunity for public comment before the Board took action and the calling of the question for a vote and the recording of the results of the vote. None of these mandates of the Sunshine Act were followed in advance of the Board's decision to remove the secure drop box.

Defendants violated the Sunshine Act when they decided to remove the drop box without properly noticing the item on the agenda, without deliberating the specific matter at the April 13 meeting and announcing a decision without properly calling the question, voting on it and recording the vote. Plaintiffs have therefore demonstrated that they are likely to prevail on the merits.

5. The Injunction that Plaintiffs Seek is Reasonably Suited to Abate the Defendants' Offending Activity.

Voiding the action taken by the Lancaster County Board of Elections for failing to properly advertise the action -- removing the drop box -- is a narrow and reasonably suited abatement of the Sunshine Act violation. Enjoining the Commissioners from implementing a decision made illegally is the only way to stop a flagrant violation of the Plaintiffs' rights to proper notice and a meaningful opportunity to comment before their government makes important decisions.

6. A Preliminary Injunction is in the Public Interest.

The issuance of the relief requested by the Plaintiffs will not adversely affect the public interest. By enjoining an act taken at a meeting that violated the Sunshine Act, public policy will be upheld and the public interest will be protected. *McGrath*, 2020 WL 5904514, at *10 (“By adopting the Sunshine Act, the Legislature specifically declared it to be the public policy of this Commonwealth to ensure the rights of its citizens to observe all public meetings and to witness the deliberations and decisions of all public officials.”); *SEIU Healthcare Pennsylvania*, 104 A.3d at 509 (“[W]hen the Legislature declares particular conduct to be unlawful, it is tantamount to categorizing it as injurious to the public.”). Thus, the requested injunctive relief promotes the public interest.

IV. CONCLUSION

For each of the foregoing reasons, Plaintiffs request that this Court grant the relief requested in their Motion for a Special and Preliminary Injunction and issue the Order in the form submitted with the Motion, to wit:

- a. Declare that the failure to list the drop box as an agenda item for the April 13, 2022, public meeting violated the Sunshine Act;
- b. Declare that the official action to remove the secure drop box from the Lancaster County Government Service Center and to stop extended lobby hours for voters to drop off ballots are void;
- c. Issue a preliminary injunction enjoining Defendants from removing the drop box and limiting extended lobby hours;
- d. Issue an injunction directing the Defendants to re-install the secure drop box;
- e. Issue a permanent injunction to enjoin the Lancaster County Board of Commissioners from removing the secure drop box and curtailing extended lobby hours until and unless they comply with all Sunshine Act requirements, including the requirement to provide advance notice of this topic on the agenda;
- f. Award Plaintiffs attorneys' fees pursuant to 65 Pa. C.S. § 714.1; and
- g. Award Plaintiffs costs and such other and further relief that this Honorable Court deems just and appropriate.

Dated: May 10, 2022

Respectfully submitted,



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