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' REPLY TO THE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDMENT

Plaintiffs, William French and Melynda Anne Reese, submit this reply to the Defendants' response in opposition to their motion for summary judgment (ECF No. 55).

I. PLAINTIFFS BRING A CLAIM FOR VIOLATION OF THEIR SUBSTANTIVE DUE PROCESS RIGHTS AND THAT HAS NOT BEEN DISMISSED.

Defendants begin by claiming that plaintiffs "never alleged a violation of substantive due process in their complaint." Def. Br., ECF No. 55 at p. 5. This is patently incorrect. Count I of the Complaint plainly states it is based on the violation of Plaintiffs' First and Fourteenth Amendment right to vote. Compl., ECF No. 1 at p. 18. The Complaint

further makes clear that the right to vote is secured by the *substantive* Due Process Clause of the Fourteenth Amendment. *Id.* at ¶ 102. Plaintiffs go on to state that "defendants' wholly inadequate election administration policies subjected plaintiffs' access to the ballot to wholly arbitrary, capricious, and standardless treatment **in violation of the substantive Due Process Clause of the Fourteenth Amendment.**" *Id.* at 110 (emphasis added).

Defendants also misinterpret this Court's prior holding and take it out of context. It is true that this Court held that plaintiffs "only plead a claim for procedural not substantive due process." Opinion, ECF No. 37 at 17-18. But that was in reference to Count IV of the Complaint, which was squarely a *procedural* due process claim, and was part of the Court's opinion regarding plaintiffs' *procedural* due process claim contained in Count IV. Indeed, Defendants never moved to dismiss Plaintiffs' *substantive* due process claim in Count I, a point that Plaintiffs emphasized in their response to Defendants' motion to dismiss. ECF No. 25 fn. 5.

Therefore, Defendants' argument that Plaintiffs did not raise a substantive due process claim is simply wrong.

II. PLAINTIFFS PROFFERED UNDISPUTED EVIDENCED THAT THEY WERE DISENFRANCHISED.

Next, Defendants assert that there is no direct evidence that any voter was disenfranchised on November 8, 2022 ("Election Day"). First, this ignores the admission by the Defendants, represented by County Counsel, before the Honorable Lesa L. Gelb of the Luzerne County Court of Common Pleas on Election Day, ECF No. 51-5 at 7:8-13, and the express finding of Judge Gelb in her order issued after that hearing. ECF No. 1-2 ("Voters in Luzerne County through no fault of their own, were disenfranchised and denied the fundamental right to vote.") Defendants now ask this Court to ignore both the blunt clarity of their admission and findings of the state court. Indeed, Defendants' efforts to walk away from their admission before the state court is shocking. Not only does it deny the obvious record, but it also suggests that Judge Gelb reached her conclusion that voters were disenfranchised without any basis in law or fact. In all events, Defendants succeeded in extending polling hours **based on their representations to Judge Gelb** that voters were disenfranchised, and, thus, they are estopped from assuming a contrary position now. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)

("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position[.]").

Second, Defendants' argument ignores the uncontroverted declarations and sworn testimony of Plaintiffs that they were disenfranchised by Defendants when they were turned away from their polling locations and told to come back later. Plaintiffs' testimony is specific, detailed, and credible. Defendants cannot defeat Plaintiffs' statements by merely claiming "a jury might not believe them." "It is by now axiomatic that 'a nonmoving party ... cannot defeat summary judgment simply by asserting that a jury might disbelieve an opponent's affidavit to that effect.'" *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 130 (3d Cir. 1998).

Finally, Defendants' reliance on the findings of the District Attorney is wholly unavailing. The District Attorney is not the fact finder and the District Attorney's report does not supplant the role of this Court and the jury in that regard.

III. PLAINTIFFS' RELIEF IS NOT HAMSTRUNG BECAUSE THEY DO NOT SEEK "CLASS WIDE" RELIEF.

Defendants quibble with the relief Plaintiffs request claiming it is too broad and that Plaintiffs' requested relief is infirm because they did not seek class certification. Def. Br., ECF No. 55 at 10. First and foremost, this argument goes to the breadth of the equitable relief that the Court should award and in no way diminishes the merits of Plaintiffs' constitutional claims. Still, Plaintiffs did not need to seek class certification because a vindication of their constitutional rights will inure to the benefit of others as a matter of law. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (plurality opinion) ("Under the [Supreme] Court's approach to constitutional litigation, a policy that is declared invalid as to one group of plaintiffs 'cannot be lawfully enforced against others.'"). Thus, if this court declares that it was unconstitutional for Defendants to deny Plaintiffs their right to vote by failing to train their employees, Defendants must in the future train *all* their employees and not merely the ones who might interact with Plaintiffs. All voters would benefit from that proper training and Plaintiffs were not recalcitrant for not seeking class certification.

IV. DEFENDANTS ADMIT THAT GILBERT HAD FINAL DECISION-MAKING AUTHORITY.

Much like their admission before the state court on Election Day, Defendants now seek to walk back their admissions concerning whether Beth Gilbert McBride, the acting Director of Elections on Election Day, had final decision-making authority. Def. Br., ECF No. 55 at 13.

Defendants are also wrong to say that Plaintiffs' claims fail because Gilbert did not have final authority regarding "training." *Id.* at 12-13. Plaintiffs have never argued that Gilbert had final decision-making authority for *training* purposes. Gilbert was one of the election officials who was not properly trained.

Still, under *Monell* and its progeny, to support a failure to train theory of liability, Plaintiffs need not point to an error by a person with final decision-making authority regarding training. The purpose of a failure to train theory is to hold a government liable for a policy of inaction. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). To succeed, Plaintiffs are not required to point to the specific policymaker whose job it was to take action to train, whether that person is Gilbert, Robinson, or the County Board or County Bureau of Elections. If the government entity fails to properly train it employees, the identity of the policymaker

who should have made sure there was proper training is irrelevant – the County is liable.

Defendants' arguments that Gilbert's affidavit is "self-serving" is absurd. Gilbert is the former acting Director of Elections. She is not adverse to the County. She is not a party to this litigation and is not a party to any (known) litigation against or by the County. So, it is unclear why her declaration is "self-serving" and Defendants offer no explanation as to why a declaration from their former acting Director of Election is.

Likewise, Defendants' arguments concerning County Manager Randy Robertson are completely baseless. Plaintiffs' can hardly be faulted for not deposing Robertson. Defendants never identified him in any written discovery as someone who had authority over adoption or implementation of Election Day procedures. Rather, Defendants have consistently maintained that Gilbert, as acting Director of Elections, had final authority regarding election policies and procedures. *See*, Ans., ECF No. 39 at ¶ 59 ("The Director of Election is the highest-ranking official within the Bureau of Elections who is tasked with overseeing all full-time, part-time, and seasonal employees of the Elections Bureau.");

Pecora dep., ECF No. 51-1 at 31:1-4 ("Q. Now, so the buck stopped with Ms. Gilbert for the November 2022 election, correct? A. Yes.").

Finally, Defendants offer no record evidence establishing that Robertson had "final and unreviewable" authority concerning hiring and training decisions. Defendants do not so much as offer a declaration from him.

Accordingly, Defendants' arguments regarding Gilbert's training and hiring authority are meritless.

V. DEFENDANTS MISLEAD THE COURT REGARDING THE ELECTION TRAINING THAT WAS RECEIVED BY POLL WORKERS AND ELECTION OFFICIALS.

Defendants suggest, contrary to admissions from Cook and Gilbert, that Defendants did, in fact, train their election officials because they trained poll workers and maintained an "internal election guide" for "senior level" employees. Def. Br., ECF No. 55 at 19. Defendants are being misleading.

First, it is true that Defendants provided election *poll workers* and *judges of election* with training. (Plaintiff never argued that they didn't.) But none of that training covered paper supplies, appropriate paper weight, Seal Team responsibilities to stock ballot printers, or what to do

if a polling location ran out of paper. As Logan Buglio, the person who provided poll worker and judge of election training, testified:

> Q. Okay. Where in the Power Point does it address either a poll worker or a judge of elections – Let's start with the judge of elections. Where in the Power Point does it address what a judge of election should do if a polling location runs out of ballots.
>
> Mr. McLaughlin: Objection to the form. You may answer.
>
> A. That's not covered in the training.
>
> Q. (BY MR. ZIMOLONG) Okay. Was it covered --- Was it covered in the training that you provided after November – the fall/November 2022 election.
>
> A. No.
> . . .
> Q. (BY MR. ZIMOLONG) Do you know why, the fall 2022 election, the judge-of-election and poll-worker training did not cover what to do if a location ran out of paper?
>
> A. Why it didn't cover it, is that what you're asking?
>
> Q. Yeah. Do you know why?
>
> A. Why? Because there is an expectation that the County will provide the necessary materials to administer the election. Poll workers have nothing to do with making sure that the machines get to the polling site or that they have a completed poll book. That's not their responsibility, so it isn't relevant to the training. It was expected to be there.

Deposition of Logan Buglio, 31:1-25; 32:1-9 attached at Exhibit 1 to this reply. The evidence shows that chaos ensued on Election Day because

there was no training or policy to guide election officers in the most fundamental election administration process – supplying proper ballots to voting locations.

Second, what Defendants refer to as an "internal election guide" was, in reality, nothing more than a **steno pad** that Emily Cook used to jot down her own informal notes. Cook dep., ECF No. 51-3 at 59:13-25 ("In February of 2022, the election guide was a steno pad that I had, where I started writing down what Mr. Susek and I were working on.") At some point, Cook started creating a word document from her notes. When asked if her notes or word document where Defendants' standard operating procedures, Cook responded: "I consider it the starting point for the standard operating procedures." *Id.* at 60:13-20. Furthermore, when asked what purpose the document served, she responded: "The purpose of it was to, I mean, first of all, to help us track what was going on prior to an election. . . .So generally keeping track of what's happening and what should be happening during that – that critical pre-election time frame." *Id.* at 64:2-11. Thus, it is utterly disingenuous for Defendants to maintain that Cook's notes where an "internal guide for

senior level Bureau of Elections employees to work from as they prepared for an election." Def. Br., ECF No. 55 at 19.

Finally, Defendants have admitted that they were on notice of the lack of training since 2021 and that the absence of training caused the shortage of ballots on Election Day. The Luzerne County District Attorney's post-election report admits that the ballot shortages on Election Day 2022 were caused by Defendants' failure to train its election officers. See Public Report of the District Attorney, 2022 General Election, ECF No. 49-5 at 22. This statement constitutes an admission by the County Defendants under Fed. R. Evid. 801(d)(2). The Luzerne County District Attorney is an officer of Defendant Luzerne County and is the County official tasked by law to review and report on the County's failures in administering each election. Therefore, the District Attorney's statements admitting that poor training caused ballot shortages is admissible against Defendants under subparts (C) and (D) of Rule 801(d)(2). *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 300 (3rd Cir. 1983). Further, Defendants have adopted the District Attorney's post-election report by reference in numerous pleadings and throughout their interrogatory responses, making the

statements admissible as Defendants' admission under (A) and (B) of Rule 801(d)(2). *Id.* at 301.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their motion for summary judgment and deny Defendants' motion for summary judgment.

Respectfully submitted,

Dated: June 1, 2024

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

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CERTIFICATION OF LENGTH OF BRIEF

Pursuant to Local rule 7.8(b)(2), I certify that this brief does no exceed 5,000 words. The actual number of words in this brief is 2,111 as identified by the Microsoft word-processing system used to prepare this brief.

Respectfully submitted,

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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 Eastern District of Pennsylvania.

Respectfully submitted,

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