



MEMORANDUM:

Authority to Regulate Poll Watcher Access to Absentee Processing Sites

From: Voter Protection Program

To: Interested Parties

Re: **Authority to Regulate Poll Watcher Access to Absentee Processing Sites**

Date: 10/30/20

As mail voting numbers skyrocket, a number of states have faced lawsuits challenging limitations on observers or poll watchers outside the traditional polling-place context. These challenges have included:

- In Pennsylvania, county boards of elections decided to open satellite offices where voters can vote and return absentee ballots. The Trump campaign sued the Philadelphia County Board in state court, asking for an order allowing representatives of the campaign to monitor satellite offices.¹ Two candidates for Congress sued the Allegheny County Board in federal court, making a similar demand.²
- In Nevada, the Trump campaign and others sued seeking an order preventing Clark County from processing absentee ballots unless poll watchers were permitted to observe certain elements of the process.³
- In New Mexico, the state Republican Party and others sought a writ of mandamus from the state supreme court allowing observers to be present during the initial stage of absentee ballot processing.⁴
- In Michigan, a candidate for the state legislature is challenging election rules requiring poll challengers to stay six feet from poll workers.⁵

None of these challenges have been successful. State and federal courts in Pennsylvania refused to mandate poll watcher access to satellite offices.⁶ The Nevada court similarly denied a

¹ *Trump for President v. Phila. County Bd. Of Elec*, No. 02035 (Oct. 9, 2020, Phil. Ct. Com. Pl.); *Trump for President v. Phila. County Bd. Of Elec*, No. 983 C.D. 2020 (Oct. 23, 2020, Com. Ct. of Penn.).

² *Parnell v. Allegheny Bd. of Elecs.*, 2:20-cv-01570 (W.D. Penn.).

³ *Krause v. Cegavske*, (1st Jud. Ct. of Nev.).

⁴ *Republican Pty. v. Toulouse Oliver*, No. S-1-SC-38537 (N.M.).

⁵ Rick Pluta, [Lawsuit In Michigan Over COVID-19 Rules For Poll Watchers](#) (Oct. 27, 2020).

⁶ *Parnell v. Allegheny Bd. of Elecs.*, 2:20-cv-01570 (W.D. Penn.) (transcript of 10/23/2020 hearing, not yet available); Paula Reed Ward, [Judge Denies Request to Allow Poll Watchers at Allegheny County Satellite](#)

temporary restraining order (although the case is proceeding),⁷ and the New Mexico Supreme Court denied the petition for mandamus.⁸ In Michigan, the Secretary of State settled with the plaintiffs, revising the guidance regarding social distancing rules for observers and allowing them to be within six feet of others if necessary.⁹

Additional cases, however, may raise similar challenges in the coming days. Cases may turn in whole or in part on the specifics of state law.¹⁰ But a number of general principles might be of use in responding to these challenges.

1. There is no First Amendment or other federal constitutional right to be a poll watcher.

It is well-established that “there is no individual constitutional right to serve as a poll watcher.” *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016) (citation omitted); *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020). Limitations on poll watching do not impede the constitutional right to vote—they do not limit voters’ range of choices “or make the actual act of casting a vote any harder.” *Boockvar*, 2020 WL 5997680, at *67.

Poll watching also “does not implicate core political speech.” *Id.* at *30. It “is not incidental to the right of free association and it therefore has no distinct First Amendment protection.” *Cortes*, 218 F. Supp. 3d at 413–14 (collecting cases) (internal quotation marks omitted). So states need not permit poll watchers at all. *See Turner v. Cooper*, 538 F. Supp. 1160, 1162 (N.D. Ill. 1983) (“[W]e would suggest that the state is not constitutionally required to permit poll watchers for political parties and candidates to observe the conduct of elections. Illinois has chosen to do so, but [plaintiff’s] right to be present at the polling place derive[s] solely from state law.”); *Boockvar*, 2020 WL 5997680, at *67 (“[I]t is at least arguable that ... Pennsylvania could eliminate the position of poll watcher without offending the constitution.”). Indeed, poll watchers “are not universal” and “are absent from much of our history.” *Cortes*, 218 F. Supp. 3d at 414.

Restrictions on poll watchers therefore are not subject to heightened scrutiny and survive if they have a “rational basis.” *Boockvar*, 2020 WL 5554644, at *30 (upholding Pennsylvania’s requirement that poll watchers be residents of the counties in which they serve as rationally related to Pennsylvania’s county-based scheme for managing elections).

[Election Offices](#) (Oct. 23, 2020); *Trump for President v. Phila. County Bd. Of Elec*, No. 983 C.D. 2020 (Oct. 23, 2020, Com. Ct. of Penn.).

⁷ Riley Snyder & Jackie Valley, [Judge Denies Temporary Restraining Order Request By Trump Campaign, Nevada Republicans to Stop Clark County Mail Vote Counting](#), The Nevada Independent, Oct. 23, 2020.

⁸ *Republican Pty. v. Toulouse Oliver*, No. S-1-SC-38537 (Oct. 27, 2020, N.M.).

⁹ Taylor DesOrmeau, [Poll challengers can be within 6 feet of Michigan election workers, state agrees to in settled lawsuit](#), Michigan Live, October 28, 2020.

¹⁰ *See, e.g., Trump for President v. Phila. County Bd. Of Elec*, No. 983 C.D. 2020 (Oct. 23, 2020, Com. Ct. of Penn.) (addressing only the specifics of state law).

2. Poll watchers are creatures of state law and can therefore be highly regulated by the state and state officials.

“Because [state law], not the United States Constitution, grants parties the ability to appoint poll watchers, the state is free to regulate their use and its decision to do so does not implicate or impair any protected associational rights.” *Cortes*, 218 F. Supp. 3d at 414. Courts reviewing election laws and regulations limiting poll watchers should not “second-guess the judgment of [legislatures] and election officials, who are experts in creating and implementing an election plan.” *Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *2 (upholding statutory limits on poll watchers: “The job of an unelected judge isn’t to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials”).

There are rational reasons not to permit, or to limit, poll watchers at absentee processing or satellite processing sites. State governments and officials have an interest in the orderly administration of election laws. Poll watchers in certain circumstances may inhibit that interest. For example, absentee and satellite processing sites may not be large enough to accommodate poll watchers, particularly given COVID-era health and safety requirements. Further, in some states, there are layers of ballot review, and interposing an additional step for challenges may delay and disrupt the counting of ballots without serving any real purpose. In addition, the presence of observers may implicate the privacy of voters and the secrecy of the ballot.

3. Election observers are part of an entire regulatory framework for administering elections and are among the less important safeguards for preventing fraud.

Litigants should not assume that poll watchers have a role in preventing fraud. “[W]hile poll watchers may help guard the integrity of the vote, they are not the Election Code’s only, or even best, means of doing so.” *Cortes*, 218 F. Supp. 3d at 404. The role of poll watchers must be considered in the context of the entire election code. A “preoccupation with the role of poll watchers to deter purported voter fraud disregards other aspects of the regulatory framework ... designed to ensure ballot integrity and thus prevent vote dilution,” many of which are more effective than poll watchers. *Cortes*, 218 F. Supp. 3d at 406.

Moreover, courts have rejected the contention that mail-in voting is unusually susceptible to fraud and therefore increases the need for poll watchers. *Boockvar*, 2020 WL 5554644, at *30 (holding that the “greater need for poll watchers because of heightened election fraud involving mail-in voting” was “unsubstantiated.”)

4. Irregularities in following observer rules do not undermine election integrity.

Denying poll watchers access to a particular location does not undermine an election’s integrity. In *Benavente v. Taitano*, 2006 Guam 16, 89 (Guam 2006), petitioners argued that poll watchers were excluded from polling stations in violation of state law. In upholding the results of the election, the court reasoned that wrongfully excluding a poll watcher “does not affect the free and intelligent casting of the vote or the ascertainment of the result, and further does not affect an essential element of the election.” *Id.* at 90.

Moreover, courts have rejected as overly speculative efforts to argue that the lack of poll watchers results in increased fraud which in turn triggers equal protection claims based on vote dilution theories. *See Cortes*, 218 F. Supp. 3d at 407; *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *2 (W.D. Pa. Oct. 10, 2020). In fact, some courts have found such theories so speculative that they have held plaintiffs lacked standing to raise equal protection claims. For example, in the Trump campaign’s recent challenge to a Pennsylvania requirement that poll watchers reside in the county where they serve, the court explained that plaintiffs’ theory was that “absent implementation of the security measures that they seek (guards by drop boxes, signature comparison of mail-in ballots, and poll watchers), there is a risk of voter fraud by other voters.” *Boockvar*, 2020 WL 5997680, at *1. And, “[i]f another person engages in voter fraud, Plaintiffs assert that their own lawfully cast vote will, by comparison, count for less, or be diluted.” *Id.* The court rejected that theory, explaining:

While Plaintiffs may not need to prove actual voter fraud, they must at least prove that such fraud is “certainly impending.” They haven’t met that burden. At most, they have pieced together a sequence of uncertain assumptions: (1) they assume potential fraudsters may attempt to commit election fraud through the use of drop boxes or forged ballots, or due to a potential shortage of poll watchers; (2) they assume the numerous election-security measures used by county election officials may not work; and (3) they assume their own security measures may have prevented that fraud.”

Id. A claim challenging the absence of poll watchers at absentee processing or satellite processing sites rests on a similarly speculative “sequence of uncertain assumptions.”