

May 5, 2022

James B. Martin, District Attorney (*via email* jamesmartin@lehighcounty.org)
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RE: Monitoring of Lehigh County Drop boxes

Dear District Attorney Martin:

We, the undersigned organizations, have learned that you sent a letter to the Lehigh County Board of Elections regarding citizens' use of drop boxes and issued a press release detailing your intention to monitor voters who are attempting to lawfully exercise their right to vote in the upcoming May 17 primary. Specifically, you announced via a press release, dated April 26, 2022, that you intend to have detectives from your office review surveillance video of the county's five ballot drop box locations and monitor drop boxes in person during this primary election cycle. Your stated reason for the deployment of so many law enforcement resources is that "[u]nder the law, a person may deposit only one ballot envelope; their own, when returning a mail-in ballot at either a mailbox or drop box." In addition, you have urged the Board of Elections to add a notice to each drop box and stand-alone signs that warn voters of the criminal penalties (\$2500 fine or imprisonment for two years or both) for depositing "any other ballot envelope but your own." You further urge the Board of Elections to limit substantially the hours voters may use boxes to make it even more difficult for voters to return ballots.

Your description of the law is an incorrect overstatement and your deployment of law enforcement officers to monitor drop boxes appears to cross the line into unlawful harassment and intimidation of voters, which is prohibited under both federal and Pennsylvania law, as described more fully below. We respectfully request that you reconsider your ill-conceived plan to monitor drop boxes because it threatens Lehigh County citizens' free exercise of the fundamental right to vote.

Your legal interpretation is flawed: the restriction on dropping off another person's ballot is not, as you claim, absolute. A person is allowed to drop off more than one ballot if that voter is a designated agent for persons entitled by law to have assistance in voting. Many voters with disabilities are physically unable either to deposit their

ballot in a mail box, or return it in person to the county offices. The Pennsylvania Commonwealth Court has held, and the Pennsylvania Supreme Court has affirmed, that federal law guarantees the right of voters with disabilities to receive assistance in returning a voted absentee or mail in ballot. *See DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1135 (Commonwealth Ct. 1995), *aff'd* 673 A.2d 905 (Pa. 1996) (citing 42 U.S.C. § 12132 and 52 U.S.C. § 10508). Thus, your blanket statement that a person may deposit only one ballot envelope, their own, is simply inaccurate. Disability Rights of Pennsylvania recently outlined the law surrounding designated agents in a letter to the Pennsylvania General Assembly, the Governor and Acting Secretary of State. We hope the attached letter helps clarify your understanding of the law. Uninformed and mistaken accusations of voters depositing ballots will disproportionately chill the right of voters with disabilities to cast a ballot because they and their lawful proxies will fear prosecution.

Moreover, regardless whether voters are legally able to deposit more than one ballot in a drop box, deployment of detectives to monitor drop boxes and your public statements that detectives will be reviewing surveillance video to specifically look for voters dropping off more than one ballot comes perilously close to intimidation and harassment of voters under both the Pennsylvania Election Code and the federal Civil Rights Act of 1957 and Voting Rights Act of 1965. To be clear, the existence of surveillance video as a security measure, by itself, should be adequate for your stated purpose, while the physical presence of law enforcement creates an unacceptable risk of inappropriate confrontation as voters are attempting to complete their vote-by-mail transaction.

First, conduct similar to your inaccurate statement of the law regarding deposit of ballots and dissemination of false statements about elections was recently held to be unlawful intimidation that violates the Voting Rights Act. *See e.g., National Coalition on Black Civic Participation v. Wohl*, 512 F.Supp.3d 500 (S.D.N.Y.2021)(granting motion for a temporary restraining order against defendants who sent robocalls to 85,000 voters conveying false information that voters' information would be used by police to track down old warrants, among other things, and that such calls constituted intimidation under Voting Rights Act of 1965).

Second, threatening voters with prosecution, intimidating them with the presence of armed detectives, and disseminating false information about drop boxes is a crime under state and federal law. The Pennsylvania Election Code imposes fines, imprisonment or both upon any person who uses threats, intimidation or force to prevent a voter from voting or interferes with the free exercise of the franchise. *See e.g.* 25 P.S. § 3527 (third-degree felony to “use or practice any intimidation, threats, force or violence with design to influence unduly or overawe any elector, or to prevent him from voting or restrain his freedom of choice”); 25 P.S. § 3547 (second degree misdemeanor to threaten or inflict “injury, damage, harm or loss, or any other manner . . . [of] intimidation or coercion upon or against any person . . . to induce or compel [a voter] to vote or refrain from voting at any election.”). Notably, anyone convicted of a violation of the Election Code is prohibited from voting for four years from the date of conviction. 25 P.S. § 3552.

Under federal law, the Civil Rights Act of 1957, 52 U.S.C.A. § 10101(b) provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose[.]

Likewise, section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote.

The threat of prosecution or adverse legal consequences constitutes intimidation within the meaning of these two federal statutes. *See United States v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967) (holding that stationing officers in and around voter registration meetings who made notes and took down license plate numbers of cars and effected arrests for traffic violations of attendees at the meeting constituted unlawful threat and intimidation); *Cf. People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1135 (E.D. Va. 1992) (on motion to dismiss, held that plaintiffs stated a claim for intimidation under the Fair Housing Act by alleging that neighbors photographed their activities and the police department communicated threats to plaintiffs.).

Further, federal law imposes fines, imprisonment or both on anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose[.]” *See* 18 U.S. Code § 594.

The totality of your actions, including your public statements, your letter to the Board of Elections suggesting stronger signage around drop boxes, and the placement of armed law enforcement personnel to observe the drop boxes is an intimidation tactic designed to discourage legal forms of voting, be it by mail or the use of drop boxes. The Pennsylvania General Assembly recognized that the physical presence of police officers is intimidating by enacting legislation requiring police officers, either in or out of uniform, to remain *ten times* farther away from polling places than any other person, 25 P.S. § 3047, *and* imposing fines and penalties upon police officers who violate this rule. 25 P.S. § 3520. While drop boxes are not polling locations, the same public policy recognizing that allowing police officers to be near voters may be intimidating applies to these other lawful forms of voting.

For all of the above reasons, we ask that you immediately cease and desist your publicly-announced deployment of armed detectives to monitor Lehigh County's five ballot drop boxes and ongoing dissemination of false information about return of mail ballots. If you have any questions or disagree with our legal analysis, please contact us. We would appreciate your acknowledgement of this letter. You can reach me via email at mschneider@aclupa.org. We look forward to hearing from you.

Respectfully submitted by the American
Civil Liberties Union of Pennsylvania
and the undersigned organizations,

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Senior Voting Rights Policy Counsel

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Asian Americans United
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CAIR- PA
Casa San Jose
Common Cause Pennsylvania
Democracy For All - PennFuture
Disability Rights Pennsylvania
League of Women Voters of Pennsylvania
Make the Road Pennsylvania
Mothers of Incarcerated Sons

New Pennsylvania Project
New Voices for Reproductive Justice
PA Budget and Policy Center
Pennsylvania Stands Up
Pennsylvania Voice
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