

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

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

---

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT

Respectfully submitted,

Dated: April 29, 2024

/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

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	II
TABLE OF AUTHORITIES .....	IV
INTRODUCTION.....	1
ARGUMENT .....	3
I. ELEMENTS OF AN ACTION UNDER SECTION 1983. ....	3
II. PLAINTIFFS’ CONSTITUTIONAL RIGHTS WERE VIOLATED.....	4
A. Plaintiffs’ constitutional right to vote. ....	4
B. Plaintiffs’ voting rights were subjected to unequal treatment. .....	8
C. Plaintiffs’ substantive due process rights were violated. ....	11
III. PLAINTIFFS’ CONSTITUTIONAL RIGHTS WERE DENIED AS A RESULT OF DEFENDANTS’ POLICIES AND CUSTOMS.....	14
A. Defendants’ affirmative decision not to order ballot paper caused the violation of plaintiffs’ constitutional rights. ....	15
B. Defendants’ failure to adopt policies and procedures caused plaintiffs’ constitutional rights to be violated.....	17
C. Defendants’ failure to train election officials responsible for administering election cause the violation of plaintiffs’ constitutional rights. ....	20

CONCLUSION .....	25
CERTIFICATION OF LENGTH OF BRIEF .....	27
PROOF OF SERVICE .....	29

RETRIEVED FROM DEMOCRACYDOCKET.COM

## TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown</i> , 520 U.S. 397 (1997) .....	25
<i>Berg v. Cnty. of Allegheny</i> , 219 F.3d 261 (3d Cir. 2000) .....	15, 22
<i>Burdick v. Takushi</i> , 504 U.S. 428 (U.S. 1992) .....	5
<i>Bush v. Gore</i> , 531 U.S. 98 (2000) .....	5
<i>Connick v. Thompson</i> , 563 U.S. 51 (2011) .....	16, 18, 21
<i>Dunn v. Blumstein</i> , 405 U.S. 330, (1972) .....	11
<i>French v. Cnty. of Luzerne</i> , 2023 WL 8374738 (M.D. Pa. 2023) .....	Passim
<i>Fulton v. City of Philadelphia</i> , 141 S.Ct. 1868 (2021) .....	11
<i>Harvey v. Plains Twp. Police Dep't</i> , 421 F.3d 185 (3d Cir. 2005) .....	3
<i>League of Women Voters of Ohio v. Brunner</i> , 548 F.3d 463 (6th Cir. 2008) .....	4, 12

<i>Natale v. Camden Cnty. Corr. Facility</i> , 318 F.3d 575 (3d Cir. 2003) .....	15, 18
<i>Porter v. City of Philadelphia</i> , 975 F.3d 374 (3d Cir. 2020) .....	16
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964) .....	4
<i>Storer v. Brown</i> , 415 U.S. 724 (1974) .....	5
<i>Thomas v. Cumberland Cnty.</i> , 749 F.3d 217 (3d Cir. 2014) .....	21
<i>Ury v. Santee</i> , 303 F. Supp. 119 (N.D. Ill. 1969) .....	10

## INTRODUCTION

This lawsuit is brought to vindicate defendants' 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. The reason voters were denied the right to vote in Luzerne County on Election Day in 2022 was because the County admittedly did not supply each polling location with enough ballot paper to permit voters to cast a vote. Because polling locations lacked ballot paper, voters necessarily could not vote. Instead, they were told they could not vote, turned away, and told to come back later. Plaintiffs, William French ("French") and Melynda Anne Reese ("Reese") (collectively, "Plaintiffs"), are two such voters.

The voter disenfranchisement that occurred on Election Day in 2022 was a result of gross election administration malpractice and deliberate indifference to proper election administration. The consequential disenfranchisement was entirely predictable. To compound the problem,

defendants failed to adopt any policies and procedures to guide their inexperienced election officials. And, likewise, failed to train these inexperienced election officials concerning proper election administration. Their failure to head warnings, failure to adopt policies and procedures, and failure to train caused widespread voter disenfranchisement on Election Day.

Worse, defendants made the inexcusable affirmative decision not to order ballot paper for the 2022 general election. This inexcusable failure was only made worse by defendants' lack of policies and procedures regarding how to address a ballot paper shortage, including any such policies or procedures related to ordering ballot paper, stocking voting machines with ballot paper before the election, and resupplying voting locations that ran low or out of paper.

Plaintiffs sue under 42 U.S.C. § 1983 and the bring this action to vindicate their constitutional rights and to obtain equitable relief to assure that their rights (and the voting rights of others) are not violated again. Plaintiffs now move for summary judgment because there are no material facts in dispute, and they are entitled to judgment as a matter of law.

## ARGUMENT

### I. ELEMENTS OF AN ACTION UNDER SECTION 1983.

“To state a cause of action under § 1983, a plaintiff must allege that: (1) the conduct complained of was committed by persons acting under color of state law; and (2) the conduct violated a right, privilege, or immunity secured by the Constitution or laws of the United States.” *French v. Cnty. of Luzerne*, \_\_\_ F. Supp. 3d. \_\_\_, 2023 WL 8374738, at \*2 (M.D. Pa. 2023) (citing *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 189 (3d Cir. 2005)). Local government entities, like defendants, are liable under Section 1983 when the “violation of [plaintiffs’] federally protected rights resulted from the enforcement of a ‘policy’ or ‘custom’ of Defendants.” *Id.* at \*3.

As this Court has already held, “[i]t is undisputed that defendants are state actors for the purposes of § 1983.” *Id.* Accordingly, the only questions that remain are whether plaintiffs have demonstrated a violation of their constitutional rights because of a policy or custom of the defendants. *Id.* The answer these questions is “yes.”

## II. PLAINTIFFS' CONSTITUTIONAL RIGHTS WERE VIOLATED.

Plaintiffs maintained three distinct constitutional rights that defendants violated on Election Day in 2022. First, that plaintiffs held (and still hold) a fundamental right to vote protected by the First and Fourteenth Amendments. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (internal citation omitted) (“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.”) Second, plaintiffs had a right to vote on equal terms with other voters in the County that was not dependent on where they lived, which is protected by the equal protection clause of the Fourteenth Amendment. *French*, 2023 WL 8374738, at \*5, ECF No. 37 at 14, (“multiple courts have found unequal treatment of ballots based on where voters live unconstitutional.”) Third, plaintiffs enjoyed a substantive due process right to vote in a system that was fair and equal with uniform rules, standards, and procedures. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008)

### A. . Plaintiffs' constitutional right to vote.

As this Court recognizes, a violation of the fundamental right to vote occurs when “the right to vote [is] denied outright or where the

government imposes substantial burdens on the right to vote.” *French*, 2023 WL 8374738, at \*3 (citing *Storer v. Brown*, 415 U.S. 724, 729-730 (1974) and *Burdick v. Takushi*, 504 U.S. 428, 433 (U.S. 1992)). The right to vote also cannot be subjected to arbitrary, capricious, or standardless treatment. *Bush v. Gore*, 531 U.S. 98 (2000).

### 1. William French.

French’s right to vote was denied outright when defendants’ election officials told him he could not vote because there were not enough ballots and then substantially burdened when he was forced to return on multiple occasions to his polling location to try to exercise his right to vote.

On Election Day, French went to his local polling location located at the Freeland Ambulance Association, 417 Johnson Street, Freeland, PA 18224. Plaintiffs’ Statement of Undisputed Material Facts (“Pltfs. Facts”), ECF No. 51, at ¶ 67. When he arrived election workers employed by defendants told French that he could not vote because there were no ballots and that he should come back later. *Id.* at ¶¶ 68-69. As instructed French returned later at approximately 3:30 p.m. *Id.* at ¶ 70. But again, election workers told French he could not vote because the polling

location still had no ballots available. *Id.* at 71. Election workers told French that polling location hours would be extended because they had no ballots. *Id.* at 72. When French asked one election worker when he expected ballots, the election worker responded, “I don’t know.” *Id.* at 73.

Since 2011, French has been fully disabled and walks with the assistance of a cane. *Id.* at ¶¶ 66, 75. French was not able to return to his polling location during extended polling hours because the sidewalks leading to his polling location are deteriorated and destroyed. *Id.* at 76. Walking on these sidewalks at night creates a risk of fall and injury. *Id.* at 77.

French was outright denied the right to vote outright twice. First, when he went to his polling location in the morning and was told flatly he could not vote. Then, when he returned to his polling location later in the day, county election officials, again told him he could not vote. Defendants also substantially burdened French’s right to vote, when they told him multiple times to return but never given an exact time when ballots would become available. Therefore, he was left to guess as to when ballots could become available. Ultimately, he had to choose between *trying* to vote only to be turned away again or risking bodily injury and harm

by traversing unsafe sidewalks at night.

In sum, French was initially denied the right to vote outright and then had substantial burdens hoisted on his right to vote. Citizens should not have to have to go to a polling location multiple times to exercise the franchise only to be turned away with vague instructions to “come back later.”

## 2. Melynda Anne Reese.

Reese is the primary care giver for her husband who, as of November 8, 2022, had recently suffered two cardiac arrests and a stroke. *Id.* at ¶ 80. Due to his condition, Reese is not able to leave the house for extended periods of time when her husband will be unattended. *Id.* at ¶ 81. On the morning of Election Day, Reese went to her polling place located at 248 State Route 4012, Shickshinny, Pennsylvania 18655 with her husband. *Id.* at ¶ 82. Upon arrival, election officials and workers told Reese that only her husband could vote because the polling location had only a limited number of ballots remaining and that Reese would have to return later in the day to cast her vote. *Id.* at ¶ 83.

At 4:00 p.m., Reese returned to vote. *Id.* at ¶ 84. When she returned, she was told there was still a waiting time. *Id.* at ¶ 85. But her husband’s

physical condition made him unable to wait in the line for a long period of time. *Id.* at ¶ 86. Reese again returned with her husband to cast her vote later in the day at approximately 6:30 p.m. *Id.* at ¶ 87. Once again, however, Reese saw the length of the line was so long that she would not be able to wait with her husband for that long to vote. *Id.* at 88.

Finally, at approximately 9:15 p.m., an election official employed by defendants called Reese and told her that ballots were finally available, and she could come to her polling place to vote. *Id.* at ¶ 89. Reese's husband had already taken his sleeping medication and it was impossible to leave the home with him at this time to attempt to vote a fourth time. *Id.* at ¶ 90.

Like French, Reese was both initially denied the right to vote and then had her right to vote substantially burdened by being told to return on multiple occasions and that she could only vote at 9:15 p.m. on Election Day evening.

**B. Plaintiffs' voting rights were subjected to unequal treatment.**

Plaintiffs' experience on Election Day was entirely dependent on where they lived. The ballot paper shortage was widespread and,

according to defendants, impacted 35-40 polling locations within the approximately 130 polling locations in the County. *Id.* at ¶ 15. Some polling locations experienced no ballot paper shortages. Cook dep., ECF No. 51-3 at 78:24-25, 79:1-2.

Plaintiffs' polling locations were among those that had ballot paper shortages. As this Court rightly observed, "[v]oters at precincts with less paper faced more substantial burdens on their right to vote than voters at precincts with more paper." *French*, 2023 WL 8374738, at \*6. Plaintiffs' right to vote was subjected to unequal treatment because defendants failed to supply each polling location with the number of ballots required under the Pennsylvania Election Code, 25 P.S. § 2967(a), and Plaintiffs lived in a precinct that defendants shortchanged on ballots.<sup>1</sup>

This Court has found this case analogous to *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969). As this Court noted, in *Ury*, the district court found that a "failure to provide adequate voting facilities to all voters, deprived some voters of the equal protection of law." *French*, 2023 WL

---

<sup>1</sup> Defendants do not deny they were on notice regarding the number of ballots each polling location was required to have under the Pennsylvania Election Code. Pltfs. Facts at ¶ 7. Nor do they deny that the failure to supply each polling location with a sufficient number of ballots caused "voters to be disenfranchised through no fault of their own." *Id.* at ¶ 16.

8374738, at \*5 (citing *Ury*, 303 F. Supp. at 126). In *Ury*, each voting precinct did not have an equal number of voters. But the village assigned the same number of judges of election to each polling location. The district court found that the village's failure to sufficiently staff each polling location caused voters to wait 2 to 3 hours to vote and in some instances were forced to attempt to vote on multiple occasions. *Ury*, 303 F.Supp. at 124. The district court found further that voters who were forced to wait in line or to return on multiple occasions "were effectively deprived of their right to vote." *Id.*

This case is indistinguishable from *Ury*, except that plaintiffs here are not seeking to overturn the results of the election. Like the village, defendants here wholly failed to adequately supply certain polling locations with sufficient ballots leading to long wait times and voters being turned away.

Defendants offer no explanation as to why some polling locations had sufficient ballots and others did not. This arbitrary deployment of ballots alone 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.)

“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). Plaintiffs could not participate in the 2022 general election on an equal basis with other citizens in the county simply because of where they lived. Accordingly, their equal protection rights were violated.

**C. Plaintiffs’ substantive due process rights were violated.**

The right to vote is a fundamental right protected by the Fourteenth Amendment’s substantive due process clause. “The Due Process Clause is implicated, and § 1983 relief is appropriate, in the exceptional case where a state’s voting system is fundamentally unfair.” *League of Women Voters of Ohio v.*, 548 F.3d at 478 (citations omitted). The facts here present such an exception case. Defendants maintain a voting system where their highest-ranking election officials were woefully unqualified, inexperienced, and untrained.

Despite knowing Beth Gilbert McBride (“Gilbert”) lacked any

experience in administering elections, the County hired her as the second-highest ranking official responsible for administering elections. Pltfs. Facts at ¶ 27. Then, only a few weeks later, defendants appointed her as Director of Elections - the highest-ranking official responsible for elections in the County. *Id.* at 31. But at no point did the defendants offer or provide Gilbert any training on how to administer an election. *Id.* at ¶¶ 31-32. Likewise, defendants appointed Emily Cook (“Cook”) as the deputy Director of Elections despite knowing that she also lacked any experience in administering elections and offered her no training on how to administer elections, as well. *Id.* at ¶¶ 33-38.<sup>2</sup>

Defendants also maintained no formal policies and procedures on how to administer an election. *Id.* at ¶ 63. Therefore, there were no standard operating procedures to rely upon at any point in the election administration process – not at the point of ordering paper, stocking the tabulators to be dispatched to voting locations, or when the ballot paper shortage issue arose on Election Day.

Defendants lack of training and procedures were so severe, that

---

<sup>2</sup> To make matters worse, defendants placed Gilbert and Cook in these positions despite being warned in 2021 by the Luzerne County District Attorney that Bureau of Elections personnel lacked training.

they could not even tell the Court of Common Pleas how many polling locations were impacted by the ballot paper shortage nor when ballot paper would arrive to those polling locations.

**“THE COURT:** For that time frame no one is going to be able to vote?

**[GILBERT]:** At certain polling locations. We’ve identified 35 polling locations that are being affected by the paper shortage.

**THE COURT:** So in the past I’ve had attachments of those locations. Do we have those attachments?

**[GILBERT]:** I don’t have a separate attachment. We just have a white board in our office, quite candidly, that were keeping track of deployment.

. . .

We’re not sure what other polling locations are going to run out of paper in the meantime. It might be more widespread.”

ECF No. 51-5 at 3:15-16, 4:1, 4:15-17.

The procedures in the County were fundamentally unfair and uneven because there were no procedures. The lack of procedures and training regarding how to administer an election is exceptional and inexcusable. Therefore, plaintiffs’ substantive due process rights were violated.

In sum, there are no material facts in dispute regarding whether plaintiffs suffered a violation of their constitutional rights. Therefore,

plaintiffs establish the first part of the Section 1983 standard.

### III. PLAINTIFFS' CONSTITUTIONAL RIGHTS WERE DENIED AS A RESULT OF DEFENDANTS' POLICIES AND CUSTOMS.

Plaintiffs' have also established that second part of the Section 1983 standard because their rights were violated by a policy, custom, or practice of defendants. There are three circumstances under which a "policy" or "custom" of governmental entity may be found. First, a "[p]olicy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 275 (3d Cir. 2000) (citations omitted). Second, a policy or custom is found when "no rule has been announced as policy but federal law has been violated by an act of the policymaker itself." *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003). Third, "a policy or custom may also exist where the policymaker has failed to act affirmatively at all, [though] the need to take some action to control the agents of the government is so obvious, and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need." *Id.* (citations quotations and omitted).

Here, the violation of plaintiffs' constitutional rights and widespread disenfranchisement was directly caused by to defendants' affirmative decision to not order ballot paper for the 2022 general election. It is also directly related to defendants' failure to adopt policies and procedures concerning the administration of elections within the county, including adopting policies and procedures related to assuring that each polling location had sufficient ballot paper. Finally, plaintiffs' constitutional rights were violated as a result of defendants' failure to train election officials whose primary responsibility was to administer elections with the County.

**A. Defendants' affirmative decision not to order ballot paper caused the violation of plaintiffs' constitutional rights.**

Official policies include decisions made by an official with final decision-making authority, such as a formal resolution, directive, or ordinance. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). These decision "need not be passed by a legislative body, or even be in writing, to constitute an official policy for the purposes of § 1983." *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." *Id.*

Gilbert made an affirmative decision not to order ballot paper for

the 2022 general election. *Id.* at ¶ 26; ECF No. 51-3 at 21-24. (Q. All right. Just so I'm clear, before the November 8, 2022, election, nobody within the Bureau ordered ballot paper specifically for use in the November of 2022 election? A. Correct."). As defendants plainly admit, Gilbert was "highest-ranking official within the Bureau of Election who is tasked with overseeing all aspects of election administration with Luzerne County," including ordering ballot paper that election. Pltfs. Facts at ¶¶ 17, 25. But for this affirmative decision not to order ballot paper for the election the violation of plaintiffs' constitutional rights would not occurred.

Defendants' affirmative decision not to order ballot paper is the *sine quo non* of plaintiffs' constitutional violation. Defendants cannot dispute this. Defendants appeared before the appeared before the Luzerne Court of Common Pleas on Election Day to obtain a court order extending voting hours and admitted that the ballot paper shortage caused voters throughout Luzerne County to be disenfranchised. Pltfs. Facts at ¶ 16.

**THE COURT:** These voters have been disenfranchised through no fault of their own.

**[COUNSEL FOR THE COUNTY]:** Correct.

**THE COURT:** We all are in agreement with that. We want to

protect the integrity of the election as best we can.

**MR. ODONNELL:** Agreed. Thank you.

ECF No. 51-5 at 7:8-13

Accordingly, the Court should grant plaintiffs' motion for summary judgment.

**B. Defendants' failure to adopt policies and procedures caused plaintiffs' constitutional rights to be violated.**

While an affirmative conduct establishes a policy or edict, so does a "policy of inaction." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A policy of inaction occurs when a policymaker fails to adopt a policy or procedure where "the inadequacy of existing practice [is] so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need." *Natale*, 318 F.3d at 584.

Defendants admit they maintained no policies or procedures regarding the administration of the election generally or ordering of ballot paper for each election specifically. Defendants had no policies and procedures to assure polling locations had sufficient ballot paper, no policies and procedures to assure that voting machines had sufficient paper

before they were delivered to polling locations, and no policies and procedures regarding resupplying a polling location ran low or out of paper. Pltfs. Facts ¶¶ 48, 50, 52, 53, 54, 59.

The consequences of failing to adopt these policies and procedures are so patently obvious that Defendants are forced to admit it. Gilbert, stated “it is obvious that without sufficient ballot paper voters might not be able to vote.” *Id.* at ¶ 13. Jennifer Pecora, the Division Head of Administrative Services in Luzerne County on Election Day and in charge of overseeing Gilbert’s office, testified on examination - **by her counsel** - that:

“Q. Okay. And you’d agree with me, obviously, that ballot paper is a critical election supply for election day?

A. Yes.

Q. And you would also agree with me that preventing paper shortages from ever occurring is a high priority, correct?

Q. So, if an election is done well, there shouldn’t be paper shortages, period, correct?

A. Correct.

Pecora dep., ECF No. 51-2, at 91:4-14.

Worse, defendants admit they were aware that the Pennsylvania

Election Code, 25 P.S. § 2967(a), required the County to have enough ballot paper for 100% of the registered voters within a voting district minus the number of registered voters within a voting district who requested mail-in or absentee ballots. Pltfs. Facts at ¶ 7. Yet, they still did not supply each polling location with enough ballot paper even to get past 10:00 a.m.

In sum, defendants admit ballot paper is a critical election supply, admit knowing what the law requires regarding the number of ballots to supply to each location, admit that preventing ballot paper shortages from occurring is a high priority, and admit that obviously that without ballot people cannot vote. Yet, despite these admissions, defendants adopted no policies and procedures to order ballot paper, no policies and procedures dispatch ballot paper, no policies and procedures assure voting machines were stocked with ballot paper, and no policies and procedures regarding resupplying polling locations that ran low or out of ballot paper.

Defendants knowingly turned a blind eye to these fundamental facts of the franchise just as they turned a blind eye to the obvious consequences of their inaction. As a result, plaintiffs' constitutional rights were

violated. Accordingly, the Court should grant plaintiffs' motion for summary judgment.

**C. Defendants' failure to train election officials responsible for administering election cause the violation of plaintiffs' constitutional rights.**

"[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." *Connick*, 563 U.S. 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 "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.

"The unconstitutional consequences of failing to give guidance let alone train election workers on how to manage ballot shortages is so patently obviously that the Plaintiffs here need not plead a pattern of pre-existing violations." *French*, 2023 WL 8374738, at \*4.

Here, defendants admit to a disturbing failure to train the election officials entrusted with performing the critical function of administration of elections. Indeed, Defendants’ failure to train their election officials is far worse than the failures where courts have held defendants liable for failing to train because the consequences of entrusting the voting process to untrained election officials are patently more obvious and predictable. *See Thomas*, 749 F.3d 217 (holding that county could be held liable under Section 1983 for injuries sustained by a detainee based on a failure to provide “de-escalation and intervention training” to correction officers.); *Berg*, 219 F.3d 261 (3d. Cir. 2000) (holding that county could be held liable for wrongful arrest under Section 1983 based on a failure to train employees on “the warrant-creation” process.).

#### 1. Gilbert.

Gilbert was initially hired to serve as the deputy Director of Elections for the County. Pltfs. Facts at ¶ 20. The deputy Director of Elections supports the Director of Elections. *Id.* at ¶ 21. In August 2022, the County’s Director of Elections, Michael Susek, resigned. *Id.* at ¶ 22. To replace him, the County appointed Gilbert the acting Director of Elections for the County. *Id.* at ¶ 22. Therefore, Gilbert was the acting

Director of Elections for the November 2022 general election. *Id.* at ¶ 23.

Before she was hired by the County as deputy Director of Elections, Gilbert had no experience in administering elections for a county and had received no training concerning the same. *Id.* at 27. Before she was hired, she had two interviews with County officials. *Id.* at ¶ 28. During both interviews, she made abundantly clear to the interviewers that she had no experience or training in administration of elections. *Id.* at ¶ 29.

After she was hired, the County did not train Gilbert in any of her responsibilities and did not train her on how to properly administer an election. *Id.* at ¶ 30. Before appointing her acting Director of Elections, the County neither offered Gilbert nor provided Gilbert with any training on the administration of elections. *Id.* at ¶ 30. While serving as acting Director of Elections, the only election related instruction Gilbert received was from Dominion Voting Systems on how the County's voting machines operated. *Id.* at ¶ 31.

## 2. Cook.

From September 2022 until January 2023, Cook was the acting deputy Director of Elections. *Id.* at ¶ 33. Before being named acting deputy Director of Elections, Cook had very limited experience with federal

election laws and limited experience with the Pennsylvania Election Code. *Id.* at ¶ 34. Before the November 2022 general election, Cook had never taken any coursework related to the administration of elections. *Id.* at ¶ 35. Before naming her as acting deputy Director of Elections, the County was aware of Cook's lack of experience administering elections. *Id.* at ¶ 36.

Before naming her as acting deputy Director of Elections, the County and the Bureau did not provide Cook with any formal training necessary for her to fulfil her job duties related to administration of elections, the Pennsylvania Election Code, or federal election law. *Id.* at ¶¶ 37-38.

### **3. Pecora.**

The County has also never provided Pecora with any training on the administration of elections, Pennsylvania Election Code, or federal elections laws. *Id.* at 36:20-21. *Id.* at ¶¶ 42-44.

### **4. The SEAL Team.**

In addition to failing to train, Gilbert, Cook, and Pecora, who were officials with direct responsibility for administer elections in the County, defendants failed to train other critical election personnel, including the

personnel responsible for stocking and sealing voting machines and members of the Board of Elections.

The County maintained a “Seal Team,” whose responsibilities included assuring voting machines were properly operating, loaded with supplies, including ballot paper, and sealed before the machines were delivered to polling locations. *Id.* at ¶ 38. Cooke and Pecora were members of the SEAL Team along with Harry Hanson, Dan Reese, Randy Shaw, Jonathan O’Dell. *Id.*, at ¶ 39; Defs.’ Ans. to Int. No. 13 at Ex. “1.” These were the individuals responsible for assuring that voting machines had enough ballot paper for 100% of registered voters at a polling location minus those that requested mailed or absentee ballots as required by the Pennsylvania Election Code. Yet, defendants inexcusably did not provide the Seal Team with any training necessary for the team to fulfil their duties, did not adopt policies and procedures that the Seal Team should follow, and did not tell the Seal Team to make sure the voting machines had adequate paper before sealing them. *Id.* at ¶ 61.

Defendants’ failure to train election officials is inexcusable. These officials are responsible for administering elections and, as is shown, if elections are not properly administered citizens are denied the right to

vote. Defendants admit to a system of administration of election that was ad hoc at best. Defendants' failure to train its election officials is comparable to putting a police officer on the beat by doing little more than handing him a gun and telling him to "have at it" at enforcing the law or putting a lifeguard on duty with no more than the instruction to make sure no one drowns. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 409 (1997) ("a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.")

Defendants' failure to train their election officials caused plaintiffs' constitutional rights to be violated. Accordingly, summary judgment is appropriate.

## CONCLUSION

Based on the foregoing, plaintiffs respectfully request the Court to grant plaintiffs' motion for summary judgment.

Respectfully submitted,

Dated: April 29, 2024

/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*

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

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

---

**CERTIFICATION OF LENGTH OF BRIEF**

Pursuant to Local rule 7.8(b)(2), I certify that this brief does not exceed 5,000 words, exclusive of the table of contents and table of authorities. The actual number of words in this brief is 4,928 as identified by the Microsoft word-processing system used to prepare this brief.

Respectfully submitted,

Dated: April 29, 2024

/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

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

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

---

**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: April 29, 2024

/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

RETRIEVED FROM DEMOCRACYDOCKET.COM