

# ELECTION OBSERVATION POST-2020

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*The United States is in the midst of a crisis in confidence in elections, despite the many process protections baked into every stage of election administration. Part of the problem is that few Americans know just how rigorous the protections in place are, and most Americans have no concept of how modern elections are run. Election observation statutes are intended to provide a window for members of the public to learn about and oversee the process and to satisfy themselves that elections are fair and that outcomes are reliable. Yet in 2020, in part due to unforeseen pandemic conditions, election observation fell short. This Essay examines the shortcomings of modern election observation in the United States, looks at reform proposals on the table, and suggests several principles that should inform efforts to address the most worrisome shortfalls.*

INTRODUCTION.....	468
I. WHY ELECTION OBSERVATION STATUTES FELL SHORT IN 2020.....	471
A. Mismatch.....	474
B. Transparency Misfires.....	480
C. Lack of Uniformity.....	482
II. POST-2020 ELECTION OBSERVATION REFORM.....	484
III. ELECTION OBSERVATION: A PATH FORWARD.....	492
A. Address the Mismatch Problem.....	492
B. Adopt “Contextualized Transparency” Mechanisms.....	493
C. Strengthen Structured Transparency Mechanisms.....	494
D. Use Transparency Technologies Thoughtfully.....	496
E. Pursue Uniformity.....	497
CONCLUSION.....	499

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## INTRODUCTION

How can we trust election outcomes? This question leapt to the fore after the 2020 election as millions of Americans (to this day) think the country inaugurated the wrong person.<sup>1</sup> A lack of public confidence in the 2020 election outcome was not entirely unpredictable: for the first time in U.S. history, a sitting president actively undermined public faith in our system of elections throughout his term in office (and beyond).<sup>2</sup> In addition, the ravages of internet-fueled misinformation and disinformation threatens to destabilize democratic functioning.<sup>3</sup> As a result, even before the massive disruptions brought on by the COVID-19 pandemic, many worried the public would not abide the result of the 2020 election.<sup>4</sup>

In this fraught and hyperpolarized environment, state election observation mechanisms may have provided ways for members of the public to satisfy themselves that the election was fairly run.<sup>5</sup> Generally speaking, state election observer statutes allow members of the public to observe election processes like ballot casting and counting.<sup>6</sup> Virtually all states have election

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1. See Harry Enten, *Polls Show Majority of Republicans Mistakenly Think the 2020 Election Wasn't Legitimate*, CNN (Apr. 11, 2021, 1:57 PM), <https://www.cnn.com/2021/04/11/politics/voting-restrictions-analysis/index.html> [<https://perma.cc/PH28-K9Q4>]; *Voter Confidence*, MIT ELECTION DATA + SCIENCE LAB (Apr. 2, 2021), <https://electionlab.mit.edu/research/voter-confidence> [<https://perma.cc/G2ZR-RQTV>]. Low public confidence in U.S. election predates the tumultuous 2020 season. See, e.g., RJ Reinhart, *Faith in Elections in Relatively Short Supply*, GALLUP (Feb. 13, 2021), <https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx> [<https://perma.cc/2NSQ-K5XR>].

2. Nicholas Kristoff, *Opinion, When a President Sabotages His Own Country*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/donald-trump-election-2020.html> [<https://perma.cc/V93W-FB7T>].

3. See Dawn Carla Nunziato, *Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation*, 19 FIRST AMEND. L. REV. 32, 33, 93 (2020) (describing the effect of social media companies and the First Amendment on democratic deliberation and self-governance); Elizabeth Dwoskin, *Misinformation on Facebook Got Six Times More Clicks Than Factual News During the 2020 Election, Study Says*, WASH. POST (Sept. 4, 2021, 12:01 PM), <https://www.washingtonpost.com/technology/2021/09/03/facebook-misinformation-nyu-study/> [<https://perma.cc/8DT6-43HF>].

4. For example, the National Task Force on Election Crises (the author is a member) was formed to address challenges to the peaceful transition of power. See *About*, NAT'L TASK FORCE ON ELECTION CRISES, <https://www.electiontaskforce.org/about> [<https://perma.cc/3TS7-P499>] (last visited Sept. 17, 2021) (“Disruptions to elections can come from natural disasters or human-made disasters such as cyberattacks or improper interference by elected officials . . . . [I]t’s critical to know the proper steps forward in dealing with a crisis to ensure a free and fair election.”).

5. See, e.g., Geoffrey Sheagley & Mollie Cohen, MIT Election Lab, *Watchers at the Polls: The Effect of Partisan Poll Watchers on Perceptions of Electoral Fairness*, MEDIUM (Aug. 31, 2021), <https://medium.com/mit-election-lab/watchers-at-the-polls-ca2e8f05592> [<https://perma.cc/CB87-BYE9>] (noting that the presence of poll watchers bolsters the public trust in elections, particularly when watchers from both parties are present).

6. The terminology of election observation differs. Many states refer to election observers as “poll watchers,” but the term is not universal. For example, Connecticut refers to election observers as “unofficial checkers,” and Massachusetts refers to election observers as “observers.” See CONN. GEN. STAT. § 9-235 (2021); 950 MASS. CODE REGS. 54.04(22) (2021).

observation statutes, and though rules differ on who is allowed to see what, all share the same motivation: to provide an avenue of transparency in the process to ensure that candidates and the public accept the result.<sup>7</sup>

In 2020, state election observation did important work to calm a nervous public. Yet, in many instances, election observation practices cracked under pressure. At Detroit's TCF Center, for example, chaos broke out during the ballot counting process. Misunderstandings and miscommunications about observation rules—specifically, the number of partisan observers allowed at the site and rules governing what observers could and could not do—led to heated protests outside the counting room.<sup>8</sup> Police formed a barricade blocking protestors from entryways into the TCF Center.<sup>9</sup> Election workers reported feeling loomed over and intimidated.<sup>10</sup> Democratic and Republican representatives volleyed complaints that observers and elections officials failed to adhere to the law.<sup>11</sup>

Election observation problems arose in Detroit and elsewhere in 2020, in part, because of the particular burdens the COVID-19 pandemic placed on observers' ability to monitor election processes.<sup>12</sup> COVID-19 restrictions

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7. See *Policies for Election Observers*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx> [<https://perma.cc/9XYM-4QEZ>] (providing a state-by-state overview of observer rules in place in 2020); see also Katyovi, *Election 2020 in Review: Poll Watchers, Observers and the Ballot Duplication Process*, OVERSEAS VOTING INITIATIVE (Mar. 30, 2021), <https://ovi.csg.org/election-2020-in-review-remote-observation/> [<https://perma.cc/TMB6-YM2M>] (describing state rules governing election observation). West Virginia is the only state that prohibits election observers. See W.VA. CODE § 3-1-37 (2021).

8. See Breana Noble & Craig Mauger, *Shouting, Confrontation at Detroit Vote Count Center: Poll Challengers Barred by Police*, DETROIT NEWS (Nov. 4, 2020, 12:48 PM), <https://www.detroitnews.com/story/news/politics/2020/11/04/poll-challengers-converge-detroit-amid-close-election-results/6161484002/> [<https://perma.cc/SZPB-XCBB>]. For an overview of observation rules that applied in Michigan, see MICH. DEP'T OF STATE BUREAU OF ELECTIONS, THE APPOINTMENT, RIGHTS AND DUTIES OF ELECTION CHALLENGERS AND POLL WATCHERS 4 (2020), [https://www.michigan.gov/documents/SOS\\_ED\\_2\\_CHALLENGERS\\_77017\\_7.pdf](https://www.michigan.gov/documents/SOS_ED_2_CHALLENGERS_77017_7.pdf) [<https://perma.cc/Y9ZQ-8JM7>].

9. See Noble & Mauger, *supra* note 8.

10. *Id.*; see also Joe Capozzi, *Trump Backers, Poll Workers Clash in Florida: 'My Early Voting Site Was Almost Like a War Zone'*, PALM BEACH POST (Nov. 6, 2020, 2:49 PM), <https://www.usatoday.com/story/news/politics/elections/2020/11/06/donald-trump-backers-poll-workers-clash-florida-early-voting-site/6190693002/> [<https://perma.cc/GCZ2-UFRN>]; Michael Wines, *Harassed and Harangued, Poll Workers Now Have a New Form of Defense*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/us/election-workers-legal-aid.html> [<https://perma.cc/WJ4Q-2V5X>]; Joey Oliver, *Detroit Election Workers Describe 'Aggressive' Poll Challengers*, PATCH (Nov. 6, 2020, 10:36 AM), <https://patch.com/michigan/detroit/detroit-election-workers-describe-aggressive-poll-challengers> [<https://perma.cc/G4ZT-Y8LL>].

11. Madeline Halpert et al., *Detroit Poll Challengers Were in the Same Room, but Had Different Accounts*, BRIDGE MICHIGAN (Nov. 6, 2020), <https://www.bridgemi.com/michigan-government/detroit-poll-challengers-were-same-room-had-different-accounts> [<https://perma.cc/U6C6-VDLY>].

12. Carol Morello, *International Election Observers in the U.S. Consider This Year the Most Challenging Ever*, WASH. POST (Oct. 22, 2020, 3:17 PM), [https://www.washingtonpost.com/national-security/election-international-monitors/2020/10/22/91712842-13c4-11eb-82af-864652063d61\\_story.html](https://www.washingtonpost.com/national-security/election-international-monitors/2020/10/22/91712842-13c4-11eb-82af-864652063d61_story.html)

forced observers, for example, to stand farther away from the processes they observed than they might have in a typical election.<sup>13</sup> The model of observers peering over the shoulder of election workers was simply not safe in November 2020.

The 2020 election also featured dramatic differences in how voters cast ballots. States with traditionally low mail-in voting rates saw huge spikes in 2020 since many perceived voting by mail to be a safer option during the pandemic.<sup>14</sup> The challenge in processing and counting mail-in ballots in states not accustomed to high volumes garnered much attention. Many states had inadequate time to consider not only how to manage election observation in a pandemic but also how to do so amidst drastically changed methods of ballot casting and counting.

Even beyond pandemic-related disruptions, election observation rules were in many ways doomed to fall short for a variety of reasons. In a trend starting decades ago, fewer and fewer Americans cast ballots at polling places on Election Day—a condition that many election transparency rules assume. The “disembodied voter” is harder to keep tabs on, making it difficult for election observers to serve their function as proxies of public trust in elections.<sup>15</sup> In addition, in today’s easily manipulated information environment, technology tools intended to boost public confidence in elections sometimes undermined it. Finally, a lack of uniformity in election observation rules contributed to confusion and mistrust. These factors combined to reduce the effectiveness of election observation mechanisms when the American public arguably needed them most.

Since the 2020 election, a growing number of state legislatures are exploring election observation reform.<sup>16</sup> As discussed below, election

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[<https://perma.cc/WB8J-2TTY>] (describing how due to COVID-19 concerns, international observers scaled back operations in the United States).

13. See, e.g., *infra* note 54 and accompanying text.

14. See David Landau et al., *Federalism, Democracy, and the 2020 Election*, 99 TEX. L. REV. ONLINE 96, 107, 112–13 (2021) (describing unprecedented levels of absentee voting in 2020); John Taschner, *Recapturing Democracy: COVID-19 and the 2020 Presidential Election*, 48 HASTINGS CONST. L.Q. 461, 480 (2021) (discussing the unique nature of how absentee balloting impacted the 2020 election); see also Miles Parks, *Why Vote Counting in Pennsylvania and Michigan Takes So Long*, NPR (Nov. 4, 2020, 6:00 AM), <https://www.npr.org/2020/11/04/931136905/we-ll-be-working-24-hours-vote-counting-to-continue-through-the-week> [<https://perma.cc/M63B-ENZJR>].

15. The idea of a “disembodied voter” is adapted from surveillance studies literature. Voting processes increasingly take place without face-to-face interaction, for example through online voter registration and mail balloting. This mimics a phenomenon surveillance studies scholars have identified with respect to financial and other transactions in modern life. See, e.g., Josh Lauer, *From Rumor to Written Record: Credit Reporting and the Invention of Financial Identity in Nineteenth-Century America*, 49 TECH & CULTURE 301, 301, 304, 306 (2008) (discussing the shift of creditworthiness determinations with the rise of “disembodied” financial identities in the nineteenth century).

16. According to the Brennan Center for Justice, as of mid-April 2021, twenty states have entertained legislation to reform election observer rules. See Eliza Sweren-Becker, *Who Watches the Poll Watchers?*, BRENNAN CTR. FOR JUST. (Apr. 29, 2021), <https://www.brennancenter.org/our-work/research-reports/who-watches-poll-watchers> [<https://perma.cc/E8QC-3W7R>] (noting that, “[o]f those, 12 bills are moving in six states,”

observation reform is needed. Some proposals address core problems exposed during the 2020 elections. Other proposals threaten, paradoxically, to contribute to eroding public confidence in election outcomes.<sup>17</sup> This Essay examines U.S. election observation rules and reforms in three parts. It first discusses key shortcomings of election observation in 2020. It then canvasses proposed state election observation reforms post-2020. Finally, it offers recommendations to help right the ship.

### I. WHY ELECTION OBSERVATION STATUTES FELL SHORT IN 2020

A comprehensive review of the history of state election observer rules pre-2020 is beyond the scope of this Essay. But, for purposes of laying out the successes and shortcomings of election observation rules in 2020, a short overview of state election observer basics will set the stage. As a preliminary matter, this Essay focuses on election observation rules and practice. It does not tackle a related, but very different, role of the election “challenger,” which allows certain individuals (usually party or candidate designees and, sometimes, observers themselves) to challenge a voter’s eligibility to register or cast a ballot at the polls.<sup>18</sup> The present effort confines discussion to election observation in part for analytic clarity and, in part, because observation rules have received less attention among legal scholars.<sup>19</sup>

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and that “[t]he plurality of bills introduced and currently moving have been filed in Texas”). Two such bills are now law. *See id.* (noting that the bills are “GA SB 202, IA SF 413”).

17. Importantly, every aspect of state election processes builds in protections to ensure the accuracy and reliability of the outcomes. From preelection machine certification, to rules requiring members of both parties to serve as election judges, to postelection audits, American elections are designed to inspire confidence before, during, and after Election Day. *See* Rachel Wright, *Election Safeguards—Combating Election Disinformation*, OVERSEAS VOTING INITIATIVE (Oct. 29, 2020), <https://ovi.csg.org/blog-election-safeguards/> [<https://perma.cc/SMA3-VYJT>]; Danielle Root et al., *Election Security in All 50 States*, CTR. FOR AM. PROGRESS (Feb. 12, 2018, 12:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/02/12/446336/election-security-50-states/> [<https://perma.cc/LD6D-T2NM>] (describing the many procedural safeguards in place to ensure U.S. elections are secure and accurate). The present effort examines only one aspect of this complex web: statutes governing observation by candidate or party representatives, the media, and/or members of the public.

18. For an excellent critique of the partisan election challenger role, see Gilda R. Daniels, *Outsourcing Democracy: Redefining Public-Private Partnerships in Election Administration*, 88 DENVER U.L. REV. 237 (2010); *see also* NICOLAS RILEY, BRENNAN CTR. FOR JUST., VOTER CHALLENGERS (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/C33P-8Z67>] (documenting the troubling racially discriminatory origin of the challenge process).

19. This attempt at analytic clarity is somewhat stymied by state observation statutes that sometimes conflate the role of observer and challenger. *See infra* note 30 (noting, for example, that Rhode Island law permits observers to challenge voter eligibility). This Essay also does not delve into federal observer laws and practices, discussed *infra* at note 158. For useful analysis of these requirements, see generally James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227 (2007). *See also* *About Federal Observers and Monitoring*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> [<https://perma.cc/JL6L-Z2F6>] (Sept. 11, 2020).

Election observation rules generally permit observation at four phases during the elections process: (1) observation of preelection processes (e.g., voting equipment testing), (2) observation of in-person voting, (3) observation of absentee ballot processing and counting, and (4) observation of postelection processes (e.g., tabulation, audits, and recounts). The majority of states permit observation of some kind at all four stages. According to the National Conference of State Legislatures, during the 2020 election, only six states lacked statutes permitting public observation of preelection processes.<sup>20</sup> Only one state (Nebraska) lacked rules permitting observation of in-person voting.<sup>21</sup> Nine states and the District of Columbia lacked statutes permitting observation of absentee ballot processing and counting,<sup>22</sup> and only one state lacked provisions for postelection observation (Wyoming).<sup>23</sup>

Despite the widespread practice in most states of allowing observers to watch before, during, and after elections, state statutes vary in who can be an observer and what observers can and cannot do in their roles. Almost all states rely on a system of partisan election observation by which political parties or candidates appoint observers.<sup>24</sup> Critics of partisan observation suggest that partisan observers are not present to ensure elections are fair but instead work against basic fairness principles because they push a particular partisan agenda.<sup>25</sup> This is almost certainly why international observation principles require nonpartisan observation.<sup>26</sup> Yet, much like the justice

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20. Those states are Alabama, Alaska, Nebraska, Nevada, New Mexico, and Tennessee. See *Policies for Election Observers*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx#> [<https://perma.cc/9XYM-4QEZ>].

21. *Id.*

22. *Id.* Those states are Alaska, Idaho, Iowa, Kansas, Mississippi, Nebraska, New Jersey, West Virginia, and Wyoming. *Id.*

23. *Id.*

24. *Id.* (“Almost all states, with a few exceptions, have statutory provisions for partisan citizen election observers. It is common practice for political parties and candidates to appoint poll watchers and/or challengers to observe elections.”). Partisan involvement in U.S. elections has a long history. See Rebecca Green, *Rethinking Transparency in U.S. Elections*, 75 OHIO ST. L.J. 779, 786 (2014) (describing partisan, rather than state-sponsored, management of elections in the eighteenth century); *id.* (“States relied heavily on powerful political parties to do much of the work of administering elections—a task parties were only too happy to undertake. Nineteenth-century American elections were run largely out of government hands. Parties printed and distributed ballots, brought (their) voters to polling places, and oversaw vote tabulation. Polling locations were commonly housed in non-state-owned establishments such as private homes, hotels, saloons, and stores.”).

25. See, e.g., Alexa Ura, *Texas Senate Advances Bill Limiting How and When Voters Can Cast Ballots, Receive Mail-in Voting Applications*, TEX. TRIBUNE (Apr. 1, 2021, 2:00 AM), <https://www.texastribune.org/2021/04/01/texas-voting-restrictions-legislature/> [<https://perma.cc/KPV9-AY24>] (arguing that “[p]oll watchers are not public watchdogs but instead inherently partisan figures, appointed by candidates and political parties to serve at polling places”).

26. See, e.g., *Declaration of Global Principles for Nonpartisan Election Observation and Monitoring by Citizen Organizations*, GLOB. NETWORK OF DOMESTIC ELECTION MONITORS, <https://gndem.org/declaration-of-global-principles/> [<https://perma.cc/5SG8-6NFM>] (last visited Sept. 17, 2021) (“Non-partisan election observation and monitoring by citizen

system relies on the adversarial process to ensure fair judicial outcomes, a system of elections that employs candidate- and party-appointed election observers seeks to achieve much the same effect: to ensure that the voters of each candidate or party are protected and that elections are administered according to the law. At least in theory, assuming all candidates' and parties' observers are diligent in their roles, and further assuming they are given meaningful access to the election process to satisfy themselves that elections are fairly run, results are more likely to be abided.<sup>27</sup> Still, the shortcomings of partisan observation are, no doubt, why thirty-three states allow nonpartisan observers (i.e., members of the public not appointed by political parties or candidates) in addition to, or sometimes instead of, partisan observers.<sup>28</sup>

Most states affirmatively list activities observers are permitted to do and/or are prohibited from doing.<sup>29</sup> Some states take diametrically opposed approaches. Rhode Island, for example, explicitly allows observers to challenge voters,<sup>30</sup> whereas Wyoming prohibits observers from doing so.<sup>31</sup> As discussed further below, no two state election observation statutes are alike.

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organizations has emerged as one of the most tangible and significant dimensions of democratic development around the globe.”).

27. Sheagley & Cohen, *supra* note 5; Judd Choate, Director of the Division of Elections in Colorado, takes this concept even further. When he started in his role in 2009, his office was embroiled in twenty different lawsuits. Conversation with Judd Choate, Dir., Div. of Elections, Colo. (May 28, 2021) (notes on file with author). Aggravated by the high volume of litigation, Choate decided to involve attorneys representing both Democrats and Republicans in every major decision his office made about the administration of state elections. *Id.* He reports convening regular meetings—sometimes monthly, sometimes weekly, sometimes more than once weekly—to get partisans’ perspectives and buy-in. *Id.* Of the practice, Choate reports, “I think the single most important thing that we have ever done to create confidence in our election is that for every major decision we make, Democrats and Republicans are in the room . . . . Whether [or not their side] won the election, they say, ‘I understand why these decisions were made.’” *Id.*

28. In some instances, a state’s statute may not explicitly provide for nonpartisan observers, but, in practice, election officials allow nonpartisan observers to watch. *See Policies for Election Observers*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx> [<https://perma.cc/9XYM-4QEZ>] (“Fourteen state [sic] don’t explicitly authorize nonpartisan citizen observers in statu[t]e but have allowed them in practice in the past. This may be left up to the discretion of the state or local election officials and evaluated on a case by case basis: Colorado, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maine, Minnesota, Montana, Nebraska (will explicitly allow them in statute beginning Nov. 14, 2020), New Jersey, New York, North Carolina and Oregon.”).

29. *See, e.g.*, IOWA CODE § 39A.4.1.b (2021) (prohibiting observers from activities such as handling or inspecting ballots, voting equipment, or voter rolls; inspecting documents produced by voters to establish their identity; comparing signatures on record to a signature on any document or ballot or ballot envelope).

30. 17 R.I. GEN. LAWS § 17-19-22 (2021) (“The watchers and any election official shall have the right to challenge the right to vote of any person offering himself or herself as a voter.”).

31. WYO. STAT. ANN. § 22-15-109(b) (2021) (“A poll watcher is authorized to observe voter turnout and registration and may make written memoranda but shall not challenge voters, conduct electioneering activities or disrupt the polling process.”).

With these basics in mind, the following discussion suggests three important reasons election observation rules fell short in 2020: (1) a mismatch between anachronistic observer rules and how modern elections are, in fact, run; (2) misfires when measures designed to increase transparency instead fueled conspiracy theories; and (3) a lack of uniformity in election observation rules among states and within states. The following discussion considers each in turn.

### A. Mismatch

The 2020 election exposed a mismatch between the rules governing observers and the way modern elections are run. Many observer statutes were written when the casting and counting of ballots in this country looked very different. Pennsylvania, for example, was a poster child for this problem. The observer statute in place in Pennsylvania in 2020 provided that candidate- and party-appointed observers may be present at “polling places” from the “time the election officers meet prior to the opening of the polls until the time that the counting of votes is complete and the district register and voting check list is locked and sealed.”<sup>32</sup> Pennsylvania’s observer statute made no provision for observation of pre-Election Day in-person voting, which the Pennsylvania legislature enabled by statute in 2019 via Act 77.<sup>33</sup> During the 2016 election, approximately 2 percent of Pennsylvania voters cast absentee ballots.<sup>34</sup> With the change to no-excuse absentee voting, election administrators had time to prepare for an increase in votes cast this way. But they could not have anticipated that, due to COVID-19, over 50 percent of Pennsylvanians would cast early absentee ballots in 2020.<sup>35</sup>

The 2019 law permitted voters to request and receive an absentee ballot in person at a County Elections Office (CEO).<sup>36</sup> On January 10, 2021, the Pennsylvania secretary of state issued guidance on in-person absentee voting, noting that the law provided for in-person absentee voting at more than one CEO located within a county.<sup>37</sup> The guidance advised that “[a]dditional

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32. 25 PA. CONS. STAT. § 2687(b) (2021).

33. Specifically, Act 77 provided for no-excuse mail-in voting—including in-person absentee voting before Election Day—for all qualified electors. 25 PA. CONS. STAT. §§ 3150.11–3150.17 (2021). Pennsylvania previously required absentee voters to provide a sanctioned excuse to obtain an absentee ballot. *See* 25 PA. CONS. STAT. § 3302 (2002).

34. DIANA CAO ET AL., HEALTHYELECTIONS.ORG, PENNSYLVANIA ELECTION ANALYSIS (2020), <https://healthyelections.org/sites/default/files/2020-08/Pennsylvania%20Memo.pdf> [<https://perma.cc/RN9M-Y9DC>] (noting that mail-in and absentee voting, combined, increased from 2 percent in 2016 to 51 percent in 2020).

35. *Id.*

36. 25 PA. CONS. STAT. § 3146.5(b)(2) (2021) (“[A] voter who presents the voter’s own application for an absentee or mail-in ballot within the office of the county board of elections during regular business hours may request to receive the voter’s absentee or mail-in ballot while the voter is at the office. Upon presentation of the application and the making of the request and upon approval under [applicable law], the county board of elections shall promptly present the voter with the voter’s absentee or mail-in ballot.”).

37. *See* PA. DEP’T OF STATE, PENNSYLVANIA APPLICATIONS AND BALLOTING GUIDANCE: MAIL-IN AND ABSENTEE BALLOTS AND VOTER REGISTRATION CHANGES 4 (2020),



business hours for CEOs may be established” and encouraged local election officials to offer voters opportunities to vote in-person absentee on weeknights and weekends “to enable maximum flexibility and convenience to voters.”<sup>38</sup> The guidance also included multiple requirements for these satellite offices to ensure the integrity of the process.<sup>39</sup>

Citing concerns about early absentee voting in Pennsylvania, the Trump campaign sought access to observe election activities at satellite locations pursuant to Pennsylvania’s election observation statute. On October 3, 2020, after election officials refused to allow the campaign to observe at satellite voting locations, the Trump campaign filed an emergency petition seeking court-ordered access.<sup>40</sup> The trial court denied the campaign’s request on October 9, 2020,<sup>41</sup> as did the appellate court on October 23, 2020.<sup>42</sup> Both courts reasoned that the election observation statute applied only to “polling places” and that “satellite election offices are ‘not polling places . . . at which watchers have a right to be present under the Election Code.’”<sup>43</sup> After all, the trial court explained, “polling places operate only on Election Day and are available only to voters residing in specific districts, whereas satellite offices are restricted by neither date nor location.”<sup>44</sup>

In her dissenting opinion, Judge Patricia A. McCullough pointed out that the “plain language definition of a ‘polling place’ is ‘the room . . . for voting at a primary or election.’”<sup>45</sup> Judge McCullough reasoned that “this language strongly suggests that the paramount and dispositive trait of a ‘polling place’ is that it is a location where an elector can go and cast his/her vote in person and in a private space, which, undisputedly, is what the Satellite Offices offer, allow, and do.”<sup>46</sup> Judge McCullough further cautioned that “the Pennsylvania Supreme Court has long held that courts should construe the election laws liberally so ‘[t]echnicalities should not be used to make the right of the voter insecure.’”<sup>47</sup>

At the heart of this dispute was a mismatch between the statute’s language and its underlying intent. The statute’s language contemplated observing at polling places on Election Day, a logical restriction since elections in

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[https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_Act%2077\\_Absentee%20and%20Mail-in%20Guidance.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_Act%2077_Absentee%20and%20Mail-in%20Guidance.pdf) [<https://perma.cc/9WSM-9D4S>].

38. *Id.*

39. *See id.* at 4–5. Some requirements include: (1) each CEO be staffed by appointed elections personnel, (2) CEOs be located in municipal or county-owned or leased property, and (3) CEOs have secure county network connections and secure collection receptacles. *Id.*

40. Donald J. Trump for President, Inc. v. Phila. Cnty. Bd. of Elections, No. 200902035, 2020 WL 6260837 (Pa. Ct. Common Pleas Oct. 3, 2020).

41. Trump v. Philadelphia Cnty. Bd. of Elections, 241 A.3d 120, at \*2 (Pa. Commw. Ct. 2020) (unpublished table decision).

42. *Id.* at \*3.

43. *Id.* at \*2.

44. *Id.*

45. *Id.* at \*16 (McCullough, J., dissenting) (quoting 25 PA. CONS. STAT. § 2602(q) (2021)).

46. *Id.*

47. *Id.* at \*12 (quoting Appeal of James, 105 A.2d 64, 66 (Pa. 1954)).

Pennsylvania historically took place at polling places on Election Day.<sup>48</sup> But the statute's intent—to allow transparency in the voting process—should clearly encompass the new mode of casting early in-person absentee ballots enabled by Act 77 if the goal is to ensure public confidence in election outcomes.<sup>49</sup>

Even aside from massive increases in mail-in voting due to COVID-19, voting in many states no longer resembles the quaint neighborhood Election Day of yore. For example, many states have moved to the “vote center” model to promote efficiency, among other reasons.<sup>50</sup> Sweeping changes in how Americans cast ballots, predating the 2020 election, means that many observer statutes may do little to achieve their purpose. Instead, the mismatch threatens to feed narratives that something is amiss.

The same is true of statutes enabling postelection observation. Machine counts have long been the target of ire for those concerned about transparent elections.<sup>51</sup> The battle to scrap voting machines that lack a paper trail has largely been won.<sup>52</sup> But, the idea that observers can meaningfully attest that the counting of votes is fair is undermined by out-of-date postelection observer statutes that do not account for how postelection ballot processing and tallying is accomplished.<sup>53</sup>

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48. See CAO ET AL., *supra* note 34 (noting that mail-in and absentee voting, combined, increased from 2 percent in 2016 to 51 percent in 2020).

49. Certainly, COVID-19-related concerns contributed to the denial of access in this case. As the court noted in a footnote, “Lingering indefinitely in indoor offices where many members of the public come and go is not recommended for health reasons in light of the COVID-19 pandemic that is ongoing at this time.” *Trump*, 241 A.3d 120, at \*11 n.42. Yet as the dissent pointed out, city officials “regularly extended numerous invitations to the public encouraging electors to vote at the Satellite Offices, which has resulted in large numbers of electors visiting these sites daily.” *Id.* at \*14 (McCullough, J., dissenting). Furthermore, the dissent noted that many satellite offices were “set up in large gymnasiums or rooms which provide ample opportunity for spacing and social distancing, including the wearing of masks.” *Id.*

50. For a detailed list of states that consolidate voting and voting processes, see *Introduction*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/vote-centers.aspx> [<https://perma.cc/WQC3-5XCW>] (last visited Sept. 17, 2021).

51. Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1734–35 (2005) (describing common concerns with electronic voting); Andrew W. Appel & Philip B. Stark, *Evidence-Based Elections: Create A Meaningful Paper Trail, Then Audit*, 4 GEO. L. TECH. REV. 523, 525 (2020) (discussing reliability and auditability of voting machines).

52. See *Voting System Paper Trail Requirements*, NAT'L CONF. OF STATE LEGISLATURES (June 27, 2019), <https://www.ncsl.org/research/elections-and-campaigns/voting-system-paper-trail-requirements.aspx> [<https://perma.cc/83VP-5QHC>]; see also Appel & Stark, *supra* note 51, at 526 (noting that “because of the widespread recognition of this fatal flaw, only a handful of states use paperless [direct-recording electronic] voting machines, and many of those states are transitioning to technologies that have a paper trail starting from the individual voter’s ballot”).

53. See Tim Harper et al., *Counting the Vote During the 2020 Election*, BIPARTISAN POL'Y CTR. (Aug 25, 2020), <https://bipartisanpolicy.org/report/counting-the-vote-during-the-2020-election/> [<https://perma.cc/4JAF-NH2S>] (describing absentee ballot tabulation at centralized locations); see also HEALTHYELECTIONS.ORG, FROM TABULATION TO CERTIFICATION: HOW

Pennsylvania saw this question litigated as well in 2020. The Trump campaign brought suit challenging inadequate positioning of candidate-appointed observers during pre-canvassing and canvassing processes.<sup>54</sup> The Trump campaign argued that the statute's requirement, allowing designated watchers "to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded,"<sup>55</sup> should be read to "require[] that . . . observers have the opportunity to 'meaningfully . . . see the process.'"<sup>56</sup> The trial court and, ultimately, the Pennsylvania Supreme Court disagreed, finding that the statute mandated only that observers be present, not that they meaningfully be able to see election processes.<sup>57</sup>

Again, the dispute boiled down to parsing an outdated statute that did not reflect the reality of postelection ballot processing. The statutory mandate that observers be allowed "in the room" reflects voting in an era in which election processes took place in "rooms" as we traditionally understand them not cavernous sports arenas and convention centers where postelection processes often take place—as they did even before 2020. Increasingly, states consolidate postelection processes as election officials around the country embrace, to varying degrees, the vastly improved efficiencies and accuracy that centralized processing affords.<sup>58</sup>

Automated processing and counting of ballots produce more accurate and reliable counts.<sup>59</sup> But mismatched election observation rules have, in many instances, not caught up: many state election observer rules fail to give observers "meaningful access"<sup>60</sup> (to use the Trump campaign's term) or

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BATTLEGROUND STATES COUNT THE VOTE (2020), [https://healthyelections.org/sites/default/files/2020-11/Counting\\_the\\_Vote.pdf](https://healthyelections.org/sites/default/files/2020-11/Counting_the_Vote.pdf) [<https://perma.cc/J7GR-UVKU>].

54. *In re Canvassing Observation*, 241 A.3d 339, 443 (Pa. 2020), *cert. denied sub nom.* Donald J. Trump for President, Inc. v. Degraffenreid, 141 S. Ct. 1451 (2021).

55. *See id.* (quoting 25 PA. CONS. STAT. § 3146.8(b) (2021)).

56. *Id.* at 343. "While this language contemplates an opportunity to broadly observe the mechanics of the canvassing process, we note that these provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they 'remain in the room.' The General Assembly, had it so desired, could have easily established such parameters; however, it did not. It would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so." *Id.* at 350.

57. *Id.* at 350–51. Another aspect of this problem is the mismatch between the number of observers statutes permit and the need for observers to meaningfully observe. Some statutes have not kept pace with modern election operations and allow too few observers to be present. For example, Georgia law permits no more than two poll watchers from each political party, political body, or independent candidate to be at the same precinct at the same time. GA. CODE ANN. § 21-2-408 (2021).

58. According to the National Conference of State Legislatures, seventeen states use vote centers that consolidate election processes. *See Introduction*, *supra* note 50.

59. *See, e.g.*, Stephen N. Goggin et al., *Post-Election Auditing: Effects of Election Procedure and Ballot Type on Manual Counting Accuracy, Efficiency and Auditor Satisfaction and Confidence*, 11 ELECTION L.J. 36, 42, 50 (2012) (concluding that hand counts of votes are unreliable).

60. *See supra* note 56 and accompanying text. Similar issues arose in Nevada in November 2020. *See* Christina A. Cassidy & Anthony Izaguirre, *Poll Watchers Emerge as a Flashpoint in Battle over Ballots*, ASSOCIATED PRESS (Nov. 5, 2020),

otherwise provide adequate transparency to satisfy observers that postelection ballot processing was fair.<sup>61</sup> Election observation rules must better account for new tallying environments and include methods to allow observers to understand and verify that election processes are proceeding lawfully—and to then translate that reassurance to the broader public.

Some states are much further along in updating observer rules to reflect consolidated and/or automated election processes than others. Colorado, widely recognized for its modern, thoughtful, and transparent election processes,<sup>62</sup> provides an excellent example. Colorado, an all-mail voting state, provides clear rules that give observers significant access to election processes without relying on outdated, opaque language referencing conditions no longer in place. For example, Colorado election regulations use broad language, requiring that observers be allowed to watch whenever “electors are voting or when election [officials] are present and performing election activities.”<sup>63</sup>

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<https://apnews.com/article/poll-watchers-ballots-access-monitor-b4e95da6bcf2c8c0e9fda190b332d6d5> [<https://perma.cc/25GJ-HEM8>] (describing how the Trump campaign filed suit seeking to halt the counting of mail ballots in Clark County, Nevada, because its observers “were being kept too far away to be able to see if signatures matched voter registration records”).

61. What constitutes “meaningful access” has not been fully fleshed out. Some might argue it requires being close enough to see voters’ IDs or to see both signatures as election officials conduct absentee ballot signature matches. *See, e.g.*, Ga. Republican Party, Inc. v. Sec’y of State for Ga., No. 20-14741, 2020 WL 7488181, at \*1 (11th Cir. Dec. 21, 2020) (suit filed in 2020 to, inter alia, require election officials to provide meaningful access to observers watching absentee ballot signature matching process). Note that some state statutes explicitly prohibit such access. *See, e.g., supra* note 29. Iowa recognizes that access must be balanced against other concerns. *See id.* Courts, too, have long recognized that access for observers cannot come at the cost of voter intimidation or disruption of election processes. *See, e.g., Poniktera v. Seiler*, 104 Cal. Rptr. 3d 121, 136–38 (Ct. App. 2010) (upholding a prohibition on recording inside polling places, discussed at *infra* note 107).

62. Colorado has been far out front in a variety of ways when it comes to election transparency. In 2017, Colorado became the first state to require a Risk-Limiting Audit after the Colorado Legislature set the process in motion to require them in 2009. *See* COLO. REV. STAT. § 1-7-515 (2021); Dylan Lynch, *Checking the Election: Risk-Limiting Audits*, NAT’L CONF. OF STATE LEGISLATURES (July 3, 2019), <https://www.ncsl.org/research/elections-and-campaigns/checking-the-election-risk-limiting-audits.aspx> [<https://perma.cc/ZAX5-J2ZV>]. In 2014, Colorado’s secretary of state launched the Accountability in Colorado Elections portal, which contains comprehensive data on voter registration statistics, voter registrations by district, voter turnout by party affiliation, election cost statistics, voting methods and ballot statistics, and legal requirements. *See Accountability in Colorado Elections*, COLO. SEC’Y OF STATE, <https://www.sos.state.co.us/pubs/elections/ACE/index.html> [<https://perma.cc/F3SK-FXF5>] (last visited Sept. 17, 2021). One reason cited for Colorado’s election transparency success is the active involvement of election administrators in developing policy. *See, e.g., Marshall Zelinger, How Did Colorado Get Really Good at Elections?: By Having Really Bad Ones Before*, 9NEWS (Nov. 6, 2020, 9:48 PM), <https://www.9news.com/article/news/local/next/how-did-colorado-get-really-good-at-elections-by-having-really-bad-ones-before/73-364ce63d-8ec6-4039-977f-cf8ca2ccbce7> [<https://perma.cc/LN4A-VN88>] (“Colorado has been really great because election officials have been relied upon by the legislature to make recommendations on changes, and the legislature has worked with election officials to make those changes . . .”).

63. *See* COLO. CODE REGS. § 1505-1 (2021). The text of Rule 8.7 under § 1505-1 reads, “[t]he county clerk must submit a watcher accommodation plan to the Secretary of State by email using the approved form no later than 90 days before an election . . . Watchers may be

In addition, Colorado has recognized that, particularly since its shift to all-mail voting in 2013, traditional election observation practices needed rethinking and updating. This is reflected not just in its rules for election observers being synchronized to how Colorado conducts its elections but also in Colorado's adoption of sophisticated processes to ensure the reliability of election outcomes. This includes sophisticated signature-matching software for mail ballots,<sup>64</sup> rigorous risk-limiting audit procedures,<sup>65</sup> and an impressive statistics portal that provides comprehensive and accessible data from Colorado elections.<sup>66</sup>

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present at each stage of the conduct of the election, including when electors are voting or when election judges are present and performing election activities . . . The county clerk must provide, and identify in some manner, at least one primary contact for watchers at each location where election activities are performed when watchers are present . . . At voter service and polling centers, the designated election official must position the voting equipment, voting booths, and the ballot box so that they are in plain view of the election officials and watchers . . . Watchers must remain outside the immediate voting area while an elector is voting. The six-foot limit in Rule 1.1.31 applies only to voting." *Id.* Another important feature of Colorado election administration is Colorado election officials' plenary power. The legislature creates the rules that govern elections, but the secretary of state has power to implement those rules. *See* COLO. REV. STAT. § 1-1-107(2)(a) (2021) ("[T]he secretary of state has the following powers: . . . [t]o promulgate, publish, and distribute . . . such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws."). Judd Choate, the director of the Division of Elections, described it as akin to the legislature framing the house and elections officials putting in the drywall and dormers. *See* Conversation with Judd Choate, *supra* note 27. The benefit of this structure is that election officials, who are most familiar with the specifics of running a modern election, are empowered to make decisions about how best to realize the legislative mandate. *Id.* In the 2020 election cycle, the power of secretaries of state to make decisions about election administration strained under the weight of arguments that the U.S. Constitution delegates the exclusive power to decide how elections are run to state legislatures. Both Georgia and Arizona have moved to strip power over the elections process from their states' secretaries of state. *See* Aaron Blake, *2 Secretaries of State Undercut Trump's Fraud Claims in Key, GOP-Controlled States. Republicans Have Now Voted to Strip Both of Power*, WASH. POST (June 26, 2021, 10:02 AM), <https://www.washingtonpost.com/politics/2021/05/27/gops-brazen-move-strip-power-fraud-narrative-busting-secretary-state-again/> [<https://perma.cc/YT2R-BXDH>]. Practically, however, to use Choate's analogy, state statutes by their nature can only frame the structure. *See* Conversation with Judd Choate, *supra* note 27. Myriad decisions can and must be made by those who administer elections, whether statewide or at the local level. That is the nature of the U.S. election system. *See* Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 359-60 (2008) (describing the decentralized nature of U.S. elections and the rulemaking power of secretaries of state and local officials).

64. COLO. REV. STAT. § 1-7.5-107.3 (2021); Sandra Fish, *Colorado Election: How County Clerks Verify Voter Signatures on Mail-In Ballots*, COLORADOAN (Oct. 9, 2020, 3:55 PM), <https://www.coloradoan.com/story/news/2020/10/09/colorado-election-how-colorado-verifies-signatures-mail-ballots/5938295002/> [<https://perma.cc/Q7P2-QVTZ>] (describing the signature verification process).

65. For a description of Risk-Limiting Audits and their value in promoting public assurance that election outcomes are correct, *see* Appel & Stark, *supra* note 51, at 530-34 (describing efforts to ensure that voting processes are verifiable and describing the risk-limiting audit process in detail).

66. *See* *Accountability in Colorado Elections*, COLO. SEC'Y OF STATE, <https://www.sos.state.co.us/pubs/elections/ACE/index.html> [<https://perma.cc/F3SK-FXF5>] (last visited Sept. 17, 2021).

Mismatch problems were not the only impediment to effective election observation in 2020. The next part explores how technology-enhanced election transparency mechanisms can undermine, instead of enhance, public confidence in elections.

### *B. Transparency Misfires*

In numerous instances, election officials responded to COVID-19 restrictions by leveraging technology to help the public see that elections were fairly run. For example, Arkansas Governor Asa Hutchinson issued an executive order on August 7, 2020, encouraging county election officials to livestream the processing, canvassing, and counting of absentee ballot envelopes online for remote observation.<sup>67</sup> In July 2020, Vermont's secretary of state issued guidance requiring that, if in-person election observation was impossible in November due to COVID-19 restrictions, "the process may be live-streamed . . . to allow for remote viewing, or may be recorded."<sup>68</sup>

The use of livestreaming to promote transparency in elections has been a long-standing practice in many jurisdictions around the country.<sup>69</sup> An early, widely praised example occurred during the Franken-Coleman recount in Minnesota in 2008. As the canvassing board reviewed contested absentee ballots in that recount, anyone with an internet connection could examine livestreamed ballots from their kitchen table along with election judges.<sup>70</sup>

Yet, just when livestreaming of election processes might have saved the day, ensuring public oversight of an election fraught with COVID-19 restrictions, today's dysfunctional information environment knocked the legs out from underneath it.<sup>71</sup> In several high-profile instances, livestreaming election processes fed massive conspiracy theories, ultimately undermining public trust. In Delaware County, Pennsylvania, for example, election workers undertook a routine practice of duplicating ballots that scanners

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67. Ark. Exec. Order No. 20-44 (Aug. 7, 2020).

68. STATE OF VERMONT: OFFICE OF THE SECRETARY OF STATE, FIRST STATEWIDE ELECTIONS DIRECTIVE (2020).

69. See, e.g., ARIZONA REV. STAT. ANN. § 16-621(D) (2021) ("For any statewide, county or legislative election, the county recorder or officer in charge of elections shall provide for a live video recording of the custody of all ballots while the ballots are present in a tabulation room in the counting center. The live video recording shall include date and time indicators and shall be linked to the secretary of state's website. The secretary of state shall post links to the video coverage for viewing by the public.").

70. See, e.g., Marisa Helms, *Political Junkies Flock to Live Streaming of Senate Recount Proceedings*, MINNPOST (Dec. 22, 2008), <https://www.minnpost.com/politics-policy/2008/12/political-junkies-flock-live-streaming-senate-recount-proceedings/> [<https://perma.cc/RZ9M-2JDM>] (describing how thousands tuned in to the canvassing livestream and noting that "a lot of [viewers] are saying they think [the recount] is incredibly honest, fair and transparent" as a result of the livestream (second alteration in original)).

71. See generally YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018); see also Nathaniel Persily, *The 2016 U.S. Election: Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 63-76 (2017).

rejected to ensure those otherwise valid votes counted.<sup>72</sup> Election officials took pains to provide transparency by livestreaming the process to ensure voters that nothing was amiss.<sup>73</sup> Yet, what the public saw on the livestream feed was election officials appearing to illegally mark ballots. That, of course, fed conspiracy theories, which Delaware County immediately sought to counteract.<sup>74</sup> But the damage had already been done.

The 2020 election supplied numerous examples of this phenomenon.<sup>75</sup> Despite best intentions, technology-enhanced measures to improve transparency and public trust very often produced the exact opposite result: whether it was video feed of boxes being unloading off trucks<sup>76</sup> or supposed suitcases of ballots under cloth-covered tables,<sup>77</sup> such efforts fed, rather than quelled, the conspiracy machine.

Part of the problem in 2020 was the toxic nature of partisanship this country continues to experience. Multiple factors, including assumed bad faith of one's political opponents, distrust of government actors, an inability to agree on the existence of facts, and malicious interference by actors foreign and domestic, makes the goal of running a smooth election particularly fraught.<sup>78</sup> These challenges also undermine traditional mainstays of transparency as a means of ensuring public confidence in election outcomes. In the old days, a picture was worth a thousand words; today, a picture breeds a thousand conspiracies.

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72. Ballot duplication is the process for replacing damaged or improperly marked ballots—when the voting system cannot read the ballot—with a new ballot that preserves the voter's intent. *See generally* Michelle Shafer, *Ballot Duplication: What It Is, What It Is Not and Why We Are Talking About It in 2020*, OVERSEAS VOTING INITIATIVE (July 20, 2020), <https://ovi.csg.org/ballot-duplication-what-it-is-what-it-is-not-and-why-we-are-talking-about-it-in-2020/> [<https://perma.cc/T6AU-RDNF>].

73. Press Release, Delaware Cnty., Pa., Delaware County's Response to Video Circulating of Ballots (Nov. 6, 2020), <https://www.delcopa.gov/publicrelations/releases/2020/ballotvideoresponse.html> [<https://perma.cc/Q22H-UVXD>] (describing efforts to livestream vote counting).

74. *Id.* (refuting claims that election officials were marking blank ballots when instead they were engaged in the routine process of ballot duplication).

75. Tanya Basu, *Vote Count Livestreams Are Here to Stay*, MIT TECH. REV. (Nov. 4, 2020), <https://www.technologyreview.com/2020/11/04/1011648/livestream-vote-counts-are-here-to-stay/> [<https://perma.cc/F6BG-VPL3>] (describing widespread use of livestreaming in the 2020 election and predicting its continued use in 2022 and beyond); *see also* David Levine, *Trust but Verify: Increasing Confidence in Democratic Elections*, GEO. WASH. INT'L L. & POL'Y BRIEF (Mar. 5, 2021), <https://studentbriefs.law.gwu.edu/ilpb/2021/03/05/trust-but-verify-increasing-confidence-in-democratic-elections/> [<https://perma.cc/G2DR-5M2L>] (describing livestream practices in 2020 in the United States and internationally).

76. Marisa Iati & Adriana Usero, *A Viral Video Implied a Man Was Illegally Moving Ballots. It Was a Photographer and His Equipment*, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/technology/2020/11/05/video-claiming-detroit-ballot-fraud-debunked/> [<https://perma.cc/5B37-B2BZ>].

77. Ali Swenson, *Surveillance Tape Breeds False Fraud Claims in Georgia*, ASSOCIATED PRESS (Dec. 4, 2020), <https://apnews.com/article/election-2020-donald-trump-georgia-media-social-media-e9a73462e39e7aa39683f0f582a6659e> [<https://perma.cc/2D4V-ZXVH>] (debunking claims of "suitcases filled with ballots" hidden under a cloth-covered table and tallied without supervision in Georgia).

78. *See generally* Persily, *supra* note 71 (describing the ills that plague modern democracy).

Counteracting misinformation and disinformation in elections presents a far bigger—and in ways existential—challenge to democratic functioning than election observer reform can hope to address. Yet, it is important to consider how observation mechanisms play a role both in perpetuating misinformation and disinformation and potentially quelling it. We learned in 2020 that livestreaming election processes is not the easy fix that some hoped it would be. Despite this, as discussed further below in Part III, thoughtful use of technology can and should be leveraged to augment oversight.

### C. Lack of Uniformity

A final shortcoming of current election observation rules and practices is their lack of uniformity. The existence of different laws in different states, and even different observation rules and practices within the same state, feeds public mistrust.<sup>79</sup> Different jurisdictions with different rules relating to who can observe and what observers may do may create barriers to entry for people to engage in observation. It also serves the narrative of election administrators hiding something: why all these different, complicated, and often confusing rules?

Variation in election observation policies between states is profound. Some states are quite permissive, allowing any member of the public to observe.<sup>80</sup> Other states are restrictive, requiring individuals to be formally appointed to observe well in advance of elections (usually by candidates or political parties).<sup>81</sup> Some states require observers to wear identification badges.<sup>82</sup> Some states require that observers be registered voters in the state;

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79. Local jurisdictions' polling places and ballot processing layouts are never one-size-fits-all. In Douglas County, Colorado, for example, ballot processing takes place in the basement of the elections office. Conversation with Judd Choate, *supra* note 27. Local administrators fashioned a glass-walled observation booth that runs down the center of the operation, allowing observers to view the various election activities underway. *Id.* Twenty miles away, in Denver, the election office that processes ballots consists of a series of rooms, each of which observers can enter, allowing observers to look over the shoulders of election workers in a way not possible in Douglas County. *Id.* Both comply with Colorado law but take different approaches to enable observation. *Id.*

80. *See, e.g.*, 17 R.I. GEN. LAWS § 17-19-22 (2021) (“The conduct of elections is open to the public.”); MINN. STAT. § 204C.19 subd. 1 (2021) (requiring that counting be open to public).

81. *See, e.g.*, N.C. GEN. STAT. § 163-45(a) (2021) (“Not more than two observers from the same political party shall be permitted in the voting enclosure at any time, except that in addition one of the at-large observers from each party may also be in the voting enclosure.”); KY. REV. STAT. ANN. § 117.315(3) (West 2021) (“The county executive committee of any political party having a ticket to elect at any regular or special election may designate not more than two (2) challengers to be present at and witness the holding of the election in each precinct in the county.”).

82. *See, e.g.*, S.C. CODE ANN. § 7-13-860 (2021).



some states require observers to be registered voters in the precinct in which they wish to observe.<sup>83</sup> Other states have no residency restrictions.<sup>84</sup>

Of course, state variation in election laws is a mainstay of U.S. elections.<sup>85</sup> In some instances, decentralized elections have proven to be a feature not a bug. Decentralized election systems were widely touted in 2016, for example, as a main reason why U.S. elections could not be easily hacked.<sup>86</sup> Indeed, election observer rules lack uniformity in large part *because* of the wide divergence in how states run elections. Election observation rules that work in one state may not work in another state since every state's elections process is different, sometimes even varying from one county to the next.<sup>87</sup> Too much standardization might also disrupt long-standing state traditions, leading to greater mistrust among those familiar with past practice. People within a state may have faith in how their elections are run because the same observer practices have been in place for decades. Change, in this way, can be antithetical to securing public trust in election outcomes.

Despite these concerns, we live in a world of instantaneous information dissemination where state borders often seem irrelevant during elections.<sup>88</sup> In presidential election years particularly, nationwide attention is routinely transfixed on elections in only a handful of swing states.<sup>89</sup> This translates to swing states being flooded with out-of-state onlookers, who may be unfamiliar with local observer law, practices, and norms. Out-of-state

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83. See *infra* note 124 (listing state statutes that confine election observation residents of either state or jurisdiction in which they seek to observe).

84. For an example of a state that does not require observers to be residents of the state, see, e.g., ME. STAT. tit. 21-A § 1 (2021).

85. See generally Landau et al., *supra* note 14 (noting the benefits of decentralization of authority over elections).

86. Drew Marvel, *Protecting the States from Electoral Invasions*, 28 WM. & MARY BILL RTS. J. 197, 200 (2019) (citing Chris Good, *When It Comes to Election Cybersecurity, Decentralized System Is Viewed as Both Blessing and Curse*, ABC NEWS (Oct. 31, 2018, 1:20 PM), <https://abcnews.go.com/Politics/election-cybersecurity-decentralized-system-viewed-blessing-curse/story?id=58877082> [<https://perma.cc/X59B-S89P>] (noting that “elections [are] overseen by about 10,000 different voting jurisdictions across the 50 states”)).

87. See *supra* note 79 (contrasting observation in Douglas County with observation in Denver).

88. Dan Balz, *Think All Politics Are Local?: The California Recall Says Most Politics Are Now National*, WASH. POST (Sept. 18, 2021, 12:28 PM), [https://www.washingtonpost.com/politics/take-california-recall-election/2021/09/18/dcfdece2-182c-11ec-9589-31ac3173c2e5\\_story.html](https://www.washingtonpost.com/politics/take-california-recall-election/2021/09/18/dcfdece2-182c-11ec-9589-31ac3173c2e5_story.html) [<https://perma.cc/77FT-5BLZ>] (“It may be time to revisit the old axiom from Tip O’Neill, the former Democratic House speaker from Massachusetts, who famously said that all politics are local. These days . . . most politics are national.”).

89. This has been a long-standing phenomenon, particularly since Florida played a pivotal role in the 2000 election. Les Kjos, *Analysis: Lawyers Flock to Florida*, UNITED PRESS INT’L (Oct. 25, 2004, 3:48 PM), <https://www.upi.com/Defense-News/2004/10/25/Analysis-Lawyers-flock-to-Florida/31021098733728/> [<https://perma.cc/PZM2-HGV7>] (describing the influx of poll watchers from out of state, which prompted the president of the Florida State Association of Supervisors of Elections to send a letter to Governor Jeb Bush during the 2004 presidential election complaining of being “‘bombarded with phone correspondence from the voters because of the harassment they’re enduring’ at polling locations . . .”).

onlookers may hold expectations about how elections are run and how observers participate based on practices in their home states.

In this environment, wide variance in observer rules breeds unfortunate confusion. It raises barriers of entry to those who would observe elections at a time when citizen engagement could help; it undermines the public trust that these statutes are meant to secure. While standardization may not be possible (or desirable), as discussed in Part III below, it may be that the federal government has a role to play in setting a floor for basic features of election observation.

## II. POST-2020 ELECTION OBSERVATION REFORM

Despite wide consensus among election administrators (and judges) that the 2020 election was one of the most well-run, fair, and transparent elections in U.S. history,<sup>90</sup> an alarming number of Americans lack faith in its outcome even months after President Joe Biden was inaugurated.<sup>91</sup> Widespread dissatisfaction with the administration of the 2020 election was bipartisan. On the left, many believe barriers to voting prevented eligible voters from casting ballots. On the right are concerns—without evidence—that millions of ineligible voters skewed the outcome. Amidst these stark divisions, legislatures around the country are pursuing election reforms.<sup>92</sup>

Legislatures in over twenty states have trained at least part of their election reform energies on observer statutes. Some reform proposals address the shortcomings identified herein. Several proposed reforms seek to ensure that

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90. NAT'L TASK FORCE ON ELECTION CRISES, STRENGTHENING OUR ELECTIONS AND PREVENTING ELECTION CRISES: LESSONS AND RECOMMENDATIONS FROM THE 2020 GENERAL ELECTION (2021), [https://static1.squarespace.com/static/5e70e52c7c72720ed714313ff/600192b45103a7521617d636/1610715829231/ElectionTF-Report\\_2021.pdf](https://static1.squarespace.com/static/5e70e52c7c72720ed714313ff/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf) [https://perma.cc/6TFX-V7UF] (assessing the November 2020 election and concluding that despite multiple opportunities for improvement and reform, the “2020 election had the highest turnout in American history, with nearly 160 million votes cast”). The report further found that “multiple independent bodies, including the Cybersecurity and Infrastructure Security Agency (CISA), Organization of Security and Cooperation in Europe (OSCE), the Organization of American States (OAS), the Harvard Electoral Integrity Project (EIP), as well as election officials in dozens of states determined that the election was secure and free of widespread irregularities.” *Id.*

91. *See supra* note 1 and accompanying text.

92. Doubt surrounding the outcome of the 2020 election inspired the Arizona legislature to conduct its own partisan review of ballots from the 2020 presidential and U.S. Senate races in Arizona, a worrisome trend that other states are imitating. *See Amy Gardner, In Echo of Arizona, Georgia State Judge Orders Fulton County to Allow Local Voters to Inspect Mailed Ballots Cast Last Fall*, WASH. POST (May 21, 2021, 6:40 PM), [https://www.washingtonpost.com/politics/georgia-ballot-inspection/2021/05/21/1e8ad1cc-ba61-11eb-a6b1-81296da0339b\\_story.html](https://www.washingtonpost.com/politics/georgia-ballot-inspection/2021/05/21/1e8ad1cc-ba61-11eb-a6b1-81296da0339b_story.html) [https://perma.cc/6R34-T2LW]; David A. Graham, *The Unfolding Disaster in Arizona: The Question Isn't Whether It Can End Well, But How Exactly It Will End Badly*, ATLANTIC (May 7, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/arizonas-election-audit-is-a-trainwreck/618834/> [https://perma.cc/3U8F-QQFW]; Nathan Layne, *Pennsylvania Republicans Launch Election Audit, Solicit Testimony on 'Improprieties'*, REUTERS (Sept. 3, 2021, 4:59 AM), <https://www.reuters.com/world/us/pennsylvania-republicans-launch-election-audit-solicit-testimony-improprieties-2021-09-03/> [https://perma.cc/Y5Z9-XBSH].

election observers are given meaningful access to perform their role—for example, allowing observers to stand physically close enough to election officials and voters to “see and hear” their activities (making exceptions, of course, for ballot secrecy).<sup>93</sup> The Georgia legislature, for example, added language to its election code requiring that poll watchers be allowed to “fairly observe” election procedures at ballot tabulation centers.<sup>94</sup>

Other bills address the mismatch problem. The Montana legislature passed a bill that gives watchers permission to be present at all ballot drop-off locations.<sup>95</sup> The New Hampshire State Senate passed a bill that gives observers the right to observe the processes of opening ballot envelopes and reviewing voter affidavits.<sup>96</sup> New York passed legislation that allows watchers to be present at meetings where absentee ballots are being processed.<sup>97</sup> Bills that address the mismatch problem are needed and should be lauded.

Election observer training is also rightfully on legislators’ radar. Georgia’s new election statute requires that poll watchers be trained to ensure they know their duties and state election laws.<sup>98</sup> The Georgia law delegates to

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93. See, e.g., S.B. 210, 105th Leg., Reg. Sess. (Wis. 2021); S.B. 1611, 87th Leg., Reg. Sess. (Tex. 2021) (providing observers permission to stand close enough to “see and hear” voters’ and election officials’ activities—provided that watchers cannot enter the voting booth—and preventing watchers from being denied “free movement” at polling places). Note that several courts have declined to hold that a lack of meaningful access invalidates an election. See, e.g., *Benavente v. Taitano*, 2006 Guam 16, 20 (holding that poll watchers being improperly denied access to polls as prescribed by law does not automatically provide the basis for a new election to be called); *Conroy v. Levine*, 100 A.D.2d 918, 919 (N.Y. App. Div. 1984) (finding that losing candidates’ poll watchers being improperly denied access to the polls did not provide basis for new election because the candidate could have sought appropriate judicial relief on election day); *Menssen v. Eureka Unit Dist. No. 140*, Woodford Cty., 388 N.E.2d 273, 277 (Ill. App. Ct. 1979) (declining to invalidate election challenged on the grounds that the public was not present to observe counting of absentee ballots and holding that the election could only be invalidated if poll watchers were systematically excluded from the polls).

94. S.B. 202, 2021–2022 Gen. Assemb., Reg. Sess. (Ga. 2021). Georgia’s legislation added the following italicized language to its poll watcher statute: “Such designated locations shall include the check-in area, the computer room, the duplication area, and such other areas as the superintendent may deem necessary to the assurance of fair and honest procedures in the tabulating center. *The locations designated by the superintendent shall ensure that each poll watcher can fairly observe the procedures set forth in this Code section.* The poll watchers provided for in this subsection shall be appointed and serve in the same manner as other poll watchers.” GA. CODE ANN. § 21-2-408(c) (2021) (emphasis added).

95. S.B. 93, 67th Leg., Reg. Sess. (Mont. 2021).

96. S.B. 89, 2021 Gen. Ct., Reg. Sess. (N.H. 2021).

97. N.Y. ELEC. LAW § 9-209 (McKinney 2021) (effective Jan 1, 2023). Oregon considered, but ultimately failed to pass, a bill requiring that observers be present when absentee ballots are printed and placed in envelopes to be mailed to voters. S.B. 824, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

98. S.B. 202, 2021–2022 Gen. Assemb., Reg. Sess. § 32 (Ga. 2021) (“No person shall be eligible to serve as a poll watcher unless he or she has completed training provided by the political party, political body, or candidate designating the poll watcher. Upon request, the Secretary of State shall make available material to each political party, political body, or candidate that can be utilized in such training but it shall be the responsibility of the political party, political body, or candidate designating the poll watcher to instruct poll watchers in their duties and in applicable laws and rules and regulations. Each political party, political

candidates and political parties the job of conducting training, although it does require the secretary of state to make training materials available for this purpose.<sup>99</sup> Done correctly, careful and detailed observer training can go a long way in contextualizing what observers see and curbing the negative effects of transparency.<sup>100</sup> If, for example, observers understood the ballot duplication process and its many protections, the unwarranted and misguided accusations levied in 2020 might have been quelled. Training and education, as explored further in Part III, are essential.<sup>101</sup>

Reforms that seek more meaningful access for observers, that address the mismatch problem, and that seek to educate observers about the election process and their role in it, are healthy legislative reactions to the current environment of widespread mistrust. Other election observation reform proposals are worrisome. Problematic legislative proposals fall into three categories: (1) bills that allow observers to use devices to record election processes, (2) legislation that imposes criminal penalties on election officials for obstructing election observers, and (3) reforms that remove state residency requirements for observers.

Following the 2020 election, legislatures around the country introduced bills to allow election observers to record what they see. So far, none advanced. An Illinois bill would have required all poll watchers in the state to wear body cameras.<sup>102</sup> A Michigan bill would have allowed watchers to use devices to record vote tabulation and would make it a misdemeanor to impede election observers from recording the tabulation process.<sup>103</sup> The Texas legislature advanced, but ultimately scuttled, bills that would give watchers authority to take pictures and record video in polling locations,

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body, or candidate shall, in their written designation of poll watchers, certify under oath that the named poll watchers have completed the training required by this Code section.”).

99. *Id.*

100. Jocelyn Benson, *When Poll-Watching Crosses the Line*, POLITICO (Aug. 25, 2016), <https://www.politico.com/magazine/story/2016/08/poll-election-monitor-challengers-vote-laws-watchers-214189/> [<https://perma.cc/3KX8-7L5A>] (advocating that states “mandate that all election monitors complete a detailed and comprehensive statewide training program that requires them to demonstrate a sufficient and accurate understanding of the laws governing elections in their state”).

101. Other states are considering training requirements for challengers. *See, e.g.*, H.B. 4528, 101st Leg., Reg. Sess. (Mich. 2021) (requiring challengers to undertake “comprehensive training” at least twenty days before each primary, general, or special election).

102. H.B. 3553, 102d Gen. Assemb. (Ill. 2021).

103. S.B. 276, 101st Leg. (Mich. 2021). In a nod to voter privacy, Michigan’s bill would make it a misdemeanor for watchers to photograph or record a voter entering, leaving, or voting at a polling place or a voter’s identification. *Id.*; *see* Nick Corasaniti, *G.O.P. Seeks to Empower Poll Watchers, Raising Intimidation Worries*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/05/01/us/politics/repUBLICAN-pollwatchers.html> [<https://perma.cc/6F7P-WRS3>] (describing efforts to allow poll watchers to record).

including of voters.<sup>104</sup> Current Texas law prohibits election observers from carrying devices to record sound and images at the polls.<sup>105</sup>

Many existing state statutes and secretary of state guidance prohibit observers from recording or taking pictures in polling places.<sup>106</sup> Challenges

104. Nick Corasaniti, *Texas Senate Passes One of the Nation's Strictest Voting Bills*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/05/29/us/politics/texas-voting-bill.html> [<https://perma.cc/NYM8-AYN5>] (noting that “lawmakers dropped some of the most stringent [provisions], like . . . a measure that would have permitted partisan poll watchers to record the voting process on video”). Proposals would have allowed watchers to submit photos, video, or audio recordings of activity they believe to be unlawful to the secretary of state. A related Texas bill would have allowed watchers to record video or audio during the vote tabulation process. See Sweren-Becker, *supra* note 16.

105. TEX. ELEC. CODE ANN. § 3.33.051(c) (West 2021) (“A watcher may not be accepted for service if the watcher has possession of a device capable of recording images or sound unless the watcher agrees to disable or deactivate the device.”). Texas’s poll watcher guide similarly prohibits watchers from “[u]sing a wireless communication device within 100 feet of polling place . . . .” TEX. SEC’Y STATE ELECTIONS DIV., POLL WATCHER’S GUIDE, §§ 33.052(b), 61.014 (2019), <https://www.sos.state.tx.us/elections/forms/pollwatchers-guide.pdf> [<https://perma.cc/U9QR-3J5U>].

106. See, e.g., ARIZ. REV. STAT. ANN. § 16-515(G) (2021) (prohibiting photos or videos within seventy-five feet of a voting location); CAL. ELEC. CODE § 18541 (West 2021) (specifying that, in the voter intimidation context, “no person shall . . . [p]hotograph, video record, or otherwise record a voter . . . .”); COLO. CODE REGS. § 1505-1, r. 15.7 (2021) (specifying observers may not “[u]se any electronic device to take or record pictures, video, or audio in any polling location or other place election activities are conducted”); Notice of Emergency and Proposed Rulemaking (D.C. Sept. 22, 2020) (to be codified at D.C. Mun. Regs. tit. 3 § 706.17(f)); MICH. DEP’T OF STATE BUREAU OF ELECS., THE APPOINTMENT, RIGHTS, AND DUTIES OF ELECTION CHALLENGERS AND POLL WATCHERS (2020), [https://www.michigan.gov/documents/SOS\\_ED\\_2\\_CHALLENGERS\\_77017\\_7.pdf](https://www.michigan.gov/documents/SOS_ED_2_CHALLENGERS_77017_7.pdf) [<https://perma.cc/Y9ZQ-8JM7>] (stating that challengers and poll watchers may not “use a video camera or recording device, or the camera or recording features of a smart phone or tablet in polling place or clerk’s office”); Minn. Sec’y of State, *Polling Place Rules*, <https://www.sos.state.mn.us/elections-voting/election-day-voting/polling-place-rules/> [<https://perma.cc/9MQM-VP2K>] (last visited Sept. 17, 2021) (“discourag[ing]” taking photos); MISS. CODE ANN. § 23-15-577(c)–(d) (2021) (noting that poll watchers are prohibited from viewing or photographing pollbooks while at polling place or photographing receipt books while at polling place); MONT. SEC’Y OF STATE, ELECTION JUDGE HANDBOOK (2020), <https://sosmt.gov/Portals/142/Elections/Documents/Officials/Election-Judge-Handbook.pdf> [<https://perma.cc/4QGW-PPMB>] (delegating decision to local election officials); OHIO SEC’Y OF STATE, ELECTION DAY VOTING DIRECTIVE 2016–23, at 7–26 (2016), [https://elections.bcoho.gov/dir2016-23\\_eom-ch\\_07.pdf](https://elections.bcoho.gov/dir2016-23_eom-ch_07.pdf) [<https://perma.cc/XW5Q-5BUD>] (prohibiting observer use of recording devices); S.D. SEC’Y OF STATE, POLL WATCHER AND OBSERVER GUIDELINES (2021), <https://sdsos.gov/elections-voting/assets/PollWatcherObserverGuidelines.pdf> [<https://perma.cc/UR6L-5QWG>] (stating that observers may not “[u]se any communication or photographic device in any manner which repeatedly distracts, interrupts or intimidates any voter or election worker . . . [or u]se any communication, photographic or video device to take video or pictures of the pollbook”); TENN. CODE ANN. § 2-7-104(e) (2021) (“Poll watchers observing the duties of the absentee counting board are prohibited from possessing any electronic device, including a cellular telephone or pager, capable of transmitting election results to a location outside the room where the ballots are being tabulated.”); TEX. ELEC. CODE ANN. § 33.051(c) (2021) (“A watcher may not . . . ha[ve] possession of a device capable of recording images or sound unless the watcher agrees to disable or deactivate the device.”); UTAH CODE ANN. § 20A-3a-801(5)(a)(i) (West 2021) (stating that an observer may not “electronically record an activity . . . if the recording would reveal a vote or otherwise violate a voter’s privacy or a voter’s right to cast a secret ballot”); VA. CODE ANN. § 24.2-604.4(D) (West 2021)

to prohibitions of photographing or recording in polling places have been unsuccessful.<sup>107</sup> Perhaps courts recognize the danger of enabling recording in polling places, fearing eligible voters might shy away from the polls if they knew partisan observers would photograph and video record them?<sup>108</sup> Another concern is whether such recordings would be manipulated or presented out of context in ways that would jeopardize free and fair elections.<sup>109</sup> In the context of policing, police body cameras and bystander cell phone videos are providing an important check on police power, albeit with concerning side effects.<sup>110</sup>

Courts are just starting to come to terms with whether laws prohibiting members of the public from recording what they see and hear in places they are legally allowed to be violate the First Amendment.<sup>111</sup> So far, courts of appeals are united on the right to record police interactions.<sup>112</sup> But elections are fundamentally different from police interactions.<sup>113</sup> Recognizing this, the U.S. Supreme Court has limited First Amendment protections in and

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(“Authorized representatives shall be allowed, whether in a regular polling place or central absentee voter precinct, to use a handheld wireless communications device but shall not be allowed to use such a device to capture a digital image inside the polling place or central absentee voter precinct.”).

107. *See, e.g.,* Poniktera v. Seiler, 104 Cal. Rptr. 3d 121, 136–38 (Ct. App. 2010) (holding that a regulation prohibiting photography and video in polling places represented a reasonable accommodation of voters’ desire to cast a secret ballot and did not infringe on the poll watcher’s constitutional rights).

108. In at least one instance, an allegation of voter intimidation due to a poll watcher’s use of cameras failed to move a court to issue an injunction. *See* Ariz. Democratic Party v. Ariz. Republican Party, No. CV-16-03752, 2016 WL 8669978, at \*13 (D. Ariz. Nov. 4, 2016) (holding that political party poll watcher training that encouraged poll watchers to follow people suspected of fraud outside of the seventy-five foot radius to photograph them did not violate an Arizona statute prohibiting photography by poll watchers within seventy-five feet of polls and did not merit an injunction due to lack of evidence that voters would be intimidated).

109. *See* Corasaniti, *supra* note 103.

110. *See generally* Jeffrey Bellin & Shevarma Pemberton, *Policing the Admissibility of Body Camera Evidence*, 87 FORDHAM L. REV. 1425 (2019) (describing the manipulation of body camera footage through police narration).

111. *See generally* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167 (2017) (describing the boundaries of the right to record).

112. *See* Fields v. City of Philadelphia, 862 F.3d 353, 355–56 (3d Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678, 689 (5th Cir. 2017); Am. Civ. Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595–600, 608 (7th Cir. 2012). *See generally* Aidan J. Coleman & Katharine M. Janes, Comment, *Caught on Tape: Establishing the Right of Third-Party Bystanders to Secretly Record the Police*, 107 VA. L. REV. ONLINE 166, 168 (2021) (noting that “[f]ederal appellate courts across the country have consistently recognized the existence of a valid First Amendment right in recording the police in public spaces”).

113. *See* Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. (forthcoming 2022) (describing the dangers of surveillance tactics in elections). The counterargument is that prohibiting election observers from recording what they see forces observers to rely on “second best” evidence when reporting irregularities to those running elections. This evidence might prove crucial to ensuring observer credibility in raising concerns. One might argue that aside from secret ballot concerns, voter privacy in and around polling places should not outweigh transparency and election integrity concerns. As Justice Antonin Scalia argued, democracy takes courage. *Doe v. Reed*, Wash. Sec’y of State, 561 U.S. 186, 228 (2010) (“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”).

around polling places, citing the “substantial consensus . . . that some restricted zone around polling places is necessary to” protect the right to vote.<sup>114</sup>

The fear that overly aggressive election observers will intimidate voters and do damage to the democratic process is hardly unfounded. This country has a long, sad history of racialized voter intimidation that continues to this day, including, and especially exacerbated by, those on a “ballot security” mission to preserve election integrity or (more ominously) the “purity” of elections.<sup>115</sup>

This history gives the next problematic set of proposals an even more worrisome overlay: post-2020 legislation imposing criminal penalties on election officials who obstruct election observers or refuse to allow them to enter polling places or other venues where election processes are taking place. Iowa has passed such a statute,<sup>116</sup> as has Texas.<sup>117</sup> Texas’s new law additionally empowers poll watchers to seek court orders against election officials who “get in their way.”<sup>118</sup>

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114. *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

115. See Hannah Knowles, *A Texas Bill Drew Ire for Saying It Would Preserve ‘Purity of the Ballot Box.’ Here’s the Phrase’s History*, WASH. POST (May 9, 2021, 3:02 PM), <https://www.washingtonpost.com/history/2021/05/09/texas-purity-ballot-box-black/> [<https://perma.cc/XV47-9K8Z>] (describing the history of the term); see also Joseph Tanfani & Jarrett Renshaw, *Challengers, Observers and Electioneering: The History and Rules of U.S. Poll Watching*, REUTERS (Oct. 7, 2020, 6:11 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/A2FD-WCK2>]. Perhaps the most infamous example of election observation running amok occurred at the hands of the Republican Party’s National Ballot Security Task Force in New Jersey in 1981. Abuses resulted in a consent decree imposed by a federal court requiring the Republican Party to allow a federal court to review proposed “ballot security” programs. See Consent Decree, *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. 2:81-cv-03876 (D.N.J. Nov. 1, 1982); see also Corasaniti, *supra* note 103.

116. S.F. 413, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

117. Nick Corasaniti, *Abbott Signs Texas Election Law, Ending a Fierce Voting Rights Battle*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/07/us/politics/greg-abbott-texas-voting-rights-law.html> [<https://perma.cc/HS63-ADA8>] (noting that the law greatly empowers poll watchers); H.B. 6, 87th Leg., Reg. Sess. (Tex. 2021) (creating a criminal offense for an election official to distance or obstruct the view of a watcher if it makes the watcher’s observation ineffective or to refuse to accept the required service of a watcher at a polling location or counting location); H.B. 4364, 87th Leg., Reg. Sess. (Tex. 2021) (creating a misdemeanor for an election official to intentionally or knowingly refuse to accept the required service of a watcher in a polling location or counting location); S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021) (creating a criminal offense for an election official to distance or obstruct the view of a watcher if it makes the watcher’s observation ineffective, making it a misdemeanor for an election official to refuse to accept the required service of a watcher in a polling or counting location and allowing watchers to file suit seeking an injunction to obtain access to a polling location or ballot counting or processing location).

118. Acacia Coronado & Nicholas Riccardi, *AP Explains: How Texas Law Makes Voting Harder*, NBC DFW (Sept. 9, 2021, 4:41 PM), <https://www.nbcdfw.com/news/local/texas-news/ap-explainer-how-texas-law-makes-voting-harder/2736064/> [<https://perma.cc/R4YG-U95L>]. The Texas law also gives poll watchers more latitude since they can only be removed from duty for violating an election law if that violation is witnessed by an election clerk or judge. *Id.*

Criminalizing the actions of election officials, the vast majority of whom are temporary workers engaged in a critical act of public service,<sup>119</sup> is risky. Election officials are charged with maintaining an orderly process during elections and ensuring that all eligible voters can cast their ballots free from intimidation. Subjecting election workers to criminal penalties at the whim of charged partisan actors is a recipe for not only a massive shortage of people willing to serve as poll workers but also disruptive and confrontational election environments.<sup>120</sup>

A mix of allowing observers to record election processes and removing election officials' ability to rein in bad behavior on the part of observers is concerning. Consider events surrounding a runoff election in Anchorage, Alaska in May 2021:

Citizen observers in Anchorage crowded outside the Election Center, photographing workers and writing down their license plate numbers. Inside, they filed challenge after challenge to routine counting procedures. At times, the observers grew openly hostile. Several officials were "accosted" in the parking lot, according to the Anchorage City Clerk's Office. Threats poured in via email, with one announcing that election officials "should be publicly executed."<sup>121</sup>

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119. *Election Poll Workers*, NAT'L CONF. OF STATE LEGISLATURES (June 17, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-poll-workers637018267.aspx> [<https://perma.cc/FST2-YBE2>] (noting that "[m]ost . . . poll workers are part-time, temporary employees hired by local election officials to staff polling places during early voting and on Election Day").

120. The poll worker shortage in the United States is already pronounced, leading to pandemic-exacerbated fears of poll worker shortages in 2020. *See, e.g.*, Editorial Board, *America's Poll Worker Shortage Is a Brewing Crisis*, BLOOMBERG (Sept. 2, 2020, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2020-09-02/election-2020-poll-worker-shortage-could-create-a-crisis-for-voters> [<https://perma.cc/MQS5-XPVY>]. Notably, this legislative inclination—reforms aimed at diminishing the power of election officials—ties into a larger post-2020 trend Professor Richard Hasen has dubbed "election subversion." Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. (forthcoming 2022) (describing the "election subversion" trend). Criminalizing the actions of election officials is not new and is even part of the federal code. *See* 52 U.S.C. § 20511 (imposing criminal penalties for a variety of election offenses on "[a] person, including an election official, . . . in any election for Federal office"). Likewise, state laws have long featured criminal penalties for election official malfeasance. For example, a 1955 Michigan law still on the books imposes criminal penalties on election officials that "prevent the presence of any such [observer] . . . or shall refuse or fail to provide such [observer] with conveniences for the performance of the duties expected of him." *See* MICH. COMP. LAWS § 168.734 (1955). Several other states have had such laws on the books for decades. *See, e.g.*, DEL. CODE ANN. tit. 15, § 5139 (2021); KY. REV. STAT. ANN. §§ 119.145, 119.225 (West 2021); N.Y. ELEC. LAW § 17-106 (McKinney 2021); OHIO REV. CODE ANN. § 3599.19(A)(13)–(14), (B) (West 2021). Prosecution under these provisions appears to be exceedingly rare and none involve prosecution for interfering with observers. *See, e.g.*, *People v. Vreeland*, 191 N.E. 579 (N.Y. 1934); *People v. Spitzer*, 266 N.Y.S. 522 (Sup. Ct. 1933) (both involving intentional false statements regarding an election result).

121. Tim Elfrink, *As GOP Candidate Used RV for 24/7 Watch, Anchorage Election Staff Say They Faced 'Unprecedented Harassment,'* WASH. POST (May 28, 2021, 4:09 AM), <https://www.washingtonpost.com/nation/2021/05/28/anchorage-election-harassment-bronson-dunbar/> [<https://perma.cc/4QH5-HDPR>] (citing a clerk's report after the election that



Citizen election surveillance has a dangerous dark side.<sup>122</sup>

A final reform trend seeks to eliminate residency requirements allowing election observers who reside outside of a voting jurisdiction to observe election processes.<sup>123</sup> It is understandable that residency restrictions would be eased. As noted above, because U.S. presidential elections come down to a handful of states, nationwide focus on how elections in those states operate leads to out-of-towners seeking access as observers. Being told “no” fuels mistrust. Yet, as explored below in Part III, there are important and court-sanctioned reasons why residency requirements improve election observation that explain why many states impose them.<sup>124</sup>

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highlighted the damaging effect of a lack of observer understanding of election processes: “[i]t was apparent from the behavior and questions . . . that a number of observers had not been trained by their campaign, many had not read the manual, and many did not have any understanding of the processes at the Election Center”).

122. See Green, *supra* note 113. A similar pattern played out in the September 2021 recall election in California. See Paige St. John, *Election Watchers Snap Photos of Workers, Challenge Voter Signatures as Recall Nears*, L.A. TIMES (Sept. 10, 2021, 12:38 PM), <https://www.latimes.com/california/story/2021-09-10/election-chiefs-wary-of-california-recall-vote-fraud-claims> [<https://perma.cc/XF87-882R>] (describing the efforts of volunteers with the Election Integrity Project in California’s recall and noting “election workers arrive to pick up ballots from a county drop box outside of Leisure World and, no matter what time of day they make their rounds, [they] are invariably met by a man who pops out to take their picture). “Other election workers report[ed] individuals photographing their license plates.” *Id.*

123. See, e.g., S.B. 656, 123d Leg., Reg. Sess. (Fla. 2021) (failing to advance but allowing watchers to serve outside of their counties of residence if they were registered Florida voters and members of the Florida Bar); H.B. 738, 101st Gen. Assemb., Reg. Sess. (Mo. 2021) (failing to pass but eliminating requirement that observer reside in the designated jurisdiction); S.B. 1535, 87th Leg., Reg. Sess. (Tex. 2021) (eliminating requirement that watchers be residents of the precincts where they will serve, requiring instead that watchers be registered voters of the territories served by a polling place or other site).

124. The 2020 election featured bipartisan challenges to poll watcher residency requirements, none of which were successful. See Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 371 (W.D. Pa. 2020) (holding that Pennsylvania’s poll watcher residency requirements were designed to encourage familiarity of poll watchers with the location they operate in); Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 390–91 (Pa. 2020) (finding that poll watcher residency requirements do not violate fundamental constitutional rights); Bolus v. Boockvar, No. 20-CV-01882, 2020 WL 6880960, at \*5 (M.D. Pa. Oct. 27, 2020) (holding that restricting poll watchers to their counties of residence is a rational basis for increasing familiarity between voters and poll watchers). Before the 2020 election, an Ohio court used a rational basis review to find that residency requirements were constitutional. See Republican Party of Pa. v. Cortes, 218 F. Supp. 3d 396, 409 (E.D. Pa. 2016) (“The legislature’s decision to allow county election officials to credential only poll watchers from their own county is rationally related to the state’s interest in maintaining its county-run election system.”). In some states, observers must be registered voters from the state but can reside anywhere within the state. See, e.g., ALA. CODE § 17-8-7 (2021); HAW. REV. STAT. § 11-77 (2021); 10 ILL. COMP. STAT. ANN. § 5/17-23 (West 2021); IOWA CODE § 49.104 (2021); LA. STAT. ANN. § 18:427 (2021); VA. CODE ANN. § 24.2-604.4 (2021). Other states are more restrictive, requiring poll watchers to be registered voters in the jurisdiction in which they will observe. See FLA. STAT. § 101.131 (2021) (“Each poll watcher shall be a qualified and registered elector of the county in which he or she serves.”); N.M. STAT. ANN. § 1-2-22 (2021) (“[W]atchers shall be voters of a precinct located in that county to which they are appointed.”); N.Y. ELEC. LAW § 8-500 (McKinney 2021) (“Each watcher must be a qualified voter of the city or county in which he is to serve.”); N.C. GEN. STAT. § 163-45 (2021) (“Persons appointed as observers . . . must be registered voters of the county for which appointed and must have

As states consider election observation reform in this highly fraught political environment, they must tread carefully. The next part offers a set of recommendations with this aim.

### III. ELECTION OBSERVATION: A PATH FORWARD

Given current anxieties many Americans feel about how elections are administered and whether they produce accurate results,<sup>125</sup> one solution is to increase civic engagement in the election process: the more people who are actively involved in elections, the more the public will learn about the many procedural safeguards and protections in place to ensure the count is correct.<sup>126</sup> Election observation practices should tap this energy but should also recognize the potential for election observation to do harm. Bearing this balance in mind, this section suggests five basic principles to guide reform.

#### A. Address the Mismatch Problem

For those that have not yet done so, states should update their observer statutes to account for how voting takes place. Where applicable, states' rules should provide meaningful access to observation at early voting sites and ensure that observer statutes account for voting centers and other consolidated election processes during voting and ballot tabulation. Much will depend on how state election administration is structured. Legislators should examine their state's election processes from end to end and evaluate how to meaningfully incorporate observation at each phase. In addition, states should plan election observation contingencies should disruptions—like pandemic or weather-related disturbances—arise.<sup>127</sup>

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good moral character.”); 25 PA. CONS. STAT. § 2687 (2021) (“Each watcher . . . must be a qualified registered elector of the county in which the election district for which the watcher was appointed is located.”); S.C. CODE ANN. § 7-13-860 (2021) (“Each watcher appointed hereunder must be a qualified voter in the county where he is to watch . . . .”); WYO. STAT. ANN. § 22-15-109 (2021) (“A poll watcher shall belong to the political party he represents and shall be a registered elector residing in the county.”).

125. Americans feel anxiety about these issues despite the widespread assessment that the 2020 election was among the most secure in modern history. *See, e.g.*, Press Release, Cybersecurity and Infrastructure Security Agency, Joint Statement from Elections Infrastructure Government Coordinating Council & the Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election> [<https://perma.cc/C6NE-23ZU>].

126. In its report on voter confidence in election outcomes, Massachusetts Institute of Technology researchers arrived at the depressing conclusion that the single greatest factor in determining whether voters have confidence in outcomes is whether their party or candidate won. *See Voter Confidence*, MIT ELECTION DATA + SCIENCE LAB (Apr. 2, 2021), <https://electionlab.mit.edu/research/voter-confidence> [<https://perma.cc/G2ZR-RQTV>]. But, aside from this finding, the researchers cite studies finding that direct experience with the voting process bolsters confidence in the outcome. *Id.* They cite research suggesting that “voters tend to be more confident when they don’t wait a long time to vote, when they encounter polling place officials who seem competent, and when they vote in person rather than by mail.” *Id.*

127. *See* Erin Duffen, *Share of Absentee Ballots Requested in Select States for the 2020 Presidential Election in the United States, as a Share of 2016 Absentee Ballots*, STATISTA

As states review where mismatches occur, the wisest states will include state and local election administrators as much as possible in crafting observer reform. As the front line in election administration, election officials are in the best position to understand what observers clamor to see, what is most likely to impinge on an orderly process, and the best ways to make observation rules effective in practice. Involving election officials in crafting rules for observers might also lessen election administrator hostility toward observers who may view observers as interlopers rather than a crucial component of well-run elections. Whether it is involvement in the legislative process or authority in developing and implementing rules and policies, the experiences and knowledge of election administrators at the state and local levels should be at the forefront of reform.

### B. Adopt “Contextualized Transparency” Mechanisms

Throwing the floodgates open to government processes and data can be dangerous despite the best intentions. Professor Lawrence Lessig identified this problem in 2009 in an article called *Against Transparency*.<sup>128</sup> In it, he tells the story of surveillance cameras recording a blonde woman walking into an older man’s hotel room and the two leaving the room several hours later, leading viewers to jump to conclusions.<sup>129</sup> The key piece of contextualized information: the woman is the man’s daughter.<sup>130</sup>

In the election context, as discussed above, transparency mechanisms can similarly backfire.<sup>131</sup> Contextualized transparency—that is, ensuring that those who observe elections are provided context and trained to understand what they are seeing—is one way to combat transparency harms. As one authority on election administration and verification recently put it:

Transparency must illustrate the complexity of running elections and educate observers. It cannot be merely theater or spectacle, especially when there are dangerous incentives for bad actors to engage in “transparency theater” or “election integrity theater.”<sup>132</sup>

Contextualized transparency also involves election officials affirmatively pushing out election information to the public. This should include everything from explainers on ballot casting and vote tabulation processes—

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(Nov. 20, 2020), <https://www.statista.com/statistics/1184283/presidential-election-absentee-ballots-requested-share-2016-ballots-us/> [<https://perma.cc/DC2X-E2C8>]; see also CAO ET AL., *supra* note 34, at 3 (analyzing the 2020 primary, finding that “[v]oting at polling places decreased by 50% in 2020 from 2016. Mail and absentee voting combined increased from 2% in 2016 to 50% in 2020”).

128. Lawrence Lessig, *Against Transparency*, NEW REPUBLIC (Oct. 9, 2009), <http://www.newrepublic.com/article/books-and-arts/against-transparency> [<http://perma.cc/GW8B-W59X>].

129. *Id.*

130. *Id.*

131. See *supra* Part I.B.

132. Edward Perez, Glob. Dir. of Tech. Dev. & Open Standards for the OSET Inst., Carter Center Roundtable on How International Standards Can Support U.S. Elections (May 26, 2021) (notes on file with author).

including details about the safeguards in place—to information about absentee ballots (e.g., how many are sent to voters, how many are returned, etc.) and to releasing voting machine data (e.g., serial numbers of voting machines, tallies at the beginning and end of the day). Indeed, many states already require election officials to disclose such information.<sup>133</sup> The more data and plain-English explanations state officials can provide about election administration, the better the public will (at least in theory) comprehend how secure and reliable elections are.<sup>134</sup>

### C. Strengthen Structured Transparency Mechanisms

Looking to history, our present circumstance is not the first time U.S. elections have confronted a crisis in confidence. As historians like Richard McCormick describe, U.S. elections in the nineteenth century reached an unsustainable level of debauchery.<sup>135</sup> At the time, states turned to a storied reform measure to restore order to the process: the secret ballot. But, the secret ballot was only one of many paradigm-shifting reforms legislatures pursued at the time. State-printed ballots, moving polling locations to public buildings, and strict chain-of-custody statutes are a few examples of the ways in which reforms sought to professionalize and institutionalize election administration.<sup>136</sup> As I explain in an earlier article on election transparency:

Although states wrested control of most voting processes from political parties, reformers understood that transparency could not be eliminated. Political parties would be unwilling to cede power without mechanisms to confirm the other party had not committed fraud or otherwise stolen the vote. Those unhappy with election outcomes would allege fraud, corruption, or official collusion in throwing the election if elections were conducted entirely out of view. State legislatures therefore passed statutes giving explicit roles to party representatives in election processes.<sup>137</sup>

This form of “structured transparency,” in which the state creates structured mechanisms for citizen election observation, is a central component of modern-day election administration, as described above. States adopted and continue to maintain defined processes for appointing

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133. See *supra* note 62 (describing the Colorado Division of Election’s practices relating to releasing data and public information about elections); see also ARK. CODE ANN. § 7-5-416(a)(4) (2021) (requiring reporting of daily counts of absentee ballots); MD. CODE ANN. ELEC. LAW § 11-302(e) (West 2021) (“At the end of each day of canvassing, a local board shall prepare and release a report of the unofficial results of the absentee ballot vote tabulation.”); LA. STAT. ANN. § 18:1313.F (2021) (requiring election boards to release absentee and early votes after the polls close in a given parish).

134. See *supra* note 62.

135. See RICHARD P. MCCORMICK, *THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664–1911*, at 151–52 (1953). (“Scenes of drunkenness at the polls had become traditional. Indeed, in a great many places voting still took place in a ‘hotel,’ which made resort to spirituous refreshment both convenient and tempting.”).

136. Green, *supra* note 24, at 788–90.

137. *Id.* at 788.

observers and detailed rules for how observers engage during the election process.<sup>138</sup>

As U.S. election processes experience extreme duress today—this time due to an information environment that enables bad actors to actively undermine public faith in outcomes<sup>139</sup>—some proposed solutions could strengthen and update structured transparency efforts. For example, the Council of State Governments (CSG) recommends that when election officials enable remote observation streamed online, those who wish to watch should be required to provide their name, address, and other information, and they should accept conditions and guidelines for remote observation.<sup>140</sup> CSG points to one such process used in Orange County, California.<sup>141</sup> This is a form of structured transparency configured for the digital age.

A more basic structured transparency regime would: (1) permit only candidate- or party-appointed poll watchers; (2) limit the number of poll watchers; (3) follow the lead of the many states with state residency requirements for observers; (4) require observers to wear ID badges; (5) provide structured mechanisms for reporting and resolving observed irregularities; and (6) prohibit observers from engaging in disruptive behavior and empower election officials to ensure that observers follow the law.<sup>142</sup> South Carolina is an example of a state with highly structured observation rules. South Carolina's statute allows candidates to appoint watchers at polling places. The statute, however, also requires all candidates certified by a single political party to be jointly represented at each polling place by no more than two watchers from the party for each 1000 registered voters at that polling place.<sup>143</sup> Further, watchers must be qualified voters in the county in which they are appointed to observe.<sup>144</sup> Under its credentialing process, observers must present polling place election officials with a letter signed by the candidate or by an appropriate party official stating that they are certified to act as a watcher in that precinct, and they also must wear a badge specifying the name of the candidate or party they represent.<sup>145</sup> South Carolina's statute prohibits conversations between watchers and voters in the

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138. *Id.*

139. Greg Sargent, Opinion, *An Anti-Trump Republican's Agonizing Travails Point to Real Trouble Ahead*, WASH. POST (May 26, 2021, 10:44 AM), <https://www.washingtonpost.com/opinions/2021/05/26/brad-raffensperger-ga-recount-nyt/> [https://perma.cc/8AC6-3SZP] (noting that the trouble with transparency in post-2020 elections is that the “point of such efforts [like the Arizona audit] . . . is to manufacture ways to cast doubt on electoral outcomes in *conscious and deliberate defiance of what full transparency and the facts reveal*”).

140. Neal Kelley, *Remote Observer Application*, ORANGE CNTY. REGISTRAR OF VOTERS, <https://ocvote.com/form/observer-request#no-back> [https://perma.cc/53ZJ-72NH] (last visited Sept. 17, 2021).

141. *Id.*

142. *See supra* note 124.

143. S.C. CODE ANN. § 7-13-860 (2021).

144. *Id.* (“Each candidate . . . may appoint a watcher for any voting place where his name appears on the ballot . . . . [C]andidates who are certified by a political party must be jointly represented at each polling place by not more than two watchers from the party for each one thousand registered voters.”).

145. *Id.*

polling place, and watchers may not interfere with the orderly conduct of the election or influence voters in the casting of their ballots.<sup>146</sup>

A tradeoff for rigorous appointment, residency, credentialing, and badge requirements is that these mechanisms create barriers to entry for would-be observers. In the past, trouble rallying enough volunteers to serve in the role of observer, especially during noncontroversial election cycles, may have prompted states to ease onerous requirements. Adding structured transparency requirements back in may make recruiting sufficient numbers of observers more difficult. Clear, uniform and not unnecessarily burdensome rules will help counter this concern—as will easily accessible training opportunities.<sup>147</sup>

Regardless, the highly charged partisan environment today cautions against lax rules regarding who can observe and suggests that states should double down on structured transparency regimes.<sup>148</sup>

#### *D. Use Transparency Technologies Thoughtfully*

Some surprisingly low-tech solutions have emerged to assist observers in absorbing and understanding what they are watching. For example, some jurisdictions found that requiring election workers to wear color-coded vests helped those watching understand each worker's role, and in some cases (when workers wore red or blue vests signifying their partisan affiliation), recognize that both Democratic and Republican election workers were present.<sup>149</sup> Another low-tech solution is adding signage (either physically on

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146. *Id.*

147. Another problem with more stringent residency requirements is the increased difficulty for partisans to recruit observers in locations where they have fewer supporters—precisely the places where partisan distrust might be highest. This concern can be somewhat assuaged by limiting residency requirements to in-state as opposed to in-county or in-precinct.

148. Relatedly, some states have rules explicitly enabling members of the media to observe at elections. *See, e.g.*, CONN. GEN. STAT. § 9-236(c) (2021) (describing how members of the news media may enter and leave the polling place at any time throughout the day to observe the election); DEL. CODE ANN. tit. 15, § 4933(c) (2021) (“[M]edia and persons conducting exit polls shall be permitted within the 50-foot exclusion zone, but may not talk to persons who have not voted while in the 50-foot exclusion zone.”); MINN. STAT. § 204C.06 (2021) (“A news media representative may enter a polling place during voting hours only to observe the voting process. A media representative must present photo identification to the head election judge upon arrival at the polling place, along with either a recognized media credential or written statement from a local election official attesting to the media representative’s credentials.”); OKLA. STAT. tit. 26, § 7-112 (2021) (specifying that members of the media may be permitted inside the polling place for a period not exceeding five minutes); VA. CODE ANN. § 24.2-604.5 (2021) (specifying that members of the media may visit and film or photograph inside the polling place for a reasonable and limited amount of time); *see also* IND. CODE § 3-6-10-1 (2021); IOWA CODE § 49.104 (2021); MD. CODE REGS. 33.07.04.02 (2021); Sarah Matthews et al., *Election Legal Guide*, REPS. COMM. FOR THE FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/election-legal-guide/> [<https://perma.cc/YDT5-3TML>] (last visited Sept. 17, 2021) (providing state-by-state rules that apply to media coverage of election processes).

149. Phone Conversation with Jennifer Morrell, Co-founder, The Elections Grp. (Feb. 19, 2021) (notes on file with author).

location or as banners in the livestream) explaining the processes for in-person observers and/or livestreams.<sup>150</sup>

Aside from low-tech solutions such as these, an important piece of contextualizing transparency in elections is ensuring thoughtful deployment of transparency technologies. For example, election officials might consider recording election processes from multiple angles. Such a recording need not be simultaneously broadcast but rather can be preserved on file as evidence if allegations of misconduct arise.<sup>151</sup> A variation of this idea would be to record everything and livestream it but allow only those who have completed a comprehensive training on what they are seeing to view the feed, enabling these knighted remote observers to both report problems in real time and transmit assurances to candidates, parties, and the public.<sup>152</sup>

Technology can also be used to help observers see better. Rather than relying on a system of observers peering over shoulders (which can get complicated when many observers are present), screens can be mounted above election workers, magnifying their computer screens or workstations to help observers standing farther away see what is taking place.<sup>153</sup> Coupled with rigorous training to help observers understand the processes election officials are engaged in, mounted screens that are strategically positioned can do a lot of work.

Unfortunately, we have seen that even the most considered technology-augmented transparency measures fall prey when bad actors proceed in bad faith. Even if the stream is narrated or features prominent signage explaining processes underway, bad-faith actors can (and likely will) manipulate these efforts—if not the footage itself—to serve their desired ends.<sup>154</sup> Election officials designing transparency technology mechanisms must take these realities into account.

#### *E. Pursue Uniformity*

Following the 2020 election, the Bipartisan Policy Center (BPC) issued a series of recommendations including that, “[n]o later than 60 days before an election, counties and states should produce and publicly display detailed observation procedures for the voting process, ballot reconciliation and canvass, recounts, and audits.”<sup>155</sup> The report’s authors, informed by a

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150. *Id.*

151. This idea draws on the same principles underpinning the impulse behind paper ballots and other means of verifying the voting process. *See* Appel & Stark, *supra* note 51, at 525.

152. Katyovi, *supra* note 7.

153. Conversation with Judd Choate, *supra* note 27 (describing screens mounted above election officials’ workstations to enable and facilitate election observation in Denver).

154. *See* Robert Chesney & Danielle K. Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1778–79 (2019) (describing concerns related to deep fake technology and the manipulation of elections).

155. Rachel Orey & Matthew Weil, *Improving the Voting Experience After 2020*, BIPARTISAN POL’Y CTR. (Apr. 7, 2021), <https://bipartisanpolicy.org/report/voting-experience-2020/> [<https://perma.cc/AZ6P-UEXP>].

bipartisan task force of election officials,<sup>156</sup> recognized that clear observation rules, published well in advance of elections, go a long way in ensuring that observation mechanisms serve their desired purpose. The BPC Report further recommended that, even in states where local officials create and implement election observation plans, “states should produce best practices for observation procedures that local jurisdictions can follow or expand upon.”<sup>157</sup> This is a direct call for standardized election observation approaches statewide. Uniform observation rules in a state will help counter narratives that election officials have something to hide.

Because state elections—especially in presidential election years—do not operate in a bubble, Congress should consider implementing rules to standardize some aspects of election observation nationally.<sup>158</sup> For example, in the interest of preventing chaos and the spread of misinformation and disinformation, Congress should consider prohibiting the use of devices by people other than election officials to record or photograph voters or voting processes in and around polling places in federal elections.<sup>159</sup> Congress might also consider prohibiting states from criminalizing election official actions seeking to preserve orderly election observation and to prevent voter intimidation.

Following the BPC’s recommendation, Congress should also consider legislation that, while accommodating variance in election observation rules, requires states to provide adequate notice to the public regarding who can observe and what observers can and cannot do.<sup>160</sup> Congress might further require that states mandate election observer training so that observers can

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156. *Id.* The BPC recommendations stem from input by a task force BPC first convened in 2018 with the goal of putting “the voices of election officials first.” *Id.* The original task force included “21 state and local election officials from diverse states and political ideologies.” *Id.* After 2020, BPC expanded its “task force to include 28 state and local election officials from 20 states.” *Id.*

157. *Id.*

158. The Voting Rights Act provides a mechanism for federal observation of state elections. *See supra* note 19. What is proposed here would not change that process; it remains a critical tool to address discrimination in voting in the states. *See* The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.). The Voting Rights Act authorizes the U.S. Department of Justice to dispatch federal observers to observe polling and ballot counting locations. In the 1960s and 1970s, particularly, federal observers were an important part of documenting enduring discrimination and ensuring that laws intending to prevent discrimination took effect on the ground. *See* James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 230 (2007) (describing federal observers under the VRA as “non-lawyer employees of the United States Office of Personnel Management (OPM) authorized to observe ‘whether persons who are entitled to vote are being permitted to vote’ and ‘whether votes cast by persons entitled to vote are being properly tabulated’”); *see also* Cody Gray, Note, *Savior Through Severance: A Litigation-Based Response to Shelby County v. Holder*, 50 HARV. C.R.-C.L. L. REV. 49, 61–62 (2015) (arguing for expanded federal observation under the Voting Rights Act post-*Shelby County*).

159. Congress holds the power to regulate the administration of federal elections in the states. U.S. CONST. art 1., § 4, cl. 1.

160. The Freedom to Vote Act contains a provision constraining observer conduct. *See* S. 2747, 117th Cong. § 303A(b) (2021) (prohibiting observers from being within eight feet of a voter or ballot).



contextualize what they see and understand the rules in place. Federally mandated training would ensure that observers understand their rights and obligations and increase the likelihood that observers serve their function without impeding the process or disrupting or deterring eligible voters from casting lawful ballots.

#### CONCLUSION

There are no easy answers when it comes to restoring public trust in American elections. With so many variables and challenges swirling, doing anything to repair public confidence seems Herculean. Still, rethinking and reworking rules for election observation is a critical piece of the puzzle. States put election observation rules into place to engage the public in the election process, provide an important mechanism of oversight, and ultimately help ensure public buy-in of election outcomes. Post-2020, these goals are more important than ever to pursue. Reforming state observer rules should be prioritized to ensure they serve—and do not undermine—their critical purpose.