

Plaintiffs respectfully submit this Reply Memorandum of Law in support of their motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction.

ARGUMENT

Most of defendants' arguments and factual contentions will be addressed at the evidentiary hearing on October 28, 2008. Plaintiffs briefly set forth below some of the legal argument responsive to defendants' opposition papers.

Defendants do not dispute the constitutional importance of the right to vote, *see, e.g., Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *United States v. Classic*, 313 U.S. 299, 315 (1941); *Bush v. Gore*, 531 U.S. 98, 104 (2000), nor do they dispute the basic balancing test the Third Circuit Court of Appeals applies in election cases: “[u]ltimately, [the Court’s] scrutiny is a weighing process: We consider what burden is placed on the rights which plaintiffs seek to assert and then we balance that burden against the precise interests identified by the state and the extent to which these interests require that plaintiffs’ rights be burdened. Only after weighing these factors can we decide whether the challenged [action] is unconstitutional.” *Rogers v. Corbett*, 468 F.3d 188, 194 (3d Cir. 2006).

Plaintiffs have carefully read defendants' papers and, based upon the defense declarations and a number of other factors, have decided *not to pursue a preliminary injunction requiring precincts to have available emergency paper ballots representing at least 20% of registered voters in each precinct*. As to the rule requiring distribution of paper ballots where 50% of machines in a precinct are out of service, however, the Third Circuit's balancing test decidedly favors plaintiffs.

As a preliminary matter, let us be clear: plaintiffs do not request the Secretary to *force* voters to use a particular method of voting. Rather, if 50% of machines do not work in a precinct, voters will have a choice: either wait in the long machine line, or get in the paper ballot line. All of the problems defendants anticipate vis-à-vis voters denied a choice of voting method simply do not exist under plaintiffs' proposal.

As to the law, defendants are simply unable to distinguish the cases cited by plaintiffs. *League of Women Voters of Ohio v. Blackwell*, 432 F.Supp.2d 723, 726 (N.D. Oh. 2005), a case quite similar to this one, defendants simply describe (essentially without analysis) as “dubious.” Def. Br. 26. But defendants offer no meaningful distinction of a case where the court found that long lines at the polls violated the Equal Protection clause. The Supreme Court's decision in *Bush v. Gore*, which decided an entire Presidential election, is also of no relevance in defendants' view: it is “limited to its facts” and of “doubtful precedential value.” Def. Br. 26. *Ury v. Santee*, 303 F.Supp. 119 (D.C.Ill. 1969), which invalidated an entire election, is somehow irrelevant because it was a post-election case. Def. Br. 26. But that cuts in favor of plaintiffs, not defendants. The remedy plaintiffs sought in *Ury*—invalidation of an entire election, and an order requiring a new election—was considerably more extreme and costly than the modest remedy plaintiffs seek here. Would defendants rather that plaintiffs request a new election in Pennsylvania *after* thousands of voters are disenfranchised on Election Day?

Defendants ultimately advance two justifications for the 100% rule: a desire for a uniform standard, and state and federal policy discouraging use of paper ballots. Def. Br. 27. A uniform standard is a worthy goal, and it is one plaintiffs seek: for *all* precincts, whenever 50% of voting machines fail, paper ballots should be distributed. A uniform 50% rule is no more or less uniform than a uniform 100% rule. A uniform 50% rule is no less clear than a 100% rule. A

uniform 50% rule is no less of a bright line test than a 100% rule. The 50% rule plainly passes the test of uniformity.

As to state/federal policy discouraging use of paper ballots, plaintiffs do not advocate that paper ballots *replace* machines; plaintiffs request that paper ballots be used only when the machines do not work. Whatever federal policy may be vis-à-vis paper ballots, the most fundamental federal election policy is that all voters get the opportunity to vote. *See, e.g., Reynolds*, 377 U.S. at 555; *Yick Wo*, 118 U.S. at 370; *Classic*, 313 U.S. at 315. No method of voting is perfect, not the least voting on touch screen machines. Plaintiffs do not allege that voting on a paper ballot is a 100% perfect method of voting either. *Cf.* Def. Br. 30. But it is far preferable to not voting at all. It is far preferable to being told to leave the polling station and to return some other time when the machines may (or may not) work. It is far preferable to waiting in line for two, three, four or more hours, hoping for the opportunity to cast a ballot. Defendants' citation of the Help America Vote Act (HAVA) is therefore nothing if not ironic: HAVA was intended to *help* Americans vote, not to subject voters to machine breakdowns and endless lines. If a machine does *not* work, nothing in HAVA encourages states to consign voters to interminable lines rather than distribute paper ballots so that voters can actually vote.

The cases cited by defendants do not help them much. In *United States v. City of Philadelphia*, 2006 WL 3922115 (E.D.Pa. Nov. 7, 2006), the United States sought to insert federal observers on the eve of a city election, a sweeping imposition that far exceeds the modest relief plaintiffs seek here (which is even more modest than the relief plaintiffs previously sought in this case). In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), plaintiff sought to enjoin Proposition 200, a comprehensive law intended to prevent voter fraud by requiring voters to present proof of citizenship at the polls. The district court denied the motion without issuing factual findings or

making conclusions of law, and the Court of Appeals, without offering any “explanation or justification,” reversed. A few days later, the district court explained its denial of the motion, issuing findings of fact and conclusions of law. Faced with this unusual procedural posture, the Supreme Court reversed the Court of Appeals, in light of (i) the appellate court’s failure to explain its opinion, and (ii) its failure to provide deference to the as-yet unwritten findings and conclusions of law from the district court. *Purcell* arose from a very particular procedural context and is plainly of little relevance here.

In *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003) and in *Taylor v. Onorato*, 428 F.Supp.2d 384 (W.D. Pa. 2006), plaintiffs alleged that the mere use of touch screen voting machines violates the Constitution, sweeping allegations far afield from the particularized claims and relief plaintiffs seek here. Nor is *Summit Cty. Democratic Cent. and Executive Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004) of much precedential value: on a three-judge panel, one judge ruled on the merits, one on standing grounds, and the third dissented. In any event, the panel’s opinion, such as it was, was premised on its finding that the presence of challengers at the polls did not burden the right to vote. Plaintiffs’ case, however, has nothing to do with challengers, and certainly does not turn on the particularized factual findings of the Sixth Circuit panel.

Ultimately, defendants do little to explain why a 50% rule imposes a burden upon them. Poll workers have already been trained in the use of emergency ballots. Poll workers have already been trained how to distribute paper ballots when a certain number of machines are broken. And as defendants note, “The 2008 General Election ballots are generally short and uncomplicated.” Def. Br. 12.

Even defendants admit that “[t]he 50% Standard could reduce waiting times if one machine were down in a precinct with two machines.” Def. Br. 8. Plaintiffs do not seek a wholesale revision of Pennsylvania election procedures, and, after reviewing and considering defendants’ sworn statements, have even abandoned half of the relief they originally sought. But there is little reason, essentially no reason, why the 50% rule should not go into effect. Given all the evidence set forth in the opening brief, which will further be demonstrated at the evidentiary hearing (including, *inter alia*, evidence of prior machine failure, the dismal experience of the 2008 primary, the already-insufficient number of voting machines, the registration of 400,000 new voters, and the predictions of extremely high turnout), the 50% rule is not only easy to implement; it is critical to ensuring the franchise.

