

The First Amendment and the Government’s Authority to Regulate Poll Observer Conduct

Poll observers¹ — members of the public permitted to monitor voting and election processes at polling places and sometimes at ballot processing centers — are a feature of elections in nearly every state. They provide a degree of transparency in the electoral process, promoting the public confidence in elections that is the lifeblood of democracy. In some cases, however, observers have also caused significant disruption at the polls and there remains concerns that similar disruptions will occur during the upcoming 2022 midterm election.

State law determines whether poll observers are permitted in the state and what rules govern their selection, conduct, and duties. This includes whether poll observers may observe early voting, the voting process within a polling place on election day, and/or the ballot-counting process on and after election day, and whether they may challenge the eligibility of a prospective voter.² Against this backdrop, questions sometimes arise about how the U.S. Constitution, specifically, the First Amendment right to freedom of speech and peaceable assembly, applies to poll observers. This guidance is intended to help answer these questions.

Is there a constitutional right to serve as a poll observer?

No. There is no federal constitutional right to be a poll observer³ and states are not required by the U.S. Constitution to allow poll observers to monitor their elections.⁴ Neither the Due Process Clause nor the First Amendment of the U.S. Constitution requires the participation of non-governmental observers in the election process.⁵ Poll observers “are not universal” and “are absent from much of our history.”⁶

For example, West Virginia does not allow poll observers at all.⁷ The existence of and limitations on the role of poll observers are entirely determined by state law.⁸

¹ In this guidance, “poll observers” includes to those who may also be called “poll watchers,” “election observers,” or “challengers.”

² For more information about state laws concerning poll observers and voter-eligibility challenges, see States United Democracy Center’s [MIDTERMS 2022: The Poll Observer Landscape](#) and [Georgetown Law’s Institute for Constitutional Advocacy and Protection’s Fact Sheet: Protecting Against Voter Intimidation](#).

³ *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 413-14 (W.D. Pa. 2020) (citing cases); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 385 (Pa. 2020).

⁴ *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 387 (3d Cir. 2020); *Dailey v. Hands*, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983).

⁵ *Sec’y of Pa.*, 830 F. App’x at 387 (Due Process); *Dailey*, 2015 WL 1293188, at *4-*5 (First Amendment); *Turner*, 583 F. Supp. at 1162 (same).

⁶ *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 414 (E.D. Pa. 2016).

⁷ W. Va. Code Ann. §§ 3-1-37 & 3-1-41; *see also Cortés*, 218 F. Supp. 3d at 414; *Boockvar*, 493 F. Supp. 3d at 414.

⁸ *Cortés*, 218 F. Supp. 3d at 414; *Boockvar*, 493 F. Supp. 3d at 414.

Is it constitutional for election officials to limit where poll observers can go and what they can observe?

Yes, as long as the officials are following state law. Because poll observers are not required by the U.S. Constitution, each state can set its own laws for the role including whether to allow poll observers at all.⁹ In other words, states are permitted to determine for themselves the “Who, What, Why, When, Where, and How” of poll observing. For example, a number of states have residency, training, or other credentialing requirements in order to serve as a poll observer.¹⁰

State law also determines which election sites poll observers can monitor and when they can engage in monitoring.¹¹ Even at sites where poll observers are allowed, state law determines which parts of the sites they can access and how close they are allowed to get to the activities they are observing.¹² Poll observers are not automatically entitled to be within a certain distance of the activities they are observing.¹³

Do poll observers have a First Amendment right to express themselves freely at election sites, and may that right be limited?

Poll observers have First Amendment speech rights, but those rights may be significantly restricted at the election sites where they are permitted to observe. Poll observing itself “does not implicate core political speech” and has no distinct First Amendment protection.¹⁴

The First Amendment right to free speech is strongest in places that are set aside for public expression and assembly, which are called “public forums.” The law is clear that polling places

⁹ *Cortés*, 218 F. Supp. 3d at 414; *Boockvar*, 493 F. Supp. 3d at 414; *see also Boockvar*, 238 A.3d at 385 (poll observer regulations reviewed on rational basis standard). Limitations on observing are not treated as limitations on the right to vote—limits on poll observers do not limit the voters’ range of choices “or make the actual act of casting a vote any harder.” *Boockvar*, 493 F. Supp. 3d at 414.

¹⁰ *See, e.g.*, Ga. Code Ann. § 21-2-408(a)(1) (prior designation of poll watchers) & (c) (training requirement); 25 Pa. Stat. § 2687(b) (residency and certification requirement); Tex. Elec. Code §§ 33.031 (residency and training requirements), 33.051(a)(2) (requirement to certify training); *see also Boockvar*, 493 F. Supp. 3d at 419 (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).

¹¹ For instance, in Pennsylvania poll observers were not given access to satellite election offices because the statutes defining the role in that state did not include those locations. *Trump for President v. Phila. County Bd. of Elections*, 241 A.3d 120 (Pa. Commw. Ct. 2020) (unpublished table decision). Similarly, in New Mexico the state supreme court denied a petition demanding that observers be permitted at the initial stage of absentee ballot processing. *Republican Party v. Toulouse Oliver*, No. S-1-SC-38537 (Oct. 27, 2020, N.M.). In contrast, in Ohio the state supreme court found that the secretary of state erred in barring poll observers from early voting sites, reading the relevant statutes as permitting them to attend those proceedings. *State ex rel. Stokes v. Brunner*, 898 N.E.2d 23, 29 (Ohio 2008).

¹² *In re Canvassing Observation*, 241 A.3d 339, 349–50 (Pa. 2020) (statute permitting observers to be “in the room” could not be read to require access within a certain number of feet); *Kraus v. Cegavske*, 2020 WL 8340238, at *5 (Nev. Dist. Ct. Oct. 29, 2020) (poll watchers not entitled to “unlimited access to all areas of the ballot counting area and observation of all information involved in the ballot counting process”).

¹³ *In re Canvassing Observation*, 241 A.3d at 349–50.

¹⁴ *Cortés*, 218 F. Supp. 3d at 415; *see also Arizona Democratic Party v. Arizona Republican Party*, No. 16-03752, 2016 WL 8669978, at *13 (D. Ariz. Nov. 4, 2016) (“[P]oll watching is not a fundamental right that enjoys distinct First Amendment protection.”); *Dailey*, 2015 WL 1293188, at *4 (same).

themselves (as opposed to the public sidewalks surrounding them) are not public forums.¹⁵ States are thus entitled to make polling places “an island of calm in which voters can peacefully contemplate their choices” and can choose to impose more stringent restrictions on expressive activity than might be allowable elsewhere.¹⁶ Similarly, because a ballot processing site is also a nonpublic forum, states can set rules to promote election integrity by preserving the confidentiality of the work performed there and minimizing harmful disruption.¹⁷

Unless specifically exempted, poll observers are subject to all the rules applicable to members of the general public at a polling place. Prohibitions at polling places may include:

- Behaving disruptively or interfering with the voting process or the orderly administration of the site;¹⁸
- Taking photographs;¹⁹
- Wearing campaign-related clothing and accessories;²⁰
- Advocating for or against a candidate or issue on the ballot (“electioneering”) within a certain distance of the polling place;²¹
- Intentionally trying to observe who or what voters are voting for;²²
- Trying to interfere with voters’ marking of their ballots, or trying to induce voters to show how they voted or disclose how they voted without their consent;²³
- Coercing or intimidating voters;²⁴ and
- Interfering with an election worker or voting equipment.²⁵

States may also enforce communication rules that are specific to poll observers.²⁶ For instance, these rules may include barring them from talking to voters,²⁷ limiting their use of cell phones,²⁸ or barring

¹⁵ *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885-86 (2018); *PG Pub. Co. v. Aichele*, 705 F.3d 91, 100 n.10 (3d Cir. 2013) (citing cases).

¹⁶ *Mansky*, 138 S. Ct. at 1887-88.

¹⁷ *Coal. for Good Governance v. Kemp*, 558 F. Supp. 3d 1370, 1385 (N.D. Ga. 2021).

¹⁸ *See, e.g.*, Fla. Stat. § 102.031(4)(c); Idaho Code Ann. § 18-2318(3); Wash. Rev. Code § 29A.84.510; *see also Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 366-67 (S.D.N.Y.2007) (dismissing claim against officer who had probable cause to remove disruptive poll watcher).

¹⁹ *Silberberg v. Bd. of Elections of New York*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017); *see also Kemp*, 558 F. Supp. 3d at 1385.

²⁰ *Mansky*, 138 S. Ct. at 1891 (invalidating ban on all political apparel as too indeterminate, but recognizing that bans on clothing and buttons related to a candidate, ballot measure, or political party appearing on the ballot may be consistent with the First Amendment, and in dicta favorably citing to limitations on clothing and accessories in Cal. Elec. Code § 319.5 and Tex. Elec. Code § 61.010).

²¹ *See, e.g.*, Ariz. Rev. Stat. § 16-1018(1); Idaho Code Ann. § 18-2318; Mich. Comp. Laws § 168.744; 25 Pa. Stat. § 3060(c); Utah Code § 20A-3a-501; Wash. Rev. Code § 29A.84.510.

²² *See, e.g.*, Ga. Code Ann. § 21-2-568.1(a).

²³ *See, e.g.*, Ga. Code Ann. § 21-2-568; N.C. Gen. Stat. § 163-273; Utah Code § 20A-3a-504.

²⁴ *See, e.g.*, Ariz. Rev. Stat. § 16-1013; Ga. Code Ann. § 21-2-567; Idaho Code Ann. § 18-2319; Nev. Rev. Stat. 293.710; 25 Pa. Stat. § 3547; Utah Code § 20A-3a-501; Wis. Stat. § 12.09.

²⁵ *See, e.g.*, Ariz. Rev. Stat. § 16-1004; Ga. Code Ann. §§ 21-2-566(1)-(2) & (8) & 21-2-569; Nev. Rev. Stat. 293.755; N.C. Gen. Stat. § 163-274.

²⁶ *Kemp*, 558 F. Supp. 3d at 1385 (plaintiffs failed to establish a substantial likelihood of succeeding on their claim that a rule limiting communications during the monitoring of absentee ballot processing rule violated the First Amendment).

²⁷ *See, e.g.*, Ga. Code Ann. § 21-2-408(d); Nev. Admin. Code § 293.245(2); Tex. Elec. Code § 33.058(a)(2)-(3).

²⁸ *See, e.g.*, Ga. Code Ann. § 21-2-408(d); Nev. Admin. Code § 293.245(2).

them from talking to election officers about the election except to call attention to an irregularity or violation of law.²⁹ Some states also have catchall laws specific to poll observers that prohibit them from interfering with or impeding the election process.³⁰

What happens if poll observers are excluded or limited in violation of state law?

Although poll observers can provide helpful additional transparency, they “are in no sense public officials charged by law with the responsibilities of conducting fair and impartial elections.”³¹ Every state’s election laws and processes include multiple safeguards against fraud or mistakes, and there is every reason to think that other aspects of the election process do more to detect and prevent these issues than poll observers do.³²

As a result, even in cases where poll observers were permitted by state law but were wrongly excluded, courts have declined to conclude that the absence of poll observers meant that fraud or mistakes occurred in the administration of the election.³³ Because the presence or absence of a poll observer “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,” courts have declined to order a new election or throw out ballots even where poll observers were improperly denied access.³⁴

This guidance document was prepared by the States United Democracy Center, 21CP Solutions, and the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center.

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²⁹ See, e.g., Tex. Elec. Code § 33.058(a)(1) & (b).

³⁰ See, e.g., Ga. Code Ann. § 21-2-408(d); Nev. Admin. Code § 293.245(3).

³¹ *Preisler v. Calcaterra*, 243 S.W.2d 62, 65 (Mo. 1951).

³² See, e.g., *Cortés*, 218 F. Supp. 3d at 403-04; *Preisler*, 243 S.W.2d at 65-66.

³³ See *Cortés*, 218 F. Supp. 3d at 407 (dismissing as “speculation” the assumption that the presence of excluded poll watchers would have prevented fraud); *Boockvar*, 493 F. Supp. 3d at 342 & 377 (same); *Benavente v. Taitano*, 2006 Guam 16, 89-90 (Guam 2006) (no evidence that results of election would have changed if poll watchers had been present); *Pressley v. Casar*, 567 S.W.3d 28, 48-49 (Tex. App. 2016) (candidate contesting election results failed to produce evidence showing that poll watchers’ inability to observe certain activities resulted in them being performed incorrectly), *rev’d in other part*, 567 S.W.3d 327 (Tex. 2019) (vacating sanctions against candidate contesting election results and her attorney but leaving decision against her on the merits undisturbed).

³⁴ *Benavente*, 2006 Guam 16 at 90; see also fn. 34.