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

WILLIAM FRENCH and MELYNDA ANNE REESE,	:	
	:	**Civil No.: 3:23-cv-00538**
Plaintiffs,	:	
	:	**(Judge Mannion)**
v.	:	
	:	
COUNTY OF LUZERNE, LUZERNE COUNTY BOARD OF ELECTIONS and REGISTRATION, and LUZERNE COUNTY BUREAU OF ELECTIONS,	:	
	:	
Defendants.	:	

DEFENDANTS' REPLY BRIEF TO PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Defendants Luzerne County ("County"), Luzerne County Board of Elections ("Board"), and Luzerne County Bureau of Elections ("Bureau")(collectively, "Defendants"), by and through their counsel, hereby file their reply brief to the brief in opposition submitted by Plaintiffs William French ("Mr. French") and Melynda Anne Reese ("Ms. Reese") (collectively "Plaintiffs").

I. Plaintiffs Were Not Denied Procedural Or Substantive Due Process.

Plaintiffs argue that "Defendants do not explain why plaintiffs failed to plead a plausible *procedural* due process claim in Count IV...." (Doc. 25, p. 16) (emphasis in original). First, the Due Process Clause is not implicated under § 1983 litigation for "garden variety" election errors. Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) ("Circuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities."); also (Doc. 18, pp. 20-21). Moreover, even under Plaintiffs' theory of the case, their constitutional right to vote was not infringed by a governmental process, such as purging the voter rolls, but instead by alleged deficient administration of an election—*i.e.* providing an inadequate supply of paper for electronic voting machines. This is not a cognizable due process claim in a § 1983 action. See Acosta v. Democratic City Comm., 288 F. Supp. 3d 597, 644 (E.D. Pa. 2018) (citing Powell v. Power, 436 F.2d 84, 88 (2d Cir. 1970)); also Barefoot v. City of Wilmington, 306 F.3d 113, 124 n. 5 (4th Cir. 2002)[1] ("That the Appellants are here asserting that they were deprived of a fundamental right does not give rise to a right to a judicial forum to pursue that assertion...But the Due Process Clause was not meant to require direct judicial review for every mere *assertion* of the deprivation of a (non-existent) liberty interest.") (emphasis in

[1] Cited by Plaintiffs in their brief in opposition to the motion to dismiss the complaint. (Doc. 25, p. 16).

original). As in Griffin, *supra*, this Honorable Court should decline Plaintiffs invitation to "supervise the administration of a local election" or extend oversight over the Defendants in future elections. See (Doc. 1, pp. 25-26) (detailing Plaintiffs prayer for injunctive relief). That is not the role of the federal courts. Griffin, 570 F.2d at 1077 ("The federal court is not equipped nor empowered to supervise the administration of a local election. If every *election irregularity* or contested vote involved a federal violation, the court would be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.") (internal citation and quotation marks omitted) (emphasis added); also See Crawford v. Marion County Election Bd., 553 U.S. 181, 208 (2008) (Scalia, J., concurrence) ("That sort of detailed judicial supervision of the election process would flout the Constitution's express commitment of the task to the States.")

As to its substantive due process claims, Plaintiffs cite Griffin and argue that the November 2020 general election in Luzerne County was so fundamentally unfair that it violated due process. See (Doc. 25, p. 18). Once again, Plaintiffs cite a case that is not factually analogous to the anomaly of the November general election conducted in Luzerne County.

In Griffin, the Rhode Island Supreme Court invalidated the use of absentee ballots in a disputed city council race in Providence, Rhode Island, after the votes had been cast and tallied. Griffin, 570 F.2d at 1066; Id. at 1068. Rhode Island election law was conspicuously silent as to whether absentee ballots could be utilized in primary elections as opposed to general elections, which had been authorized by statute. Id. at 1066. As a result of the state Supreme Court's decision, Griffin was decertified as the winner of the Democratic primary for city council. Id. at 1068. Griffin sought relief in federal court. The district court held that voters had relied upon state officials' assurance that absentee ballots were an approved method of voting and also that the number of invalidated absentee ballots "had affected the outcome of the election." Id. at 1069. The district court then invalidated the primary election result, delayed the general election, and ordered a new primary election be conducted under uniform rules. Id.

The First Circuit Court of Appeals affirmed the district court ruling. Id. at 1080 ("Here, the closeness of the election was such that, given the retroactive invalidation of a potentially controlling number of the votes cast, a new primary was warranted."); also Id. at 1079 (holding that invalidating ten percent of the total vote cast "amounted to more than a de minimis irregularity.") Indeed, the Griffin court held that the "integrity of the Tenth Ward primary in Providence was severely impugned...." Id. at 1078.

In the instant case, two voters have brought suit alleging that they could not vote because of the paper supply issues on November 8th 2022. Plaintiffs have not pleaded, nor could they, that these two votes affected the outcome of any race on the ballot. Id. Furthermore, contrary to the actions of election officials in Griffin, Defendants did not change the rules of the election after the outcome was known. In fact, the County and Bureau implemented immediate remedial measures on Election Day to combat the paper supply shortage which included, but was not limited to, restocking the paper supply, utilizing provisional and emergency ballots at polling precincts, and extending voting hours countywide until 10:00 p.m.

While the November 2022 general election was far from perfect and the paper supply shortage a self-inflicted wound, Defendants cannot fairly be said to have deprived Plaintiffs of procedural or substantive due process of law. Defendants did not place a "severe burden" on Plaintiffs right to vote even based upon the deferential pleading standards interpreting the allegations in the complaint. See Crawford, 553 U.S. at 205 (Scalia, J., concurrence) ("…burdens are not severe if they are ordinary and widespread….")

For any or all of the foregoing reasons as well as those detailed in their brief in support, Defendants request that this Honorable Court dismiss Plaintiffs' complaint.

II. Plaintiffs Were Not Denied Equal Protection Of The Law.

In support of their Equal Protection Clause claims, Plaintiffs contend that the right to vote can be "denied outright or where the government imposes substantial burdens on the right to vote." (Doc. 25, p. 5.). However, both cases cited by Plaintiffs are irrelevant to this case. First, Storer v. Brown, 415 U.S. 724, 729-730 (1974), centers around a constitutional challenge to "sore loser" election law provisions and other statutory requirements imposed upon independent and third-party candidates. Likewise, Crawford v. Marion County Election Board, 553 U.S. 181, 185-86 (2008), is an Indiana voter I.D. case. Neither of these cases demonstrates that a plaintiff whose ability to vote allegedly is affected by supply shortages on Election Day has pleaded a viable equal protection claim to survive a 12(b)(6) motion to dismiss.

Indeed, Plaintiffs failed to cite even a single case in their brief where individual plaintiffs successfully sued under the Equal Protection Clause, pursuant to 42 U.S.C. § 1983, when election officials allegedly failed to adequately supply polling places on Election Day. Furthermore, Plaintiffs fail to address in their brief that the vast majority of federal court cases in this area concern not the conduct and administration of specific state and local elections but striking down broadly applicable state or local election laws or regulations. Griffin, 570 F.2d at 1076 ("Federal court intervention into the state's conduct of elections for reasons other than racial discrimination has tended, for the most part, to be limited to striking down

state laws or rules of general application which improperly restrict or constrict the franchise") (cataloguing cases). Plaintiffs also rely upon Tully v. Okeson, 977 F.3d 608, 615 (7th Cir. 2020), and Burdick v. Takushi, 504 U.S. 428, 433 (1992); however, Tully is a COVID-19 centric case and Burdick was a constitutional challenge to Hawaii's prohibition on write-in votes.

In Burdick, plaintiff asserted that "he [was] entitled to cast and Hawaii required to count a protest vote for Donald Duck and that any impediment to this asserted right is unconstitutional." Burdick, 504 U.S. at 438. The United States Supreme Court upheld Hawaii's prohibition on write-in votes. Id. at 439 ("Hawaii's interest in avoiding the possibility of unrestrained factionalism at the general election provides adequate justification for its ban....") (internal citation omitted); also Id. ("The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies.")

In Tully, plaintiffs asserted that Indiana's failure to allow "no excuse" absentee voting by mail forced them to "make a choice between personal health and safety and exercising the right to vote." Tully, 977 F.3d at 617. The Tully court rejected the argument that inconveniencing "some voters who would prefer, but do not qualify, to vote by mail" constituted an equal protection violation. Id. The court also stated that "one less-convenient feature" of an election apparatus "does not an unconstitutional system make." Id. at 618. Now, certainly there is a difference

between plaintiff-voters seeking prophylactic relief prior to Election Day, as in Tully, and Plaintiffs, here, seeking redress after-the-fact for Election Day disruptions that allegedly impacted their ability to vote. Nevertheless, federal courts have never held that voter inconvenience constitutes an Equal Protection violation and neither have the courts held that voters must be guaranteed the same voting experience precinct by precinct. See (Doc. 25, p. 13).

In their brief, without legal citation, Plaintiffs contend that "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." Id. (emphasis added). Here, Plaintiffs attempt to classify their Equal Protection claim under a "vote dilution" theory. Unfortunately, nowhere in their complaint have Plaintiffs alleged that Luzerne County's administration of the November of 2022 General Election violated the bedrock "one man, one vote" principle. (Doc. 1). There is no credible allegation that Defendants "value[d] one person's vote over that of another." Pierce v. Allegheny County Board of Elections, 324 F. Supp. 684, 696 (W.D. 2003) (citing Bush v. Gore, 531 U.S. 98, 104-105 (2000)).

In Bush v. Gore, the U.S. Supreme Court held that the Equal Protection Clause was violated because different Florida counties were applying "varying standards to determine what was a legal vote." Bush, 531 at 107-08. Similarly, in Pierce, the court held that different standards were being applied across the Commonwealth as

to whether a third-party could deliver an absentee ballot and thus, found that "a justiciable" Equal Protection claim had been pleaded. Pierce, 324 F. Supp. at 699. Likewise, Plaintiffs cited a recent decision of a district court in the Western District of Pennsylvania denying "a motion to dismiss an equal protection claim that challenges…Pennsylvania's rules for counting domestic mailed ballots." (Doc. 25, p. 11) (citing Pennsylvania State Conference of the NAACP v. Schmidt, 2023 WL 3902954, *8 (W.D. Pa. June 8, 2023)). Critically, in that case, the court denied a motion to dismiss based upon the clear allegations that "Defendants' interpretation of Pennsylvania law creates differential treatment *in the counting of ballots*." Pennsylvania State Conference of the NAACP, 2023 WL 3902954 at *8 (emphasis added). The court stated that plaintiffs had plausibly alleged that overseas and military absentee ballots are deemed valid whereas similar errors, such as omitting or incorrectly dating a ballot return envelope, would render a domestic mail-in ballot invalid. Id. Accordingly, the district court held that "[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 proceedings." Id.

Here, Plaintiffs have not alleged that Defendants applied different voting standards to their votes as opposed to others within the county or even their voting precinct. Instead, Plaintiffs argue that the paper supply shortage a) did not affect the

entire county and b) disproportionately affected their individual ability to vote. See (Doc. 25, p. 14).

Plaintiffs assert that Defendants "wrongly claim that the paper shortage affected the entire county." Id. However, Plaintiffs concede this fact in both their complaint and brief in opposition to the motion dismiss. Both rely upon the order of the Luzerne County Court of Common Pleas that extended voting hours on November 8, 2022 until 10:00 p.m. to try and prove their Equal Protection claims. (Doc. 25, p. 7.) ("Moreover, Defendants represented to the state court on Election Day that because of the ballot paper 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.'") (emphasis added). On November 8th, voting hours were extended across the entire county and not in targeted polling precincts.

Plaintiffs continually assert that their right to vote was infringed based upon where they lived[2] although by Ms. Reese's own allegations, there were long lines at her polling precinct into the afternoon and early evening on Election Day. If indeed her right to vote was infringed or denied on the basis of geography then hundreds of other voters similarly situated would have been likewise denied the right to vote.

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[2] The polling locations that Plaintiffs claim that they attempted to vote at on November 8, 2022, were not their registered polling locations. See (Doc. 25, p. 12 n. 3).

Accepting the allegations of the complaint as true, for purposes of the present motion, Ms. Reese's claim is not that she could not vote at all. It is more fairly characterized that she could not vote when she preferred. Again, the complaint is conspicuously silent as to whether or not she was offered the opportunity to vote by provisional or emergency ballot when she first arrived at her polling place. Also, she never pleads in the complaint that the long lines encountered in the afternoon and early evening of November 8, 2022 were caused by the paper supply issues. Plaintiffs cannot avoid a motion to dismiss a complaint by omitting critical details that go to the heart of the claims alleged against Defendants.[3]

As stated in their brief in support of the motion to dismiss, Defendants do not trivialize Ms. Reese's inability to vote as she attempted to balance her caretaker responsibilities to her husband. Indeed, it is admirable and commendable that she allegedly went to such lengths to vote in an era when many able-bodied citizens not only decline to vote but decline to register to vote. Nevertheless, Ms. Reese's

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[3] Similarly, Plaintiffs criticize portions of Defendants' brief in support of its motion to dismiss and characterize it as interjecting "a series of factual affirmative defenses" including the dismissal of an Election Bureau part-time employee and identification of a *bona fide* case of voter fraud that led to a criminal prosecution. See (Doc. 25, p. 25 n. 7). However, Plaintiff cannot have it both ways. They cannot attempt to characterize the employees of the Bureau and the County charged with the administration of elections as untrained and unqualified while omitting key details that do not fit their narrative. Indeed, Plaintiffs themselves cite the discarded overseas ballots to bolster their Monell claims; however, they fail to incorporate the complete history, which is that the worker was fired and the matter was investigated culminating with no criminal charges.

dilemma which was allegedly compounded by the paper supply issues in the county does not rise to the level of a constitutional injury.

Plaintiffs also alleged that Luzerne County arbitrarily deployed ballots in violation of the equal protection clause of the Fourteenth Amendment. See (Doc. 25, p. 13) (citing Fulton v. City of Philadelphia, 141 S.Ct. 1868, 1910 (2021)). However, Fulton is not an election case, but instead it deals with the City of Philadelphia's policy not to certify a Catholic social services agency for adoption due to the agency's refusal to consider adoption to same-sex couples. It has no bearing on the issues raised in Defendants' motion to dismiss and brief in support.

For the foregoing reasons as well as those detailed in their brief in support, Defendants request that the Court grant its motion to dismiss Plaintiffs' complaint.

III. CONCLUSION

For any or all of the foregoing reasons, Defendants respectfully request that Plaintiffs' Complaint be dismissed in its entirety.

Respectfully submitted,

s/ Drew P. McLaughlin
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DATED: June 27, 2023

WORD COUNT CERTIFICATION

In accordance with Local Rule 7.8, undersigned counsel for Defendants Luzerne County, Luzerne County Board of Elections and Registration and Luzerne County Bureau of Elections, hereby certify that the foregoing brief in support of motion to dismiss contains less than 5,000 words. Specifically, relying upon the word count feature of the word processing system, the foregoing brief contains 2,705 words.

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Defendants.	:	

CERTIFICATE OF SERVICE

I, Drew P. McLaughlin, hereby certify that I have caused to be served on this 27th day of June, 2023, a true and correct copy of Defendants' Luzerne County, Luzerne County Board of Elections, and Luzerne County Bureau of Elections reply brief on all counsel of record via ECF filing as follows:

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s/ Drew P. McLaughlin
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Date: June 27, 2023