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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	Civil Action No.: 2:06cv4592
v.	)	
	)	
CITY OF PHILADELPHIA, and PHILADELPHIA CITY COMMISSION	)	Before D. Brooks Smith, *Circuit Judge*, Harvey Bartle III, *Chief District Judge*, and Petrese B. Tucker, *District Judge*
	)	
Defendants.	)	
	)	

SMITH, *Circuit Judge*.

This case came before a three-judge panel appointed by the Chief Judge of the Circuit pursuant to 28 U.S.C. § 2284 on the United States' motion for a temporary restraining order or, in the alternative, a preliminary injunction. Due to the proximity of the November 7, 2006 election, we issued an order without accompanying opinion immediately following the November 3 hearing, denying equitable relief. We now explain our reasoning for denying the relief sought by the United States.

I.

The United States ("the Government") filed this action under Sections 203 and 208 of the Voting Rights Act, alleging that the City of Philadelphia and the Philadelphia City Commission (collectively, the "City") had violated and continued to violate the rights of Spanish-speaking voters who have limited English language proficiency. Specifically, the Government claimed that the City failed to provide those voters with voting notices,

forms, instructions, assistance, or other materials or information related to the voting process in Spanish, and by failing to allow such voters to receive assistance from the assistor of their choice, as required by federal law. *See* 42 U.S.C. §§ 1973aa-1a and 1973aa-6. The Government later filed a motion for a temporary restraining order or, alternatively, a preliminary injunction. After the three-judge panel was empaneled, an evidentiary hearing was conducted on November 3, at which both the Government and the City presented witnesses and arguments to the panel in support of and opposing the requested relief.

II.

Injunctive relief is an extraordinary pre-trial remedy that should only be granted in limited circumstances. *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). In order to receive injunctive relief, the plaintiff must show that (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest. *See, e.g.*, *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005).

The Government requests that we authorize the appointment of federal observers to observe election procedures. *See* 42 U.S.C. §§ 1973a(a) and 1973f.[1] The City objects to

[1]Although federal observers are statutorily permitted to:

> (1) enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are

the appointment of observers, arguing that the Government has not satisfied the four part test. We agree that the Government has not met its high burden to show entitlement to such extraordinary relief.

Federal observers are one of the statutory remedies provided for claims of state abridgement of voting rights. 42 U.S.C. § 1973a(a) ("Whenever the Attorney General or an aggrieved person institutes a proceeding ... to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers ... to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees...."); *see also United States v. Uvalde Consol. Indep. Sch. Dist.*, 625 F.2d 547, 550 n.4 (5th Cir. 1980); *James v. Humphreys County Bd. of Election Comm'rs*, 384 F. Supp. 114, 121-22 (D.C. Miss. 1974) (describing one county's experience with federal observers). However, in order to secure the placement of federal observers, the plaintiff must present evidence that observers are "necessary to enforce ... voting guarantees." 42 U.S.C. § 1973a(a). Because the interpolation of federal observers into the electoral process constitutes a mandatory injunction, "any preliminary injunction fitting

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> being permitted to vote; and
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> (2) enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated[,]

the Government stated at the November 3 hearing that it would limit the observers' authorization so that they would not be allowed to enter voting booths with voters. *See* 42 U.S.C. § 1973f(d).

within [this] disfavored categor[y] must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity."); *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991).

III.

Before turning to the four part test, we first examine the effect of the Government's delay in filing its motion. The U.S. Supreme Court has long acknowledged that the timing in cases involving upcoming elections is a relevant consideration in determining the propriety of immediately effective relief. *See Purcell v. Gonzalez*, --- U.S. ---, 2006 WL 2988365 at *6 (Oct. 20, 2006); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief...."). When a plaintiff fails to move promptly in seeking injunctive relief, there is an increased probability that a court order may have a disruptive and deleterious effect. The Supreme Court recently reaffirmed this proposition in *Purcell v. Gonzalez*:

> Faced with an application to enjoin [an election procedure] just weeks before an election, the Court of Appeals was required to weigh, *in addition*

> *to* the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

2006 WL 2988365 at *6 (emphasis added). Sensitivity to the highly time-sensitive nature of elections and the process leading up to them is appropriate and necessary to preserve comity between the states and the federal government. *See Page v. Bartels*, 248 F.3d 175, 195-96 (3d Cir. 2001) ("Federal court intervention that would create such a disruption in the state electoral process is not to be taken lightly. This important equitable consideration [goes] to the heart of our notions of federalism....").

The time line of this case reveals dilatoriness on the part of the United States in seeking pre-trial relief. On October 13, 2006, twenty-five days before the election, the Government filed its complaint. On October 25, thirteen days before the election, the Government sought injunctive relief. At the motions hearing, the Government conceded that, although the City had been slow to provide it with requested materials, it had been in possession of most of the pertinent facts related to the filing of this case since July 2006.[2]

The Government's undue delay precluded the City from structuring and implementing election procedures in a manner responsive to the Government's concerns in a timely fashion. Although this Court is acutely aware of the critical constitutional

[2]The Government noted that despite its May 15, 2006 requests for a voter registration list, voting materials that had been translated into Spanish, and a list of bilingual poll workers, the City had not yet provided the latter.

rights at stake here, we are constrained to consider that the City's ability to correct any perceived defects in its procedures was severely hampered by the Government's tardy action. Upon notification of the Government's concerns, the City moved quickly to craft an election plan that it believed would address, as thoroughly as possible given the constraints of time and resources, the alleged deficiencies. To the extent that the case law instructs us to consider the impact of delay in analyzing the propriety of injunctive relief, we conclude that this factor weighs decidedly against the Government.

IV.

The initial inquiry of the four part test for a preliminary injunction goes to the likelihood of the moving party's success on the merits. *Kos Pharm.*, 369 F.3d at 708. The Government asserts that it is likely to prevail on the merits of its claims under both Sections 203 and 208. The City disputes the Government's prediction of success. We agree with the City.

As to Section 203, the Government claims that the City's dereliction of its duty to provide assistance to language minority groups is evident in the declarations that accompanied its motion. The declarants include Spanish-speaking voters who did not receive adequate language support while voting, federal election monitors who reported a lack of Spanish language assistance at Philadelphia polling places, and a statistical analyst who studied Census data for Philadelphia. The Government asserts that the City lacks any program to identify sites where Spanish language assistance is needed, or to confirm the

fluency of its interpreters.

The Government's claim with respect to Section 208 is that the City failed to allow voters who required and were entitled to assistance under the section to receive assistance from the person of their choice. As evidence of the City's failure, the Government proffered statements by voters that they had been denied the opportunity to receive assistance from a person of their choosing. The City counters that the isolated incidents identified by the Government do not show a standard, practice, or procedure imposed or applied by the City to impede the voting rights of limited English proficient voters. *See* 42 U.S.C. § 1973(a).

The City contends that the Government has not met its burden of showing, under the totality of the circumstances, that the City imposed or applied a standard, practice, or procedure that thwarted language minority voters from voting. This argument is persuasive. Individual accounts of disparate incidents that do not establish a standard, practice, or procedure attributable to the City comprise the entirety of the Government's evidence. The evidentiary value of these accounts is varied. Most of them were taken during the pendency of this case–months, if not years, after the incidents recounted. Moreover, the City contests the accuracy of a number of the statements. This factual dispute weighs against the Government's satisfaction of the likelihood of success on the merits element.

The Government's statistical support for the proposition that the City has

underserved its Spanish-speaking voters is similarly insufficient. The analysis makes several assumptions regarding Spanish-speaking voters that are too attenuated to actual English language ability to support a finding regarding the distribution of limited English proficient voters throughout the City. In particular, the Government asks us to presume that citizens who identified themselves as speaking English "well," "not well," and "not at all" are limited English proficient voters as defined in 42 U.S.C. § 1973aa-1a, as well as to find a correlation between a Spanish surname and Spanish language ability. *Id.* ("[T]he term 'limited-English proficient' means unable to speak or understand English adequately enough to participate in the electoral process...."); *see also Rodriguez v. Bexar County*, 385 F.3d 853, 867 n.18 (5th Cir. 2004) (noting that the use of Spanish surnames to identify Hispanic voters was "highly problematic."). The subjective judgment of a sole statistician that any voter who speaks English less than "very well" is unable to participate substantively in the electoral process is not enough to satisfy the Government's burden.

In sum, the Government has failed to meet its high burden to prove a likelihood of success on the merits. Furthermore, the Government's own assertion that it would amend and supplement its complaint after the election should the observations of federal observers reveal violative practices casts doubt on its claim to have shown a high probability of success on the facts and pleadings as currently established.

V.

Nor has the Government clearly established that irreparable harm will befall

Philadelphia's Spanish-speaking voters in the absence of injunctive relief. Although the right to vote is "the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," *Reynolds*, 377 U.S. at 555, a presumption of harm is not appropriate here. *See, e.g.*, *Chisom v. Roemer*, 853 F.2d 1186, 1188-89 (5th Cir. 1988). Even if we assume the irreparable nature of harms arising from polling place deprivations, the Government is unable to make a satisfactory showing in this case.

The City has largely fulfilled the statutory requirement that voting notices, forms, instructions, assistance, or other materials and ballots be provided in the relevant minority language. *See* 42 U.S.C. § 1973aa-1a(c). The City has demonstrated that its standard, practice, and procedure is to provide all election materials in both English and Spanish by proffering bilingual copies of election materials, as well as bilingual voting machines. The printed materials offered at the hearing were copies of those items provided to poll officials for display on election day, and the machine placed in the courtroom for demonstrative purposes was identical to those used in the City's polling places.

In the Guide for Election Officers in Philadelphia County, which is supplemental to poll worker training, poll workers are explicitly instructed to "Post All Notices[, because] Federal and State Laws require that District Election Officials must post certain Bilingual English/Spanish Notices within the polling place." The Guide details the various bilingual materials that must be posted, and explains that "[a]ll of the notices that

are required to be posted at your polling place are bilingual." Poll workers are instructed to post at least one English and one Spanish copy of each item. The Guide also provides explicit instructions regarding assistors of choice. The Assistance Declaration that voters who are not already identified as being allowed to have assistance must sign in order to have their assistor of choice accompany them into the voting booth is in both English and Spanish.

Furthermore, the City presented an election plan to the Court and the Government outlining its plans to boost Spanish language support for the November 7 election. This plan was evidently formulated after the initiation of this action, and it identified 258 divisions that require Spanish language interpreters. The City represented that, as of November 2 at 11a.m., interpreters had been assigned to all but 28 divisions, and 20 interpreters were waiting for assignments. The City also noted that it had 25 interpreters from Global Philadelphia, an interpreting service, who were on reserve status, and had contracted with that company to provide telephonic translation services on election day. City Solicitor Romulo Diaz testified that, in addition to the plans for the upcoming election, the City was formulating long-term plans with respect to improving Spanish language voter services.

These measures suggest that even without the presence of federal observers, the Spanish-speaking voting population of Philadelphia will be adequately served on election day. Because these provisions address the concerns raised by the Government as to

inadequate Spanish language support, the Government has not met its high burden to show irreparable harm.[3]

VI.

Balancing the relative harms in this case does not weigh in favor of either party. The Government correctly asserts that the harms inherent in Voting Rights Act violations are serious, and that minimal additional expenses are inconsequential in weighing the harms. *See United States v. Berks County*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003). Although the Government contends that employing Spanish-speaking poll workers should not result in increased costs beyond the expense of recruitment because bilingual workers could replace those without additional language skills, the Government overlooks the necessity of training new recruits. The City explained that its training sessions for poll workers have largely been completed, and that it has already fully delegated its human resources for the remaining days until the election.

The City's position regarding the impracticability of adding translators is undercut by the extensiveness of its election plan. Through this plan, the City has apparently been

[3]The statute authorizing federal observers effectively adds a de minimis consideration to the question of irreparable harm. In 42 U.S.C. § 1973a(a), Congress provided that the appointment of observers was not necessary where violations "(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future." The evidence here tends to show that, to the extent problems were brought to the City's attention, it moved quickly to correct them. Furthermore, the City's election plan shows that Spanish-speaking voters are now receiving adequate linguistic support.

able to dramatically increase the extent of its election day Spanish language support, and to do so within its financial means. Therefore, its assertion as to the feasibility of the Government's request for additional interpreters is not persuasive.

Moreover, the execution of the election plan significantly diminishes the possibility of Voting Rights Act violations during this and future elections. Due to the now very low risk of violations, the Government's claim as to the weight to be accorded to the potential harm is substantially diminished.

The City's argument that the presence of federal observers would intimidate voters and suppress the turnout of Spanish-speaking voters is not convincing. Federal observers are the congressionally prescribed mechanism for remedying Voting Rights Act violations such as those at issue here. *See* 42 U.S.C. §§ 1973a(a) and 1973f. In response, the City offers only the speculation of its declarants that voters in the Spanish-speaking community would be uncomfortable with federal observers in the polling places, and consequently would refrain from voting. This Court is unable to agree that the mere presence of federal observers would cause voter intimidation such that the balance of harms tips clearly in favor of the City.

VII.

The public interest in having every registered voter cast a ballot will not be adversely affected by the exclusion of federal observers from this election. At this point, maintaining the status quo and allowing the City to implement its election plan will best

serve the public interest. In light of the election plan, there is no indication that the presence of federal observers will advance the public interest.

VIII.

In conclusion, the Government has not met its onerous burden to demonstrate that it is entitled to extraordinary relief in the form of federal observers. Certainly, to the extent that the evidence shows instances of intolerance of Spanish-speaking voters and an insensitivity to their concerns, such conduct should be condemned by a democratic society that so highly values the right to vote. Yet the mandatory nature of the injunction sought, in addition to the lateness of the Government's motion, impose a particularly heavy burden upon the Government with respect to the four preliminary injunction factors, which the Government has not met. *See Acierno*, 40 F.3d at 653; *Purcell*, 2006 WL 2988365 at *6. Accordingly, the Court has denied the motion for a temporary restraining order or, in the alternative, a preliminary injunction.

DATED this 7th day of November 2006.

/s/ D. Brooks Smith
United States Circuit Judge