

# Challenging the Challengers: How Partisan Citizen Observers Contribute to Disenfranchisement and Undermine Election Integrity

*Almost every state allows political parties to sponsor and train private citizens to serve as election observers and sometimes even to challenge the eligibility of other private citizens to vote. These partisan citizen observers, referred to in this Note as “PCOs,” have far too often perpetuated the racism, disenfranchisement, and discrimination that already plague our democratic processes. While election observers can play a valuable role in preserving and maintaining the integrity of our elections at all levels, existing regulations do not effectively guard against discriminatory or intimidating PCO behavior. This Note analyzes the social and legal harms that may result from improper and illegal PCO activity and offers solutions to the PCO regime that maintain the benefits of citizen oversight of elections while minimizing the potential for intimidation, discrimination, and voter suppression.*

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## INTRODUCTION

During the first presidential debate for the 2020 elections, President Trump directly asked his supporters to “go into the polls and watch very carefully” for instances of voter fraud that could occur on Election Day.<sup>1</sup> These comments inspired confusion and fears of intimidation in an election already complicated by the COVID-19 pandemic.<sup>2</sup> The President’s remarks during the campaign appeared to be tied to the Republican Party’s (“GOP”) efforts to launch a large-scale poll watching effort by recruiting over fifty thousand volunteers nationwide to observe polling places in the November 3 election.<sup>3</sup> In response to the GOP’s efforts, Democratic and voting rights groups, including President Biden’s campaign, scaled up their own poll watching programs to recruit volunteers who could resolve election-day problems and report what then-candidate Biden had called election “chicanery.”<sup>4</sup> These efforts invoke an image described by one appeals court judge: “In this case, we anticipate the arrival of hundreds of Republican lawyers to challenge voter registrations at the polls. Behind them will be hundreds of Democrat lawyers to challenge these Challengers’ challenges. This is a recipe for confusion and chaos.”<sup>5</sup>

In almost every state, private citizens, on behalf of political parties, can observe polling places and sometimes even challenge the eligibility of other private citizens to vote.<sup>6</sup> These “poll watchers” or

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1. Alison Durkee, *Here’s Why Trump Telling Supporters to Watch the Polls Could Be an Even Bigger Threat This Year*, FORBES (Sept. 30, 2020, 10:54 AM), <https://www.forbes.com/sites/alisondurkee/2020/09/30/trump-debate-poll-watchers-election-even-bigger-threat-this-year-consent-decree/#5dbc33ab1b59> [<https://perma.cc/K3XJ-BX7V>].

2. See Daniella Silva, *Trump’s Call for Supporters to Watch Polls ‘Very Carefully’ Raises Concerns of Voter Intimidation*, NBC NEWS (Sept. 30, 2020, 4:26 PM), <https://www.nbcnews.com/news/us-news/trump-s-call-supporters-watch-polls-very-carefully-raises-concerns-n1241613> [<https://perma.cc/LF4A-CDYU>].

3. Nabil Remadna, *50,000 ‘Poll Watchers’ Expected After GOP Push*, KXAN, <https://www.kxan.com/news/us-politics/election/travis-county-begins-early-voting-as-poll-watchers-keep-an-eye-on-polling-locations/> (last updated Oct. 13, 2020, 7:47 AM) [<https://perma.cc/3PW8-ASMN>]; see also Jane C. Timm, *GOP Recruits Army of Poll Watchers to Fight Voter Fraud No One Can Prove Exists*, NBC NEWS, <https://www.nbcnews.com/politics/donald-trump/gop-recruits-army-poll-watchers-fight-voter-fraud-no-can-n1217391> (last updated June 9, 2020, 7:17 PM) [<https://perma.cc/97E9-ZYL7>] (“Republicans are recruiting an estimated 50,000 volunteers to act as ‘poll watchers’ in November, part of a multimillion-dollar effort to police who votes and how.”).

4. Fredreka Schouten, *Trump Campaign’s Poll-Watching Plans Spark Fears of Voter Suppression*, CNN, <https://www.cnn.com/2020/08/15/politics/trump-campaign-poll-watching-battles/index.html> (last updated Aug. 15, 2020, 10:42 AM) [<https://perma.cc/H9HX-27CM>].

5. Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547, 554 (6th Cir. 2004) (Cole, Jr., J., dissenting).

6. NICOLAS RILEY, BRENNAN CTR. FOR JUST., VOTER CHALLENGERS 1 (2012), [https://www.brennancenter.org/sites/default/files/legacy/publications/Voter\\_Challengers.pdf](https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf) [<https://perma.cc/F75Z-S6YA>].

“poll challengers,” referred to as “partisan citizen observers” or “PCOs”<sup>7</sup> throughout this Note, are tasked with observing election administration for discrepancies, inconsistencies, or potential instances of election fraud.<sup>8</sup> There is no federal law, however, that governs partisan voter challenges; as such, poll watching practices and restrictions vary from state to state, and sometimes states even delegate the power to create these rules to officials at the county level.<sup>9</sup> While poll watchers and challengers can play a critical role in spotting and flagging election-implementation issues, they have also been linked to instances of voter discrimination, intimidation, and suppression.<sup>10</sup>

The recent conversations on poll watching have sparked renewed interest in its history, legality, and future. Part I will provide background on this history, its development, and the efficacy of election observers, and it will discuss recent caselaw that has shifted the legal landscape of permissible election-observation activity. Part II will discuss the harms that may be created by improper poll watching and poll challenging and will analyze potential legal claims addressing such harms. Part III will put forward a model for poll watching that maintains the valuable role of civilian oversight in elections while minimizing the risk of disenfranchisement, voter intimidation, and the potential for violence and disruption at the polls. The proposed model urges legal and policy changes to the current model, changes which are designed to reduce the potential for challenges based on inadequate information, discrimination, voter intimidation, and other harms caused by the current poll watcher and poll challenger regime.

## I. THE HISTORY AND LEGAL AUTHORITY OF MODERN-DAY POLL WATCHERS AND CHALLENGERS

Both domestically and internationally, election observers and monitors can play important roles in election security, integrity, and transparency. When trained and properly resourced, observers can help deter fraudulent actors, increase the credibility and legitimacy of the

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7. For a more specific definition of “partisan citizen observer,” see *infra* Part I.B.1. This Note will focus primarily on PCOs and will use this term to refer to both “poll watchers” and “poll challengers” unless otherwise specified.

8. See RILEY, *supra* note 6, at 4 (describing the function of PCOs and emphasizing that they have the potential to “disrupt the voting process”).

9. Gilda R. Daniels, *Outsourcing Democracy: Refining Public-Private Partnerships in Election Administration*, 88 DENV. U. L. REV. 237, 240, 250 n.86 (2010) (“No federal law governs voter challenges; as such, laws explaining who can challenge and what authority they are given vary from state to state.”); see also *State Laws on Authorized Poll Watchers & Voter Challenges*, NAT’L ASS’N SEC’YS STATE (Jan. 2020), <https://www.nass.org/sites/default/files/surveys/2020-01/state-laws-poll-watchers-challengers-Jan2020.pdf> [<https://perma.cc/YY7H-JHLSJ>].

10. See *infra* Part II.A.

election, detect and report problems on the ground, and, in the case of countries in transition, hold fragile elements of an electoral process together.<sup>11</sup> In fact, election monitoring by organized citizen groups can be a “key integrity mechanism” and an “essential part of democratic development.”<sup>12</sup>

Observers can also create problems, however, if they lack sufficient training and management, thus undermining the very goals they claim to pursue. Best practices for observers include creating a credential or accreditation system to screen out unqualified applicants, permitting only challenges that are based on reliable data and reporting, clearly communicating the standards and expectations for challengers and observers, and prohibiting any form of intimidation, harassment, discrimination, or disruption at the polling location.<sup>13</sup> Moreover, there appears to be no national-level data available on how often challenges are made or upheld, and without this information, it is hard to fully understand PCOs’ role in both curbing voter fraud and producing voter suppression.

As will be argued in Parts II and III, American election observers can play a valuable role in preserving and maintaining the integrity of our elections at all levels, but existing regulations do not effectively guard against improper watching and challenging. Rather than emerging as a valuable and effective check against election fraud, poll watchers and poll challengers have far too often only perpetuated the racism, disenfranchisement, and discrimination that already plague our democratic processes.

### A. Election Fraud in the United States

Poll watcher and poll challenger activity is often justified as necessary to protect against election fraud.<sup>14</sup> Before discussing whether poll challengers and poll watchers effectively curb election fraud, it is worth investigating the extent to which election fraud occurs.

11. *Election Integrity*, ACE ELECTORAL KNOWLEDGE NETWORK, <https://aceproject.org/main/english/ei/eig04.htm> (last visited Nov. 15, 2021) [<https://perma.cc/TRM5-YCYK>].

12. *Id.* at “National Election Observation.”

13. *Id.* at “Integrity in Domestic Observation.”

14. *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) (“[B]ecause exercise of his authority promotes an honest election, the poll-watcher’s function is to guard the integrity of the vote.”); Danny Hakim, Stephanie Saul, Nick Corasaniti & Michael Wines, *Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y., TIMES, <https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html> (last updated Nov. 3, 2020) [<https://perma.cc/66KW-RGMP>] (“Thea McDonald, a spokeswoman for the Trump campaign, said . . . ‘President Trump’s volunteer poll watchers will be trained to ensure all rules are applied equally, all valid ballots are counted, and all Democrat rule-breaking is called out.’”).

Importantly, election experts maintain that in-person voter fraud is “virtually non-existent”; one study found that of the more than one billion ballots cast in elections over a fourteen-year period, there were only thirty-one instances of potential voter impersonation.<sup>15</sup> Mail-in ballots also appear to raise exceedingly few instances of voter fraud—Oregon, for example, has mailed out more than 100 million mail-in ballots since 2000 and reported only “around a dozen cases of proven fraud.”<sup>16</sup> In many cases, what may look like fraud is really due to clerical human error, such as a person mistakenly attempting to vote under a the wrong name.<sup>17</sup>

Even groups that insist voter fraud is a serious threat often struggle to prove its existence on any widespread scale. For example, the Heritage Foundation, a conservative think tank, operates an “Election Fraud Database” that aims to track instances of voter fraud<sup>18</sup>—yet, as of 2017, the Heritage Foundation had found only ten instances of in-person impersonation fraud at polling places out of billions of votes cast.<sup>19</sup> Indeed, it appears more likely that a person will be “struck by lightning” than try to impersonate someone at the polls,<sup>20</sup> and what fraud does occur tends to be “small scale, individual acts that are not calculated to change election outcomes.”<sup>21</sup>

Even though election fraud has proven to be vanishingly rare, it has occupied increasingly more space in the public consciousness and perception around voting. This issue has also become extremely

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15. See Schouten, *supra* note 4.

16. Andy Sullivan & Joseph Ax, *Explainer: Despite Trump Claims, Voter Fraud Is Extremely Rare. Here Is How U.S. States Keep It That Way*, REUTERS (Sept. 9, 2020, 5:08 AM), <https://www.reuters.com/article/us-usa-election-voter-fraud-facts-explai/explainer-despite-trump-claims-voter-fraud-is-extremely-rare-here-is-how-u-s-states-keep-it-that-way-idUSKBN2601HG> [<https://perma.cc/DEZ8-FD8E>].

17. JUSTIN LEVITT, BRENNAN CTR. FOR JUST., *THE TRUTH ABOUT VOTER FRAUD* 7 (2007), <https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf> [<https://perma.cc/U652-3G5X>]. For example, during a 1998 election, one Alan J. Mandel was alleged to have voted despite having died the year prior, yet later investigations found that the election officials who signed in Alan J. Mandell (with two *l*s) had accidentally checked the wrong name. *Id.*

18. See *Election Fraud Database*, HERITAGE FOUND., <https://www.heritage.org/voterfraud> (last visited Feb. 22, 2022) [<https://perma.cc/ZB4T-EHSC>].

19. *Analysis: Heritage Foundation's Database Undermines Claims of Recent Voter Fraud*, BRENNAN CTR. FOR JUST. (Sept. 8, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/analysis-heritage-foundations-database-undermines-claims-recent-voter> [<https://perma.cc/ZN4G-8HES>].

20. LEVITT, *supra* note 17, at 4.

21. Pat Beall, Catharina Felke, Sarah Gelbard, Jackie Hajdenberg, Elizabeth Mulvey & Aseem Shukla, *We Analyzed a Conservative Foundation's Catalog of Absentee Ballot Fraud and Found No Credible Threat to the 2020 Election*, FRONTLINE (Oct. 20, 2020), <https://www.pbs.org/wgbh/frontline/article/heres-why-concerns-about-absentee-ballot-fraud-are-overhyped/> [<https://perma.cc/D2UC-ZP4C>] (quoting Rick Hasen).

partisan in nature. Despite the Trump administration's own statement that the 2020 election was "the most secure in American history,"<sup>22</sup> eight out of ten Republicans in a January 2021 poll did not believe that the 2020 presidential election results were accurate.<sup>23</sup>

Since the November 3, 2020 election, PCOs have featured heavily in the national conversation around election fraud,<sup>24</sup> spurred in part by former President Trump's attempts to overturn or challenge election results by alleging poll watching and poll challenging violations.<sup>25</sup> This recent spike in concerns about poll watching and poll challenging has borne fruit—as of April 15, 2021, legislators in twenty states had introduced forty bills expanding poll watchers' access to ballot casting and counting during the 2021 legislative sessions.<sup>26</sup>

As will be discussed below, this outsized discussion of election fraud, which far exceeds the amount of fraud that actually occurs, not only increases demand for problematic poll watcher and poll challenger activity but also helps perpetuate the discrimination and voter suppression that too often results from such activity.

### *B. The Structure and Legal Guidelines for PCOs in the United States Today*

#### 1. Types of Election Observers in the United States

The National Conference of State Legislatures, an organization representing states and municipalities across the country, identifies five main types of election observers, whose goals are to maintain the fairness and integrity of an election: 1) PCOs, as defined above, who are nominated and trained by political parties and candidates; 2) nonpartisan citizen observers, who are recruited by nonpartisan organizations; 3) international nonpartisan observers—typically

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22. *Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Nov 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election> [<https://perma.cc/CX6B-TNVJ>].

23. Domenico Montanaro, *Poll: Majority of Americans Blame Trump for Violence at Capitol*, NPR (Jan. 15, 2021, 12:00 PM), <https://www.npr.org/2021/01/15/956850131/poll-majority-of-americans-blame-trump-for-violence-at-capitol> [<https://perma.cc/M33Q-5WYB>].

24. See *supra* note 14.

25. See Shan Li & Corinne Ramey, *What Are Election Observers? Role at Crux of Trump Lawsuits in Pennsylvania*, WALL ST. J., <https://www.wsj.com/articles/what-are-election-observers-the-role-at-the-crux-of-trump-lawsuits-in-pennsylvania-11605053759> (last updated Nov. 10, 2020, 10:14 PM) [<https://perma.cc/YNM5-PMTK>].

26. Eliza Sweren-Becker, *Who Watches the Poll Watchers?*, BRENNAN CTR. FOR JUST. (April 29, 2021), <https://www.brennancenter.org/our-work/research-reports/who-watches-poll-watchers> [<https://perma.cc/E8PG-UKKT>].

official representatives of international organizations like the United Nations—who are not citizens or residents of the country whose elections they are observing; 4) academic observers, who are often election or democracy scholars without any partisan affiliation; and 5) federal observers, who are assigned by the Department of Justice, per the Voting Rights Act of 1965, to impartially observe elections in jurisdictions where the Department is concerned about compliance with federal law.<sup>27</sup> The terminology of these observers, as well as how and where they are allowed to conduct observations, also varies by state.

## 2. Historical Background and Origins of PCOs in the United States

Although millions of Americans only learned about PCOs in the weeks after the 2020 presidential debate described in the introduction, challenger and observer laws have existed since the 1700s.<sup>28</sup> One of the first challenger laws in North America was enacted by the colony of Rhode Island and Providence Plantations in 1742 in the form of Royal Charter 252, which allowed individuals “to challenge any voter whose qualifications they had ‘cause to doubt.’”<sup>29</sup> New York state passed its first challenger law during the Revolutionary War, permitting “any elector” to challenge any voter that he personally suspected “had not taken an active and decisive part in favor of the United States” in the Revolutionary War.<sup>30</sup>

Modern PCO laws, however, have their foundations in targeting not British loyalists but rather people of color, especially Black, Latino, and Indigenous voters.<sup>31</sup> Many of today’s PCO laws were first enacted

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27. *Policies for Election Observers*, NAT’L CONF. STATE LEGS. (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx#> [<https://perma.cc/394T-W8FL>].

28. See RILEY, *supra* note 6, at 7.

29. *Id.* at 25 n.33.

30. *Id.* at 25 n.34.

31. See *id.* at 7 (“In some states, lawmakers first empowered private citizens to challenge voters at the polls only because they believed it would be an effective way to suppress voter turnout in black, Latino, or working-class communities.”). One of the most egregious examples of poll watching and challenging that targeted voters of color was “Operation Eagle Eye,” a Republican poll-watching campaign that was touted as a “ballot security” program and that aimed to deploy 100,000 poll watchers in thirty-five large cities to challenge or deter up to 1.25 million voters nationwide. See TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION* 49–53 (2012). Critics of the program argued it was designed to, or would inevitably lead to, intimidation and challenges of people of color. The President of the Los Angeles Young Republicans noted that they were only planning to send watchers to a heavily Black district where he claimed to have “first-hand knowledge” of election law violations; in St. George, South Carolina, one in every three Black voters was being challenged at the polls. See *id.* at 51. This program was designed and operated by those at the highest level of Republican Party membership, including future Supreme Court Chief Justice William Rehnquist, who, in his Supreme Court confirmation hearings, denied any racial motivations for the program, claiming instead that cities were targeted because they were



in the nineteenth and early twentieth centuries and were designed to suppress and intimidate voters of color.<sup>32</sup> For example, an 1877 amendment to Florida's challenger statute, which was first enacted in 1845, required challenged voters to present two witnesses from the district who were "personally known" to at least two polling-place officials to vouch for the voter's eligibility to vote.<sup>33</sup> Yet polling place officials were almost exclusively white and, due to systemic oppression of Black communities and segregation, unlikely to know any witnesses who were Black, thus disenfranchising many Black voters.<sup>34</sup> Minnesota had analogous witness requirements—but these only applied in Minneapolis and St. Paul, and the law was quickly used to target Black voters in those areas.<sup>35</sup> Similarly, in Arizona, a voter challenger law allowed for challenges based on a literacy test of the U.S. Constitution, aimed at disenfranchising Mexican Americans.<sup>36</sup>

Today, PCOs are prohibited from making challenges based on race or ethnicity and from intimidating voters. Following the Voting Rights Act and myriad democratic reforms during the civil rights movement, states amended or repealed their voter challenger laws to prohibit challenges based on race or national origin.<sup>37</sup> Additionally, federal laws, including the Civil Rights Act of 1957 and the Voting Rights Act of 1965, make it a federal crime to "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce" anyone trying to

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heavily Democratic. *See id.* at 48. *See also* *Democrats Charge G.O.P. Poll Watch Today Will Harass the Negroes and the Poor*; *REPUBLICANS SAY HONESTY IS GOAL*; *Assert 100,000 Sentinels in 35 Cities Will Seek Only to Avert Voting Fraud*, N.Y. TIMES (Nov. 3, 1964), <https://www.nytimes.com/1964/11/03/archives/democrats-charge-gop-poll-watch-today-will-harass-the-negroes-and.html> [<https://perma.cc/DT4Y-LMYK>].

32. RILEY, *supra* note 6, at 7. ("The legislative record in these states indicates that challenger laws were often enacted, amended, and used not for the purpose of preventing fraud but, rather, to disenfranchise voters of color.")

33. *Id.* at 8.

34. *Id.*

35. *Id.*

36. *Id.* For the text of the 1912 statute that enacted the literacy test, see James Thomas Tucker, Rodolfo Espino, Tara Brite, Shannon Conley, Ben Horowitz, Zak Walter & Shon Zelman, *Voting Rights in Arizona: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 283, 285–86 (2008):

Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

4) Is able to read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, unless prevented from doing so by physical disability;

5) Is able to write his name, unless prevented from so doing by physical disability.

37. Eliza Sweren-Becker & Hannah Klain, *Limits on Observers and Challengers at the Polls*, BRENNAN CTR. FOR JUST. (Oct. 12, 2020), <https://www.brennancenter.org/our-work/research-reports/limits-observers-and-challengers-polls> [<https://perma.cc/QBV8-5ZRW>] ("[F]ederal law prohibits discrimination and intimidation at the polls.")

exercise their right to vote.<sup>38</sup> Despite the existence of these laws preventing discrimination and intimidation, many race-neutral PCO laws still allow for disproportionate disenfranchisement and intimidation of people of color, low-income groups, and other marginalized communities.<sup>39</sup>

### 3. Who Can Serve as a PCO Today

There is no federal law, outside of the civil rights legislation that prohibits discrimination and intimidation in voting broadly, that established uniform guidance on PCOs,<sup>40</sup> but there are overall patterns among state laws for determining who is allowed to serve in this capacity and what they are allowed to do.<sup>41</sup> Despite President Trump's call during the first 2020 general election debate to engage in PCO activity,<sup>42</sup> there remain many legal restrictions that prohibit private citizens from simply showing up at any polling place and taking it upon themselves to challenge voters.

One type of restriction on PCOs is the nomination process. Forty-one states and the District of Columbia have a formal appointment process for PCOs, where a party or candidate will nominate individuals who are then approved by elections officials.<sup>43</sup> Nine states allow for PCOs without any form of appointment or accreditation.<sup>44</sup> Even among states that require an appointment process, however, many states do not require a code of conduct, special training, or official documentation for PCOs, and this renders the appointment process more informal than the accreditation process that is considered a best practice under international standards for election observation.<sup>45</sup> Often, the responsibility for training PCOs is left up to the political parties themselves; in Arkansas, individuals are appointed by a political party and complete a "poll watcher authorization form" to gain access to a polling site, but they are not required to complete any

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38. *Voter Intimidation Violates Federal Law*, PROTECT DEMOCRACY (Sept. 2020), <https://www.lvw.org/sites/default/files/2020-10/Voter%20Intimidation%20Explainer.pdf> [<https://perma.cc/U5VB-6CWA>].

39. *See infra* Part II.C.

40. Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 369–77 (2002).

41. *See* NAT'L ASS'N SEC'YS STATE, *supra* note 9 (cataloguing the approaches that vary considerably from state to state).

42. *See supra* Introduction.

43. NAT'L CONF. STATE LEGS., *supra* note 27.

44. *Id.*

45. *Id.*; ACE ELECTORAL KNOWLEDGE NETWORK, *supra* note 11, at "Accrediting Observers."

official training or certification.<sup>46</sup> Rather, the political parties appear to provide such training: Arkansas Democrats recruited poll watchers to be the “eyes and ears for the [Democratic Party of Arkansas]’s Voter Protection Team,” noting that “[n]o previous poll watching experience is necessary. We’ll have comprehensive training to make sure Poll Watchers are fully prepared and comfortable.”<sup>47</sup>

As such, the process for volunteering as a PCO varies widely, and training is often left to political parties who may lack the expertise, accountability, and non-partisan interests of professional elections officials. The practice of allowing a challenger from both political parties was intended to provide maximum security against voter fraud, since each would have a stake in a smooth and fair election.<sup>48</sup> Yet these goals are undermined when PCOs are not provided with adequate training or supervision or when an inadequate screening process fails to reject any actor who might observe or challenge in a racially discriminatory way.<sup>49</sup>

### C. The Challenge Process

#### 1. When a Challenge May Be Lodged

PCOs and any potential challenges they raise may be permitted in three different stages of an election: 1) prior to when voting begins, where PCOs might observe or challenge registration;<sup>50</sup> 2) during voting itself, where PCOs may watch for questionable activity and raise challenges to the election officials at the polling place;<sup>51</sup> and 3) after election day, when PCOs may be permitted to observe or challenge the “canvassing,” or counting, of ballots.<sup>52</sup>

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46. ARK. CODE ANN. § 7-5-312 (West 2021) (detailing poll watcher powers and requirements); 108 ARK. CODE R. § 108.00.9-900(l) (West 2021).

47. *Be A Poll Watcher – Protect Our Democracy!*, DEMOCRATIC PARTY OF ARK., <https://www.arkdems.org/be-a-poll-watcher-protect-our-democracy/#.YAORN5NKjUo> (last visited Nov. 16, 2021) [<https://perma.cc/PB93-L9GM>].

48. See Joseph Tanfani & Jarrett Renshaw, *Challengers, Observers and Electioneering: The History and Rules of U.S. Poll Watching*, REUTERS (Oct. 7, 2020, 5:11 AM), <https://www.reuters.com/article/us-usa-election-poll-watchers-facts-expl/challengers-observers-and-electioneering-the-history-and-rules-of-u-s-poll-watching-idUSKBN26S1IH> [<https://perma.cc/UW9E-W4CH>] (“People from both parties keep an eye on the voting - and each other - to make sure things go smoothly.”).

49. See RILEY, *supra* note 6, at 15; Jason Belmont Conn, Note, *Of Challengers and Challenges*, 37 U. TOL. L. REV. 1021, 1028 (2006).

50. *Challenge to Voter Registration*, WASH. STATE, [https://www.sos.wa.gov/\\_assets/elections/challenge\\_instructions\\_and\\_form.pdf](https://www.sos.wa.gov/_assets/elections/challenge_instructions_and_form.pdf) (last visited Nov. 16, 2021) [<https://perma.cc/P3K3-RWE7>].

51. RILEY, *supra* note 6, at 15.

52. *Poll Watchers and Challengers*, NAT’L CONF. STATE LEGS. (Oct. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/poll-watcher-qualifications.aspx> [<https://perma.cc/9C8B-XRPQ>].

PCO activity that occurs prior to the start of voting typically takes the form of “registration challenges,” where the challenger may alert an election official of a specific person and a specific reason for ineligibility.<sup>53</sup> Oftentimes, the PCO must make the challenge several weeks in advance of Election Day, and this time allows the election official to notify the voter of the challenge and ask that they verify their eligibility.<sup>54</sup> Importantly, this time provides the opportunity for critical legal challenges to the methodology or basis for the challenge—as is the case with blanket challenges, discussed further in Part II.C, that rely on false or misleading information.<sup>55</sup>

The second opportunity for PCOs to engage in election monitoring occurs during voting itself, when they can observe the voting process and in some jurisdictions even challenge the eligibility of individual voters.<sup>56</sup> The authority of PCOs varies widely among states; most states allow for PCOs, whether designated as “poll watchers” or as “poll challengers,” to issue challenges against voters they believe to be ineligible.<sup>57</sup> Some states are more limited in who may challenge a voter. In Kansas, “poll agents” (the state’s statutory term for poll watchers) are permitted to “observe the proceedings” at precinct polling sites, county election offices, or the ballot counting process, but only an election judge can challenge a voter “whom the judge shall know or suspect [is] not [ ] qualified as an elector.”<sup>58</sup> The third opportunity for a PCO to engage in election monitoring occurs during the counting of absentee ballots, when poll workers and election officials are tabulating votes.<sup>59</sup>

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53. RILEY, *supra* note 6, at 5.

54. *Id.*

55. See Peter K. Schalestock, *Monitoring of Election Processes by Private Actors*, 34 WM. MITCHELL L. REV. 563, 572–75 (2008) (discussing Democrat-backed legal challenges to Republican efforts to challenge “approximately two thousand registrations they believed were duplicates” in Washington State’s 2005 election).

56. These PCO challenges are distinct from laws in many states where individuals, not affiliated with a political party, can challenge voters they believe to be ineligible. In Arizona, for example, poll observers must be appointed and approved by elections officials, but any voter may “orally challenge” another voter if they believe them to already have voted in that election, to be impersonating another voter, to not meet the residency requirements of that precinct, or for any other non-discriminatory reason. See *Poll Worker’s Training Handbook*, COCHISE CNTY. ELECTIONS DEPT 31, 33, <https://www.cochise.az.gov/DocumentCenter/View/586/Poll-Worker-Handbook-PDF> (last visited Oct. 6, 2021) [<https://perma.cc/9KS2-GC7J>].

57. *Id.*

58. NAT’L ASS’N SEC’YS STATE, *supra* note 9, at 6–7. For examples of other states in which PCOs are not permitted to challenge voters, see *infra*, note 249.

59. See Schalestock, *supra* note 55, at 588–90 (discussing the rule regarding absentee challenges in various states).

## 2. Evidentiary Standards for Raising a Challenge

The evidentiary standard that challengers must meet when raising a challenge also varies in its rigor and scrutiny. At their strictest, a challenger must have “personal knowledge” that the voter is not eligible to cast a ballot. For example, in Minnesota, where such “personal knowledge” is required, “[s]uspicion is not a basis for making a challenge. The challenger must personally know that a specific person is not eligible to vote for a specific reason.”<sup>60</sup> Minnesota, however, appears to be in the minority—many other states permit a lower standard.<sup>61</sup> Often, a challenge may be permitted on knowledge or suspicion<sup>62</sup> or on “good reason” to believe that such voter is not qualified to cast a ballot.<sup>63</sup> Many states, however, do not list a standard for challenges,<sup>64</sup> creating a vagueness in the statute which makes it vulnerable to inconsistent or inappropriate interpretation.

## 3. Burden of Proof for Justifying a Challenge

In most states, once a challenger lodges a challenge, the burden of proof is on the *voter* to prove their eligibility.<sup>65</sup> Some states require a

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60. *Rules for Challengers*, OFF. MINN. SEC’Y STATE, <https://www.sos.state.mn.us/elections-voting/election-day-voting/rules-for-challengers/> (last visited Nov. 16, 2021) [<https://perma.cc/BZ9X-Y868>].

61. NAT’L ASS’N SEC’YS STATE, *supra* note 9.

62. *See, e.g.*, IOWA CODE ANN. § 49.79(1) (West 2021) (“It is the duty of each official to challenge any person offering to vote whom the official knows or suspects is not duly qualified.”); NEB. REV. STAT. ANN. § 32-926 (West 2021) (“Any person offering to vote, even though such person is registered, may be challenged as unqualified . . . . The judge or clerk of election shall challenge any person offering to vote whom he or she knows or suspects not to be duly qualified.”); N.Y. ELEC. LAW § 8-502 (McKinney 2021) (“An inspector shall challenge every person offering to vote, whom he shall know or suspect is not entitled to vote in the district . . . .”); VA. CODE ANN. § 24.2-651 (West 2021) (“Any qualified voter may, and the officers of election shall, challenge the vote of any person who is listed on the pollbook but is known or suspected not to be a qualified voter.”).

63. *See* ALASKA STAT. ANN. § 15.15.210 (West 2021) (“Every election official shall question, and every watcher and any other person qualified to vote in the precinct may question, a person attempting to vote if the questioner has good reason to suspect that the questioned person is not qualified under AS 15.05.”); MICH. COMP. LAWS ANN. § 168.727(1) (West 2021) (“An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct . . . .”).

64. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-591 (“Any qualified elector of the county may orally challenge a person offering to vote as not qualified under § 16-121.01 or on the ground that the person has voted before at that election.”); GA. CODE ANN. § 21-2-229(a) (West 2021) (“Any elector of a county or municipality may challenge the qualifications of any person applying to register to vote in the county or municipality and may challenge the qualifications of any elector of the county or municipality whose name appears on the list of electors.”).

65. *The Role of Challengers in Elections*, PROJECT VOTE 8 (Jan. 3, 2008), <https://www.issueab.org/resources/440/440.pdf> [<https://perma.cc/N9GA-MX77>] (“This is the case in the vast majority of states. The challenged voter must affirmatively prove that he is registered, is voting in the right place, is who he says, or is otherwise qualified.”).

voter to provide proof of identity or residency to demonstrate their eligibility to vote.<sup>66</sup> Others simply require the poll challenger to state a “reason for challenge.”<sup>67</sup> In some states where identification is required to vote in general, such challenges may be surmountable. If a state such as Nevada does not otherwise require an ID to vote, however, a challenged voter may be asked to show a photo identification when they had no knowledge that they would be required to bring and present ID.<sup>68</sup>

Some states put a higher burden on the challenger to prove the validity of a challenge. In Washington, if a challenger asserts that the voter is misrepresenting their residency, the challenger must provide the address at which the voter actually resides or swear to personally having taken specific steps to determine the individual’s residency.<sup>69</sup> In North Carolina, a challenge may only be sustained if it is “substantiated by affirmative proof,” and without such proof, the voter is presumed to be “properly registered or affiliated.”<sup>70</sup>

#### 4. The Challenge Process

Once a challenge is launched, most states will require the challenged voter to sign affidavits or other sworn statements attesting to their qualifications to vote in that election.<sup>71</sup> There is significant variation in how states proceed following this sworn statement—some require election judges to inquire into the voter’s qualifications in the

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66. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/17-10(a) (West 2021) (“[T]he person so challenged shall provide to the judges of election proof of residence by producing two forms of identification showing the person’s current residence address . . . .”); MD. CODE ANN., ELEC. LAW § 10-312(a)(2) (West 2020) (“An individual whose right to vote is challenged at the polls may establish the individual’s identity by presenting any of the following forms of identification . . . .”); NEV. REV. STAT. ANN. § 293.303(7) (West 2020) (“If the challenge is based on [suspected lack of residency] and the challenged person executes the oath or affirmation, the election board shall not issue the person a ballot until he or she furnishes satisfactory identification which contains proof of the address at which the person actually resides.”); UTAH CODE ANN. § 20A-3a-205 (West 2020) (“When presented with a challenge the poll worker shall: (a) request that the [person] provide valid voter identification; and (b) review the identification provided by the person.”).

67. STATE BD. ELECTION COMM’RS, AGENCY # 108.00, RULES ON POLL WATCHERS, VOTE CHALLENGES, AND PROVISIONAL VOTING 14 (2015), <https://www.sos.arkansas.gov/uploads/rulesRegs/Arkansas%20Register/2016/jan2016/108.00.15-008.pdf> [<https://perma.cc/N4U5-8GZA>].

68. *Voter ID Laws*, NAT’L CONF. STATE LEGS. <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (last updated Jan. 7, 2022) [<https://perma.cc/SE4H-HDZ8>] (listing Nevada as a state where no documents are required to vote); NEV. REV. STAT. ANN. § 293.303 (West 2020).

69. WASH. STATE, *supra* note 50.

70. N.C. GEN. STAT. ANN. § 163-90.1(b) (West 2021).

71. PROJECT VOTE, *supra* note 65, at 9.

moment and come to a decision on the challenge's validity,<sup>72</sup> others allow for a process to evaluate challenges outside the regular voting process,<sup>73</sup> or still others permit the challenged voter to cast a ballot after they have completed the sworn statement certifying their qualifications.<sup>74</sup>

If a voter is challenged, they may still be permitted to cast some form of ballot. Because states are required under the federal Help America Vote Act of 2002 ("HAVA") to provide a provisional ballot to any voter whose eligibility is uncertain, a voter in any state will still be permitted to vote provisionally if a challenge against them is not resolved.<sup>75</sup> In some states, the challenged voters will be permitted to vote by regular ballot if the challenge is found invalid but will be required to vote by a special ballot if the challenge is sustained.<sup>76</sup> In other states, a voter whose challenge is upheld (or who does not sign an affidavit swearing to their qualifications) will be denied a ballot entirely.<sup>77</sup>

The consequences for presenting an impermissible or baseless challenge also vary by state. In many states, like Minnesota, all challengers will be required to sign a "challenge form" or affidavit detailing the challenge and attesting they honestly believe the challenge is valid.<sup>78</sup> Often, such as in Maine, challengers sign such affidavits under penalty of perjury;<sup>79</sup> however, some states go even

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72. See, e.g., N.M. STAT. ANN. § 1-12-22 (West 2021); see also IOWA CODE ANN. § 49.80(2) (West 2021) (describing the questions an election official may ask the voter to determine the voter's qualifications).

73. See GA. CODE ANN. § 21-2-230(i) (West 2021) (describing the procedure for how a challenged voter, if it is "not practical" to conduct a hearing on the challenge's validity before the polls close, may complete a "challenged ballot" that will be evaluated at a later time).

74. See, e.g., IDAHO CODE ANN. § 34-1111 (West 2021) ("Upon a challenged elector's subscribing the elector's oath, he shall be entitled to vote.").

75. 52 U.S.C. § 21082(a); see also *The Help America Vote Act*, BRENNAN CTR. FOR JUST. 2, <https://www.brennancenter.org/sites/default/files/legacy/d/HAVA%20Fact%20Sheet.pdf> (last visited Nov. 16, 2021) [<https://perma.cc/HQB9-MQFZ>] (describing how after the passage of HAVA, states in federal elections "must provide 'provisional' ballots at every polling place for voters who do not appear in the official registration lists, whose eligibility to vote is challenged or who are unable to provide the identification required under HAVA").

76. BRENNAN CTR. FOR JUST., *supra* note 75, at 2.

77. See PROJECT VOTE, *supra* note 65, at 10; see also GA. CODE ANN. § 21-2-230(h) (West 2021) ("If the registrars uphold the challenge, the challenged elector shall not be permitted to vote and, if the challenge is based upon the grounds that the elector is not qualified to remain on the list of electors, the challenged elector's name shall be removed from the list of electors.").

78. See, e.g., *Republican Party of Minnesota: Poll Challenger Training*, MINN. GOP (2016), <https://mngop.com/wp-content/uploads/2020/05/Poll-Challenger-Training.pdf> [<https://perma.cc/2ZW8-H2DB>].

79. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 673 (West 2021) ("Making a false statement on the affidavit is punishable under penalties of perjury.").

further. For example, Florida makes a “frivolous” challenge a first-degree misdemeanor.<sup>80</sup>

#### *D. Recent Legal Developments Regarding PCOs*

There has been a renewed interest in PCOs, in part due to President Trump’s call to action for private citizens to volunteer as poll watchers and the string of lawsuits filed by his campaign, which focused on supposed refusals to allow PCOs during the ballot-counting stage. Moreover, this past election was the first presidential election in over thirty years in which the Republican National Party was not bound by a Consent Decree restricting its poll watching efforts at the national level.<sup>81</sup> Finally, recent developments in state-level laws indicate that PCOs will continue to be a tool used in the name of “ballot security” and “ballot integrity,” further entrenching the existing faulty, problematic challenger practices.

##### 1. Case Study: The Expiration of the 1981 Consent Decree Changes the PCO Landscape

In 1981, the Democratic National Committee (“DNC”) sued the Republican National Committee (“RNC”), alleging that the RNC had implemented voter caging efforts on communities of color and intimidated voters by hiring armed off-duty police officers wearing armbands that read “National Ballot Security Task Force” to patrol precincts in minority neighborhoods.<sup>82</sup> The RNC settled the lawsuit by entering into a Consent Decree that restricted its ballot security activities.<sup>83</sup> Under the decree, the RNC agreed to refrain from ballot security measures in precincts where the racial and ethnic minority of the precinct was a factor in targeting such activity, from permitting watchers or challengers to present themselves as “performing official or

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80. FLA. STAT. ANN. § 101.111(2) (West 2021). It should be noted that this penalty is lessened by removing liability for “any action taken in good faith and in furtherance of any activity or duty permitted of such electors or poll watchers by law.” *See id.*

81. Yelena Dzhanova, *There’s Nothing Stopping the RNC from Using Voter Intimidation Tactics in November Now That a Decades-Old Agreement Has Ended, Experts Warn*, BUS. INSIDER (Sept. 13, 2020, 2:33 PM), <https://www.businessinsider.com/rnc-engage-voter-intimidation-because-1982-consent-decree-ended-2020-9> [<https://perma.cc/ZB2Q-SRPQ>].

82. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 579 (D. N.J. 2009). Voter caging will be discussed in later sections but essentially consists of mailing non-forwardable mail to addresses in a precinct and recording the names and addresses for any mail that is returned as individuals who have potentially moved and are no longer eligible to vote at that address. This list may then be used to challenge individuals from that list who attempt to cast ballots from that address. For additional discussions and definitions of voter caging, see *infra*, note 193.

83. *See Democratic Nat’l Comm.*, 671 F. Supp. at 579–80.



governmental functions,” and from recruiting “private personnel deputized as law enforcement personnel” in connection with these activities.<sup>84</sup>

On November 5, 2016, however, a New Jersey District Court judge denied the DNC’s motion to extend this Consent Decree.<sup>85</sup> The court held that the plaintiffs provided only circumstantial evidence, not direct evidence, to show the national-level organization was engaging in the prohibited activities.<sup>86</sup> The court reasoned that even if *state*-level actors had been engaging in activities banned by the Consent Decree, the *national* RNC had not, and since only the national group was covered by the Consent Decree, there was no need to extend it.<sup>87</sup> Following the November hearing, the Consent Decree formally expired on December 31, 2017, making the 2020 election the first presidential election in over thirty-five years where the RNC could engage in PCO measures without court preclearance.<sup>88</sup>

It may be too soon to tell exactly how the expiration of this Consent Decree impacted and will continue to impact the national coordination of poll watching and poll challenging efforts by the RNC. In fact, the decades-long existence of the Consent Decree may be the reason relatively few cases or literature have discussed these issues. The Republican Party chairman for Fond du Lac County, Wisconsin, however, stated that “the big push is going to be for poll observers,”<sup>89</sup> and a Trump campaign lawyer privately told a group of Republicans that the decree’s expiration was “a huge, huge, huge deal,” as it allows for more of such coordination.<sup>90</sup> Indeed, the \$20 million effort to recruit up to fifty thousand poll watching volunteers, as noted above, was likely part of this effort.<sup>91</sup>

Both Republicans and Democrats are committed to building the infrastructure to recruit, train, and maintain large numbers of PCOs.

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84. *Id.*

85. *See* Democratic Nat’l Comm. v. Republican Nat’l Comm., No. 81–03876, 2016 WL 6584915, at \*1 (D. N.J. Nov. 5, 2016).

86. *Id.* at \*15–16.

87. *Id.*

88. Vann R. Newkirk II, *The Republican Party Emerges from Decades of Court Supervision*, ATLANTIC (Jan. 9, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-gop-just-received-another-tool-for-suppressing-votes/550052/> [<https://perma.cc/GPG5-RW5M>].

89. Michael Wines, *Freed by Court Ruling, Republicans Step Up Effort to Patrol Voting*, N.Y. TIMES (May 18, 2020), <https://www.nytimes.com/2020/05/18/us/Voting-republicans-trump.html> [<https://perma.cc/D4WT-VSSF>].

90. Andy Kroll, *The Plot Against America: The GOP’s Plan to Suppress the Vote and Sabotage the Election*, ROLLING STONE (July 16, 2020, 6:00 AM), <https://www.rollingstone.com/politics/politics-features/trump-campaign-2020-voter-suppression-consent-decree-1028988/> [<https://perma.cc/C8UC-94YF>].

91. Dzhanova, *supra* note 81.

Ahead of the 2020 general election, then-candidate Joe Biden commented that his team planned to employ “600 lawyers and 10,000 volunteers” to fight the GOP’s PCO efforts.<sup>92</sup> In fact, in the spurious lawsuits filed by President Trump following the November election, many of which focused on PCOs, we again saw a scenario in which “hundreds of Republican lawyers” were followed by “hundreds of Democrat[ic] lawyers” in a furious contest over poll watchers.<sup>93</sup>

## 2. Recent State-Level Election Laws Reveal Renewed Interest in PCOs as a Tool for “Ballot Security” and “Integrity”

The 2021 legislative sessions saw the introduction of multiple bills that aimed to expand the power and authority of PCOs. In Louisiana, Governor John Bel Edwards vetoed a bill that would expand who could appoint poll watchers to include state political parties with at least twenty-five percent of the vote in the state, stating that the increased authority to appoint PCOs would “further politicize the operation of elections.”<sup>94</sup> In Florida, Governor Ron DeSantis signed SB 90 into law, framed by his office as an “election integrity bill”<sup>95</sup> but by others as a “sweeping voter suppression law,”<sup>96</sup> which expanded PCO authority to allow poll watchers to be present for the signature-matching processes during absentee vote tabulation.<sup>97</sup> And most controversially, in September 2021, Texas Governor Greg Abbott signed

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92. Schouten, *supra* note 4.

93. *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 554 (6th Cir. 2004) (Cole, Jr., J., dissenting).

94. See JC Canicosa & Wesley Muller, *Louisiana Gov. John Bel Edwards Vetoes Bills Related to Vaccines, Emergency Powers and Elections*, LA. ILLUMINATOR (July 2, 2021, 6:59 PM), <https://lailluminator.com/2021/07/02/louisiana-gov-john-bel-edwards-vetoes-bills-related-to-vaccines-emergency-powers-and-elections/> [<https://perma.cc/SWL4-VFG7>].

95. Press Release, Ron DeSantis, Governor of Florida, Governor Ron DeSantis Signs Bill to Safeguard the Sanctity of Florida Elections (May 6, 2021), <https://www.flgov.com/2021/05/06/governor-ron-desantis-signs-bill-to-safeguard-the-sanctity-of-florida-elections/> [<https://perma.cc/E8NQ-DKVB>].

96. Eliza Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law> (last updated May 6, 2021) [<https://perma.cc/CE72-S7RV>]. See also Gene Jones, Opinion, *FL Veterans’ Group Urges Defeat of SB 90 Voter Suppression Bill*, FLA. PHOENIX (April 13, 2021, 9:00 AM), <https://floridaphoenix.com/2021/04/13/fl-veterans-group-urges-defeat-of-sb-90-voter-suppression-bill/> [<https://perma.cc/RM75-P245>] (“It should be obvious to all that the real purpose of this unnecessary legislation is to suppress the vote.”).

97. FLA. STAT. ANN. § 102.141(2)(a) (West 2021) (“During each meeting of the county canvassing board, each political party and each candidate may have one watcher able to view directly or on a display screen ballots being examined for signature matching and other processes.”).

SB 1 into law, also framed as an “Election Integrity” bill,<sup>98</sup> which makes the rejecting of an appointed poll watcher by an election official a Class A misdemeanor, the same criminal degree as burglary of a vehicle,<sup>99</sup> and empowers poll watchers to seek legal action against elections officials who “unlawfully prevented or obstructed” them from performing their poll watching duties.<sup>100</sup> These new laws indicate that PCOs are here to stay and are one of the next frontiers in the contentious, highly partisan fight between efforts for fair ballot access and those for “ballot integrity.”

## II. PCOS: ANALYZING THEIR EFFICACY, IMPACT, AND POTENTIAL HARMS

### A. *Evaluating PCOs as an Election Security Mechanism*

This Note does not make the argument that PCOs, particularly observers without the power to challenge, have no place in our elections. There are numerous cases in which PCOs have played a critical role in preventing election mistakes and even incorrect casting of ballots. In one case, poll watchers in a Washington State election observed voters submitting provisional ballots directly into tabulators and intervened to alert officials of the mistake.<sup>101</sup> The poll watchers’ reporting led to discovering that 425 provisional ballots across two counties had been submitted incorrectly.<sup>102</sup> In another case, it appears that poll watchers provided testimony as to voter intimidation that had occurred and potential tampering of absentee and Election Day ballots.<sup>103</sup> It is clear that PCOs can provide important eyes and ears on the ground to further strengthen our elections system, but because they are often wielded as a tool for fraud prevention, it is important to evaluate the extent to which they meet these goals.

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98. Press Release, Gregg Abbott, Governor of Texas, Governor Abbott Signs Election Integrity Legislation Into Law (Sept. 7, 2021), <https://gov.texas.gov/news/post/governor-abbott-signs-election-integrity-legislation-into-law> [<https://perma.cc/4LVS-G4MA>].

99. Acacia Coronado & Nicholas Riccardi, *EXPLAINER: How a New GOP Law in Texas Makes Voting Harder*, AP NEWS (Sept. 7, 2021), <https://apnews.com/article/elections-media-texas-voting-health-905ff2d6e6863f457694ae655d6cd49e> [<https://perma.cc/4JN2-KAKM>].

100. TEX. ELEC. CODE ANN. § 33.063 (West 2021).

101. See Schalestock, *supra* note 55, at 567–68.

102. *Id.*

103. See *Underwood v. Guley*, No. 2:18-CV-1310-MHH, 2018 WL 4052174, \*1 (N.D. Ala. Aug. 24, 2018) (“[T]hrough the testimony of 2014 poll watchers . . . the plaintiffs have offered evidence that suggests that there may have been some voter intimidation during the 2014 municipal election in Bessemer and that election officials may have tampered with absentee ballots and ballots cast on the day of the election.”).

In the nineteenth and early twentieth centuries, voter fraud was “rampant,” with political party machines registering individuals under fake names or threatening voters with physical violence.<sup>104</sup> In the infamous case of Tammany Hall in New York, one political party encouraged voters to “shav[e] off first their side whiskers, then their chin whiskers, and finally their mustaches” as a form of disguise in order to vote multiple times.<sup>105</sup> Following Reconstruction, voter fraud manifested itself as efforts by political parties to disenfranchise Black voters by stealing ballot boxes, in addition to voter intimidation and suppression tactics such as refusing to hold elections in majority-Black precincts, and intimidating Black voters through violence.<sup>106</sup>

Yet the mid-to-late-twentieth century brought new laws and technology that revolutionized the way states conduct elections and, in doing so, created a robust infrastructure against fraud. The passage of state laws restricting electioneering and the Voting Rights Act of 1965 have made the blatantly discriminatory and overtly corrupt election practices of the nineteenth and early twentieth centuries illegal, with harsh criminal penalties.<sup>107</sup> Moreover, the development of election-security protocols and technology makes voter fraud increasingly difficult and helps correct for the sort of clerical errors that are commonly mistaken for intentional voter fraud.<sup>108</sup> Every state and Washington, D.C., requires voters to sign an affidavit or statement when voting by mail, and such signature can then be compared to that on their voter registration form.<sup>109</sup> Mail-in ballot forms also have barcodes that allow election officials to track which voters have already cast a ballot and help voters track their ballots.<sup>110</sup> As far as in-person voting, states are increasingly adopting electronic poll books that allow election officials to track several actions in real time, such as whether a person has already voted or if they have requested or received a mail-in ballot.<sup>111</sup>

As such, laws against electioneering and intimidation, the development of modern technology, absentee voting, and existing

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104. Erin Blakemore, *Voter Fraud Used to be Rampant. Now It's an Anomaly.*, NAT'L GEOGRAPHIC (Nov. 11, 2020), <https://www.nationalgeographic.com/history/2020/11/voter-fraud-used-to-be-rampant-now-an-anomaly/> [<https://perma.cc/754P-3KKN>].

105. SAVING THE REPUBLIC 343 (Roger Kimball ed., 2018). The Democratic Tammany Hall in New York City became known as a political machine which used voter intimidation and fraud to secure its power and authority. See Blakemore, *supra* note 104.

106. *Id.*

107. *Id.*

108. See LEVITT, *supra* note 17, at 7.

109. Sullivan & Ax, *supra* note 16.

110. *Id.*

111. *Id.*

election law infrastructure such as electronic voter databases, may “significantly diminish” the value added by PCOs when it comes to preventing election fraud.<sup>112</sup> One judge has pointed out that election officials have more authority and oversight to challenge voters than poll watchers may have: “[W]hile poll watchers may help guard the integrity of the vote, they are not [this state’s] Election Code’s only, or even best, means of doing so.”<sup>113</sup> As political parties continue to devote tens of millions of dollars to their training and recruitment,<sup>114</sup> it becomes even more important to critically evaluate their actual efficacy.

### *B. Legal Harms Resulting from Problematic PCO Activity*

PCOs can have grave implications for the democratic process, the disenfranchisement of marginalized populations, and the public’s faith in our election systems. Such consequences are especially concerning given the shaky justifications for PCOs as an election security measure.<sup>115</sup> PCOs, when engaging in problematic activity, may commit violations of various federal laws. Moreover, preemptive challenges are important to ensuring voters are not disenfranchised—post-injury litigation, while critical to holding bad actors accountable, may be too late for voters whose ballot access has been minimized because of discriminatory, baseless, or disruptive voter challenges or intimidating PCO actions.

#### 1. Constitutional Claims to Challenge Discriminatory or Disruptive PCO Activity<sup>116</sup>

Although PCOs are not permitted to disrupt voting,<sup>117</sup> challengers can still “wreak chaos” inside polling places by delaying

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112. RILEY, *supra* note 6, at 7; *see also* Sullivan & Ax, *supra* note 16 (discussing modern mail-in voting security protections).

113. Republican Party of Pa. v. Cortés, 218 F. Supp. 3d 396, 404 (E.D. Pa. 2016).

114. Sam Levine, *Republicans Devote \$20m and 50,000 People to Efforts to Restrict Voting*, GUARDIAN (May 18, 2020, 5:14 PM), <https://www.theguardian.com/us-news/2020/may/18/republicans-devote-20m-and-50000-people-into-efforts-to-restrict-voting> [<https://perma.cc/PG8F-M6UT>].

115. *See supra* Part II.A.

116. This Note will only explore potential constitutional claims for discriminatory and disruptive PCO activity. Although section 2 of the Voting Rights Act could theoretically provide protection against discriminatory voting laws, the scope of its protection is uncertain following *Brnovich v. Democratic National Committee*. *See* 141 S. Ct. 2321 (2021). Moreover, Justice Gorsuch’s concurrence in *Brnovich* raised questions as to whether that section created a private right of action, further limiting the ability of advocates to challenge under this law. *See id.* at 2350 (Gorsuch, J., concurring). Given the uncertainty of section 2’s future, it will not be discussed as a potential legal hook in this Note.

117. *See* ALA. CODE § 17-8-7(d) (2020) (“A watcher may not disturb voters.”).

voting, distracting election officials with challenges, and creating confusion.<sup>118</sup> Challengers may not even need to be aggressive or loud to be disruptive—the act of raising a challenge itself requires election employees to take time away from their other election day duties to review, evaluate, and process an Election Day challenge. For example, in a 2010 recall election, three voter challengers, including one from True the Vote, “slowed voting to a crawl,” to the point that some students attempting to register and vote on that same day “gave up and left.”<sup>119</sup>

Sometimes, PCOs may become loud or aggressive, or violate rules regarding talking to voters or poll workers; in such cases, election officials may be granted authority by statute to remove them from the polling location.<sup>120</sup> In one egregious case, a poll watcher during the 2021 Georgia Senate runoffs was escorted out of the precinct by the deputy sheriff for “yelling at voters and poll workers” and refusing to leave the location when asked.<sup>121</sup> Not only did the poll watcher require poll workers, Board of Elections officials, and the poll managers to take time to address and deescalate her behavior, but it was also noted that the staff and voters were understandably made “uncomfortable” by her actions.<sup>122</sup>

PCOs also have a long history of discriminatory challenges.<sup>123</sup> Occasionally, these challenges have had explicitly racist or otherwise discriminatory motivations; in one 2004 primary election in Alabama, PCOs targeted dozens of Asian-American voters whom they claimed lacked citizenship and proper residency, leading to disruption, delays, and confusion at the polling place.<sup>124</sup> The incumbent city-council member who appointed the challengers made no secret of the racial motivations behind his PCO strategy, stating that “we figured if they couldn’t speak good English, they possibly weren’t American citizens.”<sup>125</sup> Another 2004 election saw three individuals in Georgia file pre-election challenges to more than seventy-five percent of the

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118. RILEY, *supra* note 6, at 11.

119. Stephanie Saul, *Looking, Very Closely, for Voter Fraud*, N.Y. TIMES (Sept. 16, 2012), <https://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html> [<https://perma.cc/ACN5-CCCA>].

120. See RILEY, *supra* note 6, at 11 (“Disruptive challengers can also distract poll workers and may even need to be removed from the polling place by law enforcement officials.”).

121. *Poll Watcher Removed from Chatham County Voting Precinct*, WTOC, <https://www.wtoc.com/2021/01/05/poll-watcher-removed-chatham-county-voting-precinct/> (last updated Jan. 5, 2021, 4:44 PM) [<https://perma.cc/Q33R-H9VC>].

122. See *id.*

123. See RILEY, *supra* note 6, at 7 (surveying the “Historical Origins of Challenger Laws” in numerous states).

124. See *id.* at 12–13.

125. *Id.* at 13.

registered Latino voters in their county, with one individual even asking the local board of elections for a list of voters with Spanish surnames.<sup>126</sup>

PCOs are barred from challenges based on race, ethnicity, or nationality under federal laws,<sup>127</sup> but challenges based on residency or other disqualifying criteria are permitted.<sup>128</sup> As such, it is more often the case that certain classes of voters are swept up in challenge efforts not because of any discriminatory motivations—at least not those explicitly stated—but because PCOs may target groups they believe are more likely to move or be otherwise considered unqualified to vote. These classes of voters include young people (including students)<sup>129</sup> and low-income voters<sup>130</sup>—both of which are disproportionately likely to move as compared to the general population<sup>131</sup>—and voters with disabilities.<sup>132</sup> In this way, even challenges without an explicit discriminatory intent may have significant discriminatory impact.<sup>133</sup>

One avenue for challenging disruptive or discriminatory PCO activity is under the *Anderson/Burdick* balancing test established by the U.S. Supreme Court in *Burdick v. Takushi*.<sup>134</sup> Used to evaluate claims that a voting law violates the Fourteenth Amendment, this test comprises two prongs: 1) evaluating the severity of the harm caused by the policy, which in turn determines the level of scrutiny which should be applied, and 2) analyzing the policy under the corresponding scrutiny.<sup>135</sup> Voting restrictions that fully deny or heavily burden the right to vote will be analyzed under strict scrutiny; those which only impose “reasonable, nondiscriminatory restrictions” may be justified by

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126. *See id.* at 12.

127. Sweren-Becker & Klain, *supra* note 37 (“[F]ederal law prohibits discrimination and intimidation at the polls.”).

128. *See* RILEY, *supra* note 6, at 11.

129. Instances of PCOs challenging student voters include challenges to more than 300 Skidmore College students who were challenged for lack of residency in a 2003 mayoral election, Election Day challenges to more than two dozen Bethel College students by a Democratic poll watcher who was appointed by the district’s incumbent, and hundreds of challenges to Dartmouth University students during the 2002 midterms, which led to “complete chaos” at the polls. *See id.* at 13.

130. *See id.* at 13–14 (describing residency-based challenges founded on foreclosure or eviction lists, which are more likely to impact low-income people and people of color).

131. *Permanent Portable Voter Registration*, PROJECT VOTE 1 (Feb. 2015), <http://www.projectvote.org/wp-content/uploads/2015/06/PermPortFactSheet-PV-Feb2015.pdf> [<https://perma.cc/4CVD-F8TL>].

132. *See* RILEY, *supra* note 6, at 34 nn.123 & 126 (describing challenges by Republican PCOs in 2004 who “pledged last week to challenge mentally disabled voters not accompanied by a legal guardian” and a 2010 instance where poll workers felt pressured by poll watchers to impermissibly ask questions about the qualifications of voters with disabilities).

133. *See id.* at 11 (discussing current issues with challengers).

134. *See* 504 U.S. 428 (1992); *see also* *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

135. *Burdick*, 504 U.S. at 434.

simply the state's "important regulatory interests."<sup>136</sup> In *Burdick*, the Court evaluated the burdens on Hawaii voters created by the prohibition on write-in candidates and found them to be "limited."<sup>137</sup> As such, the policy banning write-in candidates was given only rational basis review and, when weighed against the interests of the state in election administration, was found to be insufficient to overcome the state's legitimate interest in preventing any party animosity created by the write-in option.<sup>138</sup>

A 2004 case demonstrates how the *Anderson/Burdick* test may be employed, and although the injunction granted by the District Court was stayed by the Sixth Circuit,<sup>139</sup> it is still instructive as the Sixth Circuit did not explicitly use the *Anderson/Burdick* analysis, instead finding the case failed under the preliminary injunction standard.<sup>140</sup> In *Spencer v. Blackwell*, the Republican Party in one Ohio county was challenged in court after the Party planned to send hundreds of poll challengers out during the 2004 presidential election "to ensure that voters are not disenfranchised by fraud."<sup>141</sup> The Republican Party overwhelmingly sent its PCOs to minority districts—only fourteen percent of new voters in a majority white precinct would face a challenger, but ninety-seven percent of new voters in a majority Black voting precinct would.<sup>142</sup> In fact, the County Board of Elections Chair testified that two-thirds of the poll challengers recruited filed to be PCOs in majority Black precincts.<sup>143</sup> In response, the Democratic Party petitioned to have 557 PCOs who would "monitor" the 629 Republican PCOs—resulting in the potential for nearly 1,200 PCOs across the state.<sup>144</sup>

In this case, the district court specifically applied the *Anderson/Burdick* test and issued an injunction preventing Ohio from allowing any challengers into polling places across the state on Election Day.<sup>145</sup> The court noted that the extreme risk of disruption created a severe burden on the voter:

The sheer number of people present in and around the polling place, the unprecedented number of newly registered voters, and the presence of inexperienced challengers, lacking

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136. *See id.*

137. *Id.* at 439.

138. *Id.* at 440.

139. *See* Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547 (6th Cir. 2004).

140. *Id.* at 551.

141. 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004).

142. *Id.*

143. *Id.*

144. *See id.* at 530 n.3.

145. *Id.* at 538.



any significant training and limited by precinct workers who have never before had to deal with such a situation, creates an extraordinary and potentially disastrous risk of intimidation and delay . . . . This Court finds that the presence of vast numbers of challengers inexperienced in the electoral process, under these conditions, imposes a severe burden on the right to vote of individual voters and of Ohio voters at large.<sup>146</sup>

The severity of the burden triggered strict scrutiny under *Anderson/Burdick*, and the court then turned to whether the policy of allowing challengers was narrowly tailored to serve a compelling state interest.<sup>147</sup> The court then found the challenger statute inadequate:

In this case, the portion of § 3505.20 allowing private challengers to challenge the eligibility of a person offering to vote at a precinct is not narrowly tailored to serve Ohio's compelling interest in preventing voter fraud . . . . Since the election judges are the individuals who are knowledgeable and experienced in the process of identifying potential ineligible voters, asking them the relevant questions, and making determinations, disruption of this system by over 1100 lawyers who have no experience in the process cannot be said to be narrowly tailored to serve a compelling state interest in preventing voter fraud.<sup>148</sup>

The Sixth Circuit opinion staying this injunction similarly provides insight into what a plaintiff might need to show to succeed on a claim that PCOs unconstitutionally burden the right to vote.<sup>149</sup> Over a vigorous dissent, the majority held that a preliminary injunction barring the PCOs was inappropriate.<sup>150</sup> The majority declared that the plaintiffs could not show they were likely to succeed on the merits, the first prong of the test to grant a preliminary injunction, for two reasons.<sup>151</sup> First, the court reasoned that the plaintiffs did not show that PCO challengers would actually burden the right to vote.<sup>152</sup> Second, the prospect of longer lines did not rise to the level of an unconstitutional burden.<sup>153</sup>

Moreover, the likelihood of success for plaintiffs challenging disruptive PCOs under the *Anderson/Burdick* test may have narrowed since *Spencer v. Blackwell*. Since *Spencer*, the Supreme Court has held that burdens that do not affect substantial portions of the population are not severe, most notably in the 2008 case upholding Indiana's voter

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146. *Id.* at 535.

147. *Id.* at 535–36.

148. *Id.* at 536–37.

149. *See* Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell, 388 F.3d 547 (6th Cir. 2004).

150. *See id.* at 551–54 (“On balance, the public interest weighs against the granting of the preliminary injunction.”).

151. *See id.*

152. *Id.* at 551.

153. *See id.*

ID law, *Crawford v. Marion County Election Board*.<sup>154</sup> In *Crawford*, the majority applied the *Anderson/Burdick* test to a facial challenge of an Indiana statute requiring government identification in order to vote and held that the statute did not amount to a constitutional violation for those without IDs.<sup>155</sup> The Court interpreted the statute broadly to determine the burden on “all Indiana voters,” rather than just those specifically without drivers licenses, and concluded that the voter ID law imposed “only a limited burden on voters’ rights.”<sup>156</sup> Thus, courts applying *Anderson/Burdick* to PCO cases could arguably, after *Crawford*, require a showing that PCOs significantly burdened the voting rights of all voters in the precinct.<sup>157</sup> In a facial challenge, this application would likely allow courts to conclude that the PCO statute did not significantly burden the average voter, even if some voters were more likely to experience heavier burdens.

## 2. Voter Intimidation Claims Under Federal Statutes

Challengers who confront and question voters directly or distribute information about election fraud penalties that are perceived as threatening can leave many voters intimidated and nervous.<sup>158</sup> While intimidation is less pervasive now than it was prior to and during the civil rights era, when voters of color and Black voters in particular were routinely intimidated by physical violence and other forms of aggression, intimidation remains an issue.<sup>159</sup> As private and partisan groups like True the Vote expand their “ballot security” efforts,<sup>160</sup> there is increased risk that voters may be intimidated by people from outside

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154. See 553 U.S. 181, 197, 202–03 (2008) (considering “only the statute’s broad application to all Indiana voters, [the court] conclude[d] that it ‘imposes only a limited burden on voters’ rights’”) (quoting *Burdick v. Takushi*, 504 U.S. 428, 439 (1992)).

155. *Id.* at 197, 205.

156. *Id.* at 202–03.

157. See *id.*

158. See Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 178 (2015) (“[V]oters are deterred from voting through subtle[] tactics, such as aggressive poll-watching, anonymous threats of harm, frivolous and excessive voter registration challenges, and coercion by employers.”).

159. See *id.* at 177 (“Today, voter intimidation is a significantly less pernicious influence on American elections than it was during the civil rights era. Nevertheless, voter intimidation periodically reemerges as a problem.”).

160. “Ballot security” refers to efforts where “political operatives and private citizens take it upon themselves to police the voter rolls and voting booths.” See “*Ballot Security*” Operations, BRENNAN CTR. FOR JUST. (Oct. 20, 2010), <https://www.brennancenter.org/our-work/research-reports/ballot-security-operations> [<https://perma.cc/RWH3-48BD>].

communities observing their actions or challenging their eligibility to vote.<sup>161</sup>

Voter intimidation by PCOs can happen at all stages of the ballot process. Within the polling place, PCOs may intimidate voters in the process of making challenges or by simply having what voters interpret as a threatening presence.<sup>162</sup> For example, Latino voters have reported feeling intimidated by PCOs who inquire about their citizenship status.<sup>163</sup> Moreover, intimidating observer and challenger behavior appears to be increasing as outside organizations such as True the Vote launch and scale up their own civilian oversight efforts, separate from those organized by political parties. During the 2010 midterms, the Wisconsin election coordinator for the League of Women Voters, a non-partisan organization dedicated to protecting ballot access and encouraging civic engagement, received more than fifty reports of intimidating behavior by True the Vote volunteers, including “hover[ing] over registration tables” and “aggressively challeng[ing] voters’ eligibility,” while previous elections only garnered a handful of such complaints.<sup>164</sup>

Voters may be intimidated even before they enter the polling place. In her testimony before Congress about Texas’s 2021 law that introduced new barriers to voting and granted PCOs increased authority, including making it a crime for an election official to reject an individual who otherwise meets the qualifications to serve as a PCO,<sup>165</sup> State Representative Senfronia Thompson noted:

In a minority area, [poll watching] has a chilling effect. That chilling effect is the depression of voting . . . It is intimidating, and the word gets out that these people are at your polls looking at you like they want to arrest you, keep you from voting, and people, as a result of that, do not go and cast a vote.<sup>166</sup>

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161. See, e.g., WENDY WEISER & VISHAL AGRAHARKAR, *BALLOT SECURITY AND VOTER SUPPRESSION: WHAT IT IS AND WHAT THE LAW SAYS*, BRENNAN CTR. FOR JUST. 8 (2012), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Ballot\\_Security\\_Voter\\_Suppression.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Ballot_Security_Voter_Suppression.pdf) [https://perma.cc/3H4H-YR2M] (explaining how “True the Vote,” a Houston-area organization, led a “nationwide campaign to recruit volunteer poll watchers for the 2012 election”).

162. See *id.* at 7–8 (listing various examples of voter intimidation).

163. Expert Report of Orville Vernon Burton, Ph.D. at 20, *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 213-cv-00193), 2014 WL 12791825.

164. Mariah Blake, *The Ballot Cops*, ATLANTIC (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-ballot-cops/309085/> [https://perma.cc/9FPS-7QN8].

165. Nicholas Riccardi, *EXPLAINER: What’s in the Texas GOP’s Voting Bills?*, ASSOCIATED PRESS (July 14, 2021), <https://apnews.com/article/health-government-and-politics-texas-voting-coronavirus-pandemic-9bc36a6e8c967757340ab25f49b8ddbdf> [https://perma.cc/Q5VY-V26H].

166. *Democracy in Danger: The Assault on Voting Rights in Texas: Hearing Before the Subcomm. on C.R. & Civ. Liberties of the H. Comm on Oversight & Reform*, 117th Cong. 11 (2021) (statement of Hon. Senfronia Thompson, Tex. State Rep.).

There are three major federal statutes that authorize civil claims for voter intimidation: section 11(b) of the Voting Rights Act, section 131(b) of the Civil Rights Act of 1957, and section 2 of the Enforcement Act of 1871 Act—also known as the “KKK Act.”<sup>167</sup> Although plaintiffs often bring claims under all three statutes, section 11(b) provides the broadest possible legal basis for a claim of illegal PCO voter intimidation.<sup>168</sup> It states that “[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote . . . .”<sup>169</sup> While section 131(b) requires plaintiffs to prove racial motivation, and the KKK Act demands showing a conspiracy among defendants, section 11(b) requires only a connection between the defendant’s conduct and a showing that the defendant’s conduct was objectively intimidating.<sup>170</sup> In addition to federal voter protections, each state has anti-intimidation statutes that may provide additional legal support.<sup>171</sup>

Section 11(b)’s lack of intent requirement was designed to provide broad protection against voter intimidation.<sup>172</sup> In his Congressional testimony in support of the Voting Rights Act of 1965, Attorney General Nicholas Katzenbach noted that the voter-intimidation provision was a “substantial improvement” over section 131(b) since it did not require proving purposeful intimidation on behalf of the defendant.<sup>173</sup> He went on to say that the standard was “intended to avoid the imposition . . . of the very onerous proof of ‘purpose.’”<sup>174</sup>

Despite the lower burden of proof, section 11(b) claims are rarely brought, perhaps because plaintiffs, already intimidated, feel resistant to step forward or because organizations are unwilling to devote

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167. Cady & Glazer, *supra* note 158, at 192.

168. *See id.* at 192–93 (noting how section 11(b) “expanded upon the protections afforded by existing law”).

169. 52 U.S.C. § 10307(b).

170. Cady & Glazer, *supra* note 158, at 193; *cf.* *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir. 1985) (dismissing a voter-intimidation claim under section 11(b) because of a lack of intent). Cady and Glazer, however, argue that this case misinterpreted the law—in justifying its holding, it cited a case which only included a claim for section 131(b), thus conflating the two statutes’ standards. *See* Cady & Glazer, *supra* note 158, at 205; *see also* *League of United Latin Am. Citizens v. Pub. Int. Legal Found.*, No. 1:18-cv-00423, 2018 WL 3848404, at \*4 (E.D. Va. Aug. 13, 2018) (“[I]n the absence of plain statutory text, statutory history, or binding case law to the contrary, the Court does not find that a showing of specific intent or racial animus is required under § 11(b).”).

171. *Intimidation of Voters*, BALLOTPEDIA, [https://ballotpedia.org/Intimidation\\_of\\_voters](https://ballotpedia.org/Intimidation_of_voters) (last visited Nov. 17, 2021) [<https://perma.cc/AFV7-3GGG>].

172. Cady & Glazer, *supra* note 158, at 190.

173. *Id.*

174. *Id.*

resources to a case where relatively few voters were impacted.<sup>175</sup> Furthermore, there is little case law on successful section 11(b) claims—one 2015 article found only four unreported cases and no reported cases—and even if plaintiffs do win, the statute does not allow for plaintiffs’ damages.<sup>176</sup> These factors likely contribute to the fact that few successful section 11(b) claims have been made, and even the successful cases are typically limited to injunctive relief.<sup>177</sup>

One case in which plaintiffs successfully raised a section 11(b) claim against intimidation by PCOs was *Daschle v. Thune*.<sup>178</sup> In *Daschle*, plaintiffs in a U.S. Senate race in South Dakota alleged that PCOs intimidated indigenous voters by “standing two to three feet” behind voters, “ostentatiously making notes,” following voters out to their cars after they voted and noting their license plate numbers, and having “loud conversation” inside the polling place about native people who were prosecuted in another state for voting illegally.<sup>179</sup> The complaint further alleged that “word travels fast in small-population counties in South Dakota” and that other Native Americans would soon hear about the PCOs and be intimidated from voting.<sup>180</sup> The court then granted a temporary restraining order against the defendants, prohibiting them from following Native American voters from the polling places and ordering them not to copy or record the license plates of any vehicles in which Native Americans arrived or departed from the polling places.<sup>181</sup>

Despite its irregular usage, section 11(b) provides an opportunity for litigators to prevent voter intimidation as well as develop additional case law that protects against intimidation.<sup>182</sup> These benefits are especially salient since voter-intimidation claims can be brought against private actors, whereas constitutional claims require state action.<sup>183</sup> It appears that many litigators are seizing the

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175. *See id.* at 179–80 (noting that “simple cost-benefit analysis may not always justify a voter intimidation suit” for both individual voters and organizational plaintiffs, including civil rights groups and political organizations).

176. *Id.* at 207.

177. *See id.* at 212–13 (explaining that “[f]or most plaintiffs challenging voter intimidation, success is defined as stopping the defendant’s conduct” through an injunction).

178. *See Daschle v. Thune*, No. Civ. 04-4177, 2004 WL 3650153 (D.S.D. Nov. 2, 2004).

179. Complaint at ¶ 15, *Daschle*, 2004 WL 3650153.

180. *Id.* at ¶ 18.

181. *See* Temporary Restraining Order, at 2, *Daschle*, 2004 WL 3650153, [https://www.clearinghouse.net/chDocs/not\\_public/VR-SD-0046-0003.pdf](https://www.clearinghouse.net/chDocs/not_public/VR-SD-0046-0003.pdf) [<https://perma.cc/NYL6-ZZYZ>].

182. Cady & Glazer, *supra* note 158, at 179.

183. This Note assumes, for the sake of argument, that PCOs are acting as state actors. For further discussion on this point, see Belmont Conn, *supra* note 49, at 1031–33.

opportunity, and these recent wins offer insight into how similar claims could be made against intimidating PCOs.

For example, in *Council on American-Islamic Relations—Minnesota v. Atlas Aegis, LLC*, a federal judge in Minnesota enjoined a private security company and affiliated individuals from deploying or threatening to employ armed agents within 2,500 feet of Minnesota polling places following a claim of voter intimidation.<sup>184</sup> The court found that plaintiffs were likely to succeed on the merits<sup>185</sup> by relying on evidence from the Minneapolis City Clerk that residents had expressed concerns about security and harassment and on additional evidence from the City of Saint Paul that the city's large minority population would be "especially likely to be intimidated" by the defendant's armed agents.<sup>186</sup> Plaintiffs who make claims of PCO intimidation may want to seek similar statements from city officials, especially if there is a concentrated effort to enlist private security as PCOs.

### 3. Unreliable Challenger Methodology May Violate the NVRA or Raise Due Process Concerns

One of the most concerning issues with PCOs involves what the Brennan Center for Justice refers to as "baseless challenges," which involve a challenger questioning a voter's eligibility based on inadequate or false information.<sup>187</sup> This practice partly results from the lack of consistent or high-quality training discussed above but is also due to "error-prone" methods of determining which voters may be ineligible.<sup>188</sup> One such method is a practice known as "voter caging," where political parties compile lists of voters who may be ineligible based on residency status.<sup>189</sup> Political operatives will identify a specific geographic area, often where there is a disproportionate amount of voters belonging to the opposite party, and then send first-class, do-not-forward letters to individuals in those areas based on the registrant's listed address.<sup>190</sup> The individuals for which the letters are returned are presumed to no longer live at that address and would therefore be

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184. 497 F. Supp. 3d 371, 375 (D. Minn. 2020).

185. Likelihood of succeeding on the merits is the first prong in a four-prong test for determining whether a preliminary injunction should be granted. *Id.* at 378. The other three prongs are "the threat of irreparable harm to the movant absent the injunction; . . . the balance of the harms between issuance and nonissuance of the injunction; and . . . the public interest." *Id.*

186. *Id.* at 376–77.

187. RILEY, *supra* note 6, at 11.

188. *Id.*

189. Chandler Davidson, Tanya Dunlap, Gale Kenny & Benjamin Wise, *Vote Caging as a Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533, 537–38 (2008).

190. *Id.* at 538.

ineligible to vote under the current registration, and their names are put on a “caging list.”<sup>191</sup> Finally, these lists are provided to poll watchers or challengers recruited by that party so that they may challenge the residency of any voter trying to vote at that precinct whose name appears on the caging list.<sup>192</sup>

Yet there are myriad reasons that an eligible voter who provided correct information to an election official might still have their letter returned as undeliverable. Such reasons include, but are not limited to, the following: voters being temporarily away from their permanent address, such as college students or military voters stationed on bases; the voter rolls containing typos or clerical errors; the voter living at a non-traditional address, such as individuals experiencing homelessness; or the mail not being properly delivered.<sup>193</sup> Challengers may also rely on foreclosure filings, despite the possibility that the voter resolved the issue.<sup>194</sup> Other unreliable data sources may include lists of “no-match” voters who are flagged because their information does not match records in existing government databases, even though studies demonstrate that many match failures are due to clerical errors.<sup>195</sup>

Deeply concerning is the fact that these unreliable methods have historically been targeted at voters of color and low-income voters—in one notorious memorandum written ahead of a 1986 Senate race, one regional party’s political director wrote, “I know this race is really important to you. I would guess that this [voter caging] program will eliminate at least 60-80,000 folks from the rolls. . . . If it’s a close race, which I’m assuming it is, this could keep the black vote down considerably.”<sup>196</sup> Even if voter caging efforts are not intended to disenfranchise voters based on their race, they may have the unintended consequence of doing so. For example, challenges based on foreclosure lists would likely have a disproportionate impact on low-

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191. *Id.*

192. *Id.*

193. JUSTIN LEVITT, BRENNAN CTR. FOR JUST., A GUIDE TO VOTER CAGING (2007), <https://www.brennancenter.org/our-work/research-reports/guide-voter-caging> [<https://perma.cc/UBS3-EHKM>]. For example, one 2004 list of “undeliverable” Milwaukee addresses found that roughly twenty percent of the addresses were attributable to data error. *See id.*; *see also* Zusha Elinson & Sara Randazzo, *Nevada Election Results: The 3,000 Challenged Votes*, WALL ST. J. (Nov. 8, 2020, 2:48 PM), <https://www.wsj.com/articles/nevada-election-results-the-3-000-challenged-votes-11604863720> [<https://perma.cc/CX9D-XRWH>] (describing how the list of 3,062 voters identified through a change-of-address database challenged by Trump campaign attorneys included hundreds of eligible individuals who appeared to be connected with the military, such as individuals who had a Nevada permanent address but were transferred elsewhere).

194. WEISER & AGRAHARKAR, *supra* note 161, at 5.

195. *Id.*

196. LEVITT, *supra* note 193.

income people of color, since they are more likely to be foreclosed on than wealthier, white voters.<sup>197</sup>

Provisions against such voter caging activities were included as a stipulation to the 1982 Consent Decree mentioned in Part I. With the expiration of the 1982 Consent Decree, it is unclear if and how such voter caging efforts by the RNC will be renewed. Even without any national party involvement, such activities are still presumably allowed at the state level. For example, ahead of the Georgia Senate runoff in January 2021, Texas-based conservative group True the Vote published a list of over 360,000 individuals who they claimed were ineligible to vote based on the fact that those individuals had registered a change of address with the National Change of Address (“NCOA”) registry.<sup>198</sup> The organization then recruited Republicans in counties across the state to file mass voter challenges ahead of the runoff, which would then force challenged voters to file provisional ballots when they appeared at the polling place.<sup>199</sup> Like much of the data culled from lists of address changes, however, the information in the NCOA list was unreliable and prone to errors.<sup>200</sup> In Cobb County, two individuals filed mass challenges based on the NCOA list but presented extremely distinct challenge data sets—one with 16,024 people and one with 3,618 people.<sup>201</sup> Moreover, the challengers did not explain why the challengers believed the individuals listed in the NCOA list were the same individuals on the registration list or how they could guarantee these were not false matches.<sup>202</sup>

These mass challenges did not go unnoticed or unopposed. At least one lawsuit challenging the use of this list was filed, claiming challenges based on the list would lead to voter intimidation under

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197. WEISER & AGRAHARKAR, *supra* note 161, at 5.

198. See Complaint at ¶¶ 42, 61, *Fair Fight, Inc. v. Engelbrecht*, No. 2:20-cv-00302 (N.D. Ga. Dec 23, 2020):

Defendants have now published lists of hundreds of thousands of Georgians who they claim are ineligible to vote, recruited volunteers to monitor voters as they return their ballots, urged ‘citizen watchdogs’ to take photos and videos of illegal activity, and [] offered their supporters a one million dollar bounty as incentive to accuse individuals of voting illegally.

199. Mark Niese, *Eligibility of 364,000 Georgia Voters Challenged Before Senate Runoff*, ATLANTA J.-CONST. (Dec. 22, 2020), <https://www.ajc.com/politics/eligibility-of-364000-georgia-voters-challenged-before-senate-runoff/3UIMDOVRFVERXOJ3IBHYWZBWYI/> [https://perma.cc/RP2G-QQ9M].

200. See Letter from Eliza Sweren-Becker & Gowri Ramachandran, Brennan Ctr. for Just., to Cobb Cnty. Bd. of Elections & Registration 1–2 (Dec. 18, 2020), <https://www.brennancenter.org/sites/default/files/2020-12/2020.12.18%20Brennan%20Center%20Letter%20to%20Cobb%20County%20Board%20of%20Elections.pdf> [https://perma.cc/7MB6-EX8C ] [hereinafter Letter to Cobb County].

201. See *id.* at 1.

202. See *id.*



section 11(b) of the Voting Rights Act, as discussed above.<sup>203</sup> Mass-challenge efforts based on the NCOA list were blocked by election boards in many counties, including Cobb; challenges to more than four thousand voters in Hill and Muscogee Counties were blocked by a federal judge, who held that the mass challenge would likely violate the National Voter Registration Act (“NVRA”), which prohibits “systemic” removal of voter registrations within ninety days of an election.<sup>204</sup>

There are, however, two other legal claims advocates may be able to make in the face of mass voter challenges or even individual challenges based solely on processes like voter caging and NCOA list culling: 1) a claim that permitting challenges based on this unreliable data effectively violates the NVRA’s procedural requirements for voter purges and 2) a due process clause violation for arbitrary and unfair denial of rights.

*a. Challenges that Result in the Purging of Voter Rolls May Violate the NVRA*

Pre-election challenges to voter registrations that are based solely on voter caging or other unreliable methodologies and that result in voters being removed represent an illegal voter purge under the NVRA. The NVRA, enacted in 1993, is a federal law that sets standards for how states provide registration opportunities to voters and for when states may remove voters from the voter rolls.<sup>205</sup> Importantly, the law prohibits states from removing a voter from the voter rolls because of change of address unless 1) the voter confirms in writing that they have changed their residence, or 2) the voter has failed to respond to a notice letter sent to that address requesting they confirm their address *and* failed to vote in two elections following the delivery of that notice (the “notice-and-waiting” requirement).<sup>206</sup> Without the voter’s confirmation

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203. In December 2020, Fair Fight Action, a civic engagement and organizing group, filed a lawsuit against True the Vote for harassment and intimidation under section 11(b), noting the challenges based on the NCOA list. *See* Complaint, at ¶¶ 15–16, Fair Fight, Inc. v. Engelbrecht, No. 2:20-cv-00302 (N.D. Ga. Dec 23, 2020). Out of fear of harassment by True the Vote and its volunteers, two plaintiffs in the case chose to remain anonymous. *Id.*

204. *Judge Blocks Residency Challenges to 4,000 Georgia Voters*, ASSOCIATED PRESS (Dec. 29, 2020, 1:30 PM), <https://abcnews.go.com/Politics/wireStory/judge-blocks-residency-challenges-4000-georgia-voters-74950407> [<https://perma.cc/BJE9-SRZS>]. Coincidentally, the federal judge in the case was U.S. District Judge Leslie Abrams Gardner, sister of Fair Fight founder and former gubernatorial candidate Stacey Abrams.

205. Naila Awan, *The NVRA: A Q&A for Human Services Professionals*, DEMOS (Aug. 26, 2020), <https://www.demos.org/blog/nvra-qa-human-services-professionals> [<https://perma.cc/E55B-R3CM>].

206. *See* 52 U.S.C. § 20507(d).

that they have moved or a complete notice-and-waiting process, removals based on unreliable challenge data may violate the NVRA.<sup>207</sup>

One example of this type of legal claim is *North Carolina State Conference of the NAACP v. Bipartisan Board of Elections & Ethics Enforcement*, in which the court held that three North Carolina counties violated the NVRA by improperly removing hundreds of voters, identified through voter caging, from the voter rolls.<sup>208</sup> In the first county, the Elections Board in Beaufort, North Carolina received challenges to over 130 voters who challengers claimed were not county residents because letters to their houses were returned as undeliverable through a voter caging effort.<sup>209</sup> The Elections Board upheld sixty-five of these challenges, without sending proper notice<sup>210</sup> or waiting for two cycles of election inactivity by the voter.<sup>211</sup> Cumberland County, the second county in *North Carolina State Conference of the NAACP*, received challenges for over four thousand voters, identified through the same voter caging process as Beaufort County, but under the name “Voter Integrity Project of NC—Cumberland County,” and removed more than 3,500 voters in violation of the NVRA.<sup>212</sup> The third county, Moore County, received nearly five hundred challenges through the “Moore Voter Integrity Project” and removed 374 voters from the rolls in violation of those same NVRA provisions.<sup>213</sup> As demonstrated by this case, when states or local jurisdictions remove voters from the rolls on the basis of residency-based challenges, they may violate federal law.<sup>214</sup>

While the NVRA may provide a legal claim against voter purges that result from challenges, it does not provide a legal claim for when PCOs bring a challenge based on unreliable data that does not result in the voter’s removal from the voting rolls. In the case of a voter who is forced to vote provisionally, there may be liability under the due process clause for arbitrary denial of rights.

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207. Letter to Cobb County, *supra* note 200, at 3.

208. See No. 1:16CV1274, 2018 WL 3748172, at \*3–10 (M.D.N.C. Aug. 7, 2018).

209. *Id.* at \*4.

210. The county did provide notice-of-challenge letters, but these letters were not NVRA compliant as they did not include the statutorily required prepaid postage or preaddressed return card, nor information on how the voters could maintain their registrations. See *id.* at \*4 n.4.

211. See *id.* at \*4.

212. *Id.* at \*8.

213. *Id.* at \*9.

214. See *id.*

*b. Challenges Based on Unreliable Methodology May Raise Due Process Concerns*

Due process grounds may present another legal argument for those fighting baseless challenges in court. Due process is a “flexible,” case-specific standard<sup>215</sup> that requires balancing three factors: “[f]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government’s interest.”<sup>216</sup>

Recent application of traditional voting-rights doctrine suggests that due process may be a valuable legal hook for claims that seek to expand voting access. An equal protection analysis, which is often applied to election-law cases in the form of the *Anderson/Burdick* test described in Part II.B, has been a key tool in affirming ballot access since the 1960s,<sup>217</sup> when the Fourteenth Amendment was used to strike down discriminatory voting laws, such as poll taxes.<sup>218</sup> The protection offered by the Fourteenth Amendment, however, has been significantly narrowed since then; controversial cases like *Crawford v. Marion County Election Board*, which upheld Indiana’s voter ID requirement on the grounds that few voters were actually impacted and that the burden of obtaining a license was merely “inconvenient,”<sup>219</sup> have reduced the number and type of claims individuals can make under the Fourteenth Amendment. The Voting Rights Act, once a centerpiece legal protection for voting-rights advocates, has been similarly dismantled: first in *Shelby County v. Holder*, where the Supreme Court struck down section 5’s preclearance provision at the heart of the Act’s enforcement mechanism;<sup>220</sup> and most recently in *Brnovich v. Democratic National Committee*,<sup>221</sup> which significantly weakened

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215. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”).

216. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

217. Anthony Gaughan, *The Due Process Clause and Voting Rights*, JURIST (Aug. 27, 2018, 3:44 PM), [https://www.jurist.org/commentary/2018/08/the-due-process-clause-and-voting-rights/#\[https://perma.cc/3FXL-PQGB\]](https://www.jurist.org/commentary/2018/08/the-due-process-clause-and-voting-rights/#[https://perma.cc/3FXL-PQGB]) (“Since the 1960s, most plaintiffs challenging state restrictions on voting rights have relied primarily on the Equal Protection Clause of the 14th Amendment.”).

218. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (“We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”).

219. *See* 553 U.S. 181, 198 (2008) (“For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”).

220. *See* 570 U.S. 529 (2013).

221. 141 S. Ct. 2321 (2021).

section 2's protections against election laws with discriminatory impacts.<sup>222</sup> As such, in many cases, the traditional tools of voter protection are no longer available for advocates.

Given this weakening of more traditional voter-protection laws, the Due Process Clause may offer an additional tool in advocates' toolbox.<sup>223</sup> Although it does not appear that Due Process Clause arguments have been raised to challenge the unreliable challenge list methodology, an analogous argument can be made from other voting rights cases. In *Saucedo v. Gardner*, the absentee ballots of 275 New Hampshire voters were denied under the state's signature match requirement.<sup>224</sup> The court held that the signature match policy violated the voters' due process rights because the voter

is not even given notice that her ballot has been rejected due to a signature mismatch. Moreover, moderators receive no training in handwriting analysis or signature comparison; no statute, regulation, or guidance from the State provides functional standards to distinguish the natural variations of one writer from other variations that suggest two different writers; and the moderator's assessment is final, without any review or appeal.<sup>225</sup>

One can imagine a similar argument for challenges based on faulty methodology. Signature matching, as testified to by an expert forensic-document examiner, requires "sufficient knowledge, training, equipment, and experience" to correctly evaluate the many variations, intentional and unintentional, that occur across a single individual's signature.<sup>226</sup> Based on this testimony, the court reasoned that by assigning the handwriting analysis to laypersons, the defendant's signature matching protocols were "fraught with error."<sup>227</sup> Moreover, the "absence of functional standards" and "meaningful review or oversight" of the layperson handwriting analysis "only compounded" the likelihood of error.<sup>228</sup>

These concerns can be extended to the unreliable methodology behind voter caging. Leaving the statistical analysis of determining

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222. *Court Case Tracker: Brnovich v. Democratic National Committee*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/brnovich-v-democratic-national-committee> (last updated July 1, 2021) [<https://perma.cc/8VPR-MYMS>] ("This means it will be even more difficult for voting rights advocates to challenge discriminatory voting laws.")

223. See Gaughan, *supra* note 217 (explaining that the Due Process Clause might be a better vehicle for voting rights in at least some cases). For a discussion of the Due Process Clause's application to partisan gerrymandering, see Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655 (2017).

224. 335 F. Supp. 3d 202, 211 (D.N.H. 2018).

225. *Id.* at 206.

226. *Id.* at 217.

227. *Id.*

228. *Id.* at 218.

which individuals have moved, based on a change of address registry, to laypersons who lack the statistical or administrative training to avoid false matches (as was the case in True the Vote’s Georgia campaign discussed above)<sup>229</sup> is a recipe for error and disenfranchisement. Additionally, organizations engaging in voter caging may similarly lack functional standards—they may not provide methodology for how they ensured that their lists were free of data entry errors, false matches for voters with similar names, or improper inclusion of those temporarily living at an address different than their permanent address.<sup>230</sup> Without these procedural safeguards, voter challenges founded on such third-party lists could arguably violate voters’ rights to due process.<sup>231</sup>

#### 4. A Lack of Statewide Standards for Determining Challenge Validity May Raise Uniformity Claims

Many states lack uniform standards for how to evaluate the validity of a challenge, leading to potential uniformity claims under *Bush v. Gore*’s analysis of the Fourteenth Amendment’s Equal Protection Clause. As discussed in Part I.C, when a voter is challenged at the polling place, one of three procedures will typically follow, depending on state law:<sup>232</sup> 1) the voter will be permitted to vote with a regular ballot after swearing an oath that they are eligible to vote;<sup>233</sup> 2) the voter will be permitted to cast a provisional or “challenge” ballot after swearing an oath that they are eligible to vote;<sup>234</sup> or 3) if the voter is determined ineligible by the election officials in that precinct, the

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229. See *supra* notes 198–204.

230. See Letter to Cobb County, *supra* note 200, at 2 (“[T]he information fails to demonstrate how any conclusion about a particular voter was reached.”).

231. See *id.* (describing a number of due process concerns).

232. See *supra* Part I.C; see also PROJECT VOTE, *supra* note 65, at 10.

233. See, e.g., KY. REV. STAT. ANN. § 117.245 (West 2021) (noting that voters may cast a ballot after signing a written oath testifying to their eligibility, which will be “investigate[d]” by the state’s attorney and county attorney for voter fraud); N.Y. ELEC. LAW § 8-504(1)-(6) (McKinney 2021) (permitting vote by regular ballot once a voter has sworn to two separate oaths of eligibility and answered “such questions as may pertain to the reason his right to vote at such election in such district was challenged”).

234. See, e.g., FLA. STAT. ANN. § 101.111(b)(1) (West 2021) (With the exception of residency challenges, in which the voter will be given the opportunity to change their legal address and cast a regular ballot if the new address is within the precinct, “[t]he clerk or inspector shall immediately deliver to the challenged person a copy of the oath of the person entering the challenge, and the challenged voter shall be allowed to cast a provisional ballot . . .”). Florida had previously allowed challenged voters to present evidence that they were eligible before local officials determined their eligibility but removed this provision in 2005 in favor of automatically requiring challenged voters to file provisional ballots. See PROJECT VOTE, *supra* note 65, at 15.

voter will be denied a ballot.<sup>235</sup> This third procedural pathway—where an individual’s vote may be denied based on the decision of an individual or group of election officials—raises concerns regarding uniformity.

In *Bush v. Gore*, the Supreme Court held that Florida’s procedures for recounting ballots in the 2000 election violated the Equal Protection Clause and, in doing so, ended the 2000 election in favor of President George W. Bush.<sup>236</sup> The Court’s reasoning rested on a uniformity argument: different procedures for recounting ballots, such as whether or not to count a “‘dimpled chad’ where the voter is able to successfully dislodge the chad in every other contest on that ballot,” led to an “unequal evaluation of ballots.”<sup>237</sup> These procedural differences, the Court held, constituted “arbitrary and disparate treatment [of] voters in [] different counties” in violation of the Fourteenth Amendment.<sup>238</sup> Although the Court explicitly noted that its “consideration [was] limited to the present circumstances,” this conception of uniformity doctrine has continued to percolate among lower courts in deciding election-law questions.<sup>239</sup>

Like the recount procedures in *Bush*, when the decision on whether a voter challenge is credible rests in the hands of precinct-level election officials who receive little guidance from the state on how to evaluate such challenges, “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”<sup>240</sup> For example, in Louisiana,

- a. If a challenge is made, a majority of the commissioners must determine whether

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235. See, e.g., HAW. REV. STAT. ANN. § 11-25(b)–(c) (West 2021) (“The challenge shall be considered and decided immediately by the clerk, and the ruling shall be announced . . . . If neither the challenger nor the challenged voter appeals the ruling of the clerk, then the voter shall either be allowed to vote or be prevented from voting in accordance with the ruling.”); *Poll Watchers Booklet*, LA. SEC’Y STATE 5 (2019), <https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/PollWatchersBooklet.pdf> [<https://perma.cc/MZ7J-M5FD>] (“If a challenge is made, a majority of the commissioners must determine whether the challenge is valid or invalid . . . . If the commissioners determine by majority vote that the challenge is valid, the applicant shall not be permitted to vote.”).

236. See *Bush v. Gore*, 531 U.S. 98, 106–07 (2000); Ian MacDougall, *Why Bush v. Gore Still Matters in 2020*, PROPUBLICA (Nov. 1, 2020, 5:00 AM), <https://www.propublica.org/article/why-bush-v-gore-still-matters> [<https://perma.cc/LCN3-9APW>].

237. *Bush*, 531 U.S. at 106–07.

238. *Id.* at 107.

239. *Id.* at 109; see, e.g., *Jones v. U.S. Postal Serv.*, 488 F. Supp. 3d 103 (S.D.N.Y. 2020), *order clarified*, No. 20 CIV. 6516 (VM), 2020 WL 6554904 (S.D.N.Y. Sept. 29, 2020); *Ga. Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019); *Hunter v. Hamilton Cnty. Bd. of Elections*, 850 F. Supp. 2d 795 (S.D. Ohio 2012); *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated* (July 21, 2006), *superseded*, 473 F.3d 692 (6th Cir. 2007).

240. See *Bush*, 531 U.S. at 106.

the challenge is valid or invalid. If invalid, the applicant shall be permitted to vote.

b. *If the commissioners determine by majority vote that the challenge is valid, the applicant shall not be permitted to vote.*

c. If the valid challenge is based on change of residence and the applicant has moved within the parish or has moved outside the parish within the last three months, the voter shall be allowed to vote upon completing an Address Confirmation Card (ACC-Election Day).<sup>241</sup>

With no other instructions on how the commissioners might evaluate the validity of the challenge in the Poll Watchers Booklet, it is entirely foreseeable that the standards used for determining the challenge may vary from parish to parish across Louisiana.<sup>242</sup> In such a case, a *Bush v. Gore* uniformity argument could be warranted.

### *C. PCOs Contribute to Voter Suppression and the Loss of Public Faith in Our Elections*

Given the increased rhetoric around election fraud, the disputed certification process, and ensuing white supremacist insurrection at the U.S. Capitol on January 6, 2021, this Section will raise the additional harm of undermining faith in election security.

Massive PCO operations may undermine our elections system by reinforcing the idea that election fraud exists on any widespread scale. Indeed, many voters might be inclined to believe that voter fraud *must* exist because political parties are spending so much time and energy to recruit and train tens of thousands of poll watchers to prevent it. Such misinformation has already proven harmful—one must only look to the insurrectionists who stormed the capitol on January 6, 2021, who claimed, among many other untrue assertions, that the election was “stolen.”<sup>243</sup>

Additionally, the outsized presence of PCOs in our national election conversations may discourage vulnerable voters from turning out to vote for fear of even the *possibility* of being challenged or observed. In this way, voters who are already most likely to face barriers to voting—people of color, low-income individuals, immigrants, college students, geographically mobile voters—may be even less inclined to cast their ballots out of concern that they will be harassed or even physically attacked. In its recent filing, Fair Fight Action

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241. LA. SEC’Y STATE, *supra* note 235, at 5 (emphasis added).

242. *See id.*

243. Laurel Wamsley, *What We Know So Far: A Timeline of Security Response at the Capitol on Jan. 6*, NPR (Jan. 15, 2021, 5:00 AM), <https://www.npr.org/2021/01/15/956842958/what-we-know-so-far-a-timeline-of-security-at-the-capitol-on-january-6.s> [<https://perma.cc/AS7S-GG8N>].

highlights this potential for voter fear and discouragement in its complaint against True the Vote for its unsubstantiated mass-challenge effort during the 2021 Georgia Senate runoffs:

While several counties have already rejected True the Vote's mass challenges, and multiple courts have already thrown out their supporters' frivolous claims of voter fraud, these repeated attempts at voter suppression have lasting effects on the electorate: *lawful voters will be deterred and intimidated from participating in the political process out of fear that they will be accused by Defendants and their supporters of voting illegally.*<sup>244</sup>

In fact, the Georgia voters who volunteered as plaintiffs in challenging True the Vote's mass challenge lists chose to remain anonymous out of fear of harassment and intimidation.<sup>245</sup> In these ways, continued messaging that PCOs are an invaluable failsafe against election fraud only serves to perpetuate the belief that they are effective, necessary components of our "election security" system. Without reform, PCOs are likely to continue leading to baseless accusations, discrimination, disruption, and intimidation.

### III. PROPOSED SOLUTION

Given the potential for PCOs to harm our democratic processes and suppress the vote of marginalized groups, especially when observers and challengers may be only marginally effective at their stated goals of stopping election fraud, there must be better policy options available to maximize ballot accessibility while maintaining election security. This Section will offer legal and policy models for doing so.

First, federal election officials should study the impact of PCOs and the regularity of PCO challenges and then provide guidance to state and local elections officials on best practices. As noted above, there appears to be no national data on how often individuals are challenged at the polls, how often such challenges are upheld, and how many of the provisional ballots submitted by challenged voters are found to be valid and subsequently counted.<sup>246</sup> Without this data, we cannot know how effective PCOs are and, consequently, whether the investments in their recruitment, training, and management are justified. Even more concerning, without this information, we cannot determine how many individuals are required to go through the stressful, intimidating, and frightening process of having their right to vote unnecessarily and falsely called into question.

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244. Complaint at ¶ 7, *Fair Fight, Inc. v. Engelbrecht*, No. 2:20-cv-00302 (N.D. Ga. Dec 23, 2020) (emphasis added).

245. *Id.* at ¶¶ 15–16.

246. *See supra* Part I.



A. *Permit PCOs to Observe Only, Without the Authority to Lodge Challenges*

Given the potential harms created by PCOs, the availability of election officials to perform the same functions without the risk of such harms, and the development of more effective election-security measures, the most appropriate response is to prohibit PCOs from challenging another voter's qualifications, especially on Election Day.<sup>247</sup>

Many states already have policies that prohibit Election Day challenges by PCOs.<sup>248</sup> Although currently all fifty states allow for some form of PCO, some states only allow PCOs to observe, without the authority to challenge.<sup>249</sup> In such states, only an election official, poll worker, or judge is permitted to do so.<sup>250</sup> This approach has several advantages. First, it ensures that all challenges are made by trained officials who likely have more experience in differentiating between election fraud and unintentional voter mistakes.<sup>251</sup> Second, it incorporates challenges into the landscape of existing election-security measures rather than duplicating, and thus confusing, efforts.<sup>252</sup> Additionally, while PCOs may be relying on inaccurate or incomplete voter caging lists, election officials typically have more updated or accurate information from the state's efforts to verify voter addresses.<sup>253</sup> Lastly, while allowing only certified election officials to make challenges does not eliminate the risk of discriminatory challenges or

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247. See RILEY, *supra* note 6, at 2 (“Private citizens should not be allowed to challenge voters at the polls on Election Day.”).

248. *Id.*

249. See, e.g., ALA. CODE § 17-10-2 (2021) (permitting only “inspectors,” defined in ALA. CODE § 17-1-2 as “[t]he election poll worker in charge of a precinct who serves as chief returning officer for the precinct,” to launch challenges); CAL. ELEC. CODE § 14240(b) (West 2021) (“A person, other than a member of a precinct board or other official responsible for the conduct of the election, shall not challenge or question any voter concerning the voter’s qualifications to vote.”); W. VA. CODE ANN. § 3-1-41(a) (West 2021) (“It is the duty of the members of the receiving board, jointly or severally, to challenge the right of any person requesting a ballot to vote in any election.”). See also RILEY, *supra* note 6, at 17 (discussing states that had eliminated Election Day challenges by PCOs at the time of that report’s publishing).

250. ELEC. § 14240(b); § 3-1-41(a).

251. See *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 536–37 (S.D. Ohio 2004) (noting that election judges were likely more capable of dealing with any potential voter fraud than PCOs: “[T]he election judges are the individuals who are knowledgeable and experienced in the process of identifying potential ineligible voters, asking them the relevant questions, and making determinations . . .”).

252. See *supra* notes 112–114.

253. Sullivan & Ax, *supra* note 16 **Error! Bookmark not defined.** (discussing electronic databases used in polling places); see also *Electronic Poll Books | e-Poll Books*, NAT’L CONF. STATE LEGS. (Oct. 25, 2019), <https://www.ncsl.org/research/elections-and-campaigns/electronic-pollbooks.aspx> [<https://perma.cc/K9LC-YRLK>] (discussing increased use of electronic poll books, or “e-poll books,” at polling places, and their capacity to track voters’ identifying information).

harassment toward marginalized groups, it might help reduce such voters' fears of intimidation if they know only officials, rather than private citizens, will be allowed to raise such challenges.

While there are downsides to this model, such obstacles can be overcome. Election officials would have to add challenger duties to their existing list of responsibilities, which can be significant, especially on hectic election days. Election officials, however, are already involved in the challenger process because they are charged with evaluating any challenge raised and often already have the authority to raise challenges themselves.<sup>254</sup> It is not evident that removing PCOs would actually add to election officials' duties if they independently had the capacity to challenge a voter all along. Moreover, eliminating challenges by PCOs might in fact reduce the workload for election officials, as they would not have to supervise challengers or manage disruptions challengers might cause.

Some may argue that an election official who must multitask is more likely to miss election fraud. Given what we know about the extreme rarity of election fraud,<sup>255</sup> however, combined with existing security measures,<sup>256</sup> this would not necessarily be the case. Some may argue that eliminating challenges will reduce public confidence in elections, as it will be perceived as reducing transparency and citizen involvement in the elections process. Under this solution's model, however, PCOs would still be allowed to act as observers. As such, individuals concerned about election security will retain the opportunity to volunteer on behalf of a political party and raise any voter fraud concerns directly to the political parties, whose lawyers can then investigate potential legal violations, without interrupting the regular voting process.

### *B. States Permitting Challenges Must Implement Stronger Evidentiary Burdens, Standardized and Certified Trainings, and Other Procedural Safeguards*

States may still purport an interest in using PCOs as a tool to prevent election fraud, however, and it is unlikely that state legislatures will choose to eliminate PCOs entirely, given their long

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254. See Bureau of Elections, *The Challenge Process: Questions and Answers*, MICH. DEPT STATE: LANSING, [https://www.michigan.gov/documents/sos/Challenger\\_QA\\_177165\\_7.pdf](https://www.michigan.gov/documents/sos/Challenger_QA_177165_7.pdf) (last visited Feb. 22, 2022) [<https://perma.cc/B29K-EP28>] (“[T]he chairperson of the precinct board or an election inspector designated by the chairperson is responsible for supervising the challenge.”).

255. See *supra* Part I.A.

256. These existing security measures include both requirements on the voter, such as voter ID requirements, and requirements on state elections bureaus to confirm voters' identities and residencies upon registration.

history. As such, states that continue to permit challenges by partisan actors must implement more rigorous procedural safeguards to protect against abuse, discrimination, intimidation, and other troubling consequences of haphazard PCO challenges.

One possible legislative option would be permitting PCOs to challenge voters so long as they follow specific, previously established regulations and guidelines. First, states should restrict when PCOs may raise a challenge. Rather than allowing challenges during all parts of the election process, PCOs should be permitted to raise challenges only before and after the voting period, with no option to challenge voters as they attempt to cast their ballots.<sup>257</sup> This restriction would still allow PCOs to raise their concerns about voter fraud but would reduce the likelihood that voters would be denied the opportunity to cast a regular ballot before the challenger's claim has been fully vetted. It would also allow election officials to take the time needed to thoroughly vet such challenges and lighten their workloads on voting days, as they would not be expected to evaluate challenges in the moment.<sup>258</sup> Finally, permitting challenges only before and after the voting period allows for voter protection groups to take action, including by filing lawsuits or submitting their analysis for consideration. As was demonstrated by the denial of True the Vote's challenger efforts in Georgia, such a rule may help prevent baseless challenges before they happen while still providing challengers the opportunity to bring their concerns forward.<sup>259</sup>

Furthermore, if challenges are permitted, states should strictly regulate who may become a PCO. All PCOs should be required to go through a formal nomination, accreditation, and training process that is monitored by the State Board of Elections. Michigan introduced such a bill during the 2021 legislative session; although the bill was later vetoed by the governor, it would have required the Secretary of State and other elections officials to develop and require "comprehensive training" for election challengers and prohibit anyone without certification of training from acting as a challenger.<sup>260</sup> This process

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257. See RILEY, *supra* note 6, at 20 ("Private citizens should not be allowed to challenge voters at the polls and poll-watchers should be expressly prohibited from interacting directly with voters.").

258. See *id.* (noting that election officials need "sufficient time to properly review and decide every challenge" and that barring challenges on election day "would allow election officials to focus more on their various other responsibilities").

259. See *supra* note 204.

260. See Clara Hendrickson, *Michigan House Lawmakers Pass Bill Requiring Election Challengers to Undergo Training*, DETROIT FREE PRESS (June 17, 2021, 3:46 PM ET), <https://www.freep.com/story/news/politics/2021/06/17/michigan-house-election-challenger-training/7726985002/> [<https://perma.cc/94X8-C2PV>]; H.B.4528 101st Leg., Reg. Sess. (Mich. 2021).

would ensure that all PCOs receive the same information, allow election officials to screen out any individuals they do not believe are qualified, and provide a set of core guidelines to which PCOs would be held accountable. Additionally, states should prohibit those who have made discriminatory challenges or who have been found to engage in voter intimidation from serving as a PCO in the future.

Lastly, if PCOs are permitted to challenge voters, they must be required to meet a base level of evidentiary proof.<sup>261</sup> Whether it is “clear and convincing evidence”<sup>262</sup> or “personal knowledge,”<sup>263</sup> each state should clearly define what may or may not be used to lodge a challenge, what constitutes a “good reason” to suspect a voter is ineligible, and what may be used as proof. States should consider lists developed through partisan voter caging insufficiently reliable. States should also require additional and more rigorous documentation of challenges. All challenges should be documented in writing and should state specific reasons for the challenge.<sup>264</sup>

PCOs should be required to meet these evidentiary and documentation burdens when filing a challenge, and any challenge which does not meet the burden should be rejected.<sup>265</sup> For example, in Utah, pre-election challenges to a voter’s eligibility provide that “[t]he filer has the burden to prove, by clear and convincing evidence, that the basis for challenging the individual’s eligibility to vote is valid.”<sup>266</sup> A similar requirement that puts the burden of proof on the filer and holds them to clear evidentiary standards could be adapted to Election Day challenges as well.

If states were to permit challenges, the above changes would create checks on PCO power that would hopefully reduce the likelihood of voter disenfranchisement, harassment, and discrimination. PCOs, even acting only as observers, may still contribute to harassment of voters or elections officials. Although it is unknown whether it was a PCO who recorded it, a video of a Georgia election worker seen throwing away a “ballot,” which was really voting instructions, went viral, and the employee has since “gone into hiding” because of threats made against him.<sup>267</sup> Moreover, these solutions do not guarantee that election

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261. See RILEY, *supra* note 6, at 20.

262. *Id.*

263. See *id.* at 18 (discussing states which have adopted a personal knowledge requirement for polling-place challenges).

264. See *id.* (discussing changes to state law that require challenges be in writing).

265. See *id.* (“If a challenger fails to provide proof that a particular voter is ineligible, then any challenge against that voter should be immediately rejected.”).

266. UTAH CODE ANN. § 20A-3a-804(4)(b) (West).

267. Sean Keenan, *An Atlanta Election Worker Is in Hiding After a Claim that He Tossed a Ballot. His Boss Says the Claim Is False*, N.Y. TIMES (Nov. 6, 2020),

officials will not make discriminatory or baseless challenges or themselves intimidate voters. Such policies do, however, provide more accountability and require evidentiary proof for those who attempt to do so.

### CONCLUSION

Voters should be able to exercise their right to cast a ballot without fear of being falsely accused of voter fraud; profiled or discriminated against because of their race, age, or citizenship status; or harassed by other private citizens. The modern-day infrastructure that allows PCOs to raise challenges without sufficient training or accountability, however, provides significant potential for voter discrimination, intimidation, and suppression to happen under the guise of civilian oversight of elections. Moreover, despite the tens of millions of dollars invested by political parties in recruitment and training, it is unclear that PCOs are even an effective or necessary tool in preventing voter fraud. What remains is a flawed system, rooted in racial discrimination and disenfranchisement, that cannot be justified in its current form.

In order to resolve these deficiencies, significant limitations on PCOs must be adopted. At stake is ballot access for those who are most likely to face barriers to voting—people of color, immigrants, young people, and low-income voters. Also at stake is the public's confidence in the security of our elections, which continues to be undermined by the myth of widespread voter fraud and the perception that PCOs play a significant role in stopping it. We must take steps to maximize PCOs' capacity to prevent fraud while also protecting voters from harassment, discrimination, intimidation, and disenfranchisement.

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<https://www.nytimes.com/2020/11/06/us/politics/an-atlanta-election-worker-is-in-hiding-after-a-claim-that-he-tossed-a-ballot-his-boss-says-the-claim-is-false.html> [<https://perma.cc/6W7F-2LP9>].

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