

State and Federal Election Contests: An Overview

Elections in this country are almost always hard-fought and often contentious. Disputes as to how the election was conducted, which ballots are 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. Although perhaps imperfect, 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.

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 choosing Electors.” U.S. Const. art II, § I, cl. 4. 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 3rd this year. 3 U.S.C. § 1. 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.”¹ Thus, the legislatures in each state have plenary power 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.²

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 provides a strong incentive (but not an absolute requirement) for states to resolve those election disputes no later than December 8, 2020. The Electoral Count Act, 3 U.S.C. § 5, provides that a state’s appointed slate of presidential electors qualifies for “safe harbor” status if, at least six days before “the time fixed for the meeting of the electors” (December 14th this year³), the state makes a “final determination” of any dispute by “judicial or other methods or procedures” pursuant to state laws enacted prior to Election Day. A slate of electors that qualifies for safe harbor status must be treated as “conclusive” by Congress when it meets in a special joint session to count electoral votes on January 6, 2021. *Id.*; see also 3 U.S.C. § 15 (setting the date for the joint session). (For more information, see the Task Force paper, [*The Electoral Count Act & the Process of Electing a President*](#).)

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

² See Thomas H. Neale, [*The Electoral College: How It Works in Contemporary Presidential Elections*](#), Cong. Research Serv. (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.

³ See 3 U.S.C. § 7 (requiring that the electors meet in their respective states on “the first Monday after the second Wednesday in December”).

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. Generally speaking, the courts that hear these challenges apply a balancing test to assess compliance with the Constitution: 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.⁴

It is also common for these same 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 require automatic recounts when the margin of victory is very narrow.⁵

Finally, all states have laws governing election contests, which are legal challenges to the official results of the election.⁶ Depending on the state, election contests may 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 focuses on election contests in the following states that are likely to have close races in November: **Arizona, Florida, Georgia, Iowa, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Pennsylvania, Texas, and Wisconsin.** We also summarize the law applicable to federal election contests and the relationship between federal law and 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. As a threshold matter, while several states’ 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

⁴ See generally *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

⁵ See, e.g., National Conference of State Legislatures, *Automatic Recounts* (Updated Jan. 30, 2020).

⁶ 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.

example, Iowa requires that election contests be filed within two days of the statewide canvass;⁷ Georgia requires that contests be filed within five days of the determination of the official results;⁸ and Pennsylvania requires that contests be filed within twenty days of Election Day.⁹

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). (See *Appendix*)

Grounds for Challenging the Results. Several states, including Arizona, Florida, Georgia, and Iowa, specify the grounds upon which election contests may be based.¹⁰ 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,¹¹ 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.¹²

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.¹³ That is often particularly important where unintentional mistakes rather than intentional misconduct provide the basis for the challenge.¹⁴ In many states, though, the courts make an exception for certain kinds of systemic problems that call into question the overall fairness or integrity of the election, even when the

⁷ Iowa Code Ann. § 60.4.

⁸ Ga. Code Ann. § 21-2-524.

⁹ 25 Pa. Stat. § 3456.

¹⁰ 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).

¹¹ See, e.g., *Appeal of Soucy*, 139 N.H. 110, 117 (N.H. 1994); N.C. Gen. Stat. Ann. § 163-182.10(d).

¹² See, e.g., *St. Joseph Twp. v. City of St. Joseph*, 373 Mich. 1, 6 (1964) (Michigan high 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.”).

¹³ See, e.g., *Kinney v. Putnam Cnty. 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. § 212-2-522 (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. § 162-182.10(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.”).

¹⁴ See, e.g., *Beckstrom v. Volusia Cnty. 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.¹⁵ Finally, some courts make clear that they generally will not entertain post-election contests over issues that could have been raised before the election.¹⁶

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.¹⁷ Because voiding elections is generally considered a disfavored remedy (or at least a remedy of last resort), some states actually prohibit it. For example, Texas law specifically provides that voiding the election is not permitted in the context of presidential elections. Other states, like Michigan and Pennsylvania, provide for specified remedies that do not include voiding the election. (See *Appendix*)

Appeals. Most states allow for the initial decision in 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 timeframes applied in most states may not be quick enough to meet the deadlines imposed by federal law. (See *Appendix*)

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A few of the states that we focus on in this paper have unique election contest laws that meaningfully differ from the judicial proceedings described above:

North Carolina

In North Carolina, election contests are adjudicated by the State Board of Elections (SBE), an independent, quasi-judicial state agency also charged with election administration.¹⁸ The SBE is empowered to initiate election

¹⁵ 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 Cnty. 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.”).

¹⁶ 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).

¹⁷ Whether state courts can actually order a new election depends on a combination of federal and state law. Where state law clearly gives courts (or administrative bodies) the authority to order a new election in a presidential contest, that is likely sufficient under the Electoral Count Act, which gives state legislatures the power to determine how to appoint electors following a failed election. But where state law is unclear or does not confer that authority, ordering a new presidential election is arguably outside the jurisdiction of state courts. See, *infra* p. 9 (discussion of 3 U.S.C. § 2).

¹⁸ N.C. Gen. Stat. Ann. § 163-22(a); 163-28. North Carolina state law also retains a statutory *quo warranto* action to challenge the validity of the election results directly in court, *id.* § 1-515, but it is rarely used and lacks the expedited procedure available under the election contest statute.

contests and conduct its own investigations, and has broad equitable remedial powers.¹⁹ The SBE has the authority to proclaim a different winner or to order a partial revote, a new election, or a discretionary recount.²⁰ The SBE's final decision in an election contest is appealable in state court only for legal error.²¹

North Carolina is unique, though, because of a state law providing that if a presidential election contest remains unresolved by noon on the safe harbor deadline (December 8, 2020), the general assembly may appoint presidential electors itself.²² In addition, if any electors still remain to be appointed after noon on the day before the electors' meeting day (December 14, 2020), the governor may do so.²³ State law directs both the general assembly and the governor to select electors based on "their best judgment of the will of the electorate," but that judgment is not reviewable by a court.²⁴ An election result subsequently certified by the SBE will override those selections if made before noon on the electors' meeting day.²⁵

Ohio

Ohio has procedures for contesting statewide and local elections, but they do not apply to presidential elections. In fact, the state contest law specifically excludes presidential and vice-presidential election races and instead requires that controversies involving those offices be resolved under federal law.²⁶

Texas

In Texas, the governor "has exclusive jurisdiction of a contest of the election of presidential electors."²⁷ The governor sets the time and place, as well as the rules, for the contest proceedings, though he or she is required to

¹⁹ *Id.* §§ 163-27.1(a), 163-182.12.

²⁰ *Id.* §§ 163-182.4, 163-182.7, 163-182.12, 163-182.13.

²¹ *Id.* § 163-182.14; *see also Ponder v. Joslin*, 262 N.C. 496, 500 (1964).

²² N.C. Gen. Stat. Ann. § 163-213(a). The statute anticipates that this requires an "extra session" of the legislature, which requires the agreement of three-fifths of both houses to convene. N.C. Const. art. II, § 11. Or, the governor may call the legislature into session on the grounds that it is an "extraordinary occasion." N.C. Const. art. III, § 5. Moreover, because this legislative appointment statute has never been used, its legality has never been tested.

²³ *Id.* § 163-213(b).

²⁴ *Id.* § 163-213(c).

²⁵ *Id.* § 163-213(d).

²⁶ Ohio Rev. Code Ann. § 3515.08 ("The nomination or election of any person to any federal office, including the office of elector for president and vice president . . . shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.").

²⁷ Tex. Elec. Code § 221.002(e). Under Texas law, an election contest is not an ordinary lawsuit but rather a special legislative proceeding to provide a remedy for elections tainted by fraud, illegality, or other irregularities. *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999). A contest for presidential electors therefore cannot be brought in state court because "[e]lection contests are creatures of statute, and the power of a trial court to consider such contests exists only to the extent authorized by statute." *In re Bishop*, 2020 WL 1074583, at *2 (Tex. App. Mar. 6, 2020) (citations omitted). Texas also has a *quo warranto* statute that provides a potential remedy when "a person usurps, intrudes into, or unlawfully holds or executes a franchise or an office." Tex. Civ. Prac. & Rem. Code Ann. § 66.001(1). The courts have not yet opined on whether this *quo warranto* action is available in a presidential election, but it appears to be precluded by the governor's exclusive jurisdiction.

hear all legal evidence presented by the parties.²⁸ The governor is then required to issue a written decision no later than the seventh day before “the date set by law for the meeting of the electors” (which is the day before the federal safe harbor deadline).²⁹ Notably, the governor is specifically prohibited from voiding the election and ordering a new one.³⁰ The governor’s “exclusive jurisdiction” over presidential election contests suggests that his or her decision cannot be appealed under state law.

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.

That said, federal law actually 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.³¹

It is not easy to succeed in a federal post-election contest, though, as federal courts are often reluctant to overturn the result of an election absent exceptional circumstances. Challenges in federal court usually include due

²⁸ Tex. Elec. Code §§ 243.006, 243.009.

²⁹ *Id.* § 243.012.

³⁰ *Id.* § 243.012.

³¹ With the exception of courts in the Fifth Circuit, federal courts will generally agree to hear election contests. However, depending on the presence of state-law issues and/or the existence of active parallel state election contests, courts do on occasion decide to abstain from hearing cases under the *Pullman* abstention doctrine. See generally *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (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. 13, 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).

However, 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)).

process and/or equal protection claims under the Fourteenth Amendment—though as a practical matter the ultimate analysis is often largely the same.³²

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 election³³

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

Federal case law provides the following basic principles that apply to due process claims in election contests: *First*, although such cases do not arise frequently, courts are more likely to find a constitutional violation if they believe there has been “intentional conduct by state actors to uneven the playing field for voters.”³⁴ *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.³⁵ *Third*, isolated and unintentional maladministration generally will not give rise to a due process claim.³⁶ 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 treatment.³⁷

³² 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. Section 2 prohibits states from imposing or applying any voting “standard, practice or procedure . . . in a manner which results in a denial or abridgement 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).

³³ *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978).

³⁴ *Gold v. Feinberg*, 101 F.3d 801 (2nd Cir. 1996).

³⁵ See, e.g., *Griffin* 570 F.2d at 1079-80; see also *Krieger v. City of Peoria*, 2014 WL 4187500 (D. Ariz. Aug. 22, 2014).

³⁶ See, e.g., *Gamza v. Aguirre*, 619 F.2d 449, 452-53 (5th Cir. 1980).

³⁷ 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)).

Equal protection cases involving elections have focused on four types of discrimination—race,³⁸ district or geographic alignment,³⁹ voting method,⁴⁰ and political affiliation.⁴¹ 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”⁴² and not be valued less than another’s “by later arbitrary and disparate treatment.”⁴³

Particularly relevant to post-election contests are two equal protection theories. *First*, challengers may claim that state officials have violated state election law in a discriminatory fashion. Those challengers 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.”⁴⁴ *Second*, challengers may allege that a state’s election procedures “do not satisfy the minimum requirement for nonarbitrary treatment of voters [or votes].”⁴⁵ Courts have “found equal protection violations where a lack of uniform standards and procedures results in arbitrary and disparate treatment.”⁴⁶

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

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. In general, however, federal courts have broad discretion in selecting a remedy in election contests. Depending on the circumstances, the following especially significant remedies may be available:

- *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.⁴⁷

³⁸ See, e.g., *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967).

³⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *Moore v. Ogilvie*, 394 U.S. 814 (1969).

⁴⁰ See, e.g., *N.E. Ohio Coalition for Homeless. v. Husted*, 696 F.3d 580 (6th Cir. 2012).

⁴¹ See, e.g., *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014).

⁴² *Reynolds v. Sims*, 377 U.S. 533, 544-45 (1964); see also *Bush*, 531 U.S. at 126.

⁴³ *Bush*, 531 U.S. at 104-05.

⁴⁴ *Snowden v. Hughes*, 321 U.S. 1, 8-9 (1944); see also *Smith v. Cherry*, 489 F.2d 1098, 1102-03 (7th Cir. 1973).

⁴⁵ *Bush*, 531 U.S. at 105.

⁴⁶ *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 920 (E.D. Va. 2018).

⁴⁷ 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.”); *Marks v. Stinson*, 19 F.3d 873, 888 (3d Cir. 1994) (“[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.”).

- *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.”⁴⁸ 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,⁴⁹ and whether the challengers could have raised their complaints prior to the election.⁵⁰

Importantly, although they may void a state’s presidential election results, federal courts likely do not have the authority to order a new election. A court order voiding an election arguably means that the state has “failed to make a choice” on Election Day within the meaning of 3 U.S.C. § 2. In that case, the Electoral Count Act gives state legislatures the power to decide how to appoint electors. To the extent doing so is not otherwise prohibited by state law, they may call for a new election, but it is unlikely that the federal courts can require it.⁵¹

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 ECA, states have only from Election Day until December 8, 2020 (five weeks), to resolve election disputes under state law if they want to have their certificates of appointed electors treated as conclusive by Congress. States then have only six additional days—until December 14, 2020, when the Electoral College meets—to complete the process of appointing electors without risking disenfranchisement. As a result, it is critical that these proceedings move as quickly as reasonably possible. And even when a new election is possible under the law, it may not be realistic as a practical matter.

The Supreme Court

The various ways in which post-election contests or other election disputes may reach the Supreme Court of the United States—including whether or not the Supreme Court is likely to take up those disputes and/or resolve them on the merits—is beyond the scope of this paper. In general, however, most cases reach the Supreme Court through the federal appellate process (federal district courts > federal courts of appeals > Supreme Court) or on appeal from a state’s highest court if questions of federal law are involved.

CONCLUSION

While perhaps imperfect, there are processes and standards in place for adjudicating post-election disputes under both state and federal law. Indeed, post-election disputes and related litigation have become an expected—if not relatively normal—part of elections in this country.⁵² It is important for voters and the general American public to

⁴⁸ See, e.g., *Gjersten v. Bd. of Election Comms. for City of Chi.*, 791 F.2d 472, 478 (7th Cir. 1986); *Bell v. Southwell*, 376 F.2d 659, 662-65 (5th Cir. 1967).

⁴⁹ 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”).

⁵⁰ See, e.g., *Soules v. Kawaiians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180-81 (9th Cir. 1988).

⁵¹ 3 U.S.C. § 2 (“Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such manner as the legislature of such State may direct.”).

⁵² For a discussion of state legislatures appointing electors directly, see the Task Force paper, *A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election*.

understand that anyone with actual evidence of fraud, misconduct, or other irregularities in an election has a forum (maybe even more than one) for making and proving such allegations.

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 a free and fair 2020 presidential election by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except an election that is free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all of its 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 ELECTION INFORMATION

State	Recount Threshold ⁵³	Deadline to Certify Results ⁵⁴	Forum for Post-Election Contests	Application of Contest Law to Presidential Elections	Standing	State Law Accounts for ECA Safe Harbor?	Remedies Available
AZ ⁵⁵	Automatic recount when the margin is less than or equal to 0.1% of all votes or 200 votes (whichever is less).	Fourth Monday after the election.	Superior Court (appeal likely allowed).	Likely Applies. Contest statute applies to “state officers,” which includes some federal elected officials.	Voters	No	Declare new winner; void election.
FL ⁵⁶	Automatic recount when the margin is 0.5% or less of the total votes cast.	14th day after the election.	Circuit Court of Leon County (appeal allowed).	Applies based on prior precedent.	Candidates; voters; taxpayers	Implied by decision in <i>Bush v. Gore</i> .	Declare new winner.
GA ⁵⁷	Mandatory if a candidate requests and the margin is 0.5% or less of the total votes cast.	17th day after election.	Superior Court (appeal allowed).	Applies by express terms of statute.	Candidates; voters	No	Declare new winner; void election; call new election.
IA ⁵⁸	Mandatory if requested by a candidate and the margin is less than the greater of 1% of total votes cast or 50 votes.	27 days after the election.	Special Contest Court (no appeal allowed).	Applies by express terms of statute.	Candidates	Yes. The Contest Court’s judgement must issue by the safe harbor deadline.	Declare new winner.
MI ⁵⁹	Automatic recount if the margin is 2,000 votes or less.	20th day after the election.	Court of Appeal (appeal allowed).	May apply, depending on whether presidential electors are “state officers” for purposes of	Citizen of county where action	No	Declare new winner; damages.

⁵³ This chart 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.

⁵⁴ Some certification deadlines may change in the event of a recount or election contest.

⁵⁵ Ariz. Rev. Stat. §§ 16-648, -650, -661, -672, -674, -676; *see also Harless v. Lockwood*, 85 Ariz. 97, 99 (1958) (construing “state officers” language to encompass federal congressional elections).

⁵⁶ Fla Stat. §§ 102.111-112, 102.121, 102.141, 102.166, 102.168, 102.1682, 102.1685; *Gore v. Harris*, 772 So. 2d 1243 (Fla.), *rev’d sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

⁵⁷ Ga. Code §§ 21-2-495, 2-499, 2-502, 2-521, 2-524, 2-527.

⁵⁸ Iowa Code §§ 50.38, 50.48, 57.1, 60.1, 60.5, 60.6.

⁵⁹ Mich. Comp. Laws §§ 168.841, 168.842, 168.88a, 600.4505, 600.4515, 600.4545; Mich Ct. R. 3.306.

				<i>quo warranto</i> actions.	brought; state attorney general		
MN ⁶⁰	Mandatory recount on request if any candidate in the race trails the winner by less than a 0.25% margin.	Third Tuesday after the election.	Special contest court (can appeal to state supreme court).	Applies by express terms of statute.	Candidates; voters	No	Declare new winner; void election.
NH ⁶¹	Candidate may apply to the secretary of state for a recount if the margin is less than 20% of total votes cast.	Not specified (on completion of initial vote count or after completion of recount proceedings).	Ballot Law Commission (can be appealed to state supreme court).	Applies by express terms of statute.	Candidates	No	Declare new winner.
NC ⁶²	Mandatory if requested by a candidate and the margin is less than 0.5% of total votes cast or 10,000 votes, whichever is less.	The Tuesday three weeks after the election.	County & State Board(s) of Elections (can be appealed to superior court).	Applies by express terms of statute.	Candidates; voters	Yes. The legislature may appoint electors if election disputes are not resolved by noon on the safe harbor deadline.	Declare new winner; call for partial revote; call new election.
OH ⁶³	Automatic recount if the margin is less than 0.25% of total votes cast.	10 days after receipt of canvass from boards of elections (which are due 21 days after the election).	None for presidential elections.	---	---	Yes. Recounts must be completed by the safe harbor deadline.	---
PA ⁶⁴	Automatic recount if the margin is 0.5% or less of total votes cast.	Not specified.	Court of Common Pleas of Dauphin County (appeal allowed).	Applies by express terms of statute.	Voters (100 signatories needed)	No	Declare new winner.

⁶⁰ Minn. Stat. §§ 204C.33, 204C.35(1)(b)(2), 204C.40(2), 208.05, 209.01-10.

⁶¹ N.H. Rev. Stat. §§ 659:81, 660:1, 665:8, 665:16.

⁶² N.C. Gen. Stat. §§ 163-182.5, -182.7, -213.

⁶³ Ohio Rev. Code §§ 3505.32, 3505.34-35, 3505.38, 3515.01, 3515.08-09, 3515.011, 3515.041.

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

TX ⁶⁵	Automatic recount if there's a tie vote; on candidate request if margin is less than 10% of total votes cast.	33rd day after the election.	Governor (no appeal allowed).	Applies by express terms of statute.	Candidates (including candidates for elector)	Yes. The governor is required to decide election contests by the seventh day before the day the electors meet (the day before the safe harbor deadline).	Declare new winner.
WI ⁶⁶	Candidate may apply for a recount if the margin is no more than 1% of total votes cast.	December 1st	Elections Canvassing Commission (can be appealed to circuit courts and courts of appeals).	Applies by express terms of statute.	Candidates	No	Declare new winner; void election.

⁶⁵ Tex. Elec. Code §§ 67.012, 212.001, 212.023, 216.001, 221.002, 243.002, 243.012.

⁶⁶ Wis. Stat. §§ 7.70, 9.01; *McNally v. Tollander*, 100 Wis. 2d 490 (1981).