

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

SEAN PARNELL, *et al*,

Civil Action No. 2:20-1570

Plaintiffs,

vs.

ALLEGHENY COUNTY BOARD OF  
ELECTIONS, *et al*,

**Judge J. Nicholas Ranjan**

Defendants.

**RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER**

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Pursuant to this Court’s Order (ECF #12) Defendants (hereafter “Allegheny County Defendants”) file this response to Plaintiff Sean Parnell and Luke Negron’s (hereafter “Messrs. Parnell/Negron”) Motion for Temporary Restraining Order and supporting Brief<sup>1</sup>. (ECF # 2, #18.) Messrs. Parnell/Negron seek an order that, the “Allegheny County Board of Elections is hereby enjoined from denying poll watchers access to their [sic] satellite voting locations.” (ECF # 2-1.) As a matter of law, Messrs. Parnell/Negron have no entitlement to the relief they seek, and their Motion should be denied.

Preliminary injunctive relief is an “extraordinary remedy” and “should be granted only in limited circumstances.” [Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 708 \(3d Cir. 2004\)](#). “A temporary restraining order is a ‘stay put,’ equitable remedy that has its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation.” [J.O. v. Orange Twp. Bd. of Educ., 287 F.3d 267, 273 \(3d Cir. 2002\)](#) (citations omitted).

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<sup>1</sup> Given the nature of the Motion and the relief sought, the Motion would more accurately be called a motion for preliminary injunction. The standard for granting a temporary restraining order under [FED. R.CIV. P. 65\(b\)](#) is the same as that for issuing a preliminary injunction. [Bieros v. Nicola, 857 F.Supp. 445, 446 \(E.D.Pa.1994\)](#).

1 In a case such as this where the primary purpose of the motion for relief is not to maintain  
 2 the status quo, but in fact to obtain mandatory relief, the burden on the moving party is  
 3 “particularly heavy.” [Punnett v. Carter, 621 F.2d 578, 582 \(3d Cir. 1980\)](#). Messrs. Parnell/Negron’s  
 4 Motion does not seek to maintain the status quo. Instead, Messrs. Parnell/Negron seek relief  
 5 that would order the Allegheny County Defendants to undertake an affirmative act; permit poll  
 6 watchers at satellite offices. Moreover, that relief would grant Messrs. Parnell/Negron  
 7 substantially all of the relief they seek in Count II. As such, the Third Circuit holds Messrs.  
 8 Parnell/Negron to a heightened showing to obtain this relief. [Punnett, 621 F.2d, 578, 582](#).

9 Messrs. Parnell/Negron have done nothing in their Motion or supporting Brief to satisfy  
 10 the “particularly heavy” and heightened standard to which they are held. [Punnett, 621 F.2d 578,](#)  
 11 [582 \(3d Cir. 1980\)](#). Their Motion should be summarily denied.

## 12 ANALYSIS

### 13 A. Standing – Plaintiffs Do Not Have It

14 Article III of the Constitution, “limits the judicial power of the United States to the  
 15 resolution of ‘Cases’ and ‘Controversies.’” [Hein v. Freedom from Religion Foundation, Inc., 551 U.S.](#)  
 16 [587, 597–98 \(2007\)](#) quoting [DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 \(2006\)](#). “The existence  
 17 of a case and controversy is a prerequisite to all federal actions, including those for declaratory  
 18 or injunctive relief.” [Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454,](#)  
 19 [1462 \(3d Cir. 1994\)](#). One element of this “bedrock requirement” of a case or controversy is that  
 20 plaintiffs “must establish that they have standing to sue.” [Reilly v. Ceridian Corp., 664 F.3d 38, 41](#)  
 21 [\(3<sup>rd</sup> Cir. 2011\)](#) quoting [Raines v. Byrd, 521 U.S. 811, 818 \(1997\)](#).

## I. Standard for Standing

Article III standing requires that a plaintiff show:

1. he has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
2. the injury is fairly traceable to the challenged action of the defendant; and,
3. it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

[\*Friends of the Earth, Inc. v. Laidlaw Environmental Services \(TOC\), Inc.\*, 528 U.S. 167, 181 \(2000\)](#) citing [\*Lujan v. Defenders of Wildlife\*, 504 U.S. 555, 560 –561 \(1992\)](#).

At the pleading stage, the plaintiff has the burden of establishing standing. [\*Lujan\*, 504 U.S. at 561](#); [\*Storino v. Borough of Point Pleasant Beach\*, 322 F.3d 293, 296 \(3d Cir. 2003\)](#). Although “general factual allegations of injury resulting from the defendant’s conduct may suffice,” [\*Lujan\*, 504 U.S. at 561](#), the complaint must still “clearly and specifically set forth facts sufficient to satisfy” Article III. [\*Whitmore v. Arkansas\*, 495 U.S. 149, 155 \(1990\)](#).

## 2. 1<sup>st</sup> Prong – Injury in Fact

To satisfy the injury in fact element of Article III standing, a plaintiff’s injury “must be concrete in both a qualitative and temporal sense.” [\*Reilly v. Ceridian Corp.\*, 664 F.3d at 42](#) quoting [\*Whitmore v. Arkansas\*, 495 U.S. 149, 155 \(1990\)](#). Thus, “the complaint must allege an injury ... that is ‘distinct and palpable,’ as distinguished from merely ‘abstract’ and the alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Id.* Allegations of “possible future injury” are not sufficient to satisfy Article III. *Id.*, citing [\*Whitmore\*, 495 U.S. at 158](#), [\*Lujan\*, 504 U.S. at 564 n. 2](#) (stating that allegations of a future harm at some indefinite time cannot be an “actual or

imminent injury”). Instead, “[a] threatened injury must be ‘certainly impending,’” *Id.*, quoting [Whitmore, 495 U.S. at 158](#) (*cleaned up*), and “proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all,” *Id.*, quoting [Lujan, 504 U.S. at 564 n. 2](#); [Whitmore, 495 U.S. at 155](#) (explaining that the imminence requirement “ensures that courts do not entertain suits based on speculative or hypothetical harms”). Accordingly, a plaintiff “lacks standing if his ‘injury’ stems from an indefinite risk of future harms inflicted by unknown third parties.” *Id.*, quoting *Lujan*, 504 U.S. at 564.

Furthermore, Article III standing is not a “forum for generalized grievances.” [Lance v. Coffman, 549 U.S. 437, 439 \(2007\)](#). As the United States Supreme Court observed in *Lujan*,

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

[Lujan, 504 U.S. at 56-61](#).

Applying this well-established case law to the case at bar, the interest that Messrs. Parnell/Negron seek to vindicate in this case is not a personal interest. Count II does not state that a concrete and definite harm such as voter fraud<sup>2</sup> or illegal voting will personally befall them if poll watchers are not allowed at the satellite offices. Rather, Messrs. Parnell/Negron that they

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<sup>2</sup> The legal viability of the notion that poll watchers were necessary to prevent voter fraud is questionable in light of the Pennsylvania Supreme Court’s decision of [Pennsylvania Democratic Party v. Boockvar, No. 133 MM 2020, --- A.3d ---, 2020 WL 5554644 \(Sept. 17, 2020, Pa.\)](#). In that case, the Court rejected the claim that “poll watchers are vital to protect against voter fraud. *Id.* at \*30.

bring this action for the purpose of “ensuring that the integrity of this year’s election is upheld at the Satellite Offices in Allegheny County.” (ECF #1, *Complaint*, ¶ 11.) This averment fails to meet the requirement of alleging distinct and palpable harm needed for Article III standing. Instead, Messrs. Parnell/Negron’s averment is a mere statement that they wish to see that the law is followed. Longstanding case law does not recognize standing based upon the assertion of an interest common to all members of the public. [\*Tyler v. Judges of Registration\*, 179 U.S. 405, 406 \(1900\)](#) (“[E]ven in a proceeding which he prosecutes for the benefit of the public ... [the plaintiff] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens”).

### 3. 2<sup>nd</sup> Prong – Injury Must Be Traceable to Defendants

The allegations seeking a poll watcher’s certificate are so muddled and confusing that it is impossible to discern whose interest (other than the general public interest) is alleged to be at stake in this case. The Court is well aware that the ability to become and to select a poll watcher is controlled by state law. [\*Trump for President, Inc. v. Boockvar\*, 20-cv-966, --- F.Supp.3d ---, 2020 WL 5997680, \\* 7 \(Oct. 10, 2020, W.D.Pa.\)](#).

The Pennsylvania Election Code entitles each candidate for nomination or election at any election to appoint two watchers for each election district in which the candidate is voted for. [\*25 P.S. § 2687\(a\)\*](#). Additionally, the Election Code entitles each political party and each political body to appoint three watchers at any general, municipal or special election for each election district in which candidates of such party or political body are to be voted for. *Id.*

In this case, Messrs. Parnell/Negron aver that they, “desire to have poll watchers at the

1 Satellite Offices.” (ECF #1, *Complaint*, ¶ 61.) They aver that a Mr. Chew and a Mr. Hagerman  
 2 “attempted to obtain poll watchers certificates on October 14 and 15, 2020, but were refused.”  
 3 (*Id.*, at ¶ 62.) This refusal is purported evidenced by affidavits and correspondence attached as  
 4 Exhibit B to the Complaint. (ECF #1-2.)

5 The authorization for Mr. Chew and for Mr. Hagerman to obtain poll watching status,  
 6 however, is not to serve as poll watchers for Messrs. Parnell/Negron. The authorization is to  
 7 serve as poll watchers for the Republican Party of Pennsylvania. (*Id.*)

8 That the Election Code does not allow poll watching at satellite offices is confirmed by  
 9 two sources. The Secretary of the Commonwealth issued guidance to the county boards of  
 10 election that poll watchers are not permitted at satellite voting locations. [GUIDANCE](#)  
 11 [CONCERNING POLL WATCHERS AND AUTHORIZED REPRESENTATIVES \(October 6, 2020\)](#)<sup>3</sup>. Further,  
 12 the plaintiffs in the *Trump for President v. Boockvar, et al.*, 20-CV-996, admitted this in their  
 13 amended complaint. (*Trump for President v. Boockvar, et al.*, 20-CV-996, ECF #232. *Amended*  
 14 *Complaint*, ¶ 178.) “Pennsylvania law does not speak to the ability of poll watchers to be present  
 15 at the other locations that were used to collect mail-in and absentee ballots for the Primary  
 16 Election.” (*Id.* ¶ 181.) For these reasons Messrs. Parnell/Negron lack standing because the injury  
 17 purported is not fairly traceable to the challenged action of the County Defendants.<sup>4</sup>

18  
 19 <sup>3</sup><https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Poll%20Watcher%20Guidance%20Final%2010-6-2020.pdf>.

20 <sup>4</sup> Whether the denial of poll watching certificates is an injurious event is traceable to actions of  
 21 the County Defendants is legally problematic. The text of the Election Code limits poll watching  
 22 to polling places in election districts on election day. See, [25 P.S. §2687 \(b\)](#) (“Each watcher so  
 appointed shall be authorized to serve in the election district for which the watcher was  
 appointed”). Under the Election Code, a polling place is “the room provided in each election  
 district for voting at a primary or election.” [25 P.S. § 2602\(q\)](#). An “election district” is the area  
 “within which all qualified electors vote at one polling place.” [Id. § 2602\(g\)](#). And “voting at a  
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#### 4. 3<sup>rd</sup> Prong – Must Be Likely Injury Will Be Remedied by Action

To meet the redressability requirement, a plaintiff must establish that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” [\*New Jersey Peace Action v. Obama\*, 379 F. App'x 217, 221 \(3d Cir.2010\)](#) (citing [\*Lujan v. Defenders of Wildlife\*, 504 U.S. 555, 560,\(1992\)](#)). In this case, Messrs. Parnell/Negron have not suffered any injury that can be redressed because they did not seek to have Mr. Chew or Mr. Hagerman serve as poll watchers. As Mr. Chew and Mr. Hagerman note in their letters attached to the Complaint, they were authorized to serve as poll watchers for the Republican Party of Pennsylvania, an entity that is not a party. (ECF #1-3.) Thus, the remedy sought does not address a concrete and specific harm suffered by Messrs. Parnell/Negron. Therefore, Count II fails to satisfy the redressability prong needed to confer Article III standing. Moreover, it is mere speculation that Messrs. Parnell/Negron’s actual alleged injury would be redressed by the relief they seek.

#### 5. Plaintiffs Cannot Satisfy Injury Requirement Via 3<sup>rd</sup> Party Standing

Messrs. Parnell/Negron assert that they bring this action on behalf of themselves and “on behalf of all citizen electors of Allegheny County.” (ECF #1, *Complaint* ¶¶ 26, 27.) In addition to asserting an Equal Protection claim upon an impermissible assertion of an interest common to all members of the public, Messrs. Parnell/Negron seek to assert third party rights in violation of prudential limitations on the exercise of federal jurisdiction over third-party claims.

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primary or election” is in-person voting that takes place on a single day. See generally [25 P.S. art. IV](#) (setting forth the day for each election); see also [id. § 3046](#) (election court “on the day of each primary and election”); [id. § 3048\(a\)](#) (poll workers meet at their polling place before the “opening the polls on the day of each primary and election”).



1 It is a well-established tenet of standing that a “litigant must assert his or her own legal  
 2 rights and interests and cannot rest a claim to relief on the legal rights or interests of third  
 3 parties.” Powers v. Ohio, 499 U.S. 400, 410 (1991); see also, Valley Forge Christian Coll. v. Ams. United  
 4 for Separation of Church and State, Inc., 454 U.S. 464, 474–75; Wheeler v. Travelers Ins. Co., 22 F.3d  
 5 534, 538 (3d Cir. 1994). This principle is based on the assumption that “third parties themselves  
 6 usually will be the best proponents of their own rights,” Singleton v. Wulff, 428 U.S. 106, 114  
 7 (1976) (plurality opinion), which serves to foster judicial restraint and ensure the clear  
 8 presentation of issues. Sec’y of State v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984).

9 Nevertheless, the prudential limitation on third party standing is not an absolute bar.  
 10 Third-party standing is allowed under certain circumstances. In Pennsylvania Psychiatric Soc. v.  
 11 Green Spring Health Services, Inc., 280 F.3d 278 (3d Cir. 2002), the Third Circuit observed:

12 The Supreme Court has found that the principles animating these prudential  
 13 concerns are not subverted if the third party is hindered from asserting its own  
 14 rights and shares an identity of interests with the plaintiff. More specifically, third-  
 15 party standing requires the satisfaction of three preconditions: 1) the plaintiff must  
 16 suffer injury; 2) the plaintiff and the third party must have a “close relationship”;  
 17 and 3) the third party must face some obstacles that prevent it from pursuing its  
 18 own claims. It remains for courts to balance these factors to determine if third-  
 19 party standing is warranted.

20 Id. at 288-89 (cleaned up). In this case, the three-factor test for third-party standing set forth in  
 21 Pennsylvania Psychiatric is not satisfied.

22 As discussed above, Messrs. Parnell/Negron do not have standing to pursue an Equal  
 Protection claim. Second, there is no close relationship between the named Plaintiffs and the  
 third party. The case from the First Circuit case relied upon the Plaintiffs, Mancuso v. Taft, 476  
F.2d 187 (1<sup>st</sup> Cir. 1973) as supportive of their assertion of third-party standing is readily

1 distinguishable. In *Mancuso*, the plaintiff invoked third party rights because he was seeking to run  
2 for a public office and thus have an opportunity to present himself to the voters. Here, the  
3 Plaintiffs are well passed the threshold problem of candidacy for public office extant in *Mancuso*.  
4 Seeking to obtain poll watchers for satellite branch offices of the County Defendants enjoys no  
5 close relationship to the interest of ordinary citizens because the rights of ordinary citizen  
6 electors are not at stake or in any way vindicated by the failure to issue poll-watching certificates.  
7 Finally, there are no obstacles in the path of third parties pursuing a claim here. As stated earlier,  
8 the two individuals claiming denial of poll-watching certificates readily can seek relief.

9 In summary, Messrs. Parnell/Negron cannot overcome the initial threshold of having  
10 standing to pursue Count II. They have alleged no personal, concrete injury-in-fact to their  
11 personal legal interest. Rather, they seek to vindicate vague and generalized interests common  
12 to all members of the public. Messrs. Parnell/Negron attempt to assert generalized third-party  
13 rights violates the prudential limitation on third party standing. For these reasons, lack standing  
14 to bring their Motion for a temporary restraining order.

15  
16 **B. Laches – Plaintiffs’ Delay in Action Bars This Motion**

17 Before addressing the merits of Messrs. Parnell/Negron’s Motion, this Court should first  
18 address whether they unreasonably delayed in filing it. Messrs. Parnell/Negron’s failure to timely  
19 file their Motion should “weigh decidedly” against granting the extraordinary relief they seek.

20 [Republican Party of Pa. v. Cortes, 218 F.Supp. 396, 404 \(E.D.Pa. 2016\).](#)

21 In the present case, Messrs. Parnell/Negron waited 29 days after the Allegheny County  
22 Board of Elections passed the September 17, 2020 resolution providing for additional Elections

1 Division offices. (ECF #1-2.) These satellite offices have been in operation on October 10, 11,  
2 17, and 18. They are only in operation for two more days; October 24 and 25. (ECF #1-2.)

3 In *Republican Party*, the court was asked to decide a motion for preliminary injunction in a  
4 Pennsylvania elections case. Before addressing the four-prong test for a preliminary injunction,  
5 the court first found that the plaintiff Republican Party had forfeited the right to seek a preliminary  
6 injunction by waiting until 18 days before the election to bring its case. [\*Republican Party of Pa. v.\*](#)  
7 [\*Cortes\*, 218 F.Supp. 396, 405 \(E.D.Pa. 2016\)](#).

8 *Republican Party* applies here. Messrs. Parnell/Negron's 29-day delay, combined with two-  
9 thirds of the satellite office operations having already been completed, bars their Motion.

## 10 **C. Constitutional Rights**

### 11 **I. Plaintiffs Fail to Address Court's Order to Identify Rights Being Violated**

12 This Court specifically ordered Messrs. Parnell/Negron to file a, "brief and supporting  
13 evidence" that addresses "whose constitutional rights are being violated and how." (ECF # 12.)  
14 Nowhere in Messrs. Parnell/Negron's brief did they comply with this order. (See ECF # 18,  
15 *generally*.) Their failure to set forth their theory of liability and evidence in support is fatal to  
16 their request for relief. It is solely a plaintiff's burden to set forth a cause of action and present  
17 facts and legal theories sufficient to support it. Messrs. Parnell/Negron have done neither, despite  
18 the Court requiring they do so.

19 It is not up to a defendant in a case to attempt to articulate for plaintiff their cause of  
20 action, let alone present an argument in opposition to something that has not been set forth. For  
21 these reasons, Messrs. Parnell/Negron's claim for Count II relief fails.

## 2. Plaintiffs' Claims Do Not Implicate U.S. Constitution

Plaintiffs' claim that, "Defendants conduct with regard to poll watchers violates the Equal Protection Clause of the 14<sup>th</sup> Amendment of the United States Constitution." (ECF #1, Complaint ¶ 90.) However, the concept of "poll watcher" is a creation of state law. [25 P.S. § 2687](#). Various courts, including this one, have already opined that no one has a Constitutional right to serve as a poll watcher. [Donald J. Trump for President, Inc. et al v. Kathy Boockvar et al, 20-cv-00966, --- F.3d. ---, 2020 WL 5997680, \\* 7, \(Oct. 10, 2020, W.D.Pa.\)](#) (Finding that there is no constitutional right to serve as a poll watcher and that instead poll watching is a creature of state law.). See also [Pennsylvania Democratic Party v. Boockvar, No. 133 MM 2020, --- A.3d ---, 2020 WL 5554644, \\*30 \(Sept. 17, 2020, Pa.\)](#) (holding "there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by [state] statute."); [Republican Party of Pa. v. Cortes, 218 F.Supp. 396, 414 \(E.D.Pa. 2016\)](#) ("State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers and parties and candidates the authority to select those individuals."); [Turner v. Cooper, 583 F.Supp. 1160, 1161-62 \(N.D.Ill. 1983\)](#) (holding that the act of poll watching is not protected by the First Amendment); [Tiryak v. Jordan, 472 F.Supp. 822, 824 \(E.D.Pa. 1979\)](#) (suggesting that poll watchers are not constitutionally guaranteed components of the elections process but rather creatures of state election law); [Cotz v. Mastroeni, 476 F.Supp.2d 332, 364 \(S.D.NY 2007\)](#) (finding "this Court's independent search as discerned [no authority] for the proposition that an individual poll watcher possesses any actionable rights above and beyond those afforded any member of the general public that is present at a polling place.).

For this Court to have jurisdiction over Count II, there must be a federal question. There

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1 is no federal question because there is no viable U.S. Constitutional claim.

2  
3 **D. Rational Basis Scrutiny Would Apply to Any Constitutional Claim**

4 Although Messrs. Parnell/Negron aver that the right to vote is fundamental (ECF #1,  
5 *Complaint* ¶ 32), they do not assert that the Allegheny County Defendant's failure to allow poll  
6 watchers at satellite offices hinders or infringes upon anyone's right to vote. Like the county  
7 residency requirement for poll watching that was at issue in [\*Donald J. Trump for President, Inc. et\*](#)  
8 [\*al v. Kathy Boockvar et al\*, 20-cv-00966, --- F.3d. ---, 2020 WL 5997680, \\* 7, \(Oct. 10, 2020,](#)  
9 [\*W.D.Pa.\*](#)), the failure to allow poll watchers at satellite offices (or more accurately, limiting poll  
10 watching to poll places at election districts on Election Day) does not hinder the "exercise of the  
11 franchise." [\*Cortés\*, 218 F. Supp. 3d at 408](#). It does not limit voters' "range of choices in the voting  
12 booth"—voters can still "cast ballots for whomever they wish[.]" *Id.* As this Court noted in  
13 *Trump*, "As Plaintiffs admit, the county-residency requirement doesn't make the actual act of  
14 casting a vote any harder." [\*Donald J. Trump for President, Inc. et al v. Kathy Boockvar et al\*, 20-cv-](#)  
15 [\*00966, --- F.3d. ---, 2020 WL 5997680, \\* 67, \(Oct. 10, 2020, W.D.Pa.\)\*](#). The same observation  
16 can be made in this case.

17 In determining whether a state election law violates the U.S. Constitution, a court must  
18 "first examine whether the challenged law burdens rights protected by the First and Fourteenth  
19 Amendments." [\*Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections\*, 95 F.3d 253, 258](#)  
20 [\*\(3d Cir. 1996\)\*](#). "Where the right to vote is not burdened by a state's regulation on the election  
21 process, ... the state need only provide a rational basis for the statute." *Cortés*, 218 F. Supp. 3d  
22 at 408. The same is true under an equal protection analysis. "If a plaintiff alleges only that a state

1 treated him or her differently than similarly situated voters, without a corresponding burden on  
2 the fundamental right to vote, a straightforward rational basis standard of review should be used.”  
3 [Obama, 697 F.3d at 428 \(6th Cir. 2012\)](#); see also [Biener, 361 F.3d at 214-15](#) (applying rational basis  
4 scrutiny where there was no showing of an “infringement on the fundamental right to vote.”);  
5 [Donatelli, 2 F.3d at 515](#) (“A legislative classification that does not affect a suspect category or  
6 infringe on a fundamental constitutional right must be upheld against equal protection challenge  
7 if there is any reasonably conceivable state of facts that could provide a rational basis for the  
8 classification.” (cleaned up)).

9 Rational reasons justify allowing poll watchers at a polling place in an election district on  
10 election day and not allowing poll watchers at satellite offices. Watchers allowed in the polling  
11 place are permitted to keep a list of voters. Watchers may make good faith challenges to an  
12 elector’s identity, continued residence in the election district, or qualifications as an eligible voter.  
13 [25 P.S. § 2687\(b\)](#). Thus, the watcher at a polling place serves two purposes: to determine who  
14 or who not has voted so that his candidate or party can “get out the vote” and challenge the  
15 residence or qualification of a person presenting themselves in person to vote. [25 P.S. § 2687\(b\)](#).

16 But at satellite election offices, these reasons for having a poll watcher do not exist. No  
17 list of voters need be taken (Election Code has a provision on generating a list of who has voted  
18 absentee or by mail – [25 P.S. § 3146.8](#). More importantly, the need to confront a voter about  
19 eligibility to vote does not exist when a voter comes in person to submit a mail-in or absentee  
20 ballot. The County Board, through the Election Division, is connected to the SURE system and  
21 immediately can address any issue regarding the person’s qualifications as an eligible voter.  
22 Proper identification must be presented by the person wishing to vote over-the-counter. This

information is checked through the SURE system to determine the eligibility of the individual presenting him/herself to vote by mail. Thus, the in-person appearance and the presence of the County Board of Election personnel supplants whatever putative fraud prevention role that the poll watchers would play at a polling place. In re Canvass of Absentee Ballots of General Election, 39 Pa. D. & C.2d 429, 431–32, 1965 WL 6179, at \*2 (Pa. Com. Pl. Montgomery County 1965) (“[I]n the casting of an absentee ballot, the ordinary safeguards of a confrontation of the voter by the election officials and watchers for the respective parties and candidates at the polling place are absent.”) (quoting In re Canvass of Absentee Ballots of April 28, 1964, Primary Election, 34 Pa. D. & C.2d 419, 420, 1964 WL 8463, at \*2 (Pa. Com. Pl. Phila. County 1964)).

#### **E. Four-Part Preliminary Junction Test**

To obtain a preliminary injunction, a plaintiff must satisfy a four-part test:

1. A reasonable probability of success on the merits;
2. The probability of irreparable harm if the relief is not granted<sup>5</sup>;
3. That granting injunctive relief will not result in even greater harm to the other party; and,
4. That granting relief will be in the public interest.

In re PennEast Pipeline Co., LLC, 938 F.3d 96, 102 (3d Cir. 2019). See also Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 (3d Cir.1988); Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999) (setting forth the four part analysis preliminary injunction).

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<sup>5</sup> Winter v. Natural Resources Defense Council, Inc., 129 S.Ct. 365, 375-76, 172 L.Ed. 2d 249 (2008) (The Court held that the extraordinary nature of preliminary relief required a showing that irreparable harm was likely regardless of the strength of the plaintiff's case on the merits.).

1 Despite this Court's Ordering Messrs. Parnell/Negron to file a brief to support their  
2 Motion for Temporary Restraining Order, and despite the clear law that they satisfy the four-  
3 prong test outlined above, to a heightened standard, Messrs. Parnell/Negron have failed to brief  
4 these requirements. On this basis alone, their Motion should be denied.

5  
6 **I. Requirement I – Likelihood of Success on the Merits**

7 To establish a reasonable probability of success on the merits, the moving party must  
8 produce sufficient evidence to satisfy the essential elements of the underlying cause of  
9 action. [Punnett v. Carter, 621 F.2d 578, 582–83 \(3d Cir. 1980\)](#).

10  
11 **a. Plaintiffs Lack Standing and Cannot Prevail in this Case**

12 The Allegheny County Defendants have already set forth in Section A of this Response,  
13 [supra](#), that Messrs. Parnell/Negron lack standing to pursue Count II of their Complaint. That  
14 argument is incorporated here by reference. The lack of standing makes it impossible for Messrs.  
15 Parnell/Negron to prevail on the merits of Count II.

16  
17 **b. There is No Constitutional Right to Have Poll Watchers**

18 The Allegheny County Defendants have already set forth in Section C(2) [supra](#), that  
19 Messrs. Parnell/Negron do not have a Constitutional Right to have poll watchers. That argument  
20 is incorporated here by reference. Accordingly, Messrs. Parnell/Negron are unlikely to be  
21 successful on the merits of Count II.



**c. *The Equal Protection Clause is Not Violated by Not Having Poll Watchers***

The 14th Amendment's Equal-Protection Clause commands that, “no State shall ... deny to any person within its jurisdiction the equal protection of laws.” [U.S. Const. amend. XIV, § 1](#). Equal protection does not mean all forms of differential treatment are forbidden. [Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 \(1992\)](#) (“Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications.”). Instead, equal protection “simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” [Id.](#) The Equal Protection Clause, “is essentially a direction that all person similarly situated should be treated alike.” [City of Cleburne, Tex. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed. 2d 313 \(1985\)](#).

Messrs. Parnell/Negron have not set forth how they have been treated differently from other similarly situated people. This failure means they have not satisfied a required element in their case. Moreover, factually, Messrs. Parnell/Negron are not able to satisfy this requirement. The Allegheny County Defendants have not issued poll watcher certificates for any class of people for the satellite offices. Thus, all persons are being treated the same.

Messrs. Parnell/Negron argue in their Brief that there is “differential treatment between the Satellite Offices... and traditional voting precincts [Election Day poll locations]. (ECF # 18, pg. 15.) However, a physical building cannot suffer a constitutional violation. Nor can Messrs. Parnell/Negron pursue a constitutional claim in that regard. They have no viable Equal Protection claim.

**d. Law Clear There Are No Poll Watchers Except of Election Day**

Messrs. Parnell/Negron are unlikely to prevail on the merits of the argument that satellite offices are “polling places.” This issue has most recently been ruled upon by the Common Pleas Court of Philadelphia. *Donald J. Trump for President, Inc. v. Philadelphia County Board of Elections, et al.*, Control No. 20100256, Sept. Term, 2020 No. 02035 (Oct. 9, 2020, Ct. of Common Pleas, Phila. Co.) (A copy of the Opinion and Order is attached to this Response as Exhibit “A.”) In *Trump v. Philadelphia*, the court held that satellite offices are not polling places under Pennsylvania elections law, and therefore no one has a right to poll watchers at these locations. This well-reasoned decision supports that Messrs. Parnell/Negron are unlikely to prevail on the merits.

Additionally, this Court, less than two weeks ago, addressed a principle similar to the issue presently before this Court; whether the Election Code, “considered drop boxes and other ballot-collection sites as “polling places,” as defined in the Election Code. [\*Donald J. Trump for President, Inc. et al v. Kathy Boockvar et al\*, 20-cv-00966, --- F.3d. ---, 2020 WL 5997680, \\* 5, \(Oct. 10, 2020, W.D.Pa.\)](#). This Court has interpreted the Philadelphia state court decision as holding that, “satellite ballot-collection locations, such as drop-box locations, are not ‘polling places,’ and therefore poll watchers are not authorized to be present at these places.” [\*Id.\* \\*74](#). There is no intervening law or change of facts within in the past ten days from which this Court would alter that ruling.

In addition to the decisional law referred to here, Pennsylvania’s Election Code – as detailed below - establishes that Messrs. Parnell/Negron do not have a meritorious Count II claim.

## **I. Election Law Establishes what is a Polling Location**

Under the Election Code, a polling place is “the room provided in each election district for voting at a primary or election.” [25 P.S. § 2602\(q\)](#). An “election district” is the area “within which all qualified electors vote at one polling place.” [25 P.S. § 2602\(g\)](#). And “voting at a primary or election” is in-person voting that takes place on a single day. See generally [25 P.S. art. IV](#) (setting forth the day for each election); see also [25 P.S. § 3046](#) (election court “on the day of each primary and election”); [25 P.S. § 3048\(a\)](#) (poll workers meet at their polling place before the “opening the polls on the day of each primary and election”).

What can or cannot be done at a polling place is subject to detailed regulation under the Election Code. See generally [25 P.S. arts. IV-V](#). Polling places do not open until 7 a.m. on Election Day and must remain open until 8 p.m. [25 P.S. § 3045](#). They must be staffed by poll workers, independently elected constitutional officers who must arrive before the polls open ([25 P.S. § 3048\(a\)](#), [25 P.S. § 2671](#)), and are overseen by the district Judge of Elections. [25 P.S. § 3060\(f\)](#). Voting operations at a polling place also are specifically detailed in the Election Code. Poll books must be delivered before election day, [25 P.S. 3044](#); [25 Pa.C.S. § 1402\(d\)](#), and voters must sign into the poll book to vote at a polling place. [25 P.S. § 3050\(a.3\)\(2\)](#). District poll workers are empowered to determine if a voter is eligible. [25 P.S. § 3053](#). Moreover, voters cannot remove ballots from polling places ([25 P.S. § 3059](#)), and once they have voted, cannot return to a polling place. [25 P.S. § 3060\(a\)](#).

## **2. Election Law Establishes Use of Poll Watchers**

As part of the in-person voting process, the Election Code enables candidates and parties

to appoint poll watchers to be at polling places and gives them a role to play at polling places on election day. [25 P.S. § 2687\(b\)](#), [25 P.S. § 3050\(a\)](#). These poll watcher provisions in the Election Code are detailed: a candidate must request and receive a watcher certificate from the Board of Elections authorizing each watcher to serve for the election district to which they are appointed ([25 P.S. § 2687\(b\)](#)); candidates are limited to two poll watchers for each election district in which the candidate will be on the ballot ([25 P.S. § 2687\(a\)](#)); and poll watchers must be residents of the county. [25 P.S. § 2687\(b\)](#). As a result, watcher certificate requests must identify the electoral district for which that watcher is assigned. *Id.* Lastly, the Election Code specifies how many poll watchers can be present at a time ([25 P.S. § 2687\(b\)](#)) and gives the local judge of elections authority to manage the presence of poll watchers at a district polling place. [25 P.S. § 3060\(f\)](#).

The Election Code also limits what a poll watcher can do at a polling place. Watchers allowed in the polling place are permitted to keep a list of voters. Watchers also may make good faith challenges to an elector's identity, continued residence in the election district, or qualifications as an eligible voter. These challenges are made to and decided by the district's judge of elections. [25 P.S. § 2687\(b\)](#); [25 P.S. § 3053](#).

### **3. Election Law Establishes Absentee/Mail-in Balloting**

The processes and procedures for voting by absentee or mail-in ballot are quite different from those for in-person voting. See generally, Election Code, [25 P.S. arts. XIII, XIII-D](#). Registered voters can apply for an absentee or mail-in ballot by mail, online, or in person at any board office, including satellite offices ([25 P.S. § 3146.2\(k\)](#), [25 P.S. § 3146.5\(b\)\(2\)](#), [25 P.S. § 3150.12\(g\)\(2\)](#)), but must provide proof of identification. [25 P.S. § 3146.2\(e.2\)](#); [25 P.S. § 3150.12\(a\)\(2\)](#). The county

board of elections must begin reviewing applications fifty days before the election and promptly deliver a ballot – by mail or in person – to all qualified voters. [25 P.S. § 3146.5\(a\)-\(b\)\(2\)](#); [25 P.S. § 3150.15\(a\)](#). The Election Code further provides candidates and parties with information for get out the vote and election integrity activities by making applications public records and requiring the Board to post a list of all voters sent ballots before Election Day. [25 P.S. § 3146.9](#); [25 P.S. § 3150.17](#); [25 P.S. § 3146.2c](#). The Election Code also details a process for challenges by the Friday before Election Day. [25 P.S. § 3146.2b](#); [25 P.S. § 3150.12b\(a\)\(2\)-\(3\)](#); [25 P.S. § 3146.8\(g\)\(5\)](#).

When voters apply for and receive an absentee or mail-in ballot, they can fill it out anywhere they want and can return it by mail or in person at a county board office (including satellite offices) or drop box. They cannot give it to poll workers at a polling place on Election Day. [25 P.S. § 3146.6\(a\)](#); [25 P.S. § 3150.16\(a\)](#). Also, they cannot vote at a machine at polling place on election day unless they surrender their absentee or mail-in ballot and envelope to be spoiled. [25 P.S. § 3146.6\(b\)\(1\)](#); [25 P.S. § 3150.16\(b\)\(1\)](#). The counting of mail-in and absentee ballots does not begin until Election Day. [25 P.S. § 3146.8\(g\)\(1.1\)](#). Just as with ballot applications, campaigns may request lists of all voters whose ballots have been received. [25 P.S. § 3146.9](#); [25 P.S. § 3150.17](#).

#### **4. Election Law Establishes Satellite Offices**

These mail-in ballot processes require that the county boards provide ballot request and ballot delivery services at their offices. The Election Code provides offices for voter registration and absentee and mail-in balloting services and permits county boards to have multiple satellite offices. [25 P.S. § 2645\(b\)](#). Thus, Allegheny County residents can apply for absentee and mail-in ballots at satellite offices. [25 P.S. § 3146.5\(b\)\(2\)](#). They can return the ballot to the Board by

personally delivering it to a satellite office. [\*Pa. Democratic Party v. Boockvar\*, 133 MM 2020, --- A.3d ---, 2020 WL 5554644, at \\*10 \(Sept. 17, 2020, Pa.\)](#). In fact, the Election Code requires the board to immediately process voter registration and absentee and mail-in ballot applications submitted in-person at any of its offices. All of which must be done before Election Day. [25 P.S. § 3146.5\(b\)](#) (in-person ballot processing); [25 P.S. § 3146.2a\(a\)](#) (absentee application deadline) [25 P.S. § 3150.12a\(a\)](#) (mail-in ballot application deadline); [25 Pa. § 3071\(b\)](#) and [\(e\)\(2\)](#) (in-person registration and deadline).

### **5. Election Law Establishes Watching of Mail-in Ballots at Pre-Canvass**

Where Section [25 P.S. § 2687](#) of the Election Code allows for poll watchers to perform very specific functions at a polling place in an election district, the General Assembly did not provide any statutory authority for poll watchers to be present for any voting conducted as part of the mail voting process. The only “watching” permitted in the Election Code for voting by mail is at the pre-canvass meeting of the Board on Election Day. At that pre-canvassing, one authorized representative of each candidate at the election and one representative from each political party is permitted to be present at the place where the absentee and mail-in ballots are pre-canvassed. [25 P.S. 3146.8 \(g\)\(1.1\)](#). However, no challenges to a voted mail-in or absentee ballot can be made at that time by any observer. [25 P.S. § 3146.2b\(c\)](#).

Given the decisional law on this point and the clarity of the Election Law on this issue, Messrs. Parnell/Negron are not likely to succeed on the merits of Count II.

## 2. Requirement II – Irreparable Harm

A preliminary injunction cannot be issued absent a showing of irreparable harm. The Supreme Court has made it clear that a possibility of irreparable harm is not sufficient – the irreparable harm must be shown to be likely in the absence of an injunction. [\*Winter v. Natural Resources Defense Council, Inc.\*, 129 S.Ct. 365, 375, 172 L.Ed. 2d 249 \(2008\)](#). It is a standard Messrs. Parnell/Negron cannot satisfy.

Messrs. Parnell/Negron do not even allege in their Motion, Complaint, or Brief what the irreparable harm would be. This alone warrants denial of the Motion. The most they say on irreparable harm is in their Proposed Order (ECF # 2-2) that Messrs. Parnell/Negron would face irreparable harm if a TRO is not issued,

as multiple individuals have already attempted to obtain poll watcher certificates on October 14 and 15, 2020, and were denied access to such certificates. This will leave the Satellite Offices in Allegheny County with no poll watchers to verify the security of the votes cast at these locations.

(ECF 2-2.) This does not aver specific, let alone irreparable, harm to Messrs. Parnell/Negron. In fact, there is no irreparable harm. Pennsylvania’s election law more than adequately protects Messrs. Parnell/Negron from suffering irreparable harm as it relates to watching the absentee and mail-in balloting process.

### I. Plaintiffs may have watchers present when absentee ballots and mail-in ballots are opened.

Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.

[25 P.S. § 3146.8\(b\)](#).

2. Plaintiffs may have representatives present at pre-canvassing of absentee and mail-in ballots.

The county board of elections shall meet no later than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. *One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed.*

[25 P.S. 3146.8.1.1](#) (*emphasis added*).

3. Plaintiffs may have representatives present at post-election canvassing of absentee and mail-in ballots not included in the pre-canvas meeting.

A county board of elections shall provide at least forty-eights hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website. *One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.*

[25 P.S. 3146.8.2](#) (*emphasis added*).

4. Plaintiffs may have representatives present when absentee and mail-in ballots are pre-canvassed or canvassed by the county board of elections. In their presence, the board shall:

1. Examine the declaration on the envelope and shall compare the information thereon with that contained in the appropriate absentee voter, mail-in voter, or other permitted voters' list;
2. Verify the proof of identification as required by the Elections Law;
3. Satisfy that the declaration is sufficient, and the information provided verifies the right to vote; and,
4. The county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

[25 P.S. 3146.8.3.](#)



1 5. Plaintiffs are permitted to challenge both absentee ballots (25 P.S. § 3146.2b) and mail-in  
2 ballots (25 P.S. § 3150.12b) based upon the qualifications of the elector.

3 6. Plaintiffs are permitted to ascertain if any person who appears at a polling place on Election  
4 Day previously received a mail-in ballot. This would give Messrs. Parnell/Negron grounds to  
5 challenge that person's right to vote at the polling place.

6 Not less than five days preceding the election, the chief clerk shall  
7 prepare a list for each election district showing the names and post  
8 offices addresses of all voting residents thereof to whom official  
9 absentee or mail-in ballots shall have been issued. Each such list  
10 shall be prepared in duplicate, shall be headed "Persons in (give  
11 identity of election district) to whom absentee or mail-in ballots  
12 have been issued for the election of (date of election)," and shall be  
13 signed by him not less than four days preceding the election. He  
14 shall post the original of each such list in a conspicuous place in the  
15 office of the county election board and see that it is kept so posted  
until the close of the polls on election day. He shall cause the  
duplicate of each such list to be delivered to the judge of election  
in the election district in the same manner and at the same time as  
are provided in this act for delivery of other election supplies, and  
it shall be the duty of such judge of election to post such duplicate  
list in a conspicuous place within the polling place of his district and  
see that it is kept so posted throughout the time that the polls are  
open. Upon written request, he shall furnish a copy of such list to  
any candidate or party county chairman.

16 [25 P.S. § 3146.2c.](#)

17 These six different protections in Pennsylvania's Elections Code more than adequately  
18 satisfy any function a "poll watcher" would serve at a satellite office and negate Messrs.  
19 Parnell/Negron claim of irreparable harm.

20 Additionally, Pennsylvania's Elections Code is very strict on who may be a poll watcher,  
21 how many there may be at a particular location, and what they are permitted to do. [25 P.S. §](#)  
22 [2687.](#) None of those restrictions apply to Messrs. Parnell/Negron and their representatives at

1 these satellite offices. These satellite offices are fully open to the public, unlike polling places.  
2 Messrs. Parnell/Negron can select any people they wish to be their eyes and ears at these  
3 locations, without having to get approval from the Board of Elections or establish where these  
4 people reside. Messrs. Parnell/Negron, and their representatives, are free to enter and remain  
5 at these locations at all times. They are free to observe what is going on. This, in addition to  
6 the other provisions of the Election Code set forth above, as well as the proposed “standstill”  
7 order the Allegheny County Defendants provided to the Court on October 22, 2020, fully  
8 satisfies Messrs. Parnell/Negron’s stated concern that they be able to “verify the security of the  
9 votes cast” and eliminates their claim of irreparable harm.

10 Any remaining argument of irreparable harm is defeated by the fact that Messrs.  
11 Parnell/Negron have available to them the remedy of intervening in the on-going state-court  
12 litigation where this issue is being litigated and that they acknowledge they are aware of (ECF #1,  
13 *Complaint*, ¶¶ 72-74). Or Messrs. Parnell/Negron could file their own state-court action. [\*Donald\*](#)  
14 [\*J. Trump for President, Inc. et al v. Kathy Boockvar et al, 20-cv-00966, --- F.3d. ---, 2020 WL 5997680,\*](#)  
15 [\*\\* 6, \(Oct. 10, 2020, W.D.Pa.\)\*](#) (In holding that *Pullman* abstention doctrine applied in elections  
16 case, this court found plaintiffs had multiple alternative avenues available to them to resolve their  
17 legal claims, including filing suit in state court and intervening in a pending state-court case that  
18 addressed the same issues).

19 Messrs. Parnell/Negron cannot meet their burden of showing irreparable harm. Their  
20 Motion should be denied.

### 3. Requirement III – Grant of Relief Will Not Do More Harm than Denying It

The relief Messrs. Parnell/Negron seek, requiring that poll watchers be permitted at satellite offices, would be more harmful than denying the relief sought. Under Pennsylvania’s Election Code, in order for poll watchers to be present, the satellite offices would have to be found to be polling locations. [25 P.S. § 2687\(b\)](#). If the satellite offices were polling locations, they would be required to be staffed with poll workers (judge of elections, and minority and majority inspectors). [25 P.S. § 2671](#). This would require staffing of positions that do not currently exist and will not exist until Election Day, November 3, 2020. [25 P.S. § 3048\(a\)](#).

Thus, the satellite offices (would-be “polling locations”) would have to be closed for failure to have the required poll workers. However, the Election Code requires that the Allegheny County Board of Elections maintain an office, and satellite offices as needed, open for electors to obtain and drop off absentee and mail-in ballots. [25 P.S. § 2645\(b\)](#); [25 P.S. § 3146.5\(b\)\(2\)](#). Thus, the Allegheny County Board of Elections is not permitted to close these offices.

This illustrates that there would be greater harm in granting the relief Messrs. Parnell/Negron seek than there would be in denying it. Moreover, the above analysis highlights the fallacy of Messrs. Parnell/Negron’s assertion that the Election Code provides them the right to have poll watchers at satellite offices. Such an interpretation falls apart when analyzed as part of Pennsylvania’s Election Code as a whole.

### 4. Requirement IV – Granting Relief is in the Public Interest

Finally, the relief Messrs. Parnell/Negron seek is not in the public’s interest. The modifications Pennsylvania made to its Election Code this past Spring and Allegheny County Board of Elections’ creation of satellite offices was done to make voting in Allegheny County

1 safer, more convenient, and more secure because of the on-going pandemic. (ECF #1-2,  
2 *Resolution of the Board of Elections of Allegheny County.*)

3 It is in the public's interest for these satellite offices to remain open and accessible for the  
4 last two remaining days they are scheduled to be open. Any interest the public might have in  
5 "watching" what happens at these locations is already being satisfied in these locations being fully  
6 open to the public. Any legitimate interest Messrs. Parnell/Negron might have in watching the  
7 collection of ballots is satisfied in the oversight opportunities already provided in the Election  
8 Code. See *Irreparable Harm* section *supra*.

9 The public's interest is not furthered by granting the relief Messrs. Parnell/Negron seek.

10 WHEREFORE, Messrs. Parnell/Negron's Motion for Temporary Restraining Order should  
11 be DENIED.

12 Respectfully submitted,

13 /s/ Andrew F. Szefi

14 Andrew F. Szefi  
County Solicitor  
Pa I.D. #83747

15 /s/ George Janocsko

16 George Janocsko  
Pa I.D. #26408

17 /s/ Virginia Spencer Scott

18 Virginia Spencer Scott  
Pa. I.D. #61647

19 /s/ Frances M. Liebenguth

20 Frances M. Liebenguth  
Pa. I.D. #314845

21  
22 ALLEGHENY COUNTY LAW DEPARTMENT

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**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION – CIVIL**


DONALD J. TRUMP FOR PRESIDENT, INC.,	:	SEPTEMBER TERM, 2020
	:	
	:	NO. 02035
Plaintiff,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 20100256
PHILADELPHIA COUNTY BOARD OF ELECTIONS; COMMISSIONER LISA M. DEELEY IN HER OFFICIAL CAPACITY; COMMISSIONER AL SCHMIDT IN HIS OFFICIAL CAPACITY; COMMISSIONER OMAR SABIR IN HIS OFFICIAL CAPACITY	:	
	:	
Defendants.	:	

**DOCKETED**  
OCT 08 2020  
N. ERICKSON  
DAY FOLLOWS

**ORDER**

**AND NOW**, this 9<sup>th</sup> day of October, 2020, upon consideration of plaintiff's emergency Election Petition, the response thereto, and all other matters of record, after hearing oral argument from counsel on October 6, 2020, and in accord with the Opinion issued simultaneously herewith, it is **ORDERED** that said Petition is **DENIED**.

**BY THE COURT:**

  
GLAZER, J.

Donald J. Trump For Pre-ORDOP



**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION – CIVIL**

DONALD J. TRUMP FOR PRESIDENT, INC.,	:	SEPTEMBER TERM, 2020
	:	
	:	NO. 02035
Plaintiff,	:	
	:	ELECTION MATTER
v.	:	
	:	Control No. 20100256
PHILADELPHIA COUNTY BOARD OF ELECTIONS; COMMISSIONER LISA M. DEELEY IN HER OFFICIAL CAPACITY; COMMISSIONER AL SCHMIDT IN HIS OFFICIAL CAPACITY; COMMISSIONER OMAR SABIR IN HIS OFFICIAL CAPACITY	:	
	:	
Defendants.	:	

**OPINION**

On October 3, 2020, plaintiff, Donald J. Trump for President, Inc. (hereinafter, the “Campaign”), filed an emergency Petition in this Election Matter requesting that the court order defendants, the Philadelphia County Board of Elections, Commissioner Lisa M. Deeley, Commissioner Al Schmidt, and Commissioner Omar Sabir (collectively, the “Board of Elections”) to “permit representatives of the Campaign to enter and remain in the satellite election offices to serve as a [sic] watchers pursuant to 25 Pa. Stat. Ann. §§ 2650 and 2687”<sup>1</sup> of the Election Code of the Commonwealth of Pennsylvania.<sup>2</sup>

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<sup>1</sup> Plaintiff’s Proposed Order, ¶ 3.

<sup>2</sup> 25 Pa. Stat. § 2600 *et seq.* “The laws relating to general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests [were first] codified, revised and consolidated” into the Election Code in 1937. *Id.* at § 2600.

The Election Code has since been amended regularly, including recently by “Act 77 of 2019 which, *inter alia*, created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on

The Board of Elections opened seven such satellite offices to great fanfare on September 29, 2020, and more may be opened at later dates prior to Election Day, which this year is November 3, 2020.<sup>3</sup> At these satellite offices, Board of Elections' employees register voters, receive voters' applications for mail-in ballots, provide mail-in ballots to voters, provide a private space for voters to fill in their mail-in ballots, and accept sealed mail-in ballots from voters, who may be residents of any ward or district in the County of Philadelphia, for later pre-canvassing and canvassing on Election Day.<sup>4</sup> The Campaign desires to appoint "watchers" to sit in these satellite offices to observe the employees and voters as they go about these activities in advance of Election Day.

"State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers and parties and candidates the authority to select those individuals. . . . Because the Pennsylvania Election Code, not the United States Constitution, grants parties the ability to

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Election Day." *Pennsylvania Democratic Party v. Boockvar*, 2020 WL 5554644, at \*1, \_\_ A3d \_\_ (Pa. Sept. 17, 2020) (referencing 25 Pa. Stat. §§ 3150.11-3150.17).

<sup>3</sup> See 25 Pa. Stat. § 2751 ("The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year. Electors of President and Vice-President of the United States, United States Senators, Representatives in Congress, the Governor, the Lieutenant Governor, the Secretary of Internal Affairs, the Auditor General, the State Treasurer and Senators and Representatives in the General Assembly shall be elected at the general election.")

<sup>4</sup> "The word 'pre-canvass' shall mean the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots." *Id.* at § 2602(q.1). "The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting." *Id.* at § 3146.8(g)(1.1).

"The word 'canvass' shall mean the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots." *Id.* at § 2602(a.1). "The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed." *Id.* at § 3146.8(g)(2).



appoint poll watchers, the state is free to regulate their use and its decision to do so does not implicate or impair any protected associational rights.”<sup>5</sup>

Under the Pennsylvania Election Code, candidates, political parties, and political bodies, such as the Campaign here, are entitled to appoint watchers for each election district in an election.<sup>6</sup> The Election Code imposes one requirement for each watcher appointed by the Campaign, namely that s/he “must be a qualified registered elector of the county in which the election district for which the watcher was appointed is located.”<sup>7</sup> If that requirement is met, then the county Board of Elections shall issue the watcher a certificate, “stating his name and the name of the candidate, party or political body he represents.”<sup>8</sup> “Watchers may be required to show their certificates when requested to do so.”<sup>9</sup>

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<sup>5</sup> Republican Party of Pennsylvania v. Cortes, 218 F. Supp. 3d 396, 414 (E.D. Pa. 2016).

<sup>6</sup> See 25 Pa. Stat. § 2687(a). Watchers earn no more than \$120.00 per day from a political body or other person, while “serv[ing] without expense to the county.” *Id.* at § 2687(a), (c).

<sup>7</sup> *Id.* at § 2687(b). “[Q]ualified elector” shall mean any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election.” *Id.* at § 2602.

The Election Code sometimes employs the term “elector” and sometimes uses the term “voter.” For simplicity’s sake, the court will use the term “voter” throughout this Opinion except where quoting directly from the Election Code.

<sup>8</sup> *Id.* at § 2687(b).

<sup>9</sup> *Id.* In this case, persons purporting to be watchers for the Campaign attempted to gain access to the Board of Elections’ satellite offices when the offices first opened for business on September 29, 2020, but they were rebuffed. See Plaintiff’s Petition, ¶¶ 33-35. However, the Campaign had not yet submitted an application to, nor received watchers’ certificates from, the Board of Elections. See Plaintiff’s Supplemental Memorandum of Law, Ex. H. Clearly, those individuals were not certified watchers at the time they attempted to gain access to the satellite offices.

For purposes of the remainder of this Opinion, the court will assume that the Campaign will be able to obtain certificates for at least some of the watchers for whom it submitted an application, *i.e.*, that some of them will meet the statutory requirement to be a watcher, and the Board of Elections will perform its ministerial duty to provide each qualified person with a watcher’s certificate in a timely fashion. See 25 Pa. Stat. §2642(e) (“The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties

The Election Code expressly grants such watchers the following substantive statutory rights:

1. To “be present in the polling place . . . from the time that the election officers meet prior to the opening of the polls under section 1208<sup>10</sup> until the time that the counting of votes is complete and the district register and voting check list is locked and sealed;”<sup>11</sup>
2. When “allowed in the polling place . . . [to] be permitted to keep a list of voters and [to] be entitled to challenge any person making application to vote and to require proof of his qualifications,”<sup>12</sup>

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imposed upon them by this act, which shall include the following: . . . To issue certificates of appointment to watchers at primaries and elections.”)

<sup>10</sup> 25 Pa. Stat. § 3048.

<sup>11</sup> *Id.* at § 2687(b). *See also id.* at § 3060(a) (“Until the polls are closed, no person shall be allowed in the polling place outside of the enclosed space at any primary or election, **except the watchers**, voters not exceeding ten at any one time who are awaiting their turn to vote, and peace officers, when necessary for the preservation of the peace.”) (emphasis supplied).

<sup>12</sup> *Id.* at § 2687(b). The Election Code provides with respect to mail-in ballots that: “Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. . . . He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.” *Id.* at § 3146.2c(c). This provision enables the Campaign or its poll watchers, as well as the Judge of Election and other officials, to ascertain if any person who appears at a polling place on Election Day previously received a mail-in ballot, which would give the watchers, and others, grounds to challenge that person’s right to vote at the polling place.

3. If certain conditions are met at the polling place, “to inspect the voting check list and either of the two numbered lists of voters maintained by the county board;”<sup>13</sup>
4. “[T]o represent [a] political body . . . at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines;”<sup>14</sup>
5. “[A]t any recount of ballots or recanvass of voting machines, . . . to examine the ballots, or the voting machine and to raise any objections regarding the same, which shall be decided by the county board, subject to appeal;”<sup>15</sup>
6. To “be permitted 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>16</sup>

The very detailed Election Code contains no provision that expressly grants the Campaign and its representatives a right to serve as watchers at “satellite offices” of the Board of Elections, so the Campaign must shoehorn its argument into one of the six above enumerated rights of watchers.<sup>17</sup>

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<sup>13</sup> 25 Pa. Stat. § 2687(b).

<sup>14</sup> *Id.* at § 2650(a).

<sup>15</sup> *Id.* at § 2650(c).

<sup>16</sup> *Id.* at § 3146.8(b).

<sup>17</sup> “Pennsylvania also does not permit poll watchers to monitor ‘pre-canvass meetings,’ although a ‘representative’ for each candidate and political party is permitted to attend” such pre-canvass meetings. Trump for President, Inc. v. Boockvar, No. 2:20-CV-966, 2020 WL 4920952, at \*4 (W.D. Pa. Aug. 23, 2020) (citing the Campaign’s Complaint in that action). *See* 25 Pa. Stat. § 3146.8(g)(1.1) (“One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.”)

The only activities occurring at the satellite offices are voter registration, application for mail-in ballots by individual voters, provision of mail-in ballots to individual voters, private completion of mail-in ballots by individual voters, and delivery by individual voters of their own mail-in ballots. No canvassing, re-canvassing, opening, counting, recounting, computation, or recording of ballots, votes, or voting machines is occurring at the satellite offices. Therefore, the rights bestowed upon watchers in Paragraphs 5 and 6 above, as well as the latter part of Paragraph 4, are not presently implicated here.<sup>18</sup> The only questions that the Campaign can and does reasonably raise here are whether the satellite offices qualify as “polling places” under Paragraphs 1, 2, and 3 above, or as “sessions of the county board of elections” under Paragraph 4 above.

In order to determine if satellite offices constitute “polling places” at which a watcher has a right to be present, one must scrutinize the Election Code’s rather obtuse language for clues. Under the Election Code’s definitions section, “[t]he words “polling place” shall mean the room provided in each election district for voting at a primary or election.”<sup>19</sup> In the City of Philadelphia, “each ward . . . shall constitute a separate election district, unless divided into two or more election districts or formed into one election district, as hereinafter provided.”<sup>20</sup> Since the Board of Elections’ satellite offices serve the entire County and not just one election district or ward, they do not appear to be polling places as contemplated by the Election Code.

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<sup>18</sup> If any of these acts do subsequently take place at the satellite offices, then watchers would be entitled to be present to the extent provided in the Election Code.

<sup>19</sup> 25 Pa. Stat. § 2602(q).

<sup>20</sup> *Id.* at § 2701.



Not only do the satellite offices fail to conform to the Election Code's geographic limits for polling places, satellite offices also fail to conform to the temporal limits for polling places, which encompass only a single Election Day: "At all primaries and elections the polls shall be opened at 7 A.M., Eastern Standard Time, and shall remain open continuously until 8 P.M., Eastern Standard Time, at which time they shall be closed."<sup>21</sup>

The portion of the Election Code that recognizes the right of watchers to be present in polling places similarly recognizes that polling places only exist on one Election Day. It gives watchers the right to watch

from the time that the election officers meet prior to the opening of the polls under section 1208 until the time that the counting of votes is complete and the district register and voting check list is locked and sealed. . . . After the close of the polls and while the ballots are being counted or voting machine canvassed, all the watchers shall be permitted to be in the polling place outside the enclosed space. . . . Watchers allowed in the polling place under the provisions of this act, shall be permitted to keep a list of voters and shall be entitled to challenge any person making application to vote and to require proof of his qualifications, as provided by this act. During those intervals when voters are not present in the polling place either voting or waiting to vote, the judge of elections shall permit watchers, upon request, to inspect the voting check list and either of the two numbered lists of voters maintained by the county board: Provided, That the watcher shall not mark upon or alter these official election records. The judge of elections shall supervise or delegate the inspection of any requested documents.<sup>22</sup>

The referenced section, "1208," likewise recognizes the ephemeral existence of polling places:

The judges, inspectors, clerks of election and machine inspectors, together with the overseers, if any, shall meet in the respective places appointed for holding the election in each election district at least thirty minutes before the hour for opening the polls **on the day of each primary and election**. They shall thereupon, in the presence of each other, take and subscribe in duplicate to the oaths required by this act. . . . If any judge of election shall not appear **at the polling place** by seven (7) o'clock A.M. **on the day of any primary or election**, the majority

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<sup>21</sup> 25 Pa. Stat. § 3045.

<sup>22</sup> *Id.* at § 2687(b). This section lists several things that watchers may do, but they may not do them until they are allowed into a polling place on Election Day.

inspector shall appoint a judge of election, who is qualified under the provisions of this act. . . .<sup>23</sup>

Further support for the finding that a satellite office is not a polling place can be found in the provisions of the recently enacted Act 77 relating to mail-in ballots. For instance, a polling place is expressly not a place where mail-in ballots can be delivered by voters for the purposes of voting:

[A] voter who applies for a mail-in ballot under section 1301-D<sup>24</sup> shall not be eligible to vote at a polling place on election day unless the elector brings the elector's mail-in ballot to the elector's polling place, remits the ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and signs a statement subject to the penalties under 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) to the same effect.<sup>25</sup>

Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.<sup>26</sup>

Given their scope, timing, and purpose, the satellite offices do not constitute polling places where watchers have a right to be present under the Election Code. The question then is whether they are “public sessions” of the Board of Elections at which watchers may be present as also provided in the Election Code:

Any party or political body or body of citizens which now is, or hereafter may be, entitled to have watchers at any registration,<sup>27</sup> primary or election, shall also be

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<sup>23</sup> 25 Pa. Stat. § 3048(a), (b) (emphasis supplied).

<sup>24</sup> *Id.* at § 3150.11.

<sup>25</sup> *Id.* at § 3150.12(f).

<sup>26</sup> *Id.* at § 3150.16(b)(1).

<sup>27</sup> Although the Election Code makes reference, rather misleadingly, to watchers at voter “registration,” the section of the Election Code conferring the right of watchers to be present at voter registration places was repealed in 1995. *See* 25 Pa. Stat. Ch. 4A (Voter Registration Act [Repealed]).

entitled to appoint watchers who are qualified electors of the county or attorneys to represent such party or political body or body of citizens at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under the provisions of this act. Such watchers or attorneys may exercise the same rights as watchers at registration and polling places, but the number who may be present at any one time may be limited by the county board to not more than three for each party, political body or body of citizens.<sup>28</sup>

The Election Code contemplates very limited “public sessions” of the Board of Elections at which watchers are entitled to appear to represent their appointing authority, in this case the Campaign. The only other references to such public sessions in the Election Code are as follows:

Each county board of elections may make regulations, not inconsistent with this act or the laws of this Commonwealth, to govern its **public sessions**, and may issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for **hearing any matters relating to the administration and conduct of primaries and elections in the county under the provisions of this act**. All subpoenas issued by the county board shall be in substantially the same form and shall have the same force and effect as subpoenas issued by the court of common pleas of such county, and, upon application, the board shall be entitled to the benefit of the process of such court if necessary to enforce any subpoena issued by them. Each member of the county board shall have the power to administer oaths and affirmations. Each person testifying before any county board shall be first duly sworn or affirmed.

Any person filing any petition with a county board or opposing the same shall have the privilege of having subpoenas issued by the board to compel the attendance of witnesses, upon condition that all witnesses so subpoenaed shall be paid witness fees, in the manner herein provided.

Witnesses subpoenaed by the county board shall each also be entitled to daily witness fees at the rate aforesaid, to be paid by the board: Provided, however, That election officers, clerks, machine inspectors, overseers and **watchers**, when subpoenaed by the county board to appear before the board, sitting for the

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The Campaign is not attempting to appoint watchers for registration places, since that is no longer permitted under the Election Code.

<sup>28</sup> 25 Pa. Stat. § 2650(a).

computation and canvassing of votes cast at an election, shall not be entitled to witness fees.<sup>29</sup>

The county board of elections shall arrange for the computation and canvassing of the returns of votes cast at each primary and election at its office or at some other convenient public place at the county seat with adequate accommodations for the watchers and attorneys authorized by this act to be present, who shall be permitted to keep or check their own computation of the votes cast in the several election districts as the returns from the same are read, as hereinafter directed. The county board shall give at least one week's previous notice by newspaper publication, as provided by section 106<sup>30</sup> of this act, of the time and place when and where the board will commence and hold its **sessions for the computation and canvassing of the returns**, and keep copies of such advertisement posted in its office during said period.<sup>31</sup>

“The Election Code makes the County Board of Election more than a mere ministerial body. It clothes [the Board of Elections] with quasi-judicial functions” in certain instances where it hears disputed election matters and computes and canvasses returns.<sup>32</sup> However, the Board of Elections’ employees’ functions at the satellite offices are not quasi-judicial; they are ministerial only. Since the Board of Elections is not holding hearings nor canvassing returns at the satellite offices, the Board of Elections is not holding public sessions at those offices.

Since the satellite offices are not “polling places,” nor do they constitute “public sessions” of the Board of Elections, the question is, what are they in the language of the Election Code? The answer lies in the activities that occur at such sites. At the satellite offices, Board of Elections’ employees engage in the following ministerial acts: they register voters; they process voters’ applications for mail-in ballots; they provide mail-in ballots to voters for the voters to

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<sup>29</sup> 25 Pa. Stat. § 2644(a)-(c) (emphasis supplied).

<sup>30</sup> *Id.* at § 2606.

<sup>31</sup> *Id.* at § 3153(a) (emphasis supplied).

<sup>32</sup> Appeal of McCracken, 370 Pa. 562, 565, 88 A.2d 787, 788 (1952).



complete in private; and they receive completed, sealed, mail-in ballots from voters. All of these are activities that the Election Code contemplates taking place in an “office” of the Election Board:

Applications may be submitted **to register to vote** or change party enrollment or name or address on a current registration record in person before the commission or a commissioner, a registrar or a clerk **at the office of the commission or at a place designated by the commission.**<sup>33</sup>

Notwithstanding any other provisions of this act and notwithstanding the inclusion of a mailing address on an absentee or **mail-in ballot application**, 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**. This request may be made orally or in writing. Upon presentation of the application and the making of the request and upon approval under sections 1302.2 and 1302.2-D,<sup>34</sup> the county board of elections shall promptly present the voter with the voter’s absentee or mail-in ballot. If a voter presents the **voter’s application within the county board of elections’ office** in accordance with this section, a county board of elections may not deny the voter’s request to have the **ballot presented to the voter while the voter is at the office** unless there is a bona fide objection to the absentee or mail-in ballot application.<sup>35</sup>

**Applications for mail-in ballots** shall be **received in the office of the county board of elections** not earlier than 50 days before the primary or election, except that if a county board of elections determines that it would be appropriate to the county board of elections’ operational needs, any applications for mail-in ballots received more than 50 days before the primary or election may be processed before that time. Applications for mail-in ballots shall be processed if received not later than five o’clock P.M. of the first Tuesday prior to the day of any primary or election.<sup>36</sup>

At any time after receiving an official **mail-in ballot**, but on or before eight o’clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and **securely seal** the same in the envelope on which is printed, stamped

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<sup>33</sup> 25 Pa. Cons. Stat. § 1322 (Voter Registration Act) (emphasis supplied).

<sup>34</sup> 25 Pa. Stat. § 3150.12(b).

<sup>35</sup> *Id.* at § 3146.5(2)(b) (emphasis supplied).

<sup>36</sup> *Id.* at § 3150.12a(a) (emphasis supplied).

or endorsed “Official Election Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be **securely sealed** and the elector shall send same by mail, postage prepaid, except where franked, or **deliver it in person to said county board of election.**<sup>37</sup>

The “**completed mail-in ballot** must be **received in the office of the county board of elections** no later than eight o’clock P.M. on the day of the primary or election.”<sup>38</sup>

It is clear from a reading of the above sections that the satellite offices where these activities, and only these activities, occur are true “offices of the Board of Elections” and are not polling places, nor public sessions of the Board of Elections, at which watchers have a right to be present under the Election Code.

The Legislators who drafted the recently enacted Act 77, and the even more recent 2020 Amendments to the Election Code, which together encompass most of the mail-in ballot provisions cited above, were clearly aware of the existence of watchers, and even made express provision for them with respect to mail-in ballots: “Watchers shall be permitted 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>39</sup> However, neither those Legislators, nor any preceding drafters of the Election Code’s provisions chose to give watchers the right to be present in the offices of the Board of Elections while the Board’s employees are performing ministerial activities with respect to mail-in ballots prior to Election Day.<sup>40</sup> For this court to read into the

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<sup>37</sup> 25 Pa. Stat. § 3150.16(a) (emphasis supplied).

<sup>38</sup> *Id.* at § 3150.16(c) (emphasis supplied).

<sup>39</sup> *Id.* at § 3146.8(b).

<sup>40</sup> In a related federal court action, the Campaign apparently admitted that “as it pertains to mail-in ballots, poll watchers are unable to monitor the drop off or mail in of ballots before Election Day.”

Election Code the right of watchers to be present in Board of Elections' offices, which the Legislature did not expressly provide, would be the worst sort of judicial activism. This court will not engage in such improper conduct, which would be a clear usurpation of the legislative function.<sup>41</sup>

The Campaign has been invited by the Board of Elections to tour the satellite offices, but has not yet accepted that invitation. The court suggests that the Campaign do so. Furthermore, individuals who are residents of, or qualified voters registered in, Philadelphia County, and who are also associated with the Campaign, may enter the satellite offices to register to vote, apply for their own mail-in ballot, receive it, fill it out in private, and/or drop it off. However, they may not linger in the satellite offices indefinitely<sup>42</sup> as "watchers" under the Election Code.

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Trump for President, Inc. v. Boockvar, 2020 WL 4920952, at \*4 (W.D. Pa. Aug. 23, 2020) (citing plaintiff's own Complaint in that action).


<sup>41</sup> As our Supreme Court has previously held in a case involving similarly important matters of public interest, "[d]eciding the case as presented involves no "cover-up;" rather, the decision reflects fidelity to the command of the oaths [judges] take to support and defend the Constitution, and to exercise judicial restraint. The [Campaign's] approach, in contrast, is the opposite of strict construction and the height of judicial activism." In re Interbranch Comm'n on Juvenile Justice, 605 Pa. 224, 245, 988 A.2d 1269, 1282 (2010). "The public and political debate, of course, may encompass all voices, responsible and irresponsible, learned and reckless, and citizens in that debate are entitled to voice their opinions giving scant or no attention to salutary restrictions existing in the law, where foundational commands and precedent must hold sway. Our task is different from that of the litigant, the politician, or the editorialist, and it is inevitably less understood and often less popular. Our sworn task is to apply the law; and in so doing we cannot ignore, rewrite or torture settled language and propositions, and then apply that construct retroactively without affording the parties an opportunity to be heard, in order to reach a perceived favored conclusion, no matter how extreme the circumstance that brings a dispute to our attention." *Id.*, 605 Pa. at 246, 988 A2d at 1283.

<sup>42</sup> 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.

### **CONCLUSION**

For all the foregoing reasons, the Campaign's Petition for a court order directing the Board of Elections to permit representatives of the Campaign to enter and remain in the satellite election offices as watchers under the Elections Code is denied.

**BY THE COURT:**

  
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**GLAZER, J.**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

SEAN PARNELL, *et al*,

Civil Action No. 2:20-1570

Plaintiffs,

v.

ALLEGHENY COUNTY BOARD OF  
ELECTIONS, *et al*,

**Judge J. Nicholas Ranjan**

Defendants.

**ORDER OF COURT**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2020, after consideration of Plaintiffs' MOTION FOR TEMPORARY RESTRAINING ORDER and any response thereto, said MOTION is DENIED. Plaintiffs' requested relief of requiring Allegheny County Board of Elections to allow for poll watchers at remote election offices is DENIED.

BY THE COURT,

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The Honorable J. Nicholas Ranjan