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

BRIEF IN SUPPORT OF RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Respectfully submitted,

Dated: June 13, 2023

/s/ Walter S. Zimolong III
WALTER S. ZIMOLONG III, ESQUIRE
JAMES J. FITZPATRICK III, ESQUIRE
Zimolong, LLC
PO Box 552
Villanova, PA 19085-0552
wally@zimolonglaw.com
james@zimolonglaw.com
Tele: 215-665-0842

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INTRODUCTION

This case involves the denial of plaintiffs' fundamental right to vote in the November 2022 general election. On November 8, 2022 (Election Day), "voters in Luzerne County through no fault of their own, were disenfranchised and denied the fundamental right to vote." *See* Order dated November 8, 2022, In Re: Extension of Time of Polls to Remain Open in the 2022 General Election, Luzerne County Court of Common Pleas, No. 09970 of 2022 at, ECF No. 1-3. Plaintiffs are two such voters. They seek to vindicate their constitutional rights under 42 U.S.C. § 1983 and equitable relief to assure that their rights are not violated again.

Defendants do not deny that plaintiffs were unable to vote in the November 2022 general election (or at least had their right significantly burdened) and they do not necessarily reject the claim that the cause was a shortage of ballots at numerous polling places in the County. Defs. Br., ECF No. 18, at 5. Instead, they chalk the admitted ballot shortage up to a "freak occurrence," and ask the Court to trust defendants that it will never happen again. Def. Br., ECF No. 18, at 14 ("The paper shortage that occurred in November of 2022 was a freak occurrence that will not be repeated.") Rather than seeing plaintiffs' constitutional right to vote

vindicated, they want the Court to ignore what happened to plaintiffs on Election Day in 2022.

Defendants have moved to dismiss the complaint *with prejudice* arguing that it does not plead sufficient facts to support any of plaintiffs' claims. The complaint easily meets the requirements imposed by Rule 8 of the Federal Rules of Civil Procedure and defendants' motion to dismiss should be denied.

ARGUMENT

I. STANDARD OF REVIEW.

To defeat plaintiffs' complaint, defendants rely on the familiar troupe of *Iqbal*[1] and *Twombly*[2] arguing that under these cases plaintiffs' complaint is devoid of facts that can withstand a motion to dismiss. Defendants grossly misstate the holdings of *Iqbal* and *Twombly* and plaintiffs' complaint easily satisfies the requirements that plaintiffs plead a plausible cause of action.

There is no dispute that *Iqbal* and *Twombly* changed how district courts review complaints faced with a Rule 12(b)(6) motion to dismiss.

[1] *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)
[2] *Bell Atlantic Corp. v. Towmbly*, 550 U.S. 544 (2007)

Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) But they did not change the rules of pleading. *Twombly* "expressly leaves intact" Federal Rule 8 which "requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests" *Id.* (quoting *Twombly*, 550 U.S. at 554.) *Iqbal* and *Twombly* do not require a plaintiff to provide "detailed factual allegations." *Id.* "The *Twombly* decision repeatedly indicated that the Court **was not** adopting or applying a heightened pleading standard." *Id.* at 234.

It also remains true that at the motion to dismiss phase a plaintiff need only *allege*, not prove, *some* facts, that would support plaintiffs' cause of action. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) Moreover, "courts accept as true the allegations in the complaint and its attachments, as well as reasonable inferences construed in the light most favorable to the plaintiffs." U.*S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). Thus, plaintiffs need not come to the courthouse doors with all their evidence under tow. "The post-*Twombly* pleading standard simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary

element[s]." *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 789 (3d Cir. 2016). Finally, in all events, even if the complaint fails to allege sufficient facts "unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint." *Phillips*, 515 F.3d at 228 (citing *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000)).

Plaintiffs' complaint easily meets the pleading standards articulated under Rule 8, *Iqbal*, and *Twombly*. They have alleged facts, which if accepted as true, show that:

- their right to vote was denied – indeed they were told on multiple occasions they could not vote- or at least severely burdened by being forced to return multiple times to attempt to vote,
- their ability to vote was subjected to a different standard based solely on where they lived because only approximately 40 of the over 170 polling places lacked ballots on Election Day,
- their right to vote was denied without adequate due process of law; and
- their substantive due process rights were violated.

They have also alleged facts that the deprivation of their constitutional right to vote was cause by official customs, practices, and policies

of the defendants and that persons with final decision-making authority took affirmative steps that caused plaintiffs' constitutional rights to be violated.

Accordingly, the Court should deny the motion to dismiss.

II. PLAINTIFFS HAVE ADEQUATELY PLEADED A CLAIM UNDER THE FOURTEENTH AMENDMENT BECAUSE THEY WERE DENIED THE RIGHT TO VOTE.

The fundamental right to vote can hardly be questioned. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections and to have their votes counted." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (internal citation omitted). The right to vote can be denied outright *or* where the government imposes substantial burdens on the right to vote. *See, Storer v. Brown*, 415 U.S. 724, 729-730 (1974); *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). The right to vote also cannot be subjected to arbitrary, capricious, or standardless treatment. *Bush v. Gore*, 531 U.S. 98 (2000).

Plaintiffs' complaint is replete with factual allegations regarding how their right to vote was outright denied or at least severely burdened. French alleges that he went to vote on Election Day and was told by an

election official that he could not vote and to come back later. Compl., ECF No. 1, ¶ 35. French alleges that, as instructed, he came back to his polling place only to be told again that he could not vote and return later. *Id.*, ¶¶ 37-38.

Reese alleges she too went to vote on Election Day and election officials told her she could not vote because they did not have a ballot for her and told her to return later. *Id.*, ¶ 43. Reese alleges that when she did return she again was told she could not vote because her polling locations still did not have enough ballots. *Id.*, ¶ 44. Reese alleges that she returned a third time to attempt to vote but again was unable to vote. *Id.*, ¶ 45. Reese alleges that it was not until 9:15 p.m. on Election Day, that election officials called her to say they finally had a ballot that she could use to vote. *Id.*, ¶ 46. Surely, taken as true, these allegations show that plaintiffs' right to vote was denied or severely burdened.

Defendants' claim that plaintiffs' complaint is deficient because "they were not outright denied the right to vote." Defs. Br., ECF No. 13, at 5. But plaintiffs need not be "outright denied the right to vote" for their voting rights to be violated. "The Fourteenth Amendment's equal protection clause prohibits states from impermissibly interfering with

individuals' fundamental rights such as the right to vote. *Tully v. Okeson*, 977 F.3d 608, 615 (7th Cir. Oct. 6, 2020) Because "voting is of the most fundamental significance under our constitutional structure," a state actor can violate the right to vote by placing significant burdens on the exercise of the right. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Defendants can hardly dispute that plaintiffs' right to vote was, at a minimum, severely burdened by the ballot shortage. Defendants concede that the ballot shortage "disrupted last November's general election" causing them to petition the state court to extend voting hours. Defs. Br., ECF No. 18, at 5. Moreover, defendants represented to the state court on Election Day that because of the ballot shortage "electors of Luzerne County may be deprived of their opportunity to participate because of circumstances beyond their control if the time for closing is not extended." Compl, ECF No. 1, ¶ 30; ECF No. 1-2.

Defendants are also wrong to claim that plaintiffs' allegations in support of their claim that their right to vote was denied or severely burdened are threadbare legal conclusions. Defs. Br., ECF No. 18, at 7. Threadbare conclusory allegations are those that "paraphrase in one way or another the pertinent statutory language or elements of the claims in

question." *Connelly*, 809 F.3d at 790. Plaintiffs do not merely paraphrase the elements of a cause of action. Rather, they explain specifically how, when, and where they were denied the right to vote or had their right severely burdened. Compl., ECF No. 1, ¶¶ 34-47. Moreover, "factual allegations . . . do not become impermissible labels and conclusions simply because the additional factual allegations explaining and supporting the articulated factual allegations are not also included." *Hassan v. City of New York*, 804 F.3d 277, 296 (3d Cir. 2015) In short, plaintiffs have alleged "facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]." *Connelly*, 809 F.3d at 789.

The final argument defendants muster for dismissal of Count I is that the Complaint "mischaracterizes" the facts regarding what happened on Election Day in 2022. Defs. Br., ECF No. 18, at 8. Defendants go on to provide an unsubstantiated version of events regarding what occurred on Election Day. *Id.* This is a factual dispute. The Court should not delve into factual disputes at the motion to dismiss phase, much less factual disputes that are unsupported by any record. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) ("As a general matter, a district court ruling on a motion to dismiss may not consider

matters extraneous to the pleadings.")

Plaintiffs "plead [the] how, when, and where" regarding the denial or severely burdening of their right to vote. *Fowler*, 578 F.3d at 212. Plaintiffs have pleaded facts regarding how the ballot shortage that "disrupted last November's general election" severely burdened their exercise of their fundamental right to vote. Clearly, plaintiffs have alleged sufficient facts that their right to vote was denied or severely burdened and they have adequately stated a claim that their Fourteenth Amendment right to vote was violated. Therefore, Court should deny defendants' motion to dismiss Count I of the complaint.

III. PLAINTIFFS HAVE PLEADED FACTS TO SUPPORT AN EQUAL PROTECTION CLAIM.

In Count II, plaintiffs allege that defendants violated their equal protection rights by subjecting them to differing voting standards based merely on where they lived. Defendants suggest that plaintiffs' equal protection claim is ailing because plaintiffs allege their right to vote was severely burdened by geography (where they lived) rather than because of their race, gender, or sexual orientation. Defs. Br., ECF No. 18, at 13. This is plainly incorrect.

As a fundamental right, the right to vote, including access to the ballot, cannot be subjected to arbitrary, capricious, or standardless treatment. *Bush*, 531 U.S. 98. This includes the right to have one's vote counted regardless of where one lives. *Reynolds*, 377 U.S. at 555 (holding that voters were denied due process based on unequal legislative districts.); *Bush*, 531 U.S. at 109 (Fourteenth Amendment assures that uniform, rational standards and procedures be used in a statewide recount of votes.); *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011) (holding that the Fourteenth Amendment required uniform rules for counting of provisional ballots cast at wrong precinct).

In *Bush*, 7 Justices of the Supreme Court ruled that Florida election officials were violating the equal protection rights of voters based on where they resided by counting their ballots under varying standards. *Bush*, 531 U.S. at 111. There the Supreme Court held that an equal protection problem arose because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Id.* at 106.

Likewise, in *Pierce v. Allegheny County Board of Elections*, 324 F.Supp. 684 (W.D.Pa. 2003), the district court for the Western District of

Pennsylvania held that a justiciable claim existed under the Fourteenth Amendment where there were differing standards among Pennsylvania counties regarding whether absentee ballots delivered by third parties should be counted. In that case, Allegheny County permitted third parties to return absentee ballots by hand. *Id.* at 690. Meanwhile, other counties in Pennsylvania, consistent with the Pennsylvania Election Code, prohibited third-party manual delivery of absentee ballots. *Id.* at 699-700. The district court held that this uneven procedure was an equal protection violation because voters in Allegheny County, who took advantage of the third-party manual delivery rule, "were afforded greater voting strength than similarly-situated voters in Philadelphia County," who could not afford themselves of the third-party delivery procedure. *Id.* Thus, the Court held that there was a lack of uniform standards for the counting of ballots that created a justiciable equal protection claim.

Last week, the district court for the Western District of Pennsylvania denied a motion to dismiss an equal protection claim that challenges the Pennsylvania's rules for counting domestic mailed ballots. *Pennsylvania State Conference of the NAACP, v. Schmidt*, 2023 WL 3902954 (W.D. Pa. June 8, 2023). In that case, plaintiffs claim that Pennsylvania's

rules for counting domestically cast mailed and absentee ballots differ from the rules for counting military or overseas ballots. Thus, the case challenges the differential treatment of ballots based on geography, where one lives. There the district court held "[a]llegations of disparate treatment in counting ballots not cast in a voting booth is all that is necessary to state a claim of equal protection at this stage of the proceedings. Plaintiffs' allegations here are sufficient to survive a motion to dismiss." *Id.*

On Election Day in 2022, the ability to vote in Luzerne County was dependent on where one lived and voters in different locations were subjected to disparate treatment. Compl., ECF No. 1, ¶ 128. There were over 170 polling locations in Luzerne County in the 2022 general election.[3] The ballot shortage impacted approximately 40 of those polling locations, including those where plaintiffs vote. Compl., ECF No. 1, ¶ 129. Meanwhile, the remaining polling locations were unaffected and had enough ballots. *Id.* Plaintiffs lived in one of the approximately 40 areas with polling locations that did not have enough ballots on Election Day. *Id.*, ¶ 127.

[3] https://www.luzernecounty.org/DocumentCenter/View/30209/Precinct-Locations---2022-General-Election.

If the voter lived in an area with a polling location with enough ballots, unlike the plaintiffs, the voter was not turned away multiple times and asked to return later. So, whether a voter was impacted by the ballot shortage was entirely dependent on where the voter lived and varied from precinct to precinct. Voters in precincts without enough ballots faced disparate treatment compared to voters in locations that had enough ballots. Moreover, voters who lived in polling locations that had enough ballots had greater voting strength than those that lived in polling locations that lacked sufficient ballots. The former could cast their vote with little to no burden. The latter, including plaintiffs, were told they could not vote and were told to return to the ballot box multiple times.

Furthermore, whether a location had ballots or did not appears – at the moment – to be entirely arbitrary. Defendants offer no explanation as to why some polling locations had sufficient ballots and others did not. This arbitrary deployment of ballots to polling places also violates the Fourteenth Amendment. *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868, 1910 (2021) (Barrett, J. concurring) (holding that the Fourteenth Amendment protects prohibits the state from arbitrarily denying fundamental rights.)

Defendants make no substantive legal argument regarding why plaintiffs have failed to state an equal protection claim. Rather, they raise a hodge podge of defenses none of which have any merit. First, defendants boldly allege they "have not adopted a policy or custom that dilutes votes, results in the arbitrary or capricious treatment of similar situated voters, or maintained an unequal system of voting that lacks uniform standards and processes." Defs. Br., ECF No. 31, 15. This is nakedly self-serving. Defendant can make that argument at the close of discovery upon a complaint record. For now, it must be ignored, as it calls upon the Court to reject the averments in plaintiffs' complaint as true and relies upon matters outside the pleadings. Second, defendants wrongly claim "the paper shortage affected the entire County." *Id.* The ballot shortage affected approximately 40 of the approximately 175 polling locations in the County. Compl., ECF No. 1, ¶ 129. Finally, defendants suggest the pleading is infirm because plaintiffs "were not the only two voters within their respective polling precincts and, as such, all eligible voters within those precincts would have been equally affected by the paper shortage." Defs. Br., ECF No. 31, at 15-16. This is irrelevant. Plaintiffs are not claiming that their right to vote was treated differently than others in

their own precincts. They are alleging that they were treated differently than those that lived in precincts unaffected by the ballot shortage and that those unaffected voters had unequal voter strength.[4]

"In decision after decision, [the Supreme Court] has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, (1972). The facts pleaded in the complaint, accepted as true, show that plaintiffs could not participate in the 2022 general election on an equal basis with other citizens in the County. Accordingly, the court should deny the motion to dismiss Count II of the complaint.

IV. PLAINTIFFS HAVE PLEADED FACTS TO SUPPORT A PROCEDURAL DUE PROCESS CLAIM.

In Count IV, plaintiffs bring a claim for violation of their procedural due process rights. "To state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was

[4] If defendants are suggesting that plaintiffs lack standing because of the numerosity of those injured, that argument too is misplaced. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, n. 7 (2016), as revised (May 24, 2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.)

deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of "life, liberty, or property," and (2) the procedures available to him did not provide "due process of law." *Hill v. Borough of Kutztown*, 455 F.3d 225, 233–34 (3d Cir. 2006). Procedural unfairness need not be deliberate to be cognizable. *See* Ben F.C. Wallace, Charting Procedural Due Process and the Fundamental Right to Vote, 77 Ohio St. L.J. 647, 656-57 (2016)

Plaintiffs have pleaded facts establishing both elements. First, there can be no question that plaintiffs have a liberty interest in the right to vote. "The right to vote—to the extent it exists and an individual has been deprived of it—is certainly a protected liberty interest, and the Due Process Clause requires fair and adequate procedures if an individual is deprived of his/her liberty." *Barefoot v. City of Wilmington, N. Carolina*, 37 F. App'x 626, 635, n. 5 (4th Cir. 2002). Second, plaintiffs have alleged that defendants deprived them of their liberty interest without due process of law. Compl., ECF No. 1, ¶ 134.

Defendants do not explain why plaintiffs failed to plead a plausible *procedural* due process claim in Count IV under this framework. Rather,

they appear to challenge it as if it were a *substantive* due process claim.[5] Defendants seem to aver that plaintiffs cannot maintain a procedural due process claim because the ballot shortage was a "garden variety" election irregularity and there was no outright fraud or purposeful conduct that caused the ballot shortage. Defs. Br., ECF No. 18, at 16-17. Defendants' argument is misplaced for several reasons. While these excuses might be sufficient to defeat a substantive due process claim *at summary judgment*, they would not defeat a procedural due process claim. Moreover, other than defendants self-serving statement that the ballot shortage was a common election day irregularity (it was not) and was not caused by purposeful or fraudulent conduct, there is nothing in the record to substantiate either of those allegations. So, the court should not even consider those arguments at this stage of the litigation.

Still, plaintiffs do not allege that their constitutional rights were violated because of an isolated incident commonly occurring on election day. Rather, they allege an egregious and pervasive misfeasance by defendants that affected thousands of voters in Luzerne County. Plaintiffs (like thousands of other voters) were disenfranchised due to "patent and

[5] Plaintiffs due bring a substantive due process claim in Count III of the complaint.

fundamental unfairness" and "broad-gauged unfairness permeate[d] [the 2020] election," so whether it resulted from defendants' misfeasance or "neutral action" is not decisive in this case. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). As observed in *Griffin*:

> "If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under S 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and the question of the availability of a fully adequate state corrective process is germane. But there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action. *Cf. Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930)."

Accordingly, the Court should deny defendants' motion to dismiss Count IV of the complaint.

V. PLAINTIFFS HAVE ALLEGED FACTS THAT THEIR CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE OF THE OFFICIAL CUSTOMS, POLICIES, PRACTICES, CUSTOMS, POLICIES, AND ACTIONS OF DEFENDANTS AND BECAUSE OF DEFENDANTS' FAILURE TO TRAIN.

A. Defendants' official policies, customs, and practices.

Defendants also challenge each of plaintiffs' claims arguing that defendants cannot be liable for any constitutional violations under the Supreme Court's holding in *Monell v. New York Dept. of Social Servs.*, 436

U.S. 658 (1978) Defendants are correct to observe that, under *Monell*, defendants cannot be held vicariously liable for the actions of their employees. Def. Br., ECF No. 18, at 7. But plaintiffs never argue otherwise, and plaintiffs do not predicate defendants' liability on respondent superior.

Under *Monell*, defendants are "liable [] for constitutional violations that are caused by its official policies and customs." *Porter v. City of Philadelphia*, 975 F.3d 374 (3d Cir. 2020) (citations omitted). Official policies include official edicts based on "decisions of a government's lawmakers," *Connick v. Thompson*, 563 U.S. 51, 61 (2011), such as a formal resolution, directive, or ordinance. However, an official "policy need not be passed by a legislative body, or even be in writing, to constitute an official policy for the purposes of § 1983." *Porter*, 975 F.3d at 383. "A pertinent decision by an official with decision-making authority on the subject constitutes official policy." *Id.*

Here, plaintiffs allege that their right to vote was denied or severely burden because defendants did not provide an adequate number of ballots at each polling location, providing an insufficient number of ballots for at least 40 polling locations, and ordering a number of ballots

less than what the Pennsylvania Election Code required. Compl., ECF No. 1, ¶ 108. Likewise, plaintiffs allege they were denied the right to vote because defendants' official policy was to implement no adequate procedure for anticipating ballot shortages and timely dispatching additional ballots in a manner that protected plaintiffs' right to vote. *Id.*, ¶ 109. Specifically, plaintiffs allege that defendants violated the plaintiffs' right to vote through the following policies and practices which had the effect of policy:

a. Supplying voting districts with an inadequate number of paper ballots;

b. Failing to implement back-up response procedures or implementing back-up response procedures that were wholly inadequate to respond to paper ballot shortages;

c. Hiring an unqualified director and failing to train the director; and

d. Failing to train other Bureau of Elections election workers.

Id., ¶ 97.

Plaintiffs further allege that the ballot shortage resulted from affirmative directives, decisions, or decrees from those with final decision-

making authority. *Id.*, ¶¶ 51, 52, 59 62-68. Plaintiffs explain that defendant Luzerne County Board of Elections is vested with the statutory authority to administer elections in the County and that its five-members make final decisions regarding the administration of elections in the county. *Id.*, ¶¶ 51-52. Plaintiffs further allege that the director of the defendant Bureau of Elections has final decision-making authority regarding administration of elections in the county, including preparing for and conducting the election, preparing ballots, establishing election policies and procedures, and training election day workers. *Id.*, ¶¶ 58-59. Simply put, plaintiffs allege that someone with final decision-making authority made an official decree not to provide at least 40 polling places with enough ballots, ordering a number of ballots less than what was required under the Pennsylvania Election Code, and supplying each polling location with a different number of ballots. The Court must accept these averments as true, and these averments are sufficient to state a claim at this stage for municipal liability. *Carter v. City of Philadelphia,* 181 F.3d 339, 357–58 (3d Cir. 1999) ("The District Court's insistence that Carter must identify a particular policy and attribute it to a policymaker, at the pleading stage without benefit of discovery, is unduly harsh.")

Defendants' brush off plaintiffs' allegations by raising an unsupported factual claim that the ballot shortage was a "fluke" caused by a "freak occurrence" and "human error." Defs. Br., ECF No. 18, at 7, 14, 17. This is nothing more than word play designed to gloss over the facts plaintiffs have pleaded in the complaint. Plaintiffs have expressly, specifically and credibly alleged that the admitted "errors that interfered with last November's general election" were caused by conscious decisions and practices amounting to policy of the defendants. The Court must credit those allegations and the motion to dismiss should be denied.

B. Failure to train.

In addition to liability based on affirmative conduct establishing a policy or edict, defendants can also be held liable "policy of inaction." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). When a local government is on "notice that its program will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the Constitution." *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378 (1989)). Accordingly, "a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Id.* at 61. Where the

policy "concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to deliberate indifference to the rights of persons with whom those employees will come into contact." *Thomas v. Cumberland Cnty.*, 749 F.3d 217, 222 (3d Cir. 2014). Deliberate indifference can be shown in two ways.

First, a plaintiff can demonstrate deliberate indifference by showing "a pattern of similar constitutional violations by untrained employees" *Id.* at 223 (citing *Connick*, 563 U.S. at 61) "A pattern of violations puts municipal decisionmakers on notice that a new program is necessary, and '[t]heir continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability.'" *Id.* (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397 (1997))

Second, a plaintiff can also show deliberate indifference "where unconstitutional consequences of failing to train could be so patently obvious" and the risk of constitutional violations "highly predictable." *Connick*, 563 U.S. at 64 (2011)

Plaintiffs have alleged that their constitutional rights were violated because defendants failed to train their election officials, including their director of elections, and workers on how to properly administer an election under federal, state and local law. Compl., ECF No. 1, ¶¶ 5, 7, 17, 73, 74, 78, 87, 95, 96.

Plaintiffs point to a pattern of constitutional violations flowing from defendants' maladministration of elections sufficient to place defendants on notice that failing to train their employees would likely cause the deprivation of the constitutional rights of voters. They also allege a pattern of constitutional violations sufficient to show that defendants acted with deliberate disregard toward the right to vote. During the 2020 General Election, an election worker threw out nine valid ballots, which, upon information and belief, were not counted. *Id.*, ¶ 88. In the May 2021 primary, Republican ballots displayed on voting machine screens were labeled as Democrat ballots. *Id.*, ¶ 89. In the November 2021 General Election, ballots contained printing errors. *Id.*, ¶ 90. Defendants claim these incidents "are different in both kind and degree" and, therefore, are insufficient to provide actual or constructive notice to defendants. Defs. Br.,

ECF No. 18, at 11.[6] But that is a factual argument that needs to be resolved by the finder of fact at the time of trial.[7]

Plaintiffs have also alleged that the consequences of defendants' failure to train were obvious. *Id.*, ¶ 74. Plaintiffs allege the consequences were obvious because of the statutory requirement that defendants properly train election day officials and employees. *Id.*, ¶ 6, 7, 54, 77. Plaintiffs further claim that consequences were obvious because defendants ignored warning from the United States Election Assistance Commission (EAC) about a looming ballot paper shortage that would likely impact the 2022 General Election. *Id.*, ¶ 71. And further failed to employ any of the EAC's recommended procedures such as designating runners to quick delivery ballot paper and to stock polling locations with extra ballots. *Id.*

Plaintiffs' allegations, taken as true, demonstrate that defendants were put on actual or constructive notice of the need for better election day training and preparation. *Connick*, 563 U.S. at 61 ("when city

[6] Defendants never address the plaintiffs' allegations that the warning from the EAC also placed defendants on notice.

[7] Defendants also improperly interjects a series of factual affirmative defenses to plaintiffs' failure to train claim, such as, the firing of election day workers who discarded ballots, an investigation by the United States Attorney, coding issues, and "instances where the Bureau did everything right." These arguments must also be dealt with at trial and should not be considered at the motion to dismiss phase.

policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.") Moreover, the allegations show that the ballot shortage was not a "fluke" occurrence but was entirely predictable and preventable. At this stage, plaintiffs have alleged sufficient facts demonstrating defendants acted with deliberate indifference to the rights of plaintiff. *See e.g. League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723, 729 (N.D. Ohio 2005) (holding that plaintiffs in voting case alleged a sufficient pattern of voting irregularities to maintain a claim against the Ohio Governor and Secretary of State on a failure to train theory of liability.)

Defendants are wrong to claim that a "single incident" is insufficient as a matter of law to support a failure to train theory of liability. Defs. Br., ECF No. 18, at 13. "In certain situations, the need for training can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights even without a pattern of constitutional violations. *Thomas,* 749 F.3d at 224 (citing *Canton*, 489 U.S. at 390). In *Thomas* and *Berg v. County of Allegheny*,

219 F.3d 261 (3d. Cir. 2000), the Third Circuit held that fact issues precluded summary judgment on single-incident failure to train cases. And, in *Carter*, the Third Circuit held a plaintiff should be permitted to pursue discovery to ferret out "exactly what training policies were in place or how they were adopted." *Carter*, 181 F.3d at 358. So, even if defendants' failure to train their employees and officials in preparation for the 2022 general election were considered a "single incident," defendants could still be held liable because the consequences of their failure to train is so obvious.

Accordingly, the Court should deny defendants' motion to dismiss based on plaintiffs allege inability to establish *Monell* liability.

VI. DEFENDANTS' REMAINING MUNICIPAL LIABILITY ARGUMENTS ARE WITHOUT MERIT.

Defendants also raise several other arguments against *Monell* liability none of which have any merit. For example, defendants ask the Court to accept their bald statement that "[d]efendants have not adopted a policy or custom that dilutes voters, results in the arbitrary or capricious treatment of similar situated voters, or maintained an unequal system of voting that lacks uniform standards and processes." Defs. Br., ECF

No. 18, at 15. But plaintiffs have alleged facts that defendants did have an official policies and edicts that resulted in arbitrary and capricious treatment of voters, Compl., ECF No. 1, ¶ 97(a)-(d), and those allegations are accepted as true.

Defendants also argue that the defendant Board of Election cannot be liable based on a failure to train because "it has no authority to train, supervise, or discipline the Director of Elections" or any personnel. This too contradicts the facts alleged in the complaint which are accepted as true. Id., ¶¶ 51, 54. These are also matter outside the pleadings to defeat the complaint and the Court should not consider those averments. Nonetheless, defendants offer no legal or factual support for their allegation regarding the powers of the Board. Defendants do point to the Home Rule Charter generally but do not say where or why the Home Rule Charter prevents the Board of Elections from hiring, firing, or training its personnel.

Defendants likewise interjects that the defendant Bureau is "a department within the County government and not a separate legal entity." Def. Br., ECF No. 18, at 9. Once again defendants offer no support for

this conclusion and lobbed it at the Court's feet as a matter it must accept. It should not.

Thus, the Court should reject each of defendants' factual arguments in support of the motion to dismiss.

VII. DEFENDANTS ARE NOT ENTITLED TO A DISMISSAL OF THE COMPLAINT WITH PREJUDICE.

Defendants request that the court dismiss the complaint with prejudice. ECF No. 13-1. It would be an error to dismiss the complaint with prejudice for two reasons. First, if the Court agrees that the complaint is inadequately pleaded, then "unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint." *Phillips*, 515 F.3d at 228. Second, defendants have not explained why plaintiffs substantive due process claim is inadequately pleaded. As Count II makes clear, plaintiffs claim that defendants violated their substantive due process rights under the Fourteenth Amendment. Compl., ECF No. 1, ¶ 114. Yet, except for their arguments related to *Monell* liability, defendants raise no independent legal argument as to plaintiff's substantive due process claim. Accordingly, in all events, the Court should deny defendants' request to dismiss the complaint with prejudice.

CONCLUSION

Based on the foregoing, plaintiffs respectfully request the Court to dismiss defendants' motion to dismiss.

Respectfully submitted,

Dated: June 13, 2023

/s/ Walter S. Zimolong III
WALTER S. ZIMOLONG III, ESQUIRE
JAMES J. FITZPATRICK III, ESQUIRE
Zimolong, LLC
PO Box 552
Villanova, PA 19085-0552
wally@zimolonglaw.com
james@zimolonglaw.com
Tele: 215-665-0842
Attorney for plaintiffs

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

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,

Dated: June 13, 2023

/s/ Walter S. Zimolong III
WALTER S. ZIMOLONG III, ESQUIRE
JAMES J. FITZPATRICK III, ESQUIRE
Zimolong, LLC
PO Box 552
Villanova, PA 19085-0552
wally@zimolonglaw.com
james@zimolonglaw.com
Tele: 215-665-0842