IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM FRENCH, ET. AL.	:	
	:	No. 3:23-cv-538-MEM
Plaintiffs	:	
	:	
v.	:	
	:	
LUZERNE COUNTY, ET. AL.	:	
	:	
Defendants	:	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

Dated: May 20, 2024

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INTRODUCTION

On November 8, 2022 ("Election Day"), plaintiffs, William French and Melynda Anne Reese, like thousands of voters in Luzerne County, were disenfranchised because certain polling locations lacked enough ballots to enable would be voters to cast a vote. The defendants admitted this when they appeared before the Luzerne County Court of Common Pleas on Election Day to request that the state court extend polling location hours, ECF No. 51-5 at 7:8-13, and the state court expressly found as such. ECF No. 1-2. Defendants do not deny admitting the wide-spread disenfranchisement to the state court and do not now argue that the state court was wrong. To the contrary, defendants confess that "the paper shortage should never have occurred" and was wholly avoidable. Def. Br., ECF No. 54 at p. 10. Yet, defendants try to avoid liability for the wide-spread disenfranchisement that occurred on Election Day by chalking it up the ballot-paper shortage as a "fluke" and "isolated" occurrence and a "simple" violation of state election law lacking any invidious intent. None of these arguments have any merit.

The Court has already rejected defendants' arguments that it lacked any policy to order a sufficient number of ballots and that the

ballot paper shortage was an isolated incident. *French v. Cnty. of Luzerne*, 2023 WL 8374738, at *4 (M.D. Pa. Dec. 4, 2023). Since then, through discovery, plaintiffs have adduced material facts that show that defendants not only made an affirmative decision to not order ballot paper but pervasively failed to train inexperienced election officials or to adopt basic policies and procedures regarding the proper administration of elections. *See* Plaintiffs Statement of Material Fact ("Pltfs. State. Facts"), ECF No. 51.

Accordingly, the Court should deny defendants' motion for summary judgment, and it should grant plaintiffs motion for summary judgment.

STATEMENT OF FACTS

Plaintiffs incorporate by reference their statement of undisputed materials facts, ECF No. 51, and their response to defendants' statement of material fact. ECF No. 53.

ARGUMENT

I. PLAINTIFFS WERE DENIED THE RIGHT TO VOTE AND HAD THEIR RIGHT TO VOTE SIGNIFICANTLY BURDENED.

To start, defendants state that plaintiffs' claims should be dismissed as a matter of law because "violations of state election law do

not give rise to federal constitutional claims except in unusual circumstances." Def. Br., ECF No. 54, at 7. This misstates the law and plaintiffs' case.

First, there is no broad sweeping rule that "violations of state election law do not give rise to federal constitutional claims except in unusually circumstances." To the contrary, whenever a "voter has been effectively deprived of the ability to cast a legal vote [] federal due process [is implicated]." *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994). Cases addressing whether a violation of state election law *alone* will give rise to a constitutional violation stand for the unremarkable proposition that mere violation of state election law is not mean there is a substantive due process violation entitling plaintiffs to a new election. *See e.g. Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986) (emphasis added) ("Only in extraordinary circumstances **will a challenge to a state election** rise to the level of a constitutional deprivation."); *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270 (7th Cir. 1986) (action by voters and candidate to set aside results of election). Here, while plaintiffs do bring a substantive due process claim regarding the fundamental fairness of the 2022 general election, they also bring claims for violation of their

fundamental right to vote and their right to equal protection. And they do not challenge the results of the 2022 general election.

Second, in all respects, plaintiffs do not make a strict liability claim based on the Pennsylvania Election Code. They do not claim that defendants' violated state election law and, therefore, *ipso facto*, a constitutional violation occurred. Rather, they claim that their right to vote was denied outright and then significantly burdened by defendants on Election Day because of defendants' policies and customs. Specifically, plaintiffs claim their rights were violated because defendants made an affirmative decision not to order ballot paper for Election Day, failed to properly train inexperienced election officials who were responsible for administering the County's elections, and failed to adopt policies and procedures to guide those inexperienced election officials. It is true that defendants violated the Pennsylvania Election Code (a point that defendants apparently do not dispute) in process. But those errors are symptomatic of defendants' failure to properly administer the 2022 general election in Luzerne County, not the root cause of the violation of plaintiffs' constitutional rights on which plaintiffs' claim rest.

Accordingly, defendants' argument regarding violations of state

election laws is without merit.

II. PLAINTIFFS ARE NOT REQUIRED TO SHOW THAT THEIR CONSTITUTIONAL DEPRIVATION RESULTED FROM "INVIDIOUS OR FRAUDULENT INTENT."

Defendants are also wrong to argue that defendants are not liable because their election officials did not "purposely tamper" with the 2022 election, engage in fraud, or act with "invidious" intent. Def. Br., ECF No. 54, at 8. The Supreme Court and the Third Circuit have never adopted such a *mens rea* requirement. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) ("**even in the absence of fraud**, where it is not feasible to establish who would have won the election, a new election was appropriate to retore the integrity of the electoral process.") The two cases cited by defendants to support this argument, *Acosta v. Democratic City Committee*, 288 F. Supp. 3d 597 (E.D. Pa. 2018) and *Hennings v. Grafton*, 523 F.2d 861 (7th Cir. 1975), are not to the contrary and both are distinguishable.

In *Acosta*, unlike here, the district court was presented with a challenge to the result of a primary election for the Pennsylvania House of Representatives and was being asked to order a new election. The plaintiffs were disappointed candidates for Pennsylvania State

Representative. The defendants were a panoply of individuals, including election workers, members of the Democratic party, and the Pennsylvania Speaker of the House, who plaintiffs claimed were responsible for conducting the election in an unfair manner. Unlike here, the district court dismissed the claims at the pleading stage. And, unlike here, plaintiffs sought a permanent injunction barring recognition of the winning candidate, voiding the results of the election, and ordering a new election. *Id.* at 611.

The district court dismissed most of plaintiffs' claims because many of the named defendants were not state actors. Unlike here, the district court also found the complaint bereft of facts that supported "an inference that the City of Philadelphia failed to train or supervise election workers about their duty to avoid violating citizens' rights." *Id.* at 642. Rather, "plaintiffs merely alleged that the City Commissioners' Office 'failed to ensure that the election was being held fairly and in compliance with the Pennsylvania Election Code'" and "either directly allowed or failed to properly supervise the election." *Id.* Here, however, the Court has already ruled that the plaintiffs have plausibly pled their claims to support a Section 1983 claim. *French*, 2023 WL 8374738 at *3 ("Here

Plaintiffs plausibly plead that Defendants made affirmative directives, decisions, and decrees (i.e., had a policy) to order an insufficient number of ballots.") Furthermore, now that discovery is complete, plaintiffs have proved their Section 1983 claims by presenting overwhelming material facts showing defendants' culpability. *See* ECF No. 51.

Furthermore, the district court in *Acosta* did not hold that all Section 1983 claims based on a voter's First and Fourteenth Amendment rights require the voter to show "purposeful or fraudulent conduct" or "invidious or fraudulent intent." Rather, the district court held a substantive due process claim under 1983 requires government officials engage in willful or intentional conduct. *Id.* at 644 (citations omitted). Still, plaintiffs have adduced a plethora of material facts showing that defendants' intentional and willful conduct caused the ballot paper shortage. See ECF No. 51. For starters, defendants' acting Director of Elections, Beth Gilbert McBride ("Gilbert"), willfully or intentionally decided not to order ballot paper for the 2022 election. Pltfs. State. Facts, ECF No. 51, at ¶ 26. She did not (a) place the order and (b) only to have the vendor fail to fulfill the order or lose it in transit. Defendants also willfully and intentionally chose to hire Gilbert and Emily Cook as their

top two election officials knowing they lacked experience in administering elections. *Id.* at ¶¶ 28-30, 36-38. Defendants then willfully and intentionally chose not to offer or provide Gilbert or Cook with any training on the administration of elections. *Id.* at ¶¶ 28-31, 36-38. Worse, defendants chose not to train Gilbert and Cook despite being warned by their District Attorney only a few months before that defendants' election officials lacked proper training. ECF No. 53-2. Defendants also willfully and intentionally chose not to adopt any policies and procedures regarding how much ballot paper to order, what to do if a polling location ran out of or low on paper, or how ballot paper was dispatched to each polling location. *Id.* at ¶¶ 47-52. These are facts that the district court in *Acosta* held could support a constitutional claim. *Acosta*, 288 F. Supp. 3d at 646 ("If the actions alleged in the Complaints could have been attributed to the state actors and entities named in the Complaints, then Plaintiffs may have stated a plausible claim for relief.")

In *Hennings,* unlike here, plaintiffs brought a class action on behalf of all voters of Coles County, Illinois, that sought an order directing a new election. Plaintiffs alleged that vote totals were incorrectly counted because of malfunctioning voting machines and that the malfunctioning

voting machines denied them the right to vote. *Id.* After a trial on the merits, the district court denied plaintiffs' demand for a new election. Based the evidence at trial, the district court found that plaintiffs had not proven that they were denied the right to vote because of long lines or malfunctioning voting machines. *Id.*

On appeal, the Seventh Circuit considered whether "the facts as found by the District Court" established a constitutional violation under section 1983. *Id.* The Seventh Circuit found no reason to disturb the district court's findings of fact. Therefore, it held that the district court's factual finding - that plaintiffs had not proven their claims regarding long lines at polling locations effectively deny them the opportunity to vote - foreclosed any consideration regarding whether a constitutional violation. *Id.* at 864.

The Court's remark that the "irregularities [were] caused by mechanical and human error and lack[ed] invidious or fraudulent intent" is dicta. *Id.* at 864. It does not support defendants' sweeping claim that "invidious or fraudulent intent" is a required element of a Section 1983 claim involving the denial of the right to vote. Whatever the import of *Hennings*, it is not the law of the Third Circuit. To the contrary, in *Marks*,

the Third Circuit held that whenever, like here, a ballot is rejected "the voter has been effectively deprived of the ability to cast a legal vote [which] implicates federal due process concerns." *Marks,* 19 F.3d at 888. Furthermore, the Third Circuit held that "**even in the absence of fraud**" a new election may be an appropriate remedy "to restore the integrity of the electoral process." *Id.* Here, plaintiffs are requesting a decidedly more modest remedy, and no proof of fraud or invidious conduct is needed for them to succeed on their claims. *See also*, *Griffin v. Burns*, 431 F. Supp. 1361, 1366-1367 (D.R.I. 1977), *aff'd,* 570 F.2d 1065 (1st Cir. 1978) ("There is no indication that cases explicating the constitutional protections against the infringement of the right to an undiluted vote depend on the slightest measure on evil motives of state officials.")

Accordingly, defendants' arguments regarding fraudulent conduct or invidious intent are without merit and the Court should deny defendants' motion for summary judgment.

III. DEFENDANTS DID NOT MAKE AN "ACCIDENTAL MISTAKE" AND THE 2022 BALLOT PAPER SHORTAGE WAS NOT AN "EPISODIC EVENT."

Defendants continue to claim immunity because the 2022 ballot paper shortage was a "fluke occurrence," an "accidental mistake," and an

"episodic event." Def. Br., ECF No. 54 at p. 10. Defendants are pressing a failed argument that this Court has already rejected. *French*, 2023 WL 8374738, at *4. Furthermore, plaintiffs present a comprehensive record of election administration misfeasance so severe it undermined the fundamental fairness of the 2022 general election and forced defendants to admit to the Luzerne County Court of Common Pleas that voters throughout the county were disenfranchised through no fault of their own. Pltfs. State of Facts, ECF No. 51 at ¶ 16.

Defendants' "fluke occurrence" argument is not only failed but it is contradictory. While arguing that it was a "fluke" and "isolated" occurrence, defendants, nonetheless, conceded "it should have never occurred, and it was avoidable." Def. Br., ECF No. 54 at 10. It never should have occurred and was avoidable because of the defendants' policies, practices, and customs. It never should have occurred and was avoidable because defendants made an affirmative decision not to order ballot paper. Pltfs. State. of Facts, ECF No. 51 at ¶ 26. It never should have occurred and was avoidable because defendants hired inexperienced people to administer elections and then failed to train these inexperienced election officials on election administration. *Id.* at ¶¶ 30-

38. It never should have occurred and was avoidable because defendants failed adopt any policies and procedures regarding ordering of ballots, dispatching of ballots to polling places, assuring that each polling location received the statutorily prescribed number of ballots, or what to do if a polling location ran low or out of paper. Id. at ¶¶ 49-55. It never should have happened and was avoidable because defendants never trained the "SEAL TEAM," who was responsible for assuring voting machines were loaded with paper before being delivered to polling locations. *Id.* at ¶ 56. It never should have happened and was avoidable because defendants had no policies and procedures for the SEAL Team to follow. *Id.* at ¶ 58.

In sum, plaintiffs do not allege that their constitutional rights were violated because of an isolated incident commonly occurring on election day. Rather, they have adduced material facts showing an egregious and pervasive misfeasance by defendants that disenfranchised thousands of voters in Luzerne County. Plaintiffs were disenfranchised due to "patent and fundamental unfairness" and "broad-gauged unfairness permeate[d] [the 2020] election" *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Plaintiffs have adduced facts that show that "the right of the electors to

vote and to have their votes counted" was denied in 2022. *Marks*, 19 F.3d at 889. Accordingly, the Court should deny defendants' motion for summary judgment.

IV. "PRINCIPLES OF FEDERALISM" DO NOT BAR PLAINTIFFS' CLAIMS.

Defendants concerns about "principles of federalism" are likewise misplaced and unavailing.[1] This case involves the **federal** right to vote in a **federal** election. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added) ("**the Constitution of the United States protects** the right of all qualified citizens to vote, in state as well as in federal elections." Federal rights merit federal "judicial protection." *Reynolds*, 377 U.S. at 566; see *also Larsen v. Senate of Com. of Pa.*, 152 F.3d 240, 248 (3d Cir. 1998) ("When a State exercises power wholly within the domain of state interest, it is insulated from judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.")

Defendants rely on cases that involve federal oversight of state and

[1] There is also the issue regarding whether defendants properly preserved "federalism" as a defense to plaintiffs' claims. Defendants did not raise "federalism" or concerns about federalism as an affirmative defense. Def. Ans., ECF No. 39. Accordingly, defendants have waived any federalism-based defense. Fed. R. Civ. P. 8(c) ("In responding to a pleading, a party must affirmative state any avoidance or affirmative defense.")

local elections. Defs.' Br., ECF No. 54, at p. 8 (citing *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 915 (E.D. Va. 2018) (state house election); *Welker v. Clarke*, 239 F.3d 596 (3d Cir. 2001) (city council election); *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir. 1980) (school board election); *Acosta*, 288 F. Supp. 3d 597 (E.D. Pa. 2018) (state house election). But these stand only for the commonplace proposition that "states have the power to regulate the elections of their own officials." The principal that federal courts should think twice before interfering in "a purely municipal election, with no federal candidates on the ballot," *Welker*, 239 F.3d at n.3, has no application in this case, where plaintiffs were denied their right to vote for a federal candidate (Representatives in United States Congress). In all events, the courts in the cases defendants cite each concluded that they could adjudicate those state and local election claims on the merits in federal court. *See e.g., Acosta*, 288 F. Supp. 3d at 624-25 ("Plaintiffs can bring their claims in federal court").

Still, defendants' concerns about federalism go to the form of relief not the merits. Where, as here, "the entire election process including as part thereof the state's administrative and judicial corrective process fails on its face to afford fundamental fairness. . . **a federal judge need**

not be timid, but may and should do what common sense and justice require." *Griffin,* 570 F.2d at 1078 (emphasis added). Furthermore, this Court has broad discretion in tailoring appropriate equitable relief. *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Plaintiffs have presented undisputed material facts that show a pervasive fundamental unfairness in the way the 2022 general election was administered. That unfairness was caused by defendants' inadequate training and failure to adopt policies and procedures to guide their inexperienced election officials. Plaintiffs are not asking the Court to count ballots, "elaborate state election contest procedures," or adjudicate future election disputes. Def. Br. ECF No. 54 at p. 8-9. Rather, plaintiffs request relief narrowly aimed at the defendants' inadequate training and procedures, which are grounded in "common sense and justice."

Thus, defendants' federalism concerns are unwarranted. Moreover, any concerns about federalism would implicate the form of relief awarded rather than the merits of plaintiffs' claims.

V. PLAINTIFFS HAVE ADDUCED SUFFICIENT FACTS TO SUPPORT A *MONELL* CLAIM.

Next defendants argue that plaintiffs have failed to establish *Monell* liability entitling defendants to summary judgment. Def. Br.,

ECF No. 54, at 10. Here, defendants rehash many of the arguments the Court rejected in its opinion denying defendants motion to dismiss and should not be relitigated. Nonetheless, plaintiffs have presented a record replete with facts that support a *Monell* claim.

Defendants begin by repeating the incorrect claim they cannot be held liable for "single-incident occurrence caused by a lower-level employee acting under color of law." *Id.* at 9. As this Court has already explained, a single incident can give rise to a Section 1983 claim when "the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations. The unconstitutional consequences of failing to give guidance let alone train election workers on how to manage ballot shortages is so patently obvious." *French*, 2023 WL 8374738, at *4. *Id.* Moreover, a single affirmative decision by an official with final decision-making authority also can establish *Monell* liability. *Natale v. Camden Cnty. Corr. Facility*, 318 F. 3d 575, 584 (3d Cir. 2003) (a policy or custom can be found when "no rule has been announced as policy but federal law has been violated by an act of the policymaker itself."); *Porter v. City of Philadelphia*, 975 F.3d 374, 383 (3d Cir. 2020)("a pertinent

decision by an official with decision-making authority on the subject constitutes official policy.").

Furthermore, defendants' characterization of Gilbert and Cook as "low level employees" is incredible. Gilbert and Cook were far from "low level employees." They were Director and Deputy Directory of elections respectively. They were the highest and second highest ranking election officials in the County. Defendants admit Gilbert oversaw all aspects of administering elections in the County, including, ordering ballot paper. And they admit Gilbert made the affirmative decision not to order ballot paper.

Defendants further assert the already rejected argument that plaintiffs' inability to show a "pattern of underlying constitutional violations" prevents plaintiffs from recovering under a *Monell*. Def. Br., ECF No. 54 at p. 14. This argument ignores this Court's prior holding, *French*, 2023 WL 8374738 at * 4, and clear Supreme Court precedent. *Connick v. Thompson*, 563 U.S. 51, 64, (2011) ("the unconstitutional consequences of failing to train could be so patently obvious that a city could be held liable under § 1983 without proof of a pre-existing pattern

of violations.")[2] Accordingly, defendants' argument that it never before failed to order ballot paper does not defeat plaintiffs' claim predicated on a failure to train election officials.

Still, defendants had actual notice of the deficiency of its election training program and chose to ignore it. First and foremost, defendants admit that they had **no** training program whatsoever much less a deficient one. Second, in 2021, the Luzerne County District Attorney warned defendants that their election personnel were untrained. Public Report of the District Attorney, 2021 Primary Election, ECF No. No. 53-2. The 2022 general election was not the only election marred with irregularities and which resulted in an investigation by the Luzerne County District Attorney. A year earlier, the Luzerne County District Attorney investigated issues that arose during the 2021 primary election. *Id.* In his report, the District Attorney included a section titled "Note on Training" and found that defendants' election personnel lacked proper training. *Id.* at p. 15. In his report concerning, 2022 general election, the District Attorney again found that defendants' election personnel lacked

[2] Defendants further cite to a Third Circuit case, *Montgomery v. DeSimone*, 159 F.3d 120 (3d Cir. 1998) which was decided 13 years before *Connick*.

adequate training. Public Report of the District Attorney, 2022 General Election, ECF No. 49-5 at p. 23 ("**IX. Lack of Training and Experience.** . . . Witness at the House Committee[3] hearing also attributed some of the difficulties to the lack of experience and training in the Bureau at the time of the Election. We concur in that conclusion.")

Plaintiffs' arguments in support of their *Monell* claims are laid out in their motion for summary judgment. The material facts plaintiffs present overwhelmingly support a claim for *Monell* liability. ECF No. 50, 51, 52. Defendants' legal arguments to the contrary are meritless. The Court should deny defendants' motion for summary judgment and enter summary judgment in favor of plaintiffs.

VI. THE LUZERNE COUNTY BOARD OF ELECTIONS AND REGISTRATION HAS STATUTORY AUTHORITY TO HIRE, SUPERVISE, AND TRAIN EMPLOYEES.

Finally, defendants claim that summary judgment should be granted in favor of defendant, Luzerne County Board of Elections and Registration, because it does not have the power to hire, train, and/or

[3] "House Committee" refers to the United States House Committee on House Administration of the United States Congress. The hearing referenced is to the House Committee's March 28, 2023, hearing into the ballot paper shortage that is the subject matter of this litigation. https://cha.house.gov/hearings?ID=45A4C8DC-BC22-4B82-AA2D-889AF8229FCE

supervise election officials. Def. Br. ECF No. 54 at p. 17. This is incorrect. The Pennsylvania Election Code expressly states that the Board of Elections shall have jurisdiction "over the conduct of primaries and elections in [the] county." 25 P.S. § 2641(a). And in exercising that jurisdiction, it shall have the power to, among other things, "appoint their own employees, voting machine custodians, and machine inspectors," and "to instruct election officers in their duties." 25 P.S. § 2642 (d) and (g). That the Luzerne County Home Rule Charter may illegally remove the Board of Elections' jurisdiction and powers granted under the Pennsylvania Election Code, does not insulate the Board from liability. It only makes defendants' conduct worse. The Board of Elections is not simply failing to hire employees and to train them (which is bad enough) but they are ignoring a statutory mandate to do so. Accordingly, the Court should deny summary judgment in favor of the Board of Elections.

CONCLUSION

Based on the foregoing, plaintiffs, William French and Melynda Anne Reese, respectfully request that the Court deny defendants' motion for summary judgment and grant their motion for summary judgment against defendants.

Respectfully submitted,

Dated: May 20, 2024

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM FRENCH, ET. AL. Plaintiffs, v. COUNTY OF LUZERNE, ET. AL. Defendants.	:	No. 3:23-cv-00538-MEM

CERTIFICATION OF LENGTH OF BRIEF

Pursuant to Local rule 7.8(b)(2), I certify that this brief does no exceed 5,000 words, exclusive of the table of contents and table of authorities. The actual number of words in this brief is 4,040 as identified by the Microsoft word-processing system used to prepare this brief.

Respectfully submitted,

Dated: May 20, 2024

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WILLIAM FRENCH, ET. AL. Plaintiffs, v. COUNTY OF LUZERNE, ET. AL. Defendants.	:	No. 3:23-cv-00538-MEM

PROOF OF SERVICE

I hereby certify the foregoing has been filed electronically and is available for viewing and downloading from the Electronic Case Filing System of the United States District Court for the Middle District of Pennsylvania.

Respectfully submitted,

Dated: May 20, 2024

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