

**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	:	

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**PLAINTIFFS' REPLY IN SUPPORT OF THEIR RESPONSE IN  
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs file this reply to address new arguments defendants raise for the first time in their reply to plaintiffs' response in opposition to defendants' motion to dismiss. (ECF No. 28)

**I. DEFENDANTS' GROSS MALADMINISTRATION OF THE 2022  
GENERAL ELECTION VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS.**

Defendants argue that plaintiffs' claims must be dismissed because "their constitutional right to vote was not infringed by government process, such as purging voter rolls, but instead by alleged deficient administration of an election – i.e. an inadequate supply of paper for electronic voting machines." Reply Br., ECF No. 28, p. 2. This is a

distinction without a difference. Defendants fail to explain the difference between a government action, like purging of voting rolls, which defendants apparently concede could be a due process violation, and a government action, like failing to properly supply polling locations with sufficient ballot paper, which defendants argue “is not a cognizable due process claim.” Reply Br., ECF No. 28, p. 2. In all events, government action, like not supply ballots to polling locations is sufficient to serve as a basis for a due process claim.

In *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008), a group of voters sued state election officials for issues arising out of the 2004 general election in Ohio. Plaintiffs there claimed that election officials mismanaged the 2004 general election. Plaintiffs claimed that defendants’ maladministration of the 2004 general election forced voters to “wait from two to twelve hours to vote because of inadequate allocation of voting machines.” *Id.* at 477. Plaintiffs also claimed that “voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others.” *Id.* at 477-478. Like plaintiffs here, “long wait times caused some voters to leave their polling places without voting in order to attend

school, work, or to family responsibilities or because a physical disability prevented them from standing in line.” *Id.* at 478. And like here, “poll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes.” *Id.* The Sixth Circuit found that these examples of election maladministration were the kind that could support a claim that plaintiffs’ due process rights were violated because their right to vote was denied or severely burdened. *Id.* The Sixth Circuit held that “these allegations, if true, could support a troubling picture of a system so devoid of standards and procedures as to violate substantive due process.” *Id.*

Accepting the allegations of plaintiffs’ complaint as true, plaintiffs have painted a similar troubling picture regarding the standards and procedures used by defendants in administering elections. Indeed, defendants’ catastrophic failure to properly administer the 2022 general election caused defendants to petition the state court for relief and for that court to find “voters in Luzerne County through no fault of their own, were disenfranchised and denied the fundamental right to vote.” Compl., ECF No. 1, ¶ 2; ECF No. 1-2. As in *League of Women Voters*, the Court here is “not asked to examine the validity of individual ballots or to

supervise the administrative details of a local election.” *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); Compl., ECF No. 1, ¶ 8 (“Plaintiffs do not seek to overturn the results of the 2022 General Election and do not seek a recount of the votes in that election.”) Rather, plaintiffs ask the Court “to remedy a broad-gauged unfairness that infected the results of [an] election.” *Id.*

Plaintiffs’ complaint does not allege “garden-variety” election issues. It alleges specific facts showing a pervasive misadministration of elections in the county that has denied plaintiffs their right to vote or severely burdened it. Accordingly, the Court should deny the motion to dismiss.

## **II. PLAINTIFFS’ RIGHT TO VOTE IS NOT CONDITIONED ON WHETHER THEIR VOTES WOULD HAVE BEEN OUTCOME DETERMINATIVE.**

For defendants, some votes matter more than others. Defendants suggest that plaintiffs’ cause is infirm because plaintiffs’ votes could not have determined the outcome of any race in the 2022 general election. Reply Br., ECF No. 28, p. 5 (“Plaintiffs have not pleaded, nor could then, that these two votes affected the outcome of any race on the ballot”). Whether plaintiffs’ uncast ballots would have been outcome

determinative is irrelevant. First and foremost, plaintiffs are not seeking to overturn the results of any election. *See* Compl., ECF No. 1, ¶ 8 (“Plaintiffs do not seek to overturn the results of the 2022 General Election and do not seek a recount of the votes in that election.”) Rather, they are seeking a vindication of their constitutional rights. *Id.* Moreover, the fundamental right to vote and to have one’s vote counted is not a conditional right predicated on whether the vote will matter or determine the outcome of an election. “The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). If a citizen could seek redress for the government denying him the right to vote only when the vote would have been outcome determinative, the preciousness of the right to vote becomes debased. It would also invite chicanery by election officials and

foes, who would have free hand to interfere in elections so long as their conduct did not affect the outcome of the election.

Plaintiffs have a fundamental right to vote and have their vote counted regardless of whether their votes would have determined the outcome of any race in the 2022 general election. Plaintiffs have pleaded a claim that defendants denied them of that right. The Court should deny plaintiffs' motion to dismiss.

### III. PLAINTIFFS ARE NOT ALLEGING A *WESBERRY* VOTE DILUTION CLAIM.

In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court held that a state violates a voter's equal protection rights when it apportions legislative districts with grossly disproportionate populations. The Court reasoned that a voter in a legislative district with two to three times the population of another district was denied an equal weight of the vote because their vote became diluted and debased. Defendants wrongly attempt to cabin plaintiffs' equal protection claim as a *Wesberry* vote dilution argument. Reply Br., ECF No. 28, p. 8 ("Plaintiffs attempt to classify their Equal Protection claim under a 'vote dilution' theory.") Defendants mischaracterize plaintiffs' equal protection claim.

Plaintiffs are alleging that voters in Luzerne County were treated differently based on where they lived. Voters that lived in polling locations with sufficient ballot paper were able to vote, whereas, voters, like plaintiffs, that lived in locations without sufficient ballot paper could not. This type of unequal treatment based on where a voter lived has repeatedly served as a basis for an equal protection claim. *See Bush v. Gore*, 531 U.S. 98, 106 (2000) (Holding equal protection violation occurred 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.”); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008) (holding that allegations that voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines causing more severe wait times in some counties than in others could establish an equal protection claim that voters right to vote was denied or severely burdened based on where the voter lived.); *Pierce v. Allegheny County Board of Elections*, 324 F.Supp. 684 (W.D.Pa. 2003) (holding that an equal protection claim was pleaded where plaintiff alleged that counties applied different standards

to the counting of absentee ballots delivered by third parties.)

Accordingly, the Court should deny the motion to dismiss.

Respectfully submitted,

Dated: June 8, 2023

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