

# State and Federal Election Contests

Elections in this country are almost always hard-fought and often contentious. Disputes as to how the election was conducted, which ballots were counted (or not), or who won the most votes, sometimes continue well past Election Day. This has become a relatively normal part of our elections, and there are state and federal laws in place that address election-related fraud, misconduct, and other irregularities. In fact, most states have designed special legal proceedings specifically to adjudicate post-election disputes of this nature and implement remedies when necessary.

This paper provides a basic overview of those proceedings in key states, as well as relevant federal law, with a focus on the legal proceedings that can follow presidential elections.<sup>1</sup>

---

## Constitutional Structure

When Americans cast their votes for president, they do not do so directly. They instead vote for electors who, in turn, choose the president. This process is governed by the U.S. Constitution, as well as federal and state laws.

The Constitution delegates to Congress the power to “determine the Time of chusing the Electors.”<sup>2</sup> Congress, in turn, has required that all states appoint their electors on the “Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President”—which falls on November 5th this year.<sup>3</sup> But the Constitution also provides that each state “shall appoint” its slate of electors for president “in such Manner as the Legislature thereof may direct.”<sup>4</sup> Thus, the legislatures in each state enact laws to determine how their state will select its electors. All states have chosen to conduct elections, and most appoint their electors to the winner of the statewide popular vote.<sup>5</sup>

---

<sup>1</sup> This paper refers to state-law processes contesting an electoral outcome as “contests.” It refers to post-election challenges brought pursuant to federal law as “challenges.”

<sup>2</sup> U.S. Const. art II, § 1, cl. 4.

<sup>3</sup> 3 U.S.C. § 1, 21.

<sup>4</sup> U.S. Const. art. II, § 1, cl. 2. The slate of electors from each state is equal in number to the Senators and Representatives that state has in Congress. See *id.*

<sup>5</sup> See Thomas H. Neale, *The Electoral College: How It Works in Contemporary Presidential Elections*, Congressional Research Service (May 15, 2017). All but two states use a winner-take-all method of apportioning electoral votes. Nebraska and Maine appoint electors by congressional district (the winner of the popular vote in each district gets that district’s electoral vote), with the remaining two electoral votes (one for each Senator) going to the winner of the statewide vote.

In essence, then, there are fifty-one separate processes for appointing presidential electors as each state (and the District of Columbia) administers its own election according to state and local laws. In addition, almost all states have adopted methods of resolving disputes that arise before, during, and after those elections.

Federal law requires the governor or appropriate state executive to certify who the winning slate of electors is by the second Wednesday in December, which this year is December 11. The law also provides an additional five-day window for potential court resolution of ongoing disputes by no later than the day before the electors vote for president, on December 17.<sup>6</sup>

## Categories of Election Disputes

There are a wide range of election disputes that can arise at different times before, during, and after elections. Before elections, it is common for interested parties—including voters, advocacy groups, candidates, and political parties—to bring legal challenges over the rules and regulations that will govern how the election is conducted. In many cases, the courts that hear these challenges apply a balancing test: When the rules or regulations at issue impose a “severe burden” on the right to vote, the government must show that they are narrowly drawn to advance a compelling interest; when the burden imposed is not severe, courts will weigh the burden against the government’s interests.<sup>7</sup> Courts adjudicating challenges before elections also weigh the risk of confusion that could ensue from a court order soon before Election Day.<sup>8</sup>

It is also common for the same interested parties to bring emergency legal challenges on Election Day as issues arise—for example, lawsuits to extend polling place hours to compensate for long lines or to require election officials to allow certain voters to cast provisional ballots. Likewise, on and after Election Day, interested parties may challenge how (and whether) election officials are counting ballots in the first instance.

All states also have rules pertaining to recounts of election results, which generally involve re-canvassing or re-tabulating the vote tallies initially reported by one or more precincts. In some states, interested parties are required to demand a recount (and the procedures for doing so vary by state), but most states also provide for automatic recounts when the margin of victory is very narrow.<sup>9</sup>

---

<sup>6</sup> See 3 U.S.C. § 5.

<sup>7</sup> See generally *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

<sup>8</sup> See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

<sup>9</sup> See, e.g., National Conference of State Legislatures, [Automatic Recounts](#) (Updated May 13, 2024).

Finally, all states have laws governing election contests, which are legal challenges to the official results of the election.<sup>10</sup> Depending on the state, election contests can result in the original winner being confirmed, the results being overturned and a new winner declared, or in the most extreme cases, the election being voided altogether. This paper primarily focuses on election contests in the following states that may have close races in November: **Arizona, Florida, Georgia, Iowa, Michigan, Minnesota, New Hampshire, Nevada, North Carolina, Ohio, Pennsylvania, Texas, and Wisconsin.**

We also summarize the law applicable to federal election contests and how federal law relates to state election contest laws and proceedings.

## Post-Election Contests in Key States

State election contest laws vary from state to state, but they share many features. Depending on the state and office at issue, an election contest—including for the position of presidential elector—may be resolved by a trial court,<sup>11</sup> state supreme court,<sup>12</sup> the legislature,<sup>13</sup> the Governor,<sup>14</sup> board of elections,<sup>15</sup> canvassing board, recount commission, or other special tribunal.<sup>16</sup>

While several states' contest laws specify that they apply to presidential elections, some states' laws are silent on the issue—and while it is likely that these state laws would apply to presidential elections, that conclusion has never actually been tested.

Most states provide for some form of judicial or quasi-judicial proceeding to resolve election contests—meaning challenges are filed in court (or with an administrative body that functions similarly) to challenge the results of the election and the issues are ultimately decided by a judge or judges. These proceedings generally have a number of elements in common:

- **Deadlines for Filing:** Most states have deadlines for filing election contests (often just a matter of days after either the election, the statewide canvass, or certification), though some do leave the timing open ended. For example, Iowa requires that election contests be filed within two days of the state canvass;<sup>17</sup> Georgia requires that contests be filed within five

---

<sup>10</sup> In some states, the distinctions between the different kinds of election disputes (including between demands for recounts and election contests) are less clear and these processes blend together.

<sup>11</sup> See, e.g., Alaska Stat. § 15.20.550; Ark. Code § 7-5-801; Cal. Elec. Code § 16400; Del. Code tit. 15, § 5927; Fla. Stat. § 102.168(1); Ga. Code § 21-2-523(a).

<sup>12</sup> See, e.g., Colo. Rev. Stat. § 1-11-204; Conn. Gen. Stat. § 9-323; Haw. Rev. Stat. § 11-174.5(a).

<sup>13</sup> Wyo. Stat. § 22-17-114.

<sup>14</sup> Tex. Elec. Code § 221.002(e).

<sup>15</sup> See, e.g., Ind. Code Ann. § 3-12-10-4(c)(3).

<sup>16</sup> See, e.g., Iowa Code § 60.1; Md. Elec. L. Code Ann. § 12-203(a)(2); Tenn. Code Ann. § 2-17-103(a). For U.S. Senate and House races, the chamber of Congress for which a candidate is running is the ultimate arbiter of any election contests. See U.S. Const. art. I, § 5, cl. 1; see Kristen R. Lusk, Note, The Resolution of Contested Elections in the U.S. House of Representatives: Why State Courts Should Not Help with the House Work, 83 N.Y.U. L. Rev. 1213 (2008).

<sup>17</sup> Iowa Code Ann. § 60.4.

days of the determination of the official results,<sup>18</sup> and Pennsylvania requires that contests be filed within twenty days of the election.<sup>19</sup>

- **Standing to File:** In most states, challenges can be filed by candidates and/or affected voters. Some states, including Arizona, Florida, and Michigan allow almost anyone in the relevant jurisdiction to file a challenge (i.e., taxpayers or residents).<sup>20</sup>
- **Grounds for Challenging the Results:** Several states, including Arizona, Florida, Georgia, and Iowa, specify the grounds upon which election contests may be based.<sup>21</sup> In addition to errors in the tabulation of votes, these grounds generally include: misconduct or fraud (particularly by election officials); the winner's ineligibility for office; bribes having been taken by election officials; and illegal votes. Other states, like New Hampshire and North Carolina, provide more broadly that contests may be based on fraud and other irregularities,<sup>22</sup> while some states do not specify any particular grounds at all. Even where state law does not specify grounds for bringing election contests, however, the courts generally conduct similar inquiries, with a particular focus on fraud and misconduct.<sup>23</sup>
- **Standards Applied to Evaluating the Election:** In all states, the burden is on the challenger to explain the basis for bringing an election contest and to prove, with specific and credible evidence, that the court should reverse (or throw out) the results of the election. Generally, courts will only entertain challenges and consider ordering some sort of remedy where the challenger can demonstrate that the number of votes at issue is potentially dispositive—meaning the number of votes at issue is greater than the margin of victory and therefore sufficient to change the outcome of the election.<sup>24</sup> That is often particularly important where there is no intentional misconduct (i.e., something more than simple mistakes).<sup>25</sup> Some courts, though, have made an exception for certain kinds of systemic problems that call into question the overall fairness or integrity of the election, even when the

---

<sup>18</sup> Ga. Code Ann. § 21-2-524(a).

<sup>19</sup> 25 Pa. Stat. § 3456.

<sup>20</sup> See Appendix.

<sup>21</sup> Ariz. Rev. Stat. Ann. § 16-672(A); Fla. Stat. Ann. § 102.168(3); Ga. Code Ann. § 21-2-522; Iowa Code Ann. § 57.1(2).

<sup>22</sup> See, e.g., *Appeal of Soucy*, 139 N.H. 110, 117 (N.H. 1994); N.C. Gen. Stat. Ann. 163-182.10(d).

<sup>23</sup> See, e.g., *St. Joseph Twp. v. City of St. Joseph*, 373 Mich. 1, 6 (1964) (Michigan Supreme Court upholding order setting aside election which jury found tainted by "material fraud" where four of six voters in election had indirectly sold their votes); *Carlson v. Oconto Cty. Bd. of Canvassers*, 240 Wis. 2d 438, 450 (Wis. Ct. App. 2000) (Wisconsin "public policy favors upholding a flawed election in the absence of fraud, unless there is some proof of the effect the irregularity would have had on the outcome.").

<sup>24</sup> See, e.g., *Kinney v. Putnam Cty. Canvassing Bd. By & Through Harris*, 253 So. 3d 1254, 1256 (Fla. Dist. Ct. App. 2018) (To void an election, a plaintiff must establish "reasonable doubt . . . as to whether a certified election expressed the will of the voters."); Ga. Code Ann. § 21-2-522 (providing that elections can generally be contested for fraud and other irregularities only if such issues are "sufficient to change or place in doubt the result"); Iowa Code Ann. § 57.1(2) (same); *Hanlin v. Saugatuck Twp.*, 299 Mich. App. 233, 243 (2013) (collecting cases holding that elections should not be set aside unless the outcome was affected); N.C. Gen. Stat. Ann. § 163-182.10(d)(2)(e) (providing that a challenger must prove by substantial evidence that a purported irregularity "was sufficiently serious to cast doubt on the apparent results of the election"); *Carlson v. Oconto Cty. Bd. of Canvassers*, 240 Wis. 2d 438, 450 (Ct. App. 2000) (Wisconsin "public policy favors upholding a flawed election in the absence of fraud, unless there is some proof of the effect the irregularity would have had on the outcome.").

<sup>25</sup> See, e.g., *Beckstrom v. Volusia Cty. Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998) (unintentional errors by election officials are grounds for a remedy only if they affect the result by misrepresenting voters' expressed intent).

number of affected votes cannot be proven conclusively.<sup>26</sup> Finally, some courts make clear that they generally will not entertain post-election contests over issues that could have been raised before the election.<sup>27</sup>

- **Available Remedies:** Generally speaking, there are two types of remedies available in successful election contests. The court may add and/or subtract votes from either candidate's total and then declare a new winner. Or, the court may determine that the election was irreparably corrupted, or the actual results are impossible to ascertain, and therefore order that the election is void. This remedy is extremely disfavored in all contexts, and completely unavailable in others. For example, the ECRA does not authorize states to invalidate or disregard all votes in a presidential election and conduct a new one from scratch, and some states have explicitly prohibited voiding elections.<sup>28</sup> Other states, like Michigan, Nevada, and Pennsylvania, provide for specified remedies that do not include voiding the election.<sup>29</sup>
- **Appeals:** Most states allow for the initial decision on an election contest to be appealed to a higher court, or from an administrative body to a court. In many states, these appeals are considered on an expedited basis. However, even the expedited time frames applied in most states may not be quick enough to meet the deadlines imposed by federal law.<sup>30</sup>

## Federal Law on Post-Election Contests

State election contest proceedings (like elections themselves) must comply with federal law. Most importantly, state proceedings must satisfy the basic requirements of due process and equal protection established by the Fourteenth Amendment to the Constitution. As a practical matter, the election contest laws described above likely do satisfy these minimum requirements. Thus, state officials will only run afoul of the guarantees of due process and equal protection if they fail to reasonably comply with the procedures and standards set out in these state laws.

---

<sup>26</sup> See, e.g., *Bolden v. Potter*, 452 So. 2d 564, 567 (Fla. 1984) (invalidating absentee ballots where "fraudulent vote-buying practices" were so "pervasive that it tainted the entire absentee voting procedure" even if it had not been proved that fraud had swung the outcome); *Martin v. Fulton Cty. Bd. of Regist. & Elec.*, 307 Ga. 193, 223 (2019) ("[A]n election may be voided," even if the contestant cannot prove a number of discrete votes were affected, "where systemic irregularities in the process of the election are sufficiently egregious to cast doubt on the result."); *Order on Contest for Judicial District 16B, Seat 2, S.B.E. 5* (N.C. 2019) ("When substantial evidence confirms the occurrence of irregularities or improprieties, but it is not possible to quantify the precise number of affected votes, the State Board may proceed to determine whether the occurrence of such irregularities or improprieties was so extensive that they taint the results in that contest and cast doubt on its fairness."); *McNally v. Tollander*, 100 Wis. 2d 490, 505 (1981) ("[I]n a case where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of fairness, we hold such an election must be set aside, even where the outcome of the election might not be changed.")

<sup>27</sup> See, e.g., *Williams v. Fink*, 2019 WL 3297254, at \*3 (Ariz. Ct. App. July 22, 2019) (holding that challenge to a county system of ordering names on ballots could be brought only before the election).

<sup>28</sup> See, e.g., Tex. Elec. Code § 243.012 (prohibiting voiding presidential contests). Additionally, the ECRA provides that "election day" means "means the Tuesday next after the first Monday in November" in presidential election years. 3 U.S.C. § 21(1). The only remedy expressly available to a state should "force majeure events that are extraordinary and catastrophic" interfere with the electoral process is to expand the period of voting. *Id.* This lack of statutory authorization weighs heavily against a court ordering an election redo, though it does not completely preclude it when an election's results within a state are completely indeterminate or when a redo is the only means to cure a substantial constitutional or federal statutory violation.

<sup>29</sup> See Appendix.

<sup>30</sup> See Appendix.

That said, federal law plays a significant role in post-election proceedings. The state procedures described above generally are not the only means of challenging the outcome of an election. In fact, it is common for interested parties to file challenges directly in federal court, either instead of or in addition to state challenges.<sup>31</sup>

Challenges in federal court often include due process and/or equal protection claims under the Fourteenth Amendment—though as a practical matter the ultimate analysis is often largely the same.<sup>32</sup> Additionally, the ECRA enables candidates aggrieved by a state executive’s failure to issue a proper certificate of ascertainment—including issuing a certificate that contravenes the result of the state’s popular vote—to file a lawsuit in federal court.<sup>33</sup>

## Due Process

In order to succeed on a claim under the Due Process Clause of the Fourteenth Amendment, the challenger must demonstrate “patent and fundamental unfairness” in the overall conduct of an election. As the U.S. Court of Appeals for the First Circuit explained in *Griffin v. Burns*:

If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated . . . . Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots; and . . . [reach the level of ] broad-gauged unfairness [that] permeates an election . . . .”<sup>34</sup>

“Routine” or “garden-variety” election irregularities generally will not be enough to succeed in an election challenge.

Federal case law provides the following basic principles that apply to due process claims in election challenges: First, although such cases do not arise frequently, courts are more likely to find a

---

<sup>31</sup> With the exception of courts in the Fifth Circuit, federal courts will generally agree to hear election challenges. However, depending on the presence of state-law issues, and/or the existence of active parallel state election contests, the courts do on occasion decide to abstain from hearing cases under the Pullman abstention doctrine. See generally *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) (federal courts may abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided). For example, a federal court in Pennsylvania recently relied on Pullman abstention to stay a pre-election dispute based on the existence of important state law questions. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966-NR, \*2-3 (W.D. Pa. Aug. 23, 2020) (“[T]he Court will apply the brakes to this lawsuit, and allow the Pennsylvania state courts to weigh in and interpret the state statutes that undergird Plaintiffs’ federal constitutional claims.”). Other abstention doctrines, including *Rooker-Feldman* (applying to cases complaining of injuries caused by state-court judgments) and *Younger* (applying to cases seeking to enjoin or otherwise intrude on certain types of ongoing state court proceedings), are rarely, if ever, found to preclude federal election contests. See, e.g., *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 82 (2013) (explaining the limited categories of cases to which *Younger* abstention applies); *Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 579-80 (11th Cir. 1995) (*Rooker-Feldman* does not apply where federal plaintiffs were not parties to the state litigation and therefore could not have raised their constitutional claims); *Marks v. Stinson*, 19 F.3d 873, 885 n.11 (3d Cir. 1994) (*Rooker-Feldman* does not apply where the state court did not resolve plaintiffs federal claims on the merits and those federal claims were not inextricably intertwined with the state-court judgment). Fifth Circuit courts—which include courts in Louisiana, Mississippi, and Texas—interpret a Reconstruction-era statute, 28 U.S.C. § 1344, as denying federal courts jurisdiction over a wide range of election-related claims. *Keyes v. Gunn*, 890 F.3d 232, 237-39 (5th Cir. 2018) (citing *Hubbard v. Ammerman*, 465 F.2d 1169, 1180 (5th Cir. 1972)).

<sup>32</sup> In many cases, challengers may also bring claims under Sections 2 or 11(a) of the Voting Rights Act, though Section 2 claims in particular are most often brought before elections take place, and some courts do not recognize the right of private plaintiffs to bring suit under that section. See *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1218 (8th Cir. 2023). Section 2 prohibits states from imposing or applying any voting “standard, practice or procedure . . . in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color.” 52 U.S.C. § 10301(a). Section 11(a) provides that, “No person acting under color of law shall fail or refuse to permit any person to vote who is . . . qualified to vote, or willfully fail or refuse to tabulate, count, and report such person’s vote.” 52 U.S.C. § 10307(a).

<sup>33</sup> 3 U.S.C. § 5(d)(1).

<sup>34</sup> *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978).

constitutional violation if they believe there has been “intentional conduct by state actors to uneven the playing field for voters.”<sup>35</sup> Second, the effect of the alleged misconduct matters as well—i.e., the more clear it is that the irregularity was outcome-determinative, the more likely courts will intervene.<sup>36</sup> Third, isolated and unintentional maladministration generally will not give rise to a due process claim.<sup>37</sup> Therefore, it is important to recognize that the mere fact that an election irregularity could have been a “but-for” cause in determining the winner is not, in and of itself, always sufficient to establish a constitutional violation. Rather, the courts generally look for exceptional circumstances before finding a due process violation.

## Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits election officials from burdening the right to vote by intentionally or arbitrarily subjecting different classes of voters to disparate electoral treatment.<sup>38</sup>

Equal protection cases involving elections have focused on four types of discrimination—race,<sup>39</sup> district or geographic alignment,<sup>40</sup> voting method,<sup>41</sup> and political affiliation.<sup>42</sup> And while most equal protection challenges are brought in advance of elections, the Supreme Court has been clear that the right to vote includes the right to “to have one’s vote counted”<sup>43</sup> and not be valued less than another’s “by later arbitrary and disparate treatment.”<sup>44</sup>

Particularly relevant to post-election challenges in federal court are two equal protection theories. First, challengers may claim that state officials have violated state election law in a discriminatory fashion. Those challenges have a heavy factual burden of proof, because “[t]he unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.”<sup>45</sup> Second, challengers may allege that a state’s election procedures “do not satisfy the minimum requirement for nonarbitrary treatment of voters [or votes].”<sup>46</sup> Courts have “found equal protection violations where a lack of uniform standards and procedures results in arbitrary and disparate treatment.”<sup>47</sup>

---

<sup>35</sup> Gold v. Feinberg, 101 F.3d 796, 801 (2d Cir. 1996).

<sup>36</sup> See, e.g., Griffin 570 F.2d at 1079-80; see also Krieger v. City of Peoria, 2014 WL 4187500, \*3-6 (D. Ariz. Aug. 22, 2014).

<sup>37</sup> See, e.g., Gamza v. Aguirre, 619 F.2d 449, 452-53, 454 n.6 (5th Cir. 1980).

<sup>38</sup> See, e.g., League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008) (citing, *inter alia*, Bush v. Gore, 531 U.S. 98 (2000)).

<sup>39</sup> See, e.g., Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967).

<sup>40</sup> See, e.g., Bush, 531 U.S. ; Moore v. Ogilvie, 394 U.S. 814 (1969).

<sup>41</sup> See, e.g., N.E. Ohio Coalition for Homeless. v. Husted, 696 F.3d 580 (6th Cir. 2012).

<sup>42</sup> See, e.g., Riddle v. Hickenlooper, 742 F.3d 922 (10th Cir. 2014).

<sup>43</sup> Reynolds v. Sims, 377 U.S. 533, 544-45 (1964); see also Bush, 531 U.S. at 126.

<sup>44</sup> Bush, 531 U.S. at 104-05.

<sup>45</sup> Snowden v. Hughes, 321 U.S. 1, 8-9 (1944); see also Smith v. Cherry, 489 F.2d 1098, 1102-03 (7th Cir. 1973).

<sup>46</sup> Bush, 531 U.S. at 105.

<sup>47</sup> Bush v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 920 (E.D. Va. 2018). Gore’s Uniformity Principle and the Equal Protection Right to Vote,” 28 Geo. Mason L. Rev. 229 (2020)



Under either of these theories, it is likely that as a practical matter, equal protection claims will substantially or even completely overlap with substantive due process challenges alleging that an election was patently and fundamentally unfair.

## ECRA Litigation

The ECRA provides an additional avenue for aggrieved candidates to raise claims regarding post-election processes before a federal court. As mentioned above, the ECRA's December 11 deadline imposes a duty on each designated executive to timely certify their state's appointed electors in accordance with federal and state law. To ensure they complete this task and to remedy any potential violations, the ECRA provides an expedited federal judicial review process to resolve disputes related to the issuance of certificates of ascertainment.

Specifically, the ECRA enables candidates aggrieved by an executive's failure to issue a proper certificate of ascertainment—including issuing a certificate that contravenes the result of the state's popular vote—to file a lawsuit in the federal district court covering the relevant state's capital city.<sup>48</sup> Under this process, the candidate's claims are heard by a three-judge panel on an expedited basis, and the case may include direct, discretionary appeal to the Supreme Court of the United States.<sup>49</sup> The entire proceeding must be concluded by the day before the Electoral College votes, which this year makes the judicial deadline December 16, 2024.<sup>50</sup>

The ECRA's expedited judicial review procedures are focused on resolving disputes related to the issuance and transmittal of a state's certificate of ascertainment. The ECRA does not “preempt or displace” other existing causes of action in state or federal courts.<sup>51</sup> Accordingly, election contests and other types of state or federal postelection claims that are not within the purview of the ECRA's judicial review mechanism may continue to be filed apart from the ECRA.

## Remedies

Federal courts generally have a deep remedial toolkit. The appropriate remedy in a particular case depends on both the nature of the alleged election irregularities and the structure of the state's underlying election machinery. Depending on the circumstances, the following especially significant remedies may be available:

---

<sup>48</sup> 3 U.S.C. § 5(d)(1)(A); see also Electoral Count Reform and Presidential Transition Improvement Act, 168 Cong. Rec. S.9765-67 (2022) (statement of Senator Susan Collins) (“During bipartisan discussions about this legislation, Senators debated concerns about the prospect that a State's executive might take deliberate actions to controvert or delay the issuance of the certificate of ascertainment required under the Electoral Count Act. That is why this section of the bill provides an expedited process in Federal court for aggrieved Presidential or Vice Presidential candidates to address such an unprecedented action, which could include a State's executive failing to issue or transmit a certificate of ascertainment prior to the specified deadline, or issuing or transmitting a certificate of ascertainment that does not reflect the State's accurate slate of electors.”).

<sup>49</sup> 3 U.S.C. §§ 5(d)(1)(B)-(D). The three-judge panel is comprised of two judges from the circuit court of appeals in which the district lies and one judge from the district court where the action is brought.

<sup>50</sup> 3 U.S.C. § 5(d)(1)(D).

<sup>51</sup> *Id.* § 5(d)(2)(B). However, it is conceivable that other types of federal claims—like the Due Process or Equal Protection claims described above—could be consolidated or otherwise considered within the jurisdiction of the ECRA's three-judge court.



- **Ordering State Officials to Certify the Untainted Result:** Under circumstances where the “legitimate” winner can be readily ascertained, federal courts have been willing to simply order state officials to recognize that result.<sup>52</sup> In presidential contests, the ECRA makes clear that any certificate of ascertainment required to be issued or revised by a timely court order to reflect the legitimate results will supersede any prior certificate, and rulings by federal courts on federal issues must be accepted as conclusive by Congress when it meets in its joint session to count the electoral votes.<sup>53</sup>
- **Voiding the Election:** The law is clear both that “federal courts have the power to invalidate elections held under constitutionally infirm conditions,” but also that “courts need not exercise this power in the case of all [such] elections.”<sup>54</sup> In deciding whether to void an election, courts will consider a variety of factors, including the importance of eradicating any taint of the misconduct in question,<sup>55</sup> and whether the challengers could have raised their complaints prior to the election.<sup>56</sup>

But as detailed above,<sup>57</sup> unique constitutional and federal statutory obstacles make it especially impracticable to void and then “redo” a presidential election within any state. The Constitution gives Congress the authority to set the date of presidential elections.<sup>58</sup> The federal Presidential Election Day Act, as amended by the ECRA enacted pursuant to that power, requires presidential elections to be held on Election Day: the first Tuesday after the first Monday in November.<sup>59</sup> This provision authorizes a narrow extension of the voting period if necessitated by a catastrophic event that disrupts the election, but it does not authorize states to invalidate or disregard all votes cast in a presidential election and conduct a new one from scratch, as would be required for a redo.

Finally, as noted above, critical to both state and federal contest proceedings, and the remedies they ultimately require, are the time constraints imposed on states under federal law. Most importantly, under the ECRA, states and courts have only from Election Day until December 16, 2024 (41 days), to complete all post-election processes, including resolving election disputes under state and federal law. As a result, it is critical that any contest proceedings move as quickly as reasonably possible.

---

<sup>52</sup> See *Hadnott v. Amos*, 394 U.S. 358, 367 (1969) (ordering that candidates who had actually won election, but were subsequently disqualified based on failure to comply with a change in state law that had not received Voting Rights Act pre-clearance, be “treated as duly elected to the offices for which they ran.”); *Stinson*, 19 F.3d at 889 (“[T]he district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for wrongdoing.”).

<sup>53</sup> 3 U.S.C. § 5(c).

<sup>54</sup> See, e.g., *Gjersten v. Bd. of Election Comms. for City of Chi.*, 791 F.2d 472, 478 (7th Cir. 1986); *Bell*, 376 F.2d at 662-65.

<sup>55</sup> See, e.g., *Bell*, 376 F.2d at 662-65 (ordering new election despite lack of evidence that result would be different based on importance of “eradicat[ing]” the taint of “gross, spectacular . . . state-imposed, state enforced racial discrimination,” noting that “there are certain discriminatory practices which, apart from demonstrated injury or the inability to do so, so infect the processes of the law as to be stricken down as invalid”).

<sup>56</sup> See, e.g., *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180-81 (9th Cir. 1988).

<sup>57</sup> See *supra* note 27 and accompanying text.

<sup>58</sup> U.S. Const. art. II, § 1, cl. 4.

<sup>59</sup> 3 U.S.C. §§ 1, 21(1).

Finally, as noted above, critical to both state and federal contest proceedings, and the remedies they ultimately require, are the time constraints imposed on states under federal law. Most importantly, under the ECRA, states and courts have only from Election Day until December 16, 2024 (41 days), to complete all post-election process, including resolving election disputes under federal and state law. As a result, it is critical that any contest proceedings move as quickly as reasonably possible.

## Conclusion

Post-election disputes and related litigation have become an expected—if not relatively normal—part of elections in this country. It is important for voters to understand that there are state and federal laws in place that address election-related fraud, misconduct, and other irregularities, and that most states have designed proceedings for adjudicating such allegations and remedying them when necessary.

### ***About the National Task Force on Election Crises***

*The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure free and fair elections by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except elections that are free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.*

**APPENDIX: STATE-BY-STATE INFORMATION ON PRESIDENTIAL CONTESTS**

State	Recount Process <sup>60</sup>	Deadline to Certify Results	Forum for Post-Election Contests	Application to Presidential Elections	Standing	Electoral Count Reform Act considered in state law?	Remedies Available
<b>AZ</b> <sup>61</sup>	Automatic recount when the margin is less than or equal to 0.5% of total votes cast	Not later than the third Monday after the general election. (Nov. 25, 2024)	Superior Court (appeal likely allowed)	Likely applies. Contest statute applies to “any person declared elected to a state office,” and “state officers” includes some federal elected officials.	Voters	House Bill 2785 (2024) brought post-election timelines into compliance with ECRA	Declare new winner; void election
<b>FL</b> <sup>62</sup>	Automatic machine recount when the margin is less than 0.5% of the total votes cast. If the machine recount margin is less than or equal to 0.25% of total votes, a manual recount of over and under votes occurs	The 14th day after a general election. (Nov. 19, 2024) If a typographical error that would determine the election outcome occurred, the ECC must correct and recertify as soon as “practicable” (county board has 24 hours to certify corrected returns).	Statewide: Circuit Court of Leon County (appeal allowed)	Applies based on prior precedent.	Voters; taxpayers; candidates	No	Declare new winner.
<b>GA</b> <sup>63</sup>	Mandatory if a candidate requests and the margin is less than 0.5% of the total votes cast. Recounts can also be ordered by local election officials and the Secretary of State. Candidates for federal or state	No later than 5:00 pm on the 18th day following election day. (Nov. 23, 2024)	Superior Court (appeal allowed)	Applies by express terms of statute.	Candidates; voters	No	Declare new winner; void election; call new election

<sup>60</sup> This section does not account for all circumstances in which recounts may be permitted, including recounts within the discretion of state election officials and recounts resulting from certain kinds of initial tabulation errors.

<sup>61</sup> Ariz. Rev. Stat. §§ 16-648, -650, -661, -672, -676, -642; see also *Harless v. Lockwood*, 85 Ariz. 97, 99 (1958) (construing “state officers” language to encompass federal congressional elections); see also House Bill 2785.

<sup>62</sup> Fla Stat. §§ 102.121, 111.141(7), .166, .168, .1682, .1685; *Gore v. Harris*, 772 So. 2d 1243 (Fla.), rev'd sub nom. *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>63</sup> Ga. Code §§ 21-2-495, -521, -524, -527, -502, -528, -499(b).

	office can also petition the Secretary of State for a recount						
<b>IA</b> <sup>64</sup>	Mandatory if requested by a candidate request and the margin is less than fifty votes or one percent of the total number of votes cast, whichever is greater	No later than 27 days after the election. (Dec. 2, 2024).	Special Contest Court (with Chief Justice of state supreme court as presiding judge) (no appeal allowed)	Applies by express terms of statute.	Candidates	No, but the Contest Court's judgment must issue by the ECRA Deadline.	Declare new winner; set aside election
<b>ME</b> <sup>65</sup>	Candidate who is the apparent loser may file a request for recount with the Secretary of State within 5 business days after the election. No automatic or mandatory recount process	Within 20 days after the election. (Nov. 25, 2024)	None for presidential elections	--	--	--	--
<b>MI</b> <sup>66</sup>	Automatic recount for statewide election if margin is 0.1% or less of the votes cast (different thresholds for other officers)	On or before the 20th day after the election (Nov. 25, 2024).	Court of Appeal (appeal allowed); Supreme Court for presidential candidates.	Yes	Resident of county where action brought; candidate	Yes, Public Act 529 of 2023 was passed to align Michigan law with the ECRA.	Declare new winner; damages
<b>MN</b> <sup>67</sup>	Mandatory recount on request if the margin is less than one-quarter of one percent of the total number of votes counted for that office or is ten votes or less of the total number of votes cast for	The 16th day following the state general election. (Nov. 21, 2024).	Special contest court chosen from Ramsey County District Court (can appeal to state supreme court)	Not mentioned by statute	Voters; including candidates	Yes, House Bill 4772 (2024) was passed to align Minnesota law with the ECRA.	Declare new winner; void election.

<sup>64</sup> Iowa Code §§ 50.48, 57.1, 60.1, 60.5, 60.6, 57.4, 50.38.

<sup>65</sup> Me. Rev. Stat. tit. 21-A, §§ 724, 737-A, 722.

<sup>66</sup> Mich. Comp. Laws §§ 168.880a, 600.4505, 600.4545, 168.842; 168.845a; Mich Ct. R. 3.306; see also Senate Bill No. 529 and Senate Bill No. 590 (effective date 2/13/2024).

<sup>67</sup> Minn. Stat. §§ 204C.35(b)(2), 208.05, 209.01-10, 204C.33; see also Chapter 112-H.F. No. 4772.

	the office is 400 votes or less, There are also discretionary candidate recounts if these thresholds are not met						
<b>NE<sup>68</sup></b>	Mandatory if requested by a candidate and the margin is 1% or less of the votes received by the highest vote-getter (unless fewer than 500 votes cast). Otherwise the candidate must pay for the recount to receive one	Fourth Monday after the election (November 25, 2024)	Any district court; same rules for appeals as all other civil cases	Applies by express terms of statute	Candidates	Yes, provides procedures for certificate of ascertainment, and security feature verifying the authenticity of the certificate	Declaration of new winner, refund of recount fees.
<b>NV<sup>69</sup></b>	No automatic recounts but recounts can be requested by losing candidates	Canvass must be complete by fourth Tuesday after general election (November 26, 2024)	District court for presidential election contest; statute does not provide for appeal explicitly.  Writ of mandamus available in Supreme Court of Nevada	Applies by express terms of statute	Candidate for office or any registered voter of the state.	Yes, AB 192 (2023) altered recount and contest timelines to comply with ECRA	Declare new winner; refund of recount fees
<b>NH<sup>70</sup></b>	Candidate may apply to the secretary of state for a recount if the margin is less than 20% of total votes cast	On completion of initial vote count (by 8 am day following election) or after, unless otherwise ordered by the SoS, completion of recount and/or any appeal proceedings	Ballot Law Commission (presidential electors and state officers can be appealed to state supreme court)	Applies by express terms of statute.	Candidates	No	Declare new winner

<sup>68</sup> Neb. Rev. Stat. §§ 32-1036, 32-1102, 32-1117, 32-1119-21, 32-713.

<sup>69</sup> Nev. Rev. Stat. §§ 34.160, 293.387, 293.395, 293.403, 293.424, 293.427-433; Nev. R. App. P. 17(a)(2).

<sup>70</sup> N.H. Rev. Stat. §§ 659:81, 660:1, 660:27, 665:8, 665:16, 659:75, 659:84

<b>NC</b> <sup>71</sup>	Mandatory if requested by a candidate and the margin is less than 1% of total votes cast.	Yes. State Board meets 3 weeks after election day (November 26, 2024) with option to adjourn for 10 days (December 6, 2024) if canvasses not received  Appointment by legislature if no proclamation by six days before electors' meeting Day. Appointment by Governor if no appointment by the day before electors' meeting day	State Board(s) of Elections (can be appealed to Superior Court of Wake County)	Applies by express terms of statute.	Candidates; voters; the State Board of Elections (on own initiative)	Yes; requires security feature verifying the authenticity of Certificates of Ascertainment.	Declare new winner; call for partial recast of votes; call new election
<b>OH</b>	Automatic recount if the margin is less than 0.25% of total votes cast (for statewide elections) or 0.5% of total votes case (for district, county, or municipal elections). <sup>72</sup>	None officially, but immediately upon the completion of the canvass of election returns	State law provides only that challenges to federal offices must be made pursuant to federal law	Does NOT apply by express terms of statute.	None	No.	None
<b>PA</b> <sup>73</sup>	Automatic recount if the margin is less than 0.5% of total votes cast or if certain discrepancies are present.	No explicit deadline.	Court of Common Pleas of Dauphin County (appeal allowed)	Applies by express terms of statute.	Voters (100 signatories needed)	No.	Declare new winner
<b>TX</b> <sup>74</sup>	Automatic recount if there's a tie vote; on candidate request if margin is less than 10% of	33rd day after the election (December 8, 2024).	For presidential electors: Governor (no appeal allowed)	Applies by express terms of statute.	Candidates (including candidates for elector)	No, but the governor is required to decide election contests by the seventh day before the day the electors	Declare new winner (for any election); void election (for any non-presidential election)

<sup>71</sup> N.C. Gen. Stat. §§ 163-182.4, 182.5(c), 182.7, 182.14, 182.15, 210, 213(a)-(b).

<sup>72</sup> Ohio Rev. Code §§ 3505.34, 3515.011, 3515.08, 3515.011; see also Principles of Election Law § 313 TD No 1 (2016).

<sup>73</sup> 25 Pa. Stat. §§ 3154, 3162, 3291, 3351, 3352, 3457, 3464; see also *In re Decision of Cty. Bd. of Election*, 29 Pa. D. & C.2d 499, 504 (Pa. Com. Pl. 1962).

<sup>74</sup> Tex. Elec. Code §§ 212.001, 212.022, 212.023, 216.001, 221.002, 221.012, 243.002-.006, 243.012.

	votes received by the highest vote-getter.					meet.	
<b>WI</b> <sup>75</sup>	Candidate may apply for a recount if the margin is less than 1% of total votes cast.	First day of December following a general election (Dec. 1, 2024) or within 3 days of the elections commission receiving recount results	Elections commission (can be appealed to circuit courts and courts of appeals)	Applies by express terms of statute.	Candidates	No.	Declare new winner; void election (vacant elector slots are filled by present electors)

---

<sup>75</sup> Wis. Stat. §§ 5.90, 7.70, 7.75, 9.01; *McNally v. Tollander*, 100 Wis. 2d 490 (1981).