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# Election Law Manual

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**ELECTION LAW PROGRAM**

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WILLIAM & MARY  
LAW SCHOOL

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EDITED BY ALEXANDRA AMADO

# Election Law Manual

## SECOND EDITION

This edition has been substantially revised under the guidance of William & Mary graduate Alexandra Amado '20, former Election Law Program Manager. William & Mary Law graduate Elizabeth R. DePatie '22, who serves as the current Election Law Program Manager, provided invaluable support finalizing this Manual. William & Mary Law student Ellie Halfacre '23, served as lead footnote editor. The following William & Mary Law students also contributed their talents to this edition: Adriana Dunn '23, Elizabeth Harte '21, Camden Kelliher '21, George Leahy '23, Cody McCracken '22, Kristen Palmason '21, and Giselle Secada '23.

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# Introduction

This Manual is designed to provide an overview of election law in the United States. Its primary focus is state election law, although reference is made to relevant federal statutes such as the Help America Vote Act, the National Voter Registration Act, and the Voting Rights Act, as well as to relevant federal constitutional provisions.

The primary goal in creating this Manual is to provide a resource for state court judges who are called upon to resolve election disputes. During the past two decades since *Bush v. Gore*, there has been a substantial increase in election-related litigation in the United States. Much of this litigation has been filed in state court and requires application of state election law. With the encouragement of the Conference of Chief Justices, who in the years following *Bush v. Gore* identified election law as an increasingly important issue for state court judges, the Election Law Program has sought to provide a comprehensive overview of the principles that govern election litigation.

This Manual does not attempt a detailed analysis of election law statutes in all fifty states. Rather, it presents an overview of the principles that may be of use to a judge or lawyer who seeks to understand this area of the law.

The Manual is organized around various substantive election-law issues that have been litigated, as well as important procedural issues that govern this type of litigation. The manual loosely follows the continuum of elections themselves. After overview chapters on general topics, coverage moves from pre-election to Election Day to post-election litigation.

The field of election law continues to experience change as states revise their election codes and election cases are litigated across the country. The Election Law Program intends to continue revising this Manual at regular intervals. Accordingly, we welcome your feedback and suggestions for issues that warrant coverage. You may contact the Election Law Program's co-directors at:

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## CHAPTER 1

# Federal Regulation of State and Local Electoral Practices

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**CHAPTER 1:  
FEDERAL REGULATION OF STATE AND LOCAL ELECTORAL PRACTICES**

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## I. INTRODUCTION

The Constitution entrusts states with the power and authority to hold elections,<sup>1</sup> but some federal constitutional and statutory requirements nonetheless shape and constrain the state’s regulatory power.

While federal constitutional protections apply to local, state, and federal elections, many federal statutes apply *only* to elections for federal offices.<sup>2</sup> In practice, this distinction may be irrelevant as local, state, and federal elections are frequently held in tandem because financial and logistical considerations generally preclude states from operating separate federal and state election systems. Thus, federal requirements tend to permeate most elections, although, in some instances,

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1. U.S. Const. art. I, § 4, cl. 1; *Storer v. Brown*, 415 U.S. 724, 729-30 (1974).
  2. See generally Karen L. Shanton, Cong. Rsch. Serv., RL45549, *The State and Local Role in Election Administration: Duties and Structures* (2019) (examining how state and local administration of elections might be regulated by federal legislation by providing relevant listings of past federal statutes).

federal statutory rights that are expressly limited to federal elections may not have a state counterpart mandating the same requirement in state elections.<sup>3</sup>

This chapter provides an overview of the main federal constitutional and statutory requirements that affect elections.<sup>4</sup> The chapter begins with a consideration of federal constitutional protections, then discusses the main federal statutes governing the conduct of federal elections and concludes with a brief overview of federalism considerations.

## II. FEDERAL CONSTITUTIONAL CONSIDERATIONS

The federal Constitution gives state legislatures broad authority over the time, place and manner of federal elections (I, § 4, cl. 1) and the power to appoint electors in presidential elections (U.S. CONST. art. II, § 1, cl. 2). The federal Constitution contemplates that Congress can alter state election rules a state legislature set under its Article I powers. The extent of a state legislature’s authority over elections has been under scrutiny.<sup>5</sup>

The extent of a state legislature’s authority over elections has been under scrutiny.

The Constitution protects the right of all qualified<sup>6</sup> citizens to vote in state and federal elections.<sup>7</sup> Constitutional amendments explicitly address voting rights and prohibit the following:

3. For example, while federal law requires states to offer some voters provisional ballots in federal elections, it does not require states offer provisional ballots in state elections held the same day. Instead, state law governs the voter’s eligibility for a state provisional ballot. *See infra* Chapter 7: Election Day for additional information on provisional voting.
4. Campaign finance regulations and the nuances of congressional districting are beyond the scope of this manual.
5. For academic discussion of the “Independent State Legislature Doctrine,” see Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 733 (2001); Michael Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 1 (2021). *See also infra* at Chapter 12, Section V *Independent State Legislature Theory*.
6. *See infra*, Chapter 5: State Regulations of Voters for additional information on the requirements to be considered a qualified voter.
7. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

- denying or abridging a citizen’s right to vote because of race, color, or previous condition of servitude (15th Amendment),<sup>8</sup>
- denying or abridging a citizen’s right to vote because of sex (19th Amendment),<sup>9</sup>
- denying the right to vote in a federal election because of the voter’s failure to pay any poll or other tax (24th Amendment),<sup>10</sup> and
- denying the right to vote because of age if the citizen is eighteen or older (26th Amendment).<sup>11</sup>

The Constitutional amendments also:

- allow the reduction of a state’s congressional representation if otherwise qualified voters are denied the right to vote for reasons other than participation in a rebellion or other crime (14th Amendment),<sup>12</sup> and
- authorize the direct election of U.S. Senators by voters who are qualified to vote for the state’s most numerous legislative branch (17th Amendment).<sup>13</sup>

In addition to explicit protections for voting rights, other Constitutional guarantees are applicable to elections. These include:

- freedom of speech or expression, freedom of the press, and freedom of association (1st Amendment),<sup>14</sup> and
- guarantees provided by the Due Process and Equal Protection clauses (14th Amendment),<sup>15</sup> including the Supreme Court’s description of voting as a fundamental right.<sup>16</sup>

The Constitution also defines and divides important elements and duties of the electoral system in the United States between the states and the Congress. The Constitution authorizes state legislatures to set the times, places, and manner of electing Senators and Representatives,<sup>17</sup> while granting the power to judge the

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8. U.S. CONST. amend. XV, § 1.

9. U.S. CONST. amend. XIX.

10. U.S. CONST. amend. XXIV, §1.

11. U.S. CONST. amend. XXVI, §1.

12. U.S. CONST. amend. XIV, § 2.

13. U.S. CONST. amend. XVII.

14. U.S. CONST. amend. I (incorporated against the states by the Fourteenth Amendment).

15. U.S. CONST. amend. XIV, § 1.

16. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (identifying voting as “a fundamental political right” because it is “preservative of all rights”).

17. U.S. CONST. art. I, § 4, cl. 1 (granting Congress the authority to override a state legislature’s decision except for the place of choosing Senators).



elections, returns, and qualifications of its members to each congressional chamber.<sup>18</sup> Congress and the states also divide power in presidential elections.

State legislatures determine how the state selects its presidential electors,<sup>19</sup> while Congress establishes a uniform day when states will make their selections.<sup>20</sup> Congress also selects the day the electors meet and cast their votes.<sup>21</sup>

Constitutional challenges to state election regulations typically do not involve the explicit voting guarantees found in the Fifteenth, Seventeenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments. Instead, constitutional challenges to state election regulations usually focus on the protections and guarantees afforded under the First Amendment—particularly the rights of expression and association, as made applicable to the states by the Fourteenth Amendment—or on protections afforded by the Due Process or Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court has held that voting is one of the “fundamental rights” protected by the Due Process Clause of the Fourteenth Amendment, although it is a right that the state can burden or constrain under certain circumstances.<sup>22</sup>

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18. U.S. CONST. art. I, § 5, cl. 1. *See* *Roudebush v. Hartke*, 405 U.S. 15, 19, 23-26 (1972) (holding which contestant should be seated in Congress was a nonjusticiable question, but Article I, Section 5 does not prohibit a state from conducting its own recount as the Senate is still able to conduct an independent evaluation).
  19. U.S. CONST. art. II, § 1; *McPherson v. Blacker*, 146 U.S. 1, 27-35 (1892) (finding that the state legislature’s power to determine the selection method of electors is rooted in the United States Constitution and not reviewable by the state judiciary); *see* 3 U.S.C. § 5 (2000) (Safe Harbor provision) (protecting a state’s presidential elector from challenge if the state’s determination is finalized six days before the Electoral College meets).
  20. *See* 2 U.S.C. § 7 (2000) (establishing the Uniform Federal Election Day which is to be held on the Tuesday next after the first Monday in November on every even-numbered year).
  21. *See* 3 U.S.C. § 7 (2000) (setting the date for when the Electoral College meets as the first Monday after the second Wednesday in December).
  22. *Yick Wo*, 118 U.S. at 370; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 187 (1999) (noting that the Court has recognized that elections require “substantial regulation” to promote fairness and order (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974))).

# III. FEDERAL STATUTORY CONSIDERATIONS

## A. Help America Vote Act of 2002

Following *Bush v. Gore*,<sup>23</sup> Congress passed the Help America Vote Act (HAVA) in 2002 with overwhelming bipartisan support.<sup>24</sup> HAVA addressed concerns about voting integrity, voter access, and voting technology.<sup>25</sup> Though HAVA itself does not allow private lawsuits,<sup>26</sup> it is possible for individuals to sue under the state's implementing statutes.<sup>27</sup>

HAVA contains a mixture of mandatory and discretionary changes to state<sup>28</sup> election administration. Among its provisions, HAVA:

- mandates administrative compliance procedures for states opting to receive HAVA funding,<sup>29</sup>
- establishes the Election Assistance Commission (EAC), which promotes state election “best practices,” including requiring every state to develop and implement a uniform statewide definition of a valid vote for each voting system used,<sup>30</sup>
- grants to states that choose to replace their punch card or lever voting machinery,<sup>31</sup>

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23. 531 U.S. 98 (2000).

24. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 52 U.S.C. §§ 20901-21112).

25. H.R. REP. NO. 107-329, at 14 (2001) (describing the purpose of the development committee as “to ensure the usability, accuracy, security, accessibility, and integrity of voting systems and voting equipment”).

26. 52 U.S.C. § 21111 (limiting enforcement to civil actions filed in federal district court by the Attorney General, who can sue states or localities for injunctive or declaratory relief).

27. *See, e.g.*, *Kuznik v. Westmoreland County Bd. Of Comm’rs*, 588 Pa. 95, 101 -103, 149-150 (Pa. 2006) (finding that HAVA compliance preempted state law after a Pennsylvania County was sued for purchasing EVS machines without a referendum); *Fla. State. Conf. of the NAACP v. Browning*, 522 F.3d 1153,1175 (11 Cir. 2008) (reversing the district court’s preliminary injunction preventing Florida from implementing requirements for in-person registrants because HAVA did not restrict states from making such regulations); *Guare v. State*, 167 N.H. 658, 668 (N.H. 2015) (holding that a New Hampshire law’s ambiguous language was an undue burden on the right to vote despite being written to comply with HAVA).

28. 52 U.S.C. § 21141 (defining “state” to include the District of Columbia, Puerto Rico, Guam, American Samoa, and the United States Virgin Islands).

29. 52 U.S.C. § 21112.

30. 52 U.S.C. § 20921-2.

31. 52 U.S.C. § 20901.

- mandates adoption of error detection and voter notification standards for most voting technology used in federal elections held on or after January 1, 2006 regardless of whether the state opted to receive HAVA funding or not,<sup>32</sup>
- stipulates circumstances under which states must offer provisional voting in federal elections,<sup>33</sup>
- mandates design, implementation, and maintenance of a single, uniform, centralized, interactive statewide voter registration database by the states,<sup>34</sup> and
- provides a determination of when voters must offer identification to be able to vote in a federal election.<sup>35</sup>

The most significant HAVA provisions address voting technology requirements, provisional voting, statewide voter registration databases, and voter identification.

The most significant HAVA provisions address voting technology requirements, provisional voting, statewide voter registration databases, and voter identification. In elections for federal office held on or after January 1, 2006, states must use voting technology that (1) allows the voter to review and correct a ballot before it is cast; (2) alerts the voter when the voter selects more candidates than the number of vacancies, and (3) produces a permanent paper record with a manual audit capability.<sup>36</sup>

Localities must also provide one voting station per polling location that is accessible to persons with disabilities.<sup>37</sup>

HAVA additionally requires that voters casting a ballot for federal offices must be offered the opportunity to vote by provisional ballot if the voter's name is not on

32. 52 U.S.C. § 21081 (requiring the test error rate to be no greater than 1 per 500,000 ballot positions). See U.S. ELECTION ASSISTANCE COMM'N, EAC ADVISORY 2005-005: LEVER VOTING MACHINES AND HAVA SECTION 301(a) (Sept. 8, 2005) (explaining that lever voting systems conflict with HAVA's objective in creating permanent, auditable records).

33. 52 U.S.C. § 21082.

34. 52 U.S.C. § 21083 (requiring states to follow the voter registration purge requirements found in the National Voter Registration Act of 1993).

35. 52 U.S.C. § 21083(a)(5).

36. 52 U.S.C. § 21081(a)(2) (permitting jurisdictions that use paper ballots to substitute increased voter education and outreach for the notification requirements).

37. 52 U.S.C. § 21081(a)(3) (requiring at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place).

the voter registration list, and the voter attests the voter is registered in the jurisdiction where the voter is trying to vote.<sup>38</sup>

HAVA requires that provisional ballots must be separated from other ballots and not counted until the voter's eligibility is verified.<sup>39</sup> Voters who vote in federal elections after the usual poll closing time solely because the hours were extended may only vote by provisional ballots, which must be separated from other provisional ballots.<sup>40</sup> Provisional ballot voters must be able to determine if their votes were counted and, if they were not, the reason they were not.<sup>41</sup>

Under HAVA, each state must develop, implement, and maintain a computerized, statewide voter registration list.<sup>42</sup> Voter registration applicants should not be added to the statewide database unless they provide their driver's license number, the last four digits of their social security number, or attest that they have neither of these documents.<sup>43</sup> If the applicant has neither of these documents, then the state must assign the applicant a unique identification number.<sup>44</sup> States may only purge inactive voters from their registration database after following the requirements listed in the National Voter Registration Act of 1993 ("NVRA").<sup>45</sup>

Finally, HAVA addresses the circumstances under which federal election voters may be required to show identification before voting. First-time federal election voters who registered to vote by mail and did not provide identification documentation with the mailed-in form must present one of the HAVA specified

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38. 52 U.S.C. § 21082(a).

39. *Id.*; see *infra* Chapter 9: Election Contests for additional information on provisional ballots.

40. 52 U.S.C. § 21082(c). In contrast, voters who were in line before closing are permitted to vote by regular ballot.

41. 52 U.S.C. § 21082(a).

42. 52 U.S.C. § 21082(a)(5). States that do not require voter registration in federal elections are exempt from this requirement. 52 U.S.C. § 20503(b).

43. 52 U.S.C. § 21083(a)(5) (exempting states that ask voter registration applicants to provide their complete social security number under the Privacy Act, 5 U.S.C. § 552a note, from this requirement).

44. *Id.* (exempting states that ask voter registration applicants to provide their complete social security number under the Privacy Act, 5 U.S.C. § 552a note, from this requirement).

45. 52 U.S.C. § 21083(a)(2)(A). For examples of voter registration purges see *Husted v. Philip Randolph Inst.*, 138 S.Ct. 1833, 1850 (2018) (holding that Ohio law utilizing failure to vote as evidence that a registrant moved does not violate the NVRA); *American Civil Rights Union v. Philadelphia City Comm'rs*, 872 F.3d 175, 187 (3d Cir. 2017) (affirming the District Court's dismissal of ACLU's suit claiming NVRA required the Commissioners to purge voter rolls of individuals incarcerated due to felony conviction); *Bellito v. Snipes*, 935 F.3d 1192, 1210 (2019) (finding that the county's chief elections officer made reasonable effort to purge voters in compliance with the NVRA).

forms of identification at the polls.<sup>46</sup> These identification requirements set by HAVA are a floor that can be built upon by states.<sup>47</sup> States are able to enact stricter identification requirements such as requiring photo identification at the polls<sup>48</sup> or requiring prospective voters to present their driver’s license number or the last four digits of their social security number when registering to vote.<sup>49</sup>

## B. Voting Rights Act of 1965

Amended several times, the Voting Rights Act of 1965 (VRA) prohibits discrimination on account of race, color, or previous condition of servitude in any election in which an individual is otherwise qualified to vote.<sup>50</sup>

States and localities cannot use any law or practice that results in racial discrimination, even if this result was unintended<sup>51</sup> and cannot condition the right to vote on the voter’s ability to have another person vouch for the voter, or pass literacy, subject matter, or morals tests.<sup>52</sup> All states and localities must allow a voter who needs assistance because of blindness or other disability to receive assistance by a non-employer, non-union representative person of the disabled

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46. 52 U.S.C. § 21083(b)(4) This requirement is not applicable to individuals entitled to vote under the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) or other federal statutes. 52 U.S.C. § 21083(b)(3).
47. *See Sandusky Cnty. Dem. Party v. Blackwell*, 387 F.3d 565, 576 (6th Cir. 2004) (holding that HAVA does not require provisional ballots cast outside of the voter’s precinct of residency in violation of state law to be counted as legally cast votes as the state law requirements ask less of voters than HAVA permits) (“HAVA’s requirements [‘]are minimum requirements,[‘] permitting deviation from its provisions provided that such deviation is [‘]more strict than the requirements established under[‘] HAVA in terms of encouraging provisional voting, and is [‘]not inconsistent with the Federal requirements[‘] mandated by HAVA.”); *Cnty. of Nassau v. New York*, 724 F.Supp.2d 295 (E.D.N.Y. 2010) (“HAVA statute gives the states substantial discretion on how to implement its requirements.... [HAVA states] [t]he requirements established by this subchapter are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter so long as such State requirements are not inconsistent with the Federal requirements.”).
48. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 193 (2008) (“Of course, neither HAVA nor NVRA required Indiana to enact SEA 483, but they do indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology.”).
49. *Florida State Conf. of N.A.A.C.P. v. Browning*, 533 F.3d 1153, 1172 (11th Cir. 2008) (holding that HAVA does not prevent states from requiring those registering to vote to provide either their driver’s license number or the last 4 digits of their social security number) (“[HAVA] clearly contemplates the existence of requirements more restrictive than the federal minimum”).
50. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in sections of 52 U.S.C. §§ 10301-10314).
51. 52 U.S.C. § 1031(a) (stating laws may not be “imposed or applied...in a manner which results in denial or abridgment of the right...on account of race or color....”).
52. 52 U.S.C. § 10303.

voter's choice.<sup>53</sup> Voters who moved away from the jurisdiction fewer than thirty days before a federal election must also be permitted to cast an in-person or absentee ballot at their previous polling location for the offices of President and Vice President *only*.<sup>54</sup> Localities with single language minority population groups of a specified size who, as a group, have limited English proficiency and higher rates of illiteracy than the national rate must provide bilingual ballots, registration forms, instructions, and assistance to these groups.<sup>55</sup>

The two most discussed and litigated sections of the VRA are Section 2 and Section 5. Section 2 of the VRA states that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color ....”<sup>56</sup> It prevents both vote dilution—practices that diminish the political influence of a person’s vote—and vote denial—practices that prevent people from voting.<sup>57</sup> Section 5 requires certain districts to get preclearance from the federal government before approval of proposed election law changes.<sup>58</sup> This section, however, has been largely dormant since the 2013 Supreme Court case, *Shelby v. Holder*.<sup>59</sup>

### C. National Voter Registration Act of 1993

The National Voter Registration Act of 1993 (NVRA),<sup>60</sup> also known as “Motor Voter,” requires states to make federal election voter registration forms available to, and accept completed forms from, individuals who are applying for or renewing their

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53. 52 U.S.C. § 10508 (stating that voters under this section may choose who will assist them in voting).

54. 52 U.S.C. § 10502(e).

55. 52 U.S.C. § 10503(b)(2).

56. 52 U.S.C. § 10301(a) (2014).

57. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights*, 57 S.C. L. REV. 689, 691 (2006). *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (challenging voter photo ID law); *Holloway v. City of Virginia Beach*, 2021 WL 1226554 (E.D.Va. 2021) (challenging cities at-large election structure as vote dilution); *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (challenging a state statute concerning out of state ballots and third-party ballot collection).

58. 52 U.S.C.A. § 10304 (West).

59. 133 S. Ct. 2612, 2631 (2013) (striking down Section 5’s coverage formula—described in Section 4 of the VRA—that determines which districts qualified as needing to obtain preclearance because the court believed it was antiquated, imposed substantial burdens on the covered jurisdictions, and was not narrowly tailored).

60. The National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. § 20503-04).

motor vehicle license or who are visiting state offices<sup>61</sup> that provide public assistance or services to persons with disabilities.<sup>62</sup> These agencies must provide each applicant for in-person benefits with voter registration forms unless the applicant declares that they do not want to register or they do not return the declination form.<sup>63</sup> If an individual is already registered and they go to their state’s department of motor vehicles, a submission of a change of address form for their driver’s license must also operate to update the motorist’s voter registration, unless the motorist requests otherwise.<sup>64</sup> State agencies are not able to delegate these responsibilities to skirt the directive of the NVRA<sup>65</sup> and must ensure compliance.<sup>66</sup>

The NVRA requires states to make “reasonable” efforts to purge ineligible persons from voter registration lists and establishes procedures and limitations states must follow in doing so, including prohibiting states from purging registered voters solely for failure to vote.<sup>67</sup>

NVRA enforcement actions may be brought by the U.S. Attorney General or private citizens.<sup>68</sup>

Prevailing private plaintiffs may be awarded attorney’s fees.<sup>69</sup>

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61. Such as government agencies, including but not limited to the Department of Motor Vehicles, public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and public assistance or state-funded programs primarily engaged in providing services to persons with disabilities. 52 U.S.C. § 20506 (1993).

62. 52 U.S.C. § 20504. The Act does not apply to states that do not require registration to vote in federal elections or which permit polling-place registration on Election Day. 52 U.S.C. § 20503.

63. *Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014).

64. 52 U.S.C. § 20504(d).

65. *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008).

66. *U.S. v. New York*, 255 F.Supp.2d 73 (E.D.N.Y. 2003).

67. 52 U.S.C. § 20507(a)(4). *But see* *Husted v. Philip Randolph Inst.*, 138 S.Ct. 1833 (holding that an Ohio law purging voters from polls who did not respond to a notice and had not participated in two or more subsequent elections did not violate the NVRA). For more reading on the implications of *Husted*, see L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10053, SUPREME COURT TO HEAR VOTER ROLL CASE: WHAT ARE THE IMPLICATIONS? (2018).

68. 52 U.S.C. § 20510.

69. 52 U.S.C. § 20510(c).

## D. Uniformed and Overseas Citizens Absentee Voting Act

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)<sup>70</sup> delineates federal and state responsibilities for ensuring that absent uniformed services members and overseas citizens<sup>71</sup> can vote by absentee ballot in general, special, primary, or runoff elections for federal office.<sup>72</sup> To fulfill this mandate, states must:

- accept the standardized federal write-in absentee ballot in general elections for federal offices from voters who requested an absentee ballot for that election,<sup>73</sup>
- establish a “single office” to handle all absentee ballot requests from uniformed and overseas voters,<sup>74</sup>
- advise rejected absentee ballot applicants of the reason for the rejection,<sup>75</sup>
- not reject absentee ballot applications from eligible persons because the application was submitted too early,<sup>76</sup>
- consider an absentee ballot application from a uniformed services member or overseas voter to be an automatic application for an absentee ballot for the next two regularly scheduled federal elections plus any run-off elections,<sup>77</sup>
- accept absentee ballots without a stamp from uniformed services members,<sup>78</sup> and
- report the number of absentee ballots issued to and returned by uniformed and overseas absentee voters.<sup>79</sup>

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70. The Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 52 U.S.C. §§ 20301 – 20311).

71. 52 U.S.C. § 20310 (defining an “absent uniformed services voter” as “a member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote; [] a member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote; and [] a spouse or dependent of a member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote” and an “overseas voter” as “an absent uniformed services voter who, by reason of active duty or service is absent from the United States on the date of the election involved; [] a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or [] a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.”).

72. 52 U.S.C. § 20302.

73. 52 U.S.C. § 20303.

74. 52 U.S.C. § 20302(b).

75. 52 U.S.C. § 20302(d).

76. 52 U.S.C. § 20306(e).

77. 52 U.S.C. § 20102.

78. 52 U.S.C. § 20104.

79. 52 U.S.C. § 20308.



States determine whether the ballot is valid and can require it be returned by the state-established deadline.<sup>80</sup>

The U.S. Attorney General enforces UOCAVA by suing in federal district court for the declaratory and injunctive relief necessary to carry out the Act.<sup>81</sup> UOCAVA provides for fines and/or the imprisonment of individuals who intentionally deprive an individual of a UOCAVA right to vote, make false assertions of UOCAVA eligibility to vote, or attempt to influence a uniformed services member's vote.<sup>82</sup>

ADA-based voting-related lawsuits occur over polling place accessibility and accommodations that must be made to allow disabled individuals to cast a private ballot.

## E. Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits discrimination against individuals because of a disability.<sup>83</sup> Title II prohibits discrimination in the provision of public services, programs, or activities.<sup>84</sup> Title III prohibits discrimination in the enjoyment of goods, services, facilities, privileges, advantages, or public accommodations.<sup>85</sup> ADA-based voting-related lawsuits occur over polling place accessibility and accommodations that must be made to allow disabled individuals to cast a private ballot.<sup>86</sup>

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80. 52 U.S.C. § 20302(h).

81. 52 U.S.C. § 20307.

82. 18 U.S.C. §§ 608-09.

83. Americans with Disabilities Act of 1990, Pub. L. 103-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101-12189).

84. 42 U.S.C. § 12132.

85. 42 U.S.C. § 12182.

86. *See, e.g.*, *Hernandez v. NY State Board of Elections*, 479 F. Supp. 3d 1, 20 (S.D.N.Y. 2020) (denying a preliminary injunction requiring New York to provide a Remote Accessible Vote-by-Mail (“RAVBM”) system for blind voters in advance of the 2020 election as the State had already agreed to provide another method with substantially similar capabilities); *American Ass’n of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011) (holding that optical scan voting systems were not “facilities” to be regulated under the ADA); *Nelson v. Miller*, 950 F.Supp. 201, 204-05 (holding that the ADA did not extend a right to secret ballots for blind voters).

## F. Voting Accessibility for the Elderly and Handicapped Act of 1984

The Voting Accessibility for the Elderly and Handicapped Act (VAEHA)<sup>87</sup> was intended to improve access to voter registration facilities and polling places for federal elections for elderly and handicapped individuals.<sup>88</sup> The VAEHA is enforced through restricted private causes of action seeking declaratory or injunctive relief against non-compliant state and political subdivisions.<sup>89</sup> Compliance with this law does not preclude claims under the ADA.<sup>90</sup>

## IV. FEDERALISM CONSIDERATIONS

The basis of a state court's decision may have a bearing on the losing party's success in pursuing additional redress in the federal courts, particularly if the losing party did not initiate the federal lawsuit until after the state court made its decision.

The *Rooker-Feldman* doctrine, which circumscribes federal court review of state court actions in certain circumstances, arose out of two Supreme Court cases decided sixty years apart<sup>91</sup> and had its contours sharpened in 2005.<sup>92</sup> *Rooker-Feldman* prevents federal district courts from hearing cases filed by a state court losing party that: 1) were filed after the state court rendered its judgment, 2) complain of injuries created by the state-court judgment, and 3) ask the federal

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87. Voting Accessibility for the Elderly and Handicapped Act, Pub. L. 98-435, 98 Stat. 1678 (codified as amended at 52 U.S.C. §§ 20101-7).

88. 52 U.S.C. § 20101. The VEAHA has been held to apply only to federal elections. *NAACP v. Philadelphia Bd. of Elections*, No. 97-7085, 1998 U.S. Dist. LEXIS 8861 (E.D. Pa. June 15, 1998).

89. 52 U.S.C. § 20105 (requiring the voter to first notify the state's chief election officer of the non-compliance and wait forty-five days for a response before filing). *See, e.g., NAACP v. Philadelphia Bd. of Elections*, 1998 WL 321253 (E.D. Penn. 1998) (holding that the VAEHA can be applied to non-federal elections and upheld a directive mandating accessible polling places and alternative ballots be available for all elections).

90. *Amer. Ass'n of People with Disabilities v. Hood*, 278 F. Supp.2d 1345 (M.D. Fla. 2003).

91. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416-417 (1923) (holding that the only federal court with appellate jurisdiction to review state court judgments is the Supreme Court); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483-88 (1983) (holding that federal district court review of state court final judgments is barred when judgment stems from a judicial proceeding but is not barred when the state court proceeding is non-judicial in nature). *See also Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013) (articulating the standard as "forbidding a losing party in state court from filing suit in federal district court complaining of an injury caused by a state court judgment and seeking federal court review and rejection of that judgment").

92. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 282 (2005) (finding "when there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in court).

court to review and reject the state court’s judgment.<sup>93</sup> Mere entry of a state court judgment is insufficient to trigger *Rooker-Feldman* if parallel state and federal litigation existed when the state court issued its opinion.<sup>94</sup> Independent claims presented by would-be federal district court plaintiffs that are not “inextricably intertwined” with the state court judgment can be heard by federal courts, with the caveat that the state law on preclusion determines if the federal court can proceed.<sup>95</sup>

Because state courts must be able to develop their jurisprudence without federal interference,<sup>96</sup> if a state court’s decision rests on bona fide independent and adequate state grounds, the result stands regardless of how a federal court might resolve the federal issues.<sup>97</sup> If the state court’s rationale is ambiguous or obscure, then the Supreme Court is able to review the validity of the state’s action under the federal Constitution.<sup>98</sup>

While states are given power over the administration of elections, the federal government nonetheless maintains influence through U.S. Constitutional and statutory provisions.

## V. CONCLUSION

While states are given power over the administration of elections, the federal government nonetheless maintains influence through U.S. Constitutional and statutory provisions. Although some provisions only apply to federal elections, the financial and logistical consideration that would be involved in holding fully separate federal and local elections often make that distinction irrelevant. The federal government is therefore able to indirectly introduce its legislative objectives into state elections.

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93. *Id.* at 283-84.

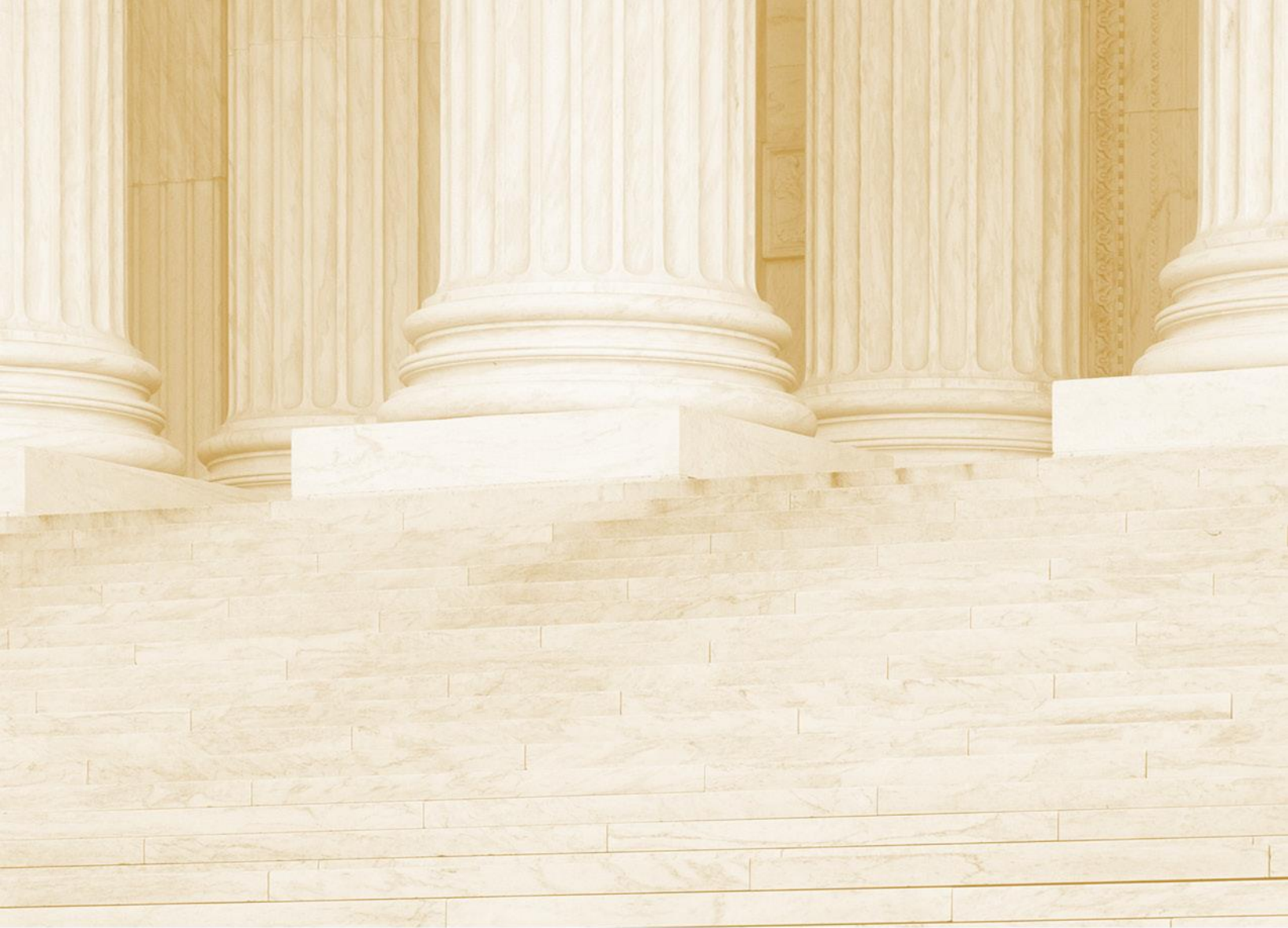
94. *Id.*

95. *Id.* at 292-93.

96. *Michigan v. Long*, 463 U.S. 1039, 1041 (1983).

97. *See id.*

98. *Id.* at 1041.



## CHAPTER 2

# State Regulation of Candidacies and Candidate Ballot Access

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**CHAPTER 2:  
STATE REGULATION OF CANDIDACIES AND CANDIDATE BALLOT ACCESS**

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# I. INTRODUCTION

It is axiomatic that before a candidate can be elected to office, the candidate's name must appear on the ballot, or she must be allowed to mount a write-in candidacy. States may regulate candidate ballot access or write-in candidacies as part of their general regulatory power over federal, state, or local elections<sup>1</sup> as long as the regulations comport with federal and state constitutional protections.<sup>2</sup> These protections exist because the state's interest in limiting ballot access is contrary to both the interests of potential candidates and of voters who may benefit from more choices at the ballot box.<sup>3</sup>

States regulate candidate ballot access to further their interests in:

- holding orderly elections with serious, rather than frivolous, contenders,<sup>4</sup>
- promoting electoral integrity,<sup>5</sup>
- limiting voter confusion caused by lengthy ballots,<sup>6</sup>
- preventing fraudulent candidacies,
- enhancing political stability by increasing the likelihood that the winner receives a majority of the votes,<sup>7</sup> and
- supporting finality by reducing the need for run-off elections.<sup>8</sup>

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1. U.S. CONST. art. I, § 4; *Lubin v. Panish*, 415 U.S. 709, 715 (1974) (noting the importance of limiting ballots to a reasonable size and serious candidates with some prospects of public support was not open for debate although the method by which a candidate's seriousness was tested might be).
  2. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (quoting *Kusper v. Pontikes*, 414n51, 58-59 (1973)) (“[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty”). *But see Anderson v. Celebrezze*, 460 U.S. 780 (1983) (noting that a state's interest in regulating ballot access for a nationwide presidential election is not as strong as when it regulates elections for state and local offices).
  3. *See Burdick v. Takushi*, 504 U.S. 428 (1992) (assessing the weight of the state's interest against “voters' rights to make free choices and to associate politically through the vote” and further elaborating the concept that voter and candidate rights cannot be untangled).
  4. *Panish*, 415 U.S. at 714 (1974) (reasserting “the imperative of protecting the integrity of the electoral system from the recognized dangers of ballots listing so many candidates as to undermine the process of giving expression to the will of the majority.”).
  5. *Id.*
  6. *Id.* at 715 (“We recognized that the State's interest in keeping its ballots within manageable, understandable limits is of the highest order.”); *id.* at 712 (citing *Thomas v. Mims*, 317 F. Supp. 179, 181 (S.D. Ala. 1970)).
  7. *See id.* at 715-16 (recognizing a state's legitimate interest in offering “ballots of a reasonable size limited to serious candidates with some prospects of public support.”).
  8. *Id.* at 712-13 (citing *Spillers v. Slaughter*, 325 F. Supp. 550, 553 (M.D. Fla. 1971) (reaffirming the interest “to limit the number of runoff elections”).

A state may regulate both primary and general election ballot access. States may set stricter standards for the general election because of the state’s legitimate interest in reserving the general election for “major political struggles.”<sup>9</sup>

Candidates have an interest in ballot access because without it, their candidacies are difficult if not impossible to maintain.<sup>10</sup> The right to be recognized as a candidate is a privilege of state, not national, citizenship.<sup>11</sup> The federal Constitution does not recognize a fundamental right to candidacy.<sup>12</sup> Thus, the legal effect of a candidate’s ballot access interest varies by state and depends on whether the state constitution recognizes a fundamental right to candidacy.<sup>13</sup>

Voters have an interest in candidate ballot access requirements because voting for their preferred candidate is one means through which voters exercise their constitutionally protected interest in associating with politically like-minded

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9. See *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997)) (“There is no question that states have a strong interest in confining party infighting to the primary election and reserving the general election for major political struggles.”); *Burdick*, 504 U.S. at 439 (1992); *Anderson v. Morris*, 636 F.2d 55, 57 (4th Cir. 1980) (“[T]hat the general election ballot is reserved for major political struggles, [and] ... that the general election ballot shall present the electorate with understandable choices and the winner shall have sufficient support to govern effectively.”).
  10. Hanna Merzbach, *Write-in Candidates: Do They Ever Win?*, KGW (Oct. 21, 2020, 11:58 AM), <https://www.kgw.com/article/news/politics/elections/do-write-in-candidates-ever-win/283-fccf8694-af1a-4a2a-80cb-a6490866dc7f> (“On the national level, write-in candidates typically garner less than a percent of the popular vote and have never won a U.S. presidential election, though they are on the rise.”).
  11. Some states remove the right to candidacy upon conviction of a crime. See MICH. COMP. LAWS ANN. § 168.938 (West); DEL. CODE ANN. tit. 15, § 7555 (West). Some states limit ineligibility to convictions for crimes that harm public integrity. See CAL. ELEC. CODE § 20 (West) (disqualifying those with felony convictions from state or local elected office when the felony “involv[es] accepting or giving, or offering to give, any bribe, the embezzlement of public money, extortion or theft of public money, perjury, or conspiracy to commit any of those crimes.”); PA. CONST. art. II, § 7 (“No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth.”).
  12. *Snowden v. Hughes*, 321 U.S. 1 (1944) (noting state constitutions may recognize a right to candidacy).
  13. See *White v. Manchin*, 318 S.E.2d 470 (W. Va. 1984) (noting the state constitution recognized a fundamental right to candidacy, stating “strict scrutiny applies, whether under the equal protection clause of the fourteenth amendment or under the fundamental right to candidacy under our state constitution,” *id.* at 488.); see *State ex rel. Billings v. City of Point Pleasant*, 460 S.E.2d 436, 440 (W. Va. 1995) (“We agree . . . that the West Virginia Constitution confers a fundamental right to run for public office. This right necessarily follows from several provisions. First, Article IV guarantees a right of political participation through Section 1’s extension of the franchise to all adults (except those of unsound mind or under a felony conviction) and through Section 4’s use of the Section 1 voter eligibility criteria to determine eligibility for public office.”).

individuals.<sup>14</sup> This protected interest is burdened if the state ballot access laws are overly restrictive, and few candidates gain ballot access. Courts have recognized that state ballot access requirements must not restrict the right to vote by so heavily burdening prospective candidates that few candidates (or only those candidates affiliated with the major political parties) qualify for ballot access.<sup>15</sup> In recognition that state candidate ballot access laws implicate voters' rights,<sup>16</sup> courts generally weigh the state's interests against the voters'—not the candidate's—interests.<sup>17</sup>

To qualify for ballot access, states require candidates to satisfy a number of state statutory requirements. Some of these requirements—such as age, residency, citizenship, and education—are personal to the prospective candidate. Other requirements, such as those relating to petition signatures or political party nominations, are intended to demonstrate that the candidate has public support. Once a candidate satisfies these hurdles, the state may require the prospective candidate to pay a filing fee, resign from a current office, or satisfy other criteria.<sup>18</sup> Some states also disqualify those with a felony conviction from holding office indefinitely or within a certain period of time<sup>19</sup> if they have been adjudicated incapacitated.<sup>20</sup>

The next section discusses the most common criteria state statutes require prospective candidates to satisfy to gain ballot access, followed by a discussion on public support requirements.

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14. See *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (requiring that states must examine candidate access restrictions by the extent and nature of the impact they have on voters); see also *Panish*, 415 U.S. at 716 (commenting on the intertwining of candidates' and voters' rights and interests).
  15. See *Williams v. Rhodes*, 393 U.S. 23 (1968) (finding it necessary to assess the “totality of the [] restrictive laws”).
  16. *Storer*, 415 U.S. at 756; see also *Celebrezze*, 460 U.S. at 786 (noting the lack of a neat separation between the rights of candidates and the rights of voters because the laws affecting candidates have a “theoretical, correlative effect on voters” (quoting *Bullock*, 405 U.S. at 143)).
  17. See *Burdick*, 504 U.S. at 440 (1992) (“We think these legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters.”); *Celebrezze*, 460 U.S. at 806 (1983) (“[T]he burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline.”).
  18. See TEX. ELEC. CODE ANN. § 172.021 (West) (requiring a filing fee or a petition in lieu of the fee), Fla. Stat. Ann. § 99.012 (West) (setting forth required resignation terms); see also UTAH CODE ANN. § 20A-9-201 (West) (requiring a *prima facie* showing of impecuniosity as evidenced by an affidavit and, if requested, a financial statement).
  19. See, e.g., IND. CODE § 3-8-1-5 (2021); MO. REV. STAT. § 115.306 (2017); LA. CONST. art. I, § 10.1; OKLA. STAT. tit. 26, § 5-105a (1986).
  20. See, e.g., N.H. REV. STAT. ANN. § 655:38 (2013).



Miscellaneous qualification requirements are discussed in the final ballot access criteria section. A separate section is devoted to general legal challenges. Because candidates are not always able to maintain their candidacies through Election Day, the chapter concludes with a discussion on candidate withdrawal and substitution.

## II. BALLOT ACCESS QUALIFICATION REQUIREMENTS

Many state candidate ballot access requirements concern qualities that are personal to the candidate, such as:

- A. education or experience,
- B. minimum age,
- C. residency,
- D. citizenship, and
- E. qualified elector.

### A. Education or Experience Requirements

Education or experience requirements are common qualification criteria for ballot access by candidates who wish to run for judicial or prosecutorial offices as well as candidates for sheriff.<sup>21</sup> The state constitution or state statutes may specify (or courts may need to ascertain):

- the deadline by which the requirements must be met,<sup>22</sup>
- whether the requirements are currently satisfied,<sup>23</sup> and
- whether the experience must be uninterrupted or whether earlier episodes can be “tacked” onto more recent ones to achieve the relevant amount of experience.<sup>24</sup>

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21. *Bowring v. Dominguez*, 44 P.2d 299 (Cal. 1935); *Gazan v. Heery*, 187 S.E. 371 (Ga. 1936); *Gamble v. White*, 566 So.2d 171 (La. Ct. App. 1990); *Hannett v. Jones*, 722 P.2d 643 (N.M. 1986); *State ex rel. Willis v. Monfort*, 159 P. 889 (Wash. 1916).

22. *See Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990) (measuring experience from Election Day, not at the time the winner would take office); *Bowring*, 44 P.2d 299 (holding that different statutory language meant judicial candidates must satisfy experience requirements by the date of the election even though land surveyors and sheriffs had until the date they took office to gain the necessary experience).

23. *See Monfort*, 159 P. 889 (holding that an attorney whose license to practice was suspended was ineligible to run for a judgeship). *See also Gamble*, 566 So.2d 171.

24. *See Hannet*, 722 P.2d 643 (holding that, notwithstanding plain statutory language, residency and legal practice requirements must be satisfied by the time “next preceding” the election and not aggregated over the candidate’s lifetime).

## B. Minimum Age Requirements

Many states have established minimum age requirements for candidates for state or local offices.<sup>25</sup>

Many age-related candidate qualification challenges concern the date by which the candidate must satisfy the requirement when the statute does not clearly specify one.<sup>26</sup> The most common measuring dates or events are:

- the petition filing deadline,<sup>27</sup>
- the date of the primary election,<sup>28</sup>
- the date of the general election,<sup>29</sup>
- the date the election results are certified,<sup>30</sup> or
- the date the winner is sworn into office.<sup>31</sup>

Many age-related candidate qualification challenges concern the date by which the candidate must satisfy the requirement when the statute does not clearly specify one.

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25. The Constitution establishes minimum age requirements for members of Congress and the President. *See, e.g.*, ALASKA STAT. ANN. § 15.25.030 (West); W. VA. CONST. art. IV, § 4; OR. CONST. art. IV, § 8; MO. CONST. art. III, § 4.
26. *See, e.g., In re Nomination Petition of Gale*, 184 A.3d 185, 186 (Pa. Commw. Ct. 2018) (contesting that the phrase “who shall have attained the age of 30 years” without a noted deadline means “he is ‘eligible’ to run for Lieutenant Governor, but if successful will be ‘disabled’ due to age from assuming the office until he attains the age of 30 years”).
27. *Montelepre v. Edwards*, 359 So. 2d 1311, 1314 (La. Ct. App. 1978) (reaffirming the interpretation of LA. STAT. ANN. § 18:451 to mean that the “section refers to qualifications for candidacy, which by definition means that one must possess the requisite qualifications for a position at the time one qualifies to seek that position; in other words, one qualifies when he files to run for the office”).
28. *Nicol v. Superior Ct., Maricopa Cty.*, 473 P.2d 455 (Ariz. 1970) (holding that though there was authority to exclude a candidate from a primary ballot if the candidate could not satisfy all the requirements to hold office, the complaint in this case was premature).
29. *Hayes v. Gill*, 473 P.2d 872, 876 (Haw. 1970); *Comer v. Ashe*, 514 S.W.2d 730, 733 (Tenn. 1974) (“[I]n the light of [TENN. CONST. art. II, § 3]. . . is to require that a State Senator must have attained age 30 by the date of the commencement of his term, *which is the day of the election.*”) (emphasis added).
30. *See MD. CODE ANN., ELEC. LAW § 12-202* (West) (“A registered voter may seek judicial relief under this section in the appropriate circuit court within the earlier of: (1) 10 days after the act or omission or the date the act or omission became known to the petitioner; or (2) 7 days after the election results are certified, unless the election was a gubernatorial primary or special primary election, in which case 3 days after the election results are certified.”).
31. *Stiles v. Blunt*, 912 F.2d 260, 261 (8th Cir. 1990) (reaffirming that a candidate must “be 24 years old on the date he would be sworn into office as required by MO. CONST. art. III, § 4 and MO. ANN. STAT. § 21.080”) (citations omitted).

When statutes do not specify the date or event when the candidate must attain the required age, courts have stepped in and done so.<sup>32</sup>

## C. Residency Requirements

State-imposed candidate residency requirements are important derivative rights of voters because they protect voters from fraudulent candidacies.<sup>33</sup> Residency requirements also improve the likelihood that voters will have an opportunity to get to know all the candidates before selecting amongst them in the election.<sup>34</sup> Additionally, residency requirements are intended to ensure that candidates are familiar with the local political climate and can identify important constituent concerns.<sup>35</sup>

Candidate residency requirements may contain: 1) geographical and 2) durational components. Geographic requirements usually require the candidate to live in the political district served by the office to which the candidate aspires. Durational residency requirements specify the length of time the candidate must have resided in the specified district before the candidate can run for office.

### 1. Geographical Residency Requirements

The concept of domicile is frequently used to assess whether a candidate whose residency has been challenged satisfies the residency requirement. Domicile is generally defined as the combination of maintaining a residence—or presence—in a place, and the intent to remain in the location.<sup>36</sup>

Individuals may have more than one residence but can only have one domicile at a time.<sup>37</sup> When the domicile of a candidate with multiple residences is disputed,

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32. *See, e.g.*, *State ex rel. Sullivan v. Hauerwas*, 36 N.W.2d 427 (Wis. 1949) (holding, in the absence of statutory language specifying a date or event, that the candidate must satisfy the age requirement by Election Day).

33. *White v. Manchin*, 318 S.E.2d 470, 478-79, 546-47 (W. Va. 1984) (holding that one-year durational residency requirement for state senators served a compelling state interest and did not violate the fundamental constitutional rights of either candidates or voters).

34. *In re Contest of Nov. 8, 2011 Gen. Election of Off. of New Jersey Gen. Assembly*, 40 A.3d 684, 699 (N.J. 2012) (“First, such requirements ensure that voters have time to develop a familiarity with the candidate. Second, they ensure that the candidate can become familiar with the constituency and the issues facing the people to be represented.”).

35. *Id.*

36. *See White*, 318 S.E.2d at 482 (borrowing domicile definition from state divorce statutes when candidate qualification statutes do not define domicile); *Darnell v. Alcorn*, 757 So. 2d 716, 719 (La. App. 1999) (finding actual domicile necessary to meet residency requirements; fictitious domicile insufficient).

37. *See Domicile*, BLACK’S LAW DICTIONARY (11th ed. 2019).

courts typically analyze the following factors to determine which location is the domicile:

- the physical character of each residence,
- the candidate’s division of time between the residences,
- the candidate’s actions in each location, and
- whether the candidate demonstrates an intention to return to the original domicile.<sup>38</sup>

Once established, domicile presumably continues until a change is demonstrated. To establish a new domicile, courts have held the candidate must have abandoned the old residence—that is, left it without a present intent to return to it as a primary residence, and acquired a new residence with the intent to remain.<sup>39</sup>

No single factor is conclusive, but if the candidate lives and votes in the same location, that location is presumed to be the candidate’s domicile.

When a candidate whose residency is challenged claims that a new domicile has been established, courts must weigh the factors relating to each location to determine if a new domicile has supplanted the previous one.<sup>40</sup> No single factor is conclusive, but if the candidate lives and votes in the same location, that location is presumed to be the candidate’s domicile.<sup>41</sup>

If the candidate lives apart from the candidate’s family, then the domicile inquiry focuses primarily on the candidate’s claimed residence and not where the candidate’s family lives.<sup>42</sup>

38. See *White*, 318 S.E.2d at 486 (“Intent to change domicile, which requires an intent not to return to the old domicile, is to be inferred from facts and circumstances, not from self-serving representations.”); *State v. Stalnaker*, 412 S.E.2d 231, 234 (W. Va. 1991) (“Stalnaker’s change in residence for convenience while he was constructing a replacement for his trailer, does not, without more, indicate a change in domicile.”).

39. See *Oglesby v. Williams*, 812 A.2d 1061, 1069, 1075 (Md. 2002) (per curiam) (holding that the candidate’s non-continuous, prior residence in the county did not satisfy the constitutional residency requirements for eligibility).

40. *Id.* at 1068–69 (“In deciding whether a person has abandoned a previously established domicile and acquired a new one, courts will examine and weigh the factors relating to each place. This Court has never deemed any single circumstance conclusive. However, it has viewed certain factors as more important than others, the two most important being where a person actually lives and where he votes. Where a person lives and votes at the same place such place probably will be determined to constitute his domicile. Where these factors are not so clear, however, or where there are special circumstances explaining a particular place of abode or place of voting, the Court will look to and weigh a number of other factors in deciding a person’s domicile.”).

41. *Id.* at 1069.

42. *In re Stack*, 184 A.3d 591, 599 (Pa. Commw. Ct. 2018).

District boundaries for state and local offices may shift most often as a result of decennial redistricting (or as a result of successful litigation challenging district lines). These boundary shifts may impact a candidate’s ability to meet residency requirements.<sup>43</sup> When a candidate’s residency has been involuntarily shifted between political districts, courts may be asked to determine which district boundaries apply and how residency requirements should be measured under the circumstances.<sup>44</sup>

## 2. Durational Residency Requirements

Durational residency requirements specify the length of time candidates must live in the political jurisdiction they wish to serve in before running for office.<sup>45</sup>

Durational residency requirements both ensure voters an opportunity to get to know the candidate and the candidate an opportunity to become familiar with local political concerns.<sup>46</sup>

Courts have consistently upheld durational residency requirements for state-wide offices.<sup>47</sup> Durational residency requirements for local offices receive greater scrutiny than those for statewide offices because the two-way informational exchange used to justify them occurs more quickly in smaller political subdivisions.<sup>48</sup>

Courts have consistently upheld durational residency requirements for state-wide offices.

43. *See Clayton v. Kiffmeyer*, 688 N.W.2d 117, 124 (Minn. 2004). The court waived the geographical residency requirement for one election cycle for an incumbent judge attempting to qualify for ballot access for re-election who, after the judicial boundaries were shifted, no longer met the residency requirements for the office. The court held that no Equal Protection violation occurred when the challenger had to meet residency requirements, but incumbent judicial candidate did not. In addition, because the office was judicial and not legislative, the court considered residency requirements to be less important because constituent representation was not involved.

44. *See, e.g., McCarter v. Broom*, 377 So. 2d 383, 384–85 (La. Ct. App. 1979) (“We therefore hold that Mr. Broom, because of his bona fide effort to establish his domicile in District 12, within a reasonable time after the reapportionment order, and before the date of his qualification as a candidate, is eligible to run for councilman from District 12.”); *Norris v. Gould*, 854 So. 2d 448, 450 (2003), *writ denied*, 853 So. 2d 611.

45. Note that durational residency requirements for voters have been reviewed more strictly than durational residency requirements for candidates. *See infra* Chapter 5: State Regulation of Voters for additional information on durational requirements imposed on voters.

46. *White v. Manchin*, 318 S.E.2d 470, 489-91 (upholding one-year durational residency requirement for state senate).

47. *Id.* at 489 (listing numerous cases upholding state durational residency requirements for state offices).

48. *Id.* at 488 (listing long line of cases invalidating durational residency requirements for local offices).

In the absence of statutory language defining how to measure durational residency, courts may be asked to determine:

- the point in the election cycle a candidate must satisfy the durational residency requirement,<sup>49</sup> or
- if the durational period must be met by uninterrupted residence or if interruptions are allowed.<sup>50</sup>

## D. Citizenship Requirements

States can deny ballot access to non-citizens without violating the U.S. Constitution.<sup>51</sup>

## E. Qualified Elector Requirements

States sometimes require candidates to be “qualified electors”—that is, registered and eligible voters in the jurisdiction—before they can obtain ballot access.<sup>52</sup>

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49. *See* *Thompson v. Mellon*, 507 P.2d 628, 636 (1973) (holding that the crucial date for durational residency requirements is the filing date of the prospective candidate’s nominating papers).

50. *See* *Callaway v. Samson*, 193 F. Supp. 2d 783, 787 (D.N.J. 2002) (finding that a state statute imposing a one-year residency requirement for local office burdened prospective candidates’ constitutional right to intrastate travel and supporters’ right to vote); *Bearup v. Voss*, 690 P.2d 790, 792 (Ariz. Ct. App. 1984) (affirming requiring residency for three “uninterrupted” years prior to the election).

51. *Sugarman v. Dougall*, 413 U.S. 634, 650 (1973) (Rehnquist, J., dissenting) (stating that non-citizens’ status was not suspect because it was not “one with which they were forever encumbered; they could take steps to alter it when and if they chose.”).

52. *See, e.g.*, 17 R.I. GEN. LAWS § 17-14-2(a) (“No person shall be eligible to file a declaration of candidacy, or be eligible to be a candidate or be eligible to be voted for or to be nominated or elected in a party primary unless the person, at the time of filing the declaration, is qualified to vote in a primary within the district for the office which he or she seeks.”); 10 ILL. COMP. STAT. 5/7-10 (2021); W. VA. CODE § 3-5-7 (2021) (“[C]andidate [must be] a legally qualified voter of that county.”). *See also* VA. CODE ANN. § 24.2-519 (1993); *Dixon v. Va. State Bd. of Elections*, 83 Va. Cir. 371 (Va. Cir. Ct. 2011) (holding candidate was eligible to hold office because of change in domicile as required by § 24.2-519 and VA. CONST. art. II, § 1); *see also* VA. CONST. art. IV, § 4 (listing candidacy qualifications for a seat in the General Assembly).

### III. PUBLIC SUPPORT REQUIREMENTS

Public support requirements further the state’s interests in limiting voter confusion brought about by cluttered ballots, enhancing political stability, and promoting electoral integrity by reducing the number of spurious candidates on the ballot.<sup>53</sup> Generally, states may constitutionally require third party, minor party, or independent candidates who do not qualify for automatic ballot access<sup>54</sup> to demonstrate a “significant modicum of support,”<sup>55</sup> or make a “preliminary showing of substantial support,”<sup>56</sup> before receiving ballot access, even though these requirements may place a burden on voters’ associational rights. States may require major political party-affiliated candidates, who usually receive automatic general election ballot access when they win the party’s nomination or prevail in a party caucus, to demonstrate some level of public support to qualify for the primary election ballot.<sup>57</sup> States may also require major political party-affiliated candidates to satisfy any party-imposed qualification criteria.<sup>58</sup>

#### A. Petition Signature Requirements

Many states require prospective candidates to demonstrate the seriousness of their candidacy by collecting a specified number of qualified voters’ signatures on petitions of support. The number of supporting signatures required is commonly a specified percentage of the state’s registered voters,<sup>59</sup> a percentage of the voters who participated in a specified recent election,<sup>60</sup> a percentage with a maximum

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53. For an example of the interests involved generally in petition requirements, *see* *Lubin v. Panish*, 415 U.S. 709, 715–16 (1974) (“That ‘laundry list’ ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. . . . Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.”).

54. The major political parties—the Democratic and Republican—as well as non-major political parties may qualify for automatic ballot access, although the specific candidate who will represent the party may not be known until decided by or through a party primary, convention, or nominating caucus.

55. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

56. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

57. *See, e.g.*, OHIO REV. CODE ANN. § 3513.07 (West) (listing the form for declaration of candidacy requirements, including the signatories, without regard for party).

58. *See infra* Chapter 3: State Regulations that Affect Political Parties for additional information on political parties.

59. ARIZ. REV. STAT. ANN. § 16-322 (“In school districts or career technical education districts, the basis of percentage shall be the total number of active registered voters in the school district or career technical education district or single member district, whichever applies”).

60. *See, e.g.*, NEV. REV. STAT. ANN. § 293.200 (West) (requiring either a percentage or a specified number of voters’ signatures for an independent candidate to qualify); *see also* *Swanson v. Bennett*, 340 F. Supp. 2d 1295, 1299 (M.D. Ala. 2004) (upholding Alabama’s “three percent” requirement).

cap,<sup>61</sup> or a fixed number of signatures.<sup>62</sup> The U.S. Supreme Court has held that petition signature requirements that are too high may burden voters' First Amendment associational rights.<sup>63</sup>

In addition to specifying the minimum number of supporting signatures the candidate needs to qualify for ballot access, state statutes may regulate additional aspects of petition signature gathering, such as:

- the maximum number of signatures a campaign may submit,<sup>64</sup>
- who may sign the petition,<sup>65</sup>
- who may circulate the petition,<sup>66</sup>
- the time frame in which the petitions can be circulated,<sup>67</sup> and
- the deadline for submitting the petitions.<sup>68</sup>

The U.S. Supreme Court has held that petition signature requirements that are too high may burden voters' First Amendment associational rights.

61. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 5-703 (West).

62. *See, e.g.*, UTAH CODE ANN. § 20A-9-408 (West); OHIO REV. CODE ANN. § 3513.05 (West).

63. *See Storer v. Brown*, 415 U.S. 724, 738-40 (1974) (holding that a signature requirement higher than 5 percent of the entire vote cast in the area's preceding general election can be "unduly onerous" on constitutional rights).

64. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-322 (2021) (limiting signatures to 1,000 for candidates for a community college district and 400 for candidates for a governing board of a school district or a career technical education district); WIS. STAT. § 8.15 (2018) (allowing no more than 4,000 signatures for statewide office, 2,000 for congressional office, 800 for state senate, and 400 for state assembly).

65. States commonly require the petition signer to be a registered voter and live in the jurisdiction subject to the office. They may also require the signer to forego participating in another nominating process, such as a primary election. *See, e.g.*, WIS. STAT. § 8.15 (2018) (requiring signatories to confirm that "I have not signed the nomination paper of any other candidate for the same office at this election").

66. *See Ryan v. Bd. of Elections of City of New York*, 426 N.E.2d 739 (N.Y. 1981) (per curiam) (finding the redistricting plan that placed petition circulator's home 125 feet outside the redrawn boundary operated to invalidate the nominating petitions he circulated for lack of compliance with circulator residency requirements). *See also* CONN. GEN. STAT. § 9-410(c) (2003) ("Each circulator of a primary petition page shall be an enrolled party member of a municipality in this state who is entitled to vote."). *But see* *Libertarian Party of Va. v. Judd*, 718 F.3d 308 (4th Cir. 2013) (affirming the lower court's judgment that enjoined enforcement of a requirement for petition circulators to be Virginia residents on First Amendment grounds).

67. *See, e.g.*, ARK. CODE ANN. § 7-7-205 (2019) ("No signature that is dated more than ninety (90) days before the date the petition is submitted shall be counted.").

68. *E.g.*, TENN. CODE ANN. § 2-5-101 (2020).



Statutes may also regulate the wording and format of petitions as well as require witness or attestation statements.<sup>69</sup>

Once prospective candidates submit their supporting petitions (and any other required paperwork) to election officials, election officials must review them for compliance to decide whether the candidate is granted or denied ballot access.<sup>70</sup> The review is an administrative process that may be subject to completion deadlines. When the petition submission deadline tolls, state statutes may prohibit prospective candidates from filing alterations, corrections, supplements, or new petitions.<sup>71</sup> Thus, if enough signatures are disqualified<sup>72</sup> during the administrative review process to drop the candidate beneath the minimum number necessary for ballot access, the candidate may be prevented from submitting additional signatures and may not meet requirements to be placed on the ballot.<sup>73</sup>

The state's interest in limiting voter confusion and enhancing political stability is not strong enough to justify all candidate ballot access restrictions. At some point, the burden placed on voters' associational rights by the candidate ballot access

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69. *See, e.g.*, KAN. STAT. ANN. § 25-205 (2020) (“I, the undersigned, an elector of the county of \_\_, and state of Kansas, and a duly registered voter, and a member of \_\_\_\_\_ party, hereby nominate \_\_\_\_\_, who resides in the township of \_\_\_\_\_ (or at number \_\_ on \_\_\_\_\_ street, city of \_\_\_\_\_), in the county of and state of Kansas, as a candidate for the office of (here specify the office) \_\_\_\_\_, to be voted for at the primary election to be held on the first Tuesday in August in \_\_\_\_\_, as representing the principles of such party; and I further declare that I intend to support the candidate herein named and that I have not signed and will not sign any nomination petition for any other person, for such office at such primary election.”).

70. If independent candidates satisfy ballot access requirements, state statutes might allow them to designate a political party label to run under. *See* *Greene v. Slusher*, 190 S.W.2d 29 (Ky. 1945) (upholding candidate's right to seek office under the “Law and Order Party” notwithstanding that no such party existed).

71. *See* *State ex rel. Sturgill v. Lorain Cnty. Bd. of Elections*, 842 N.E.2d 78 (Ohio Ct. App. 2005) (per curiam); *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004).

72. Disqualification requirements vary by state. In California for example, counties have eight days to report the raw count of signatures to the Secretary of State. If the total number of signatures reaches the signature threshold needed for the petition, the Secretary of State directs county election officials to randomly sample signatures for validation to ensure that the signatures are made by registered voters. If the result of the random sample indicates that the number of valid signatures represents between 95% and 110% of signatures necessary to qualify the petition, the Secretary of State directs the county elections officials to verify every signature on the petition. *See Initiatives and Referenda Pending Signature Verification*, CAL. SEC. OF STATE, <https://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/initiatives-and-referenda-pending-signature-verification>. Virginia law requires the state Board of Elections to come up with a process to check if an individual is registered to vote in the state, and a process to track the information from each petition. Virginia also requires a witness to every petition signature. *See* VA. CODE ANN. § 24.2-506 (2020); *Constitution Party of Va. v. Va. State Bd. of Elections*, 472 F.Supp.3d 285 (E.D. Va. 2020) (“Once a potential candidate submits his or her signatures, a Department of Elections employee manually checks the name, address, and partial social security number, if given, associated with each signature against the voter registration database to ensure that it is a qualified voter's signature.”).

73. *See* *Blankenship v. Blackwell*, 817 N.E.2d 382 (Ohio 2004).

## No bright-line rule distinguishes constitutional signature requirements from unconstitutional ones....

restrictions can be severe enough to outweigh the state's interest. In general, the courts have held that states unconstitutionally burden voters' associational rights when the state requires candidates to provide more supporting signatures than the amount necessary to demonstrate a reasonable level of public support, if the petition filing deadlines occur so early in the election cycle that the issues and interests of the electorate have not yet crystallized,<sup>74</sup> or if the totality of the petition requirements are overly restrictive.<sup>75</sup> State signature requirements are also unconstitutional when independent candidates must meet stricter requirements than those imposed on new political parties.<sup>76</sup>

No bright-line rule distinguishes constitutional signature requirements from unconstitutional ones, although courts have sanctioned statutes that require prospective candidates to submit petitions signed by one percent or less of the locality's electorate.<sup>77</sup> Generally, courts evaluate the constitutionality of petition signature requirements by assessing the interaction of a number of factors, such as the following:

- the number of signatures required to gain ballot access as a candidate for a given office,<sup>78</sup>

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74. *See* *Anderson v. Celebrezze*, 460 U.S. 780, 790-92 (1983) (noting the difficulties early petition filing deadlines present to independent candidates, at least in a presidential election).

75. *E.g.*, *Lee v. Keith*, 463 F.3d 763, 772 (7th Cir. 2006) (“Accordingly, we hold that the ballot access restrictions Illinois places on independent General Assembly candidates—the early filing deadline and the 10% signature requirement, together with the corresponding restriction disqualifying an independent candidate’s petition signers from voting in the primary—combine to severely burden Lee’s First and Fourteenth Amendment rights as a candidate and voter.”).

76. *See* *Storer v. Brown*, 415 U.S. 724, 745-46 (1974) (noting independent candidates may be independent because they do not wish to be a part of a party structure and organization and thus should not be forced to adopt party attributes to be eligible for office).

77. *See* *Jenness v. Fortson*, 403 U.S. 431, 442 n.28 (1971) (citing *Williams v. Rhodes*, 393 U.S. 23, 47 n.10 (1968) (Harlan, J., concurring in result)). In addition to Justice Harlan’s concurrence, the opinion itself noted that forty-two states required third parties to obtain supporting signatures from 1 percent or less of the electorate to achieve ballot access. *See Williams*, 393 U.S., at 33 n.9. *See infra* Chapter 3: State Regulations that Affect Political Parties for additional information on the constitutional aspects of public support requirements.

78. *Jenness*, 403 U.S. 431, 432-34 (1971) (evaluating the candidacy requirements for independent party members, including the “a nominating petition signed by at least 5% of the number of registered voters at the last general election for the office in question” as well as “[t]he total time allowed for circulating a nominating petition is 180 days, . . . the same deadline that a candidate filing in a party primary must meet” and “no limitation whatever, procedural or substantive, on the right of a voter to write in on the ballot the name of the candidate of his choice and to have that write-in vote counted” to determine the statute’s constitutionality).

- how the petition signature requirements for a given office compare to those for other offices in the same political subdivision,<sup>79</sup>
- the amount of time candidates have to gather the signatures,<sup>80</sup>
- how the petition signature deadlines for an independent candidacy compare with dates or deadlines applicable to party-supported candidates, such as the primary election, nominating convention, party caucus, or the date the party's nominee must be submitted to election officials,<sup>81</sup>
- the extent to which the state restricts who may sign the petition,<sup>82</sup> and
- whether the state's ballot access regulations effectively limit ballot access to the two major political parties.<sup>83</sup>

Because the totality of a state's ballot access regulations is important, petition signature requirements that exceed generally approved limits<sup>84</sup> may nonetheless be valid if they are mitigated by overall flexibility in the state's plan. For example, the U.S. Supreme Court upheld a state's ballot access regulations that required independent candidates or third parties to submit petitions with signatures of 5 percent of the total number of voters eligible to participate in the last election for

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79. Non-uniform petition signature requirements are ripe for attack. The ceiling, if one exists, on the signatures required to run for office in a large county should not be lower than the signature requirement resulting from an application of a percentage formula in smaller counties. *See State ex rel. Newell v. Brown*, 122 N.E.2d 105 (Ohio 1954) (finding unconstitutional a provision that required an independent candidate to meet a 7 percent signature requirement in eighty-seven counties but capping the number of signatures needed in the remaining county—the state's largest—with a fixed number that approximated a signature requirement of less than one-half of one percent).

80. *See Lee*, 463 F.3d at 772. Applying *Anderson-Burdick* framework during the COVID-19 pandemic, courts generally ruled against candidates challenging petition signature timelines. *See, e.g., Whitfield v. Thurston*, 468 F. Supp. 3d 1064 (E.D. Ark. 2020), appeal dismissed as moot, 3 F.4th 1045 (8th Cir. 2021) (holding that the signature requirements to get on the general election ballot did not violate the First Amendment); *Bond v. Dunlap*, No. 1:20-CV-00216-NT, 2020 WL 4275035 (D. Me. July 24, 2020), appeal dismissed, No. 20-1971, 2020 WL 9211021 (1st Cir. Oct. 27, 2020) (denying request for emergency injunctive relief to prevent the enforcement of the candidate ballot signature requirement).

81. *Celebrezze*, 460 U.S. at 790-92. The court held that the requirements for independent or third-party candidates to meet earlier petition filing deadlines than the deadlines applicable for candidates affiliated with political parties that are granted automatic ballot access are unconstitutional burdens on the voting and associational rights of the independent or third-party candidate's supporters. *Id.* After the primary elections, voters know their options and if they would prefer additional candidates. If petition deadlines are before the primary elections, voters who are dissatisfied with the results of the primary are unable to seek an alternative candidate who more closely aligns with their political philosophy. *Id.* at 804-05.

82. *See Storer*, 415 U.S. at 740-41 (“[A] State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot.”).

83. *See Celebrezze*, 406 U.S. 780.

84. The Supreme Court appears to approve of 1 percent signature requirements. *See Jenness*, 403 U.S. at 442 n.28 (1971) (citing *Williams v. Rhodes*, 393 U.S. 23, 43 n.10 (1968)).

the office the candidate was seeking.<sup>85</sup> While noting that the signature percentage requirement was higher than what many states require,<sup>86</sup> the court found the requirement constitutional because:

- the state’s overall ballot access scheme was flexible,
- voters could sign a nominating petition even if they had already voted in a primary election, and
- voters could sign more than one candidate’s nominating petition.<sup>87</sup>

## **B. Advancement from Primary to General Election Requirements**

Although major political parties may be granted automatic access to both the primary and general election ballots as a matter of course, independent, and third-party candidates may need to receive a specified level of support in a primary election to advance to the general election, as long as the requirements are constitutionally reasonable.<sup>88</sup>

Some states do not include the names of unopposed primary election candidates on the primary election ballot.<sup>89</sup> In Oklahoma, for example, any candidate who is unopposed in a partisan primary, is deemed to have been nominated and certified, and their name will not appear on the primary ballot.<sup>90</sup> If this occurs for each of the offices up for election, then no primary will be held.<sup>91</sup> The candidates proceed to the general election. While this approach is permitted for state and local elections, it is prohibited for federal elections because omitting even unopposed federal candidates from the ballot violates the requirement that federal officers are elected on a uniform Federal Election Day.<sup>92</sup>

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85. *See generally id.*

86. *Id.*

87. *Id.* The court also noted that write-in votes were not limited, the petition submission deadline was the same as the deadline for political parties to submit the name of their nominee, and independent candidates had 180 days to circulate their petitions.

88. *See* *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986).

89. *E.g.*, OKLA. STAT. ANN. tit. 11, § 16-111 (West 2021); ALA. CODE § 17-13-5(c) (2021); S.D. CODIFIED LAWS § 12-6-9 (2021).

90. OKLA. STAT. ANN. tit. 11, § 16-111 (2021).

91. *Id.*

92. *See generally* *Foster v. Love*, 522 U.S. 67, 70 (1997) (holding that Louisiana's October “open primary” conflicted with federal law when it led to the “election” of a congressional candidate prior to the federal election day).

## IV. MISCELLANEOUS CANDIDACY REGULATIONS

In addition to meeting personal requirements and demonstrating public support for their candidacy, many states place additional restrictions on a candidate's ballot access.<sup>93</sup> This section discusses the most common types of these additional restrictions and the legal issues that might arise with respect to those restrictions. They include:

- A. filing fees,
- B. disaffiliation periods,
- C. “sore loser” limitations,
- D. fusion candidacies,
- E. limits on the number of simultaneous candidacies,
- F. resignation requirements,
- G. “increased emoluments” limitations,
- H. term limits,
- I. election code violations, and
- J. write-in candidacies.

As with the previous section, when challenges to these regulations involve special considerations, they will be discussed along with the regulation.

### A. Filing Fees

Prospective candidates must usually pay a filing fee before their candidacy application is processed. In two 1970s-era decisions, the Supreme Court struck down the challenged filing fees as unconstitutional burdens on the associational rights of indigent voters.<sup>94</sup> The Court held that a candidate's wealth—as reflected by the candidate's ability to pay the substantial filing fees<sup>95</sup>—had no direct

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93. They can include requiring candidates to pay filing fees and limiting a candidate's ability to change political parties, run for more than one office at a time, or run for new elective office while holding a government job.

94. *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974). In *Lubin*, the court found that the filing fees meant that indigent voters were unlikely to be able to support an indigent candidate because the high filing fees would prevent the indigent candidate from qualifying from office. 415 U.S. at 718. *Belitskus v. Pizzingrilli*, 343 F.3d 632 (Ct. App. 3d 2003). *But see Biener v. Calio*, 361 F.3d 206 (Ct. App. 3d 2004) (holding that a \$3,000 filing fee does not violate Qualifications Clause, and candidate did not have standing to sue on behalf of near indigent candidates who were not able to file for the indigency exception).

95. The filing fee at issue in *Bullock* was \$8,900 in 1972, or the equivalent of more than \$63,000 in 2022. *Bullock*, 405 U.S. at 145. The filing fee at issue in *Lubin* was less, only \$875 in 1972 (or the equivalent of \$5,935 in 2022). *Lubin*, 415 U.S. at 710. *Lubin* wanted to run for Los Angeles County supervisor, which required the payment of a nonrefundable fee of \$701.60 (equivalent to \$4,755 in 2022) before the clerk would supply the forms necessary to begin the process. *Id.*

bearing on the seriousness of the candidacy, his public support,<sup>96</sup> or his qualifications for the office;<sup>97</sup> thus, the filing fees did not support the state's interest in limiting ballot access to only serious candidates.

The unconstitutional filing fees exhibited the following characteristics:

- they were based on the salary for the office being sought,<sup>98</sup>
- they covered the entire costs of the primary election without any contribution from taxpayer funds,<sup>99</sup> and
- they could not be waived even if a prospective candidate was unable, rather than merely unwilling, to pay them.<sup>100</sup>

Although nominal filing fees appear to be constitutional, no bright line exists between nominal and overly burdensome filing fee requirements.

Although nominal filing fees appear to be constitutional, no bright line exists between nominal and overly burdensome filing fee requirements. What is certain, however, is that if a state's candidate filing fee regime does not allow for alternate means of ballot access, it is vulnerable to a constitutional challenge,<sup>101</sup> and will be analyzed under heightened scrutiny.

## B. Disaffiliation Periods

Some states require prospective candidates to officially disaffiliate from their previous political party before they may run for office under a different political

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96. *Panish*, 415 U.S. at 717.

97. *Bullock*, 405 U.S. at 149.

98. *Id.* at 138, 148-49; *Panish*, 415 U.S. at 710.

99. *Bullock*, 405 U.S. 134.

100. *Panish*, 415 U.S. 709 (noting that petition signatures could not substitute for the filing fees and that write-in candidacies also required payment of the filing fee or else the votes cast for the write-in candidate would not be counted); *Bullock*, 405 U.S. 134 (noting that neither write-in voting nor petition signatures substituted for payment of the filing fee).

101. *Panish*, 415 U.S. at 718 (noting that requiring indigent candidates to pay filing fees they cannot pay is unconstitutional without other means of ballot access). Some states allow candidates to file additional supporting signature petitions in lieu of paying the filing fee. Whether the opportunity to mount a write-in candidacy is an adequate substitute for ballot access conditioned on filing fees has not yet been determined. *See id.* at 719 n.5 (stating the dubiousness of suggesting a write-in candidacy option would be a reasonable alternative to a filing fee requirement in the absence of alternate means to get the candidate's name on the ballot). *But see id.* at 723 (Blackmun, J., concurring) (suggesting that a filing fee might be constitutional if the state allowed write-in candidacies as a no-fee required alternative).

party label or as an independent.<sup>102</sup> States rely on their interest in supporting political stability to prevent party-splintering and excessive factionalism to justify disaffiliation requirements.<sup>103</sup>

Although disaffiliation requirements bar candidacies of individuals who do not decide to run for office early enough in the election cycle to comply with disaffiliation requirements, a failure to comply is nonetheless a valid bar to ballot access.<sup>104</sup> Disaffiliation requirements are independent of other candidacy qualification provisions and are not included in a “totality of the circumstances” analysis.<sup>105</sup> Presumably the length of time a disaffiliation statute requires a candidate to abstain from running for office as an independent or under a new political party label can become excessively burdensome, but a constitutional upper limit on disaffiliation periods has not yet been identified. Instead, disaffiliation periods of six months,<sup>106</sup> one year,<sup>107</sup> and four years<sup>108</sup> have been upheld.

### C. “Sore Loser” Limitations

Not all states have so-called “sore loser” statutes, but in those that do, these statutes most commonly prohibit losing primary candidates from running for an office in the general election.<sup>109</sup> The loser of the primary may be prohibited from

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102. *E.g.*, OHIO REV. CODE ANN. § 3513.191 (West) (“No person shall be a candidate for nomination or election at a party primary if the person voted as a member of a different political party at any primary election within the current year and the immediately preceding two calendar years.”). Voters who wish to participate in a party primary may also need to satisfy disaffiliation requirements, although voter-targeted disaffiliation requirements are scrutinized more closely than those applicable to candidates. *See infra* Chapter 5: State Regulation of Voters for additional information on voter disaffiliation requirements.

103. *See Storer v. Brown*, 415 U.S. 724, 736 (1974). Disaffiliation requirements generally do not unconstitutionally burden associational rights. *See Celebrezze*, 460 U.S., at 792 n. 12, (“Although a disaffiliation provision may preclude ... voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State’s disaffiliation requirements.”).

104. *Id.* (finding the state’s interest in the integrity of its political process justified a one-year party disaffiliation requirement before a candidate could gain ballot access to different party’s primary).

105. *Id.* at 737 (noting why the *Williams* aggregation of election codes does not apply).

106. *Polly v. Navarro*, 457 So.2d 1140, 1143 (Fla. Dist. Ct. App.1984) (upholding a six-month disaffiliation requirement because it was less restrictive than *Storer*).

107. *Storer*, 415 U.S. 724.

108. *See State ex rel. Graham v. Bd. of Elections*, 397 N.E.2d 1204 (Ohio 1979) (per curiam) (upholding application of the state’s four-year disaffiliation requirement in the absence of specific requirements in the charter city’s regulations).

109. *E.g.*, MICH. COMP. LAWS § 168.695 (1955) (“No person whose name was printed or placed on the primary ballots or voting machines as a candidate for nomination on the primary ballots of 1 political party shall be eligible as a candidate of any other political party at the election following that primary.”).

gaining ballot access to the general election ballot as an independent candidate or otherwise.

Courts have concluded that states legitimately use primary elections to winnow candidates, sort out intra-party differences, and reduce intra-party competition.<sup>110</sup> Through this use of the primary, states reserve the general election for the resolution of “major struggles” between political parties,<sup>111</sup> and justify their sore loser statutes.

States without explicit sore loser statutes may have other candidacy requirements that operate in a similar fashion. In one instance, a court found that a losing gubernatorial primary election candidate was ineligible to mount an independent general election candidacy because the primary candidacy was conditioned on the candidate’s oath to abide by the primary election results.<sup>112</sup>

## D. Fusion Candidacies

Fusion candidacies occur when the same individual runs as the nominee of more than one political party, generally a major party and a third-party. In usual practice, the third-party nominates a candidate who has already been selected as the major party’s nominee.<sup>113</sup>

Many states prohibit fusion candidacies.<sup>114</sup> The U.S. Supreme Court has upheld such prohibitions finding the character and magnitude of their burden on voters’ associational rights does not outweigh the state’s interest in political stability and its interest in limiting voter confusion.<sup>115</sup> In addition, fusion candidate restrictions do not prevent multiple parties from endorsing the same candidate; it only limits the candidate’s name to appearing on the ballot under one party’s label.<sup>116</sup>

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110. *Storer*, 415 U.S. at 735.

111. *Id.*

112. *Putnam v. Pyle*, 232 N.W. 20, 24 (S.D. 1930) (per curiam) (noting it made no difference that the petitions supporting his independent candidacy were circulated by third parties).

113. Fusion candidacies benefit both the third party and the major party. The third-party benefits from the increased visibility and influence it receives when the joint candidate receives votes under the third-party label. If these vote totals are high enough, the party may qualify for automatic ballot access in a future election. The major party benefits because sharing its candidate reduces the number of competing candidacies even as it increases the overall number of voters who are attracted to the candidate, thereby increasing its candidate’s chance of winning the election.

114. *E.g.*, MINN. STAT. § 204B.04(2) (2016) (“No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition.”).

115. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369-370 (1997).

116. *Id.*



## E. Limits on the Number of Simultaneous Candidacies

Some states limit candidates to running or seeking nomination for only one office at a time,<sup>117</sup> including any combination of state, federal, and local offices.<sup>118</sup> When challenged, these laws have generally been upheld.<sup>119</sup> However, statutes rendering any person ineligible to hold more than one elective office in the same town may not preclude that candidate from running for or holding elective offices in two different towns.<sup>120</sup>

## F. Resignation Requirements

“Resign to run” statutes require current elective office holders to resign their office before they become candidates for a different elective office.<sup>121</sup> The Supreme Court has upheld such statutes on the basis that the Constitution does not recognize a fundamental right to candidacy and additionally that resign to run requirements do not violate a political party’s right to associate with the candidate of its choice.<sup>122</sup> The Court has noted that resign to run statutes place fewer restrictions on election officials than constitutional restrictions on civil servants’ political activity in general.<sup>123</sup>

If a state’s constitution recognizes a right to candidacy, courts have found resign to run statutes may violate a state’s constitution.<sup>124</sup>

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117. See OHIO REV. CODE ANN. § 3513.052 (West 2010); see also MO. REV. STAT. § 115.351 (West 2007).

118. See OHIO REV. CODE ANN. § 3513.052 (West 2010).

119. See, e.g., *Levy v. Jensen*, 285 F. Supp. 2d 710 (E.D. Va. 2003), *aff’d*, 91 F. App’x 881 (4th Cir. 2004) (holding that the two-office restriction did not violate candidate’s First or Fourteenth Amendment rights); *Roberson v. Phillips Cty. Election Comm’n*, 2014 Ark. 480, 1, 449 S.W.3d 694, 695 (2014) (holding that candidates cannot run for two state, county, or municipal offices if the elections are to be held on the same date as prescribed by state law).

120. See *Nichols v. Bacon*, 108 N.Y.S.3d 71 (2019).

121. See TEX. CONST. art. XVI, § 65 (stipulating that some officeholders automatically resign when they announce their candidacy for another office if their unexpired term of office is greater than one year and thirty days).

122. *Clements v. Fashing*, 457 U.S. 957 (1982) (plurality).

123. *Id.*

124. Right to candidacy is often found when examining constitutional provisions in conjunction. See *White v. Manchin*, 318 S.E.2d 470, 488 (W. Va. 1984) (reaffirming that West Virginia’s constitution creates the “fundamental right to candidacy”); see also *State ex rel. Billings v. City of Point Pleasant*, 460 S.E.2d 436, 440 (1995) (“We agree with the relator that the West Virginia Constitution confers a fundamental right to run for public office. This right necessarily follows from several provisions. First, Article IV guarantees a right of political participation through Section 1’s extension of the franchise to all adults (except those of unsound mind or under a felony conviction) and through Section 4’s use of the Section 1 voter eligibility criteria to determine eligibility for public office.”).

## G. “Increased Emoluments” Limitations

State statutes or constitutions may prohibit individuals who in their previous position increased the “emoluments” or compensation of an office from seeking that position.<sup>125</sup> Courts may be asked to determine if the candidate’s actions render the candidate unable to qualify for ballot access because of these prohibitions.<sup>126</sup>

## H. Term Limits

Term limits for elective federal offices other than the presidency are unconstitutional.<sup>127</sup> States may, however, adopt term limits for state and local offices absent contrary provisions in the state constitution.<sup>128</sup>

## I. Election Code Violations

State statutes may prohibit or restrict candidacies by individuals who violated election statutes during previous candidacies.<sup>129</sup> Candidates may sue over the applicability of these restrictions or their length. One court upheld a five-year statutory candidacy ban a candidate incurred for failing to file timely campaign finance reports following an earlier election.<sup>130</sup>

## J. Write-In Candidacies

Although many states allow candidates who fail to gather sufficient petition signatures to qualify for ballot access to mount a write-in candidacy,<sup>131</sup> states can constitutionally prohibit write-in voting if their overall ballot access scheme is constitutional.<sup>132</sup> For example, a state that provided “easy access” to the ballot

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125. See ALA. CONST. art. IV § 59; TEX. CONST. art. III, § 18; OKLA. CONST. art. V, § 23.

126. See *State ex rel. Todd v. Reeves*, 82 P.2d 173 (Wash. 1938) (finding that an increase in judicial pensions was not an “emolument,” thus a legislator who voted for the increase was not prohibited from running for a judgeship).

127. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

128. *Cawdrey v. City of Redondo Beach*, 19 Cal. Rptr. 2d 179 (Cal. Ct. App. 1993) (1993), as modified (June 1, 1993).

129. See LA. STAT. ANN. § 18:492 (2010) (listing the false certification of a number of disclosures in violation of election laws as grounds for objecting to candidacy); 25 PA. CONS. STAT. § 3551 (1937) (stating that anyone who willfully violates any provision of the act “shall be forever disqualified from holding said office or any other office of trust or profit in this Commonwealth.”).

130. *State ex rel. Lukins v. Brown*, 298 N.E.2d 132 (Ohio 1973).

131. Or who decide to become candidates after petition or other deadlines have passed.

132. See *Burdick v. Takushi*, 504 U.S. 428 (1992).

survived a constitutional challenge to its prohibition of write-in voting in primary and general elections.<sup>133</sup>

## V. BALLOT ACCESS CHALLENGES

Candidate ballot access-related lawsuits are generally either:

- compliance-based challenges, or
- constitutional challenges.

Compliance-based challenges allege that election officials erred when they granted or denied ballot access to a particular candidate. These lawsuits are based on the candidate’s compliance (or lack thereof) with state statutes governing candidacies and ballot access. Depending on whether the plaintiff is the spurned candidate or an opponent of the candidate, the court is asked to add the candidate’s name to the ballot or to order it removed from the ballot.

Constitutionally based challenges target a specific state ballot access requirement or the state’s overall ballot access scheme. In these lawsuits, the petitioner asks the court to overrule the requirement(s) on state or federal Constitutional grounds.

### A. Compliance-Based Challenges

Compliance-based candidate ballot access challenges usually occur in one of two forms. First, a prospective candidate could sue on the candidate’s behalf, alleging ballot access was denied even though all ballot access requirements were satisfied, and ask the court to order election officials to place the candidate’s name on the ballot. Second, a voter, political party, or opposing candidate<sup>134</sup> could sue, alleging an ineligible candidate was granted ballot access, and ask the court to order election officials to remove the allegedly unqualified candidate’s name from the ballot or ask the court to enjoin election officials from counting ballots cast for the candidate if the candidate’s name cannot be removed.

Under either circumstance, the plaintiff may need to pursue administrative remedies with the local board of elections, or its equivalent, before filing a

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133. *Id.* at 436 (concluding the three separate methods to obtain ballot access in Hawaii resulted in “easy access”).

134. State statutes may define who is an appropriate party to bring this type of lawsuit.

lawsuit.<sup>135</sup> Challengers may also need to file within a statute of limitations period or else lose the opportunity to challenge the decision.<sup>136</sup>

Courts prefer to hear and resolve candidate qualification challenges before the election. Settling these disputes early limits the instability that occurs when a winning candidate's qualifications for office are challenged post-election. The preference for pre-election resolution is so strong that some courts apply laches<sup>137</sup> to dismiss post-election candidate qualification challenges filed by opposing candidates who wait for the election's outcome and sue only if their opponent wins.<sup>138</sup>

Any and all candidate requirements can be the focus of a compliance-related lawsuit. The error election officials are most likely alleged to have made involves correctly ascertaining a candidate's compliance with one or more of the following ballot access requirements:

- nominating petitions,<sup>139</sup>
- residency,
- experience, or
- non-affiliation or "sore loser" restrictions.

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135. *See generally* Seltzer v. Orlando, 225 A.D.2d 456, 457 (1996). For an example of an administrative procedure that a plaintiff must go through, see, for example, N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.3.

136. *E.g.*, TENN. CODE ANN. § 2-17-105 (2009) (requiring contests to be filed within five days from certification).

137. Laches is an equitable doctrine (sometimes called an equitable defense) that courts use at the defendant's request to dismiss lawsuits where the plaintiff's delay in bringing the lawsuit prejudiced another party. *See infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.

138. *White v. Ind. Democratic Party ex rel. Parker*, 963 N.E.2d 481, 489 (Ind. 2012) ("Our conclusion is that the Code places a burden on political campaigns to investigate and vet their opposition before the pre-election time limitations expire, but that is better than the alternative: that a challenger might ignore a known (or knowable) disqualification challenge before the election, wait to see who won at the polls, and then seek to set aside the results of the democratic process. Such a result is inconsistent with free elections and respect for voters' expressed preferences.").

139. Nominating petition problems include problems with the petition circulator's qualifications, insufficient signatures, improper signature or address information, and incomplete or incorrect information on the petition itself. A number of courts have heard cases concerning fraudulent signatures. *See, e.g.*, *Haygood v. Hardwick*, 973 N.Y.S.2d 711 (2013) (granting petition to invalidate nominating petition for fraudulent signatures); *Burman v. Subedi*, 101 N.Y.S.3d 523, leave to appeal denied, 127 N.E.3d 316 (2019) (granting petition to invalidate nominating petition for knowingly making false statements about fraudulent signatures). The presence of some fraudulent signatures does not always invalidate a petition. *See e.g.*, *Powell v. Tendy*, 15 N.Y.S.3d 428 (2015) (holding that the petitioners did not meet their burden in proving that the petition was permeated with fraud); *Overbaugh v. Benoit*, 99 N.Y.S.3d 512 (2019) (striking fraudulent signatures but not invalidating the entire petition).

In general, courts interpret candidate qualification statutes reasonably and without burdensome “ultra-technical[ity]” because they impact voters’ rights.<sup>140</sup> Because courts interpret election laws to “promote rather than defeat” candidacies,<sup>141</sup> doubt about whether a candidate satisfies the qualifications is usually resolved in the candidate’s favor.<sup>142</sup> For example, one court decided the prospective candidate substantially complied with nominating petition requirements because the obsolete petition form the candidate used contained all the required information, albeit in different locations.<sup>143</sup>

The prospective candidate who challenges election officials’ denial of ballot access may bear the burden of proving ballot eligibility.<sup>144</sup> Likewise, the individual who sues to block or reverse a candidate’s ballot access must prove the candidate’s disqualification.<sup>145</sup> Generally, a disqualification based on the candidate’s alleged inability to satisfy residency requirements, however, must be proven by clear and convincing evidence<sup>146</sup> because filing a false candidacy certification may subject the candidate to criminal penalties.<sup>147</sup>

The outcome of the candidate compliance challenge may hinge on how or when the candidate’s compliance is measured. Specifically, the candidate’s compliance may depend on the candidate’s status on a particular date, and the court may need to determine the appropriate measuring date.<sup>148</sup> Candidate qualifications are generally either measured in a “snapshot” or as an ongoing requirement.<sup>149</sup>

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140. *Heleringer v. Brown*, 104 S.W.3d 397, 405-06 (Ky. 2003) (Wintersheimer, J., concurring); *see also* *Nolan v. Cook Cnty. Officers Electoral Bd.*, 768 N.E.2d 216 (Ill. App. Ct. 2002) (noting courts take a cautious approach in interpreting statutes that set candidate ballot access requirements); *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125, 1126 (Okla. 1991) (noting qualifications for ballot access were limited to the statutory language, thus the incumbent candidate’s infirmities were insufficient reasons to remove his name from the ballot).

141. *Russell v. Goldsby*, 780 So. 2d 1048, 1051 (La. 2000).

142. *Id.*

143. *Nolan v. Cook Cnty. Officers Electoral Bd.*, 768 N.E.2d 216, 220 (Ill. App. 2002) (noting it was not making a “sweeping statement” that substantial compliance would “satisfy all certification requirements” in the Election Code).

144. *See Russo v. Burns*, 147 So. 3d 1111, 1114 (La. 2014) (“[O]nce an objector makes a prima facie showing of grounds for disqualification, the burden shifts to the defendant to rebut the showing.”).

145. *Goldsby*, 780 So. 2d 1048.

146. *Darnell v. Alcorn*, 757 So.2d 716, 719 (La. Ct. App. 1999).

147. *See In re Evans*, 547 A.2d 344 (N.J. Super. Ct. Law Div. 1988).

148. *See State ex rel. Reynolds v. Howell*, 126 P. 954 (Wash. 1912) (acknowledging different ideas about when a candidate’s eligibility is measured before deciding on the “majority view” that in the absence of specific language to the contrary, eligibility is measured at the time of election).

149. State statutes may specify which approach to use. In addition, some requirements may be measured by the “snapshot” approach and others may be ongoing.

Under a “snapshot” approach, candidate qualification criteria must be satisfied at a fixed moment in time. The most common measuring dates or events by which candidates must meet certain candidacy requirements are:

- the petition filing deadline,<sup>150</sup>
- the date of the primary election,<sup>151</sup>
- the date of the general election,<sup>152</sup>
- the date the election results are certified,<sup>153</sup> or
- the date the winner is sworn into office.<sup>154</sup>

An alternative approach considers candidate qualification requirements to be ongoing—i.e., requirements that must be satisfied throughout the election cycle. Under this approach, a candidate who satisfied qualification requirements when candidacy papers were filed may fail to satisfy them at a later date by, for example, losing a required professional license or moving outside the political subdivision.<sup>155</sup> Such candidate may find the candidacy challenged because of this subsequent failure.

No matter the approach taken by states to evaluate candidate qualification, it may be hard for defendants to use the defense of laches as courts generally hold that plaintiff’s delays in filing, which would ordinarily be defeated by a laches

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150. *See supra* note 27; *see also* *Cabrera v. Penate*, 94 A.3d 50, 59–60 (2014) (“Accordingly, we hold that, to fulfill the party affiliation requirement of § 5–203, a putative candidate must be affiliated with the political party whose nomination he or she seeks at the time of filing the certificate of candidacy. . . . [W]e find such a deadline expressed within the text of § 5–203 itself, as well as various other sections of Title 5, which governs ‘Candidates.’”).

151. *See supra* note 28.

152. *See supra* note 29.

153. *See supra* note 30.

154. *See supra* note 31; *see also* *Vowell v. Kander*, 451 S.W.3d 267, 275 (Mo. Ct. App. 2014), opinion adopted and reinstated after retransfer (July 17, 2014) (“§ 115.563.2 states that ‘[a]ny contest based on the qualifications of a candidate for the office of ... state representative which have not been adjudicated prior to the general election shall be determined by the ... state house of representatives.’ This statute presupposes that the qualifications of a candidate may well not be adjudicated until after the general election, if ever.”).

155. Note that even if the first approach would allow a candidacy to continue if the candidate who initially qualifies later fails to meet the qualifications for office, if the candidate win the election, the candidate’s qualifications to hold office can likely be challenged through a quo warranto action. *See infra* Chapter 11: Extraordinary and Equitable Relief for additional information on quo warranto.

defense, do not prejudice unqualified candidates because they were never eligible for office.<sup>156</sup>

The remedy pool for most compliance-related candidate ballot challenges is limited, even for pre-election challenges. Assuming laches does not apply, all procedural requirements have been satisfied, and the challenger wins, courts will generally issue a writ of mandamus to order election officials to add the qualified candidate's name to the ballot,<sup>157</sup> or order election officials to remove or omit the unqualified candidate's name from the ballot.<sup>158</sup>

If insufficient time exists to remove an ineligible candidate's name from the ballot, the court might instead declare the candidate ineligible to take office or advance to the next election stage should the candidate win the forthcoming election.<sup>159</sup> When a court cannot make an eligibility determination before the election, it may allow the candidacy to continue while reserving the right to determine the candidate's eligibility after the election.<sup>160</sup>

## B. Constitutional Challenges

As indicated earlier in this chapter, the Supreme Court recognizes that states have an interest in establishing candidate ballot qualification standards that limit ballot

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156. See *Polly v. Navarro*, 457 So.2d 1140, 1143 (Fla. Dist. Ct. App. 1985) (noting the candidate was not prejudiced in a seventy-four-day delay in filing because he was never eligible for the office and has not been prejudiced by noting its illegality); *Melendez v. O'Connor*, 654 N.W.2d 114, 117 (Minn. 2002) (per curiam) (holding that moving outside the district one wishes to represent leads to candidate ineligibility regardless of the timing of the eligibility challenge); *White v. Manchin*, 318 S.E.2d 470, 479 (W. Va. 1984) (holding that a seven week delay in filing was insufficient to uphold a laches claim where any prejudice to the candidate was dwarfed by prejudice to the public if the candidate won the primary and was later determined to be ineligible).

157. Note that in a pre-decision order, Justice Stewart ordered Ohio to print a second set of ballots that included the one of the plaintiff's names (the other plaintiff applied too late for this remedy) for use if the plaintiff won ballot access because otherwise the Court's decision might come too late to allow for a meaningful remedy. See *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968).

158. Note that making changes to the ballot takes time, whether the ballot is paper or electronic. In addition, absentee ballots are frequently mailed one month or more before Election Day and should reflect the ballot in use on election day. In practice, absentee ballot-related deadlines operate as unofficial deadlines for many other decisions that impact elections.

159. See *Melendez v. O'Connor*, 654 N.W.2d 114 (Minn. 2002) (per curiam) (holding that a candidate who was declared ineligible because he did not meet statutory residency requirements would remain on the primary ballot because of time constraints, but his name could not be placed on the general election ballot if he won the primary); see also *White*, 318 S.E.2d 470 (ordering certification of candidacy voided and no votes counted for the challenged candidate if his name could not be removed from the ballot where the candidate failed to meet durational residency requirements).

160. See *Hanlen v. Gessler*, 333 P.3d 41, 43 (Colo. 2014) ("Under the election code, challenges to a candidate's eligibility can be raised by any eligible elector at multiple junctures in the election process, including post-election. But the election code requires issues regarding a certified candidate's eligibility to be determined by the courts.").

length to a reasonable size and populate it only with serious candidates who have some prospects of public support.<sup>161</sup> Nonetheless, overly restrictive individual state ballot access regulations may violate the Constitution, as may the totality of the state’s regulations.<sup>162</sup>

When the constitutionality of a state’s candidate ballot access law is challenged, courts must individually analyze the regulations at issue because no “litmus-paper test” exists to separate valid from invalid regulations.<sup>163</sup> Courts use the following process to analyze the challenged regulation(s) using the *Anderson-Burdick* test:

- identify the character and magnitude of the burden the challenged regulation(s) place(s) on the plaintiff’s First and Fourteenth Amendment rights,
- identify and evaluate the precise state’s interest(s) used to justify the regulation’s burden,
- determine the legitimacy and strength of each of the state’s interests,
- consider whether the state’s interest(s) justify the burden placed on the plaintiff’s rights, and
- weigh the above factors to decide whether the challenged provision is unconstitutional.<sup>164</sup>

Even though all candidate ballot access regulations burden constitutional rights to some extent because some voter’s preferred candidate is unlikely to meet them, most ballot access regulations receive rational basis scrutiny. Only regulations that implicate wealth-based classifications (such as filing fees) or the associational rights of political parties or voters (such as petition requirements) receive heightened or strict scrutiny.<sup>165</sup>

Under rational basis review, courts uphold a state regulation’s constitutionality if the challenger cannot prove the regulation is not rationally related to a legitimate governmental objective. This burden is difficult to meet. Most challenged ballot access regulations that undergo rational basis scrutiny will be upheld.<sup>166</sup> Under this analysis, courts recognize that states have a legitimate interest in electoral

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161. *See* *Lubin v. Panish*, 415 U.S. 709, 715-16 (1974).

162. Ballot access regulations may also violate state constitutional protections.

163. *Celebrezze*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)).

164. *Id.*

165. Courts in states that recognize a fundamental state constitutional right to candidacy may need to conduct a strict scrutiny analysis of all candidate ballot access regulations.

166. *See, e.g.*, *Wood v. Quinn*, 104 F.Supp. 2d 611 (E.D. Va.), *aff’d*, 230 F.3d 1356 (4th Cir. 2000); *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010).



integrity, orderly elections, limiting voter confusion, and supporting the finality and stability of the political process, and most ballot access regulations can be justified on one or more of these grounds.<sup>167</sup>

Under strict scrutiny, the state bears the burden of proving that the challenged statute is the least restrictive, narrowly tailored means possible to achieve a compelling governmental objective. Most regulations subject to strict scrutiny are unable to satisfy this standard and are declared unconstitutional.<sup>168</sup>

In general, a candidate's pre-election death, withdrawal, or disqualification does not automatically remove the candidate's name from the ballot.

## VI. CANDIDATE REMOVAL OR SUBSTITUTION

Candidates who have gained ballot access sometimes die, withdraw their candidacy, or become disqualified before an election or between the primary and general election. Under these circumstances,<sup>169</sup> they (or others) may seek to remove a candidate's name from the ballot and may also request a substitute candidate's name be included on the ballot.

In general, a candidate's pre-election death, withdrawal, or disqualification does not automatically remove the candidate's name from the ballot.<sup>170</sup> Instead, state statutes govern the circumstances under which a withdrawal is allowed, who may make a withdrawal request, and when the withdrawal request must be

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167. See *supra* notes 4–8 and accompanying text.

168. See, e.g., *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340 (N.D. Ga. 2016), *aff'd*, 674 F. App'x 974 (11th Cir. 2017).

169. Occasionally, a court may be asked to declare an election premature and remove the elective office itself from the ballot. See *Sprague v. Casey*, 550 A.2d 184 (Pa. 1998).

170. For information on what would occur if a Presidential candidate were to die, see Stephen Ohlemacher, *What Happens If A Candidate for President Dies?*, AP NEWS (Oct. 4, 2020), <https://apnews.com/article/election-2020-donald-trump-constitutions-elections-us-supreme-court-91ce484b8046e6a555e172f42c4441f9>; Brian C. Kalt, *What Happens if a Presidential Candidate Becomes Incapacitated or Dies*, THE ATLANTIC (Oct. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/rules-exist-what-could-come-next-they-wont-prevent-total-chaos/616586/>; Andrew Prokop, *What Happens If a Presidential Candidate Dies?*, VOX (Oct. 7, 2020, 7:30 AM), <https://www.vox.com/21502447/trump-biden-death-what-happens>. See also Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. ON LEGIS. 101, 102 (2017) (noting the debate on how to handle the death of a House candidate).

received.<sup>171</sup> State statutes may also specify the administrative processes that must be followed to effectuate the removal of the candidate’s name from the ballot as well as the substitution process, if any.<sup>172</sup>

Courts become involved in candidate withdrawal and replacement issues when state statutes do not address the factual circumstances that arise or when an administrative decision granting or denying candidate withdrawal or replacement is challenged. Under these circumstances, the court may be asked to order election officials to remove a dead, ineligible, or withdrawn candidate’s name from the ballot and allow a replacement’s name to be added,<sup>173</sup> or to prohibit a withdrawal or replacement.<sup>174</sup> Withdrawal and substitution requests received close to the election may be impossible to honor because substitution deadlines may have passed, absentee ballots may have been mailed, or it may be too late to create a new ballot.<sup>175</sup>

The court may also be able to consider the public and candidate interests in allowing the substitution.<sup>176</sup> When only one candidate in a slate—such as a joint governor/lieutenant governor ticket—is ineligible or seeks to withdraw, the court may be able (or required) to consider whether the running mate was complicit in the circumstances that prompted the substitution request.<sup>177</sup> In addition, the court

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171. *E.g.*, OHIO REV. CODE ANN. § 3513.30 (West); MINN. STAT. ANN. § 204B.12 (West).

172. For example, statutes may require an election board to certify the victory of a withdrawn primary candidate before the political party is allowed to name a substitute for the general election ballot. *See State ex rel. White v. Franklin Cnty. Bd. of Elections*, 600 N.E.2d 656, 660 (Ohio 1992) (per curiam). Withdrawal and substitution requests are not automatically linked. This uncoupling discourages the last-minute switching out of candidates whose candidacies fail to capture the public’s interest.

173. *E.g.*, *Martin v. Dicklich*, 823 N.W.2d 336, 347 (Minn. 2012).

174. *E.g.*, *State v. Brodigan*, 142 P. 520, 523 (1914) (“[T]he writ should also issue prohibiting the secretary of state from allowing the name of Richard A. McKay to be withdrawn.”).

175. *See New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1028, 1039 (2002) (“What must be assessed is the actual impact on the administration of the election of allowing the substitution [past the 48-day statutory deadline before the election]; the cost and feasibility of printing and, when necessary, mailing new ballots; and, more particularly, the effect of carrying out those activities on overseas civilian and military absentee ballots.”).

176. *Heleringer v. Brown*, 104 S.W.3d 397, 404-05 (Ky. 2003) (Stumbo, J., concurring) (noting the candidate’s investment in advertising and voter contact and the public’s investment in the election process as shown through ballot order determinations and printing had been made, absentee ballots mailed, primary election just a few days off as consideration in deciding that gubernatorial candidate could replace his disqualified lieutenant governor running mate in party primary so as to not render the public’s investment in the election and his candidacy a nullity); *Schundler v. Paulsen*, 774 A.2d 585, 591 (N.J. Super. Ct. App. Div. 2001) (justifying a candidate substitution made after the deadline for the same had passed on the public policy preference for contested elections).

177. *Helering*, 104 S.W.3d at 405 (Wintersheimer, J., concurring) (determining the remaining candidate was an innocent party who had made a “sufficiently extensive investigation” into his running mate’s qualifications; thus, he should be allowed to substitute a new candidate rather than forego his candidacy).

may be asked to determine if the entire slate is affected when one slate member is disqualified or withdraws.<sup>178</sup> Finally, when doubt exists as to whether a state statute require an ineligible candidate’s name to be stricken from the ballot, courts generally prefer to continue the candidacy.<sup>179</sup> If a candidate voluntarily withdraws from candidacy, the candidacy is usually terminated regardless of whether the candidate’s name is removed from the ballot.<sup>180</sup> If the withdrawn candidate wins the election, the candidate is unable to take office, with the resulting circumstance treated as a vacancy to be filled as the relevant statute requires.<sup>181</sup>

## VII. CONCLUSION

Before candidates can be elected to office, their names must appear on the ballot. States regulate candidate ballot access or write-in candidacies. States are permitted to impose ballot access requirements so long as they comport with federal and state constitutional protections.

To qualify for ballot access, candidates usually must satisfy several state statutory requirements. Some of these requirements—such as age, residency, citizenship, and education—are personal to the prospective candidate. Other requirements—such as those relating to petition signatures or political party nominations—are intended to demonstrate that the candidate has public support.

A state’s interest in regulating candidate ballot access often involves holding orderly elections, promoting electoral integrity, limiting voter confusion caused by lengthy ballots, preventing fraud, enhancing political stability, and supporting finality. Candidates have an interest in ballot access. Without it, their candidacies are difficult or impossible to maintain. Voters also have an interest in candidate ballot access because voting for one’s preferred candidate is a means through which voters exercise their constitutionally protected right of association.

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178. *See* *Thomas v. Donitz*, 251 N.Y.S.2d 177 (Sup. Ct. 1964) (denying the candidate withdrawal petitions because to withdraw would affect the rest of the slate of candidates because a withdrawal “could be used to imply that the designating petition is permeated with fraud”).

179. *Id.* at 404.

180. *State ex rel. White v. Franklin Cnty. Bd. of Elections*, 600 N.E.2d 656, 660 (Ohio 1992) (per curiam).

181. *Id.* (holding the certification of withdrawn candidate’s victory creates a vacancy that is filled as the law directs).



## CHAPTER 3

# State Regulations that Affect Political Parties

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## CHAPTER 3: STATE REGULATIONS THAT AFFECT POLITICAL PARTIES

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## I. INTRODUCTION

States have broad, but not unlimited, power to regulate the time, place, and manner of elections. This power derives from the U.S. Constitution (with respect to federal elections)<sup>1</sup> and from their acknowledged interests in orderly elections, electoral integrity, minimized voter confusion, political stability, and electoral finality.<sup>2</sup> By the same token, individuals have a constitutionally protected right to associate with like-minded others to advance their political goals.<sup>3</sup> A common means to advance shared political goals is the organization of a political party.

States have broad, but not unlimited, power to regulate the time, place, and manner of elections.

With a proper showing of necessity to ensure fair and honest elections, states are permitted to set regulations that affect political parties.<sup>4</sup> State regulations directly affect political parties when the state:

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1. U.S. CONST., art. I, § 4 (congressional elections), art. II, §1 (presidential elections).
  2. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) (noting “substantial regulation” of elections is necessary to ensure they are fair, honest, and orderly) *and supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access.
  3. U.S. CONST. amend. I.
  4. *See Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 231 (1989).

1. regulates the political party itself,<sup>5</sup>
2. establishes ballot access requirements,<sup>6</sup> and
3. conducts primary elections.<sup>7</sup>

These three areas of state regulation implicate political parties' and voters' First and Fourteenth Amendment voting, political speech, and associational rights.

This chapter provides an overview of the state's ability to regulate political parties and the attendant legal challenges.

## II. STATE REGULATION OF POLITICAL PARTIES

Two of the many ways that states regulate political parties are by establishing requirements necessary to create a new political party and dictating party processes. Depending on the state, a group may be required to demonstrate it is a bona fide political party with a local and state party structure before it is permitted to run a candidate under a political party label.<sup>8</sup> States may also require the party to hold party conventions or meetings and demonstrate a level of public support.<sup>9</sup>

If a new political party satisfies a state's statutory requirements for establishing a recognized political party and election officials fail to recognize the party, a court can issue a writ of mandamus to compel the state officials to grant official recognition to the new party.<sup>10</sup> Alternately, a plaintiff can claim that the state granted party recognition to a group of individuals who failed to satisfy all the

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5. See, e.g., UTAH CODE ANN. § 20A-8-401 (West 2019) (bylaws for registered parties); ARIZ. REV. STAT. ANN. § 16-803 (2019) (provides guidelines for filing petition for party recognition).
  6. For a comprehensive list of ballot access requirements for a presidential election, see *State Laws Regarding Presidential Ballot Access for the General Election*, Nat. Ass'n of Sec'ys of State (Jan. 2020), [https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan20\\_0.pdf](https://www.nass.org/sites/default/files/surveys/2020-07/research-ballot-access-president-Jan20_0.pdf).
  7. See, e.g., ALA. CODE § 17-13-3 (2019); OR. REV. STAT. § 254.365 (2008).
  8. For example, in Illinois, to become an established party, the political party must poll more than 5% of the entire vote cast within the territory. 10 ILL. COMP. STAT. 5/10-2 (2019).
  9. *American Delta Party v. Wyman*, 488 F. Supp. 3d 1018, 1026 (W.D. Wash. 2020).
  10. *State ex. rel Fockler v. Husted*, 82 N.E.3d 1135, 1135 (Ohio 2017) (denying writ because they did not fulfil statutory requirements); *States' Rights Democratic Party v. State Bd. of Elections*, 49 S.E.2d 379, 382 (N.C. 1948).

statutory requirements for a political party.<sup>11</sup> In this instance, a court can be asked to order state officials to cancel the state’s recognition.<sup>12</sup>

More commonly, individuals who wish to establish a political party bring a constitutional challenge claiming the state’s requirements to do so are unconstitutionally burdensome.<sup>13</sup> Courts evaluate constitutional challenges to a state’s regulation of First Amendment political associational rights by determining how severely the regulation burdens these rights.<sup>14</sup> Under what is known as the *Anderson-Burdick* test,<sup>15</sup> states must determine the severity of the burden placed on associational rights. If the burden is heavy, the state’s regulation of political parties must be narrowly tailored to serve a compelling state interest.<sup>16</sup> If the burden is light, states must forward only a rational basis for imposing such regulation. States can usually justify regulations that impose lesser burdens on associational rights if the regulations are reasonable and non-discriminatory.<sup>17</sup> No bright line separates the two categories—the *Anderson-Burdick* test is a sliding scale, requiring a balancing. The test requires courts to make “hard judgments”<sup>18</sup> about how severely the regulation burdens associational rights.

In general, once political parties are established, states may not regulate their internal structure, governance, or policymaking.<sup>19</sup> However, if a state can posit a relationship between its regulations and “fair and honest” elections,<sup>20</sup> a state may usually: (1) enact laws that set voter eligibility requirements, including eligibility to participate in a party’s primary election; (2) require that a political party’s candidates be citizens; and (3) specify whether the party must use a primary election or nominating convention to select its general election candidates.<sup>21</sup>

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11. *Hoskins v. Howard*, 59 So. 2d 263, 264-65 (Miss. 1952).

12. *Id.*

13. *See, e.g.*, *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064, 1067 (M.D. Tenn. 2010); *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690 (E.D. Ark. 1996).

14. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

15. It was first established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and later refined in *Burdick v. Takushi*, 504 U.S. 428 (1992).

16. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005).

17. *Id.* at 587.

18. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (quoting *Storer v. Brown*, 415 U.S. 724, 730(1974)).

19. *See id.* at 363.

20. *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 231 (1989) (noting that a state’s interest in “fair and honest” elections is a subset of the state’s interest in electoral integrity) (citing *Storer v. Brown*, 415 U.S. at 730).

21. *See id.* at 231.

States may generally regulate these areas even though the party might prefer to make other choices.<sup>22</sup>

### III. SELECTION OF THE PARTY NOMINEE

States may structure and monitor the methods political parties use to select their candidates.<sup>23</sup> While some states require parties to use primary elections to determine their candidate for the general election ballot,<sup>24</sup> other states allow political parties to use party conventions or party caucuses instead.<sup>25</sup> States also have latitude in regulating voter participation in political party primary elections because of the state’s interest in electoral stability and integrity.<sup>26</sup>

However, when the state-required selection process for a party nominee conflicts with national party guidelines, the latter prevail, at least when the selection of the party’s electors to its presidential nominating convention is at stake. For example, states cannot mandate voters be registered to a specific party to vote in its primary if a party permits independent voters to vote in their primary.<sup>27</sup> Similarly, states cannot mandate the participation of nonaffiliated voters in a party’s primary election.<sup>28</sup> In addition, the U.S. Supreme Court determined that national political parties are not required to seat delegates chosen in compliance

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22. See *Timmons*, 520 U.S. at 364 (noting elaborate, empirical justification of the strength of the state’s justification is unnecessary and that “[l]egislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights”) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

23. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). The Tenth Circuit, for example, upheld a Utah law that permitted candidates to gain access to the party’s primary election ballot through a signature gathering process in addition to the traditional party nominating convention against claims by the state’s Republican party that the law violated its First and Fourteenth Amendment associational rights. *Utah Republican Party v. Cox*, 892 F.3d 1066, 1072, 1076 (10th Cir. 2018); see also UTAH CODE § 20A-9-101(12)(c); *Cox*, 373 P.3d at 1287 (Utah 2016) (interpreting UTAH CODE § 20A-9-101(12)(c) to offer the member, rather than the party, the choice). Using the Anderson-Burdick test, the court found that the law was only minimally burdensome as it still permitted the party to advertise its choice of primary candidate to its members and did not regulate an internal process, but rather one that interacted with state run and funded election systems. *Id.* at 1078-80. As such, the state’s interests in “managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot” predominated over the minimal burdens imposed. *Id.* at 1084-85.

24. See *e.g.*, UTAH CODE ANN. § 20A-9-403 (West 2021).

25. See *e.g.*, IOWA CODE § 43.4 (2010).

26. *Clingman v. Beaver*, 544 U.S. 581, 596 (2005) (citing state interest in preventing “the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party’s primary election”) (quoting *Anderson*, 460 U.S. at 788-789, n. 9).

27. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

28. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).



with state law, but in violation of national party rules<sup>29</sup> and states may not tell a political party which individuals will serve as its delegates to the party's presidential nominating convention.<sup>30</sup>

Regardless of whether the state, a political party, or a private association actually conducts the primary election, primary elections are state functions with constitutional protections for the right to vote, including the right to have one's vote counted.<sup>31</sup> States are complicit if they allow political parties to discriminate in granting voting rights.<sup>32</sup> Private associations are state actors when they select a political party's general election nominee and, as such, are subject to the same Constitutional requirements applicable to the state.<sup>33</sup> Thus, private associations and political parties cannot exclude primary voters on account of their age,<sup>34</sup> race, or sex.

Primary elections currently<sup>35</sup> follow one of three formats:

- open,<sup>36</sup>
- closed,<sup>37</sup> or
- semi-open/semi-closed.<sup>38</sup>

Legal challenges to primary elections tend to involve constitutional attacks on primary election regulations, especially regarding limits on who may vote in the primary. States may not require political parties to open their primaries to all registered voters<sup>39</sup> and may not prohibit political parties from allowing

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29. *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

30. *Cousins v. Wigoda*, 419 U.S. 477, 483 (1975).

31. *United States v. Classic*, 313 U.S. 299 (1941); *Curtis v. Oliver*, 479 F.Supp.3d 1039, 1127-1128 (D. N.M. 2020).

32. *Smith v. Allwright*, 321 U.S. 649, 661-662 (1944).

33. *Terry v. Adams*, 345 U.S. 461, 475 (1953).

34. States may not exclude primary voters if they are at least eighteen years old – although states may permit younger persons to participate.

35. In the past, some states held blanket primaries in which voters received one ballot that combined all the candidates for all the offices. Blanket primaries allowed voters to split tickets by mixing and matching the different political parties' candidates. The Supreme Court declared blanket primaries unconstitutional because they violated political parties' right to "not associate" with members of other political parties. *See Cal. Democratic Party*, 530 U.S. at 567.

36. An open primary allows participation by any qualified voter, regardless of party registration, but the voter is limited to only one party's ballot. Thus, a voter cannot split a ticket among multiple parties.

37. In a closed primary, only registered party members can vote.

38. Semi-closed/semi-open primaries allow independent and non-party affiliated voters to participate in a party primary if the party's own rules allow it. Voters who are registered party members are restricted to voting in their own party's primary.

39. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 576 (2000).

independent voters to participate in a political party's primary election if the party wishes to do so.<sup>40</sup> States may, however, restrict primary election participation to registered party members and independent or non-affiliated voters, and deny participation by voters affiliated with a different political party, even if the political party sponsoring the primary election wants to allow all voters to participate.<sup>41</sup>

If a political party uses a primary election to determine its general election nominee, its candidates' names must generally appear on the primary election ballot.<sup>42</sup> Because the U.S. Constitution does not guarantee an absolute right to use the ballot for political association,<sup>43</sup> states need not prove actual voter confusion, ballot overcrowding, or a history of frivolous candidacies before they enact ballot access restrictions.<sup>44</sup>

## IV. PARTY BALLOT ACCESS FOR THE GENERAL ELECTION

Unless candidates run for office as independents or the election is non-partisan, candidates run under a political party label. Before states grant ballot access to a political party's candidates, states may require the party to demonstrate it has the public's support as indicated by signature petitions, party-affiliated voter registrations, or previous electoral success.<sup>45</sup>

State ballot access regulations restrict all political parties but are typically of most concern to third parties.<sup>46</sup> While the major political parties—and some individual minor parties—are guaranteed ballot access because of past demonstrations of

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40. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 208 (1986) (finding an unconstitutional violation of the state Republican party's right of political association by a state law that prohibited the party from allowing independent voters to participate in the party primary).

41. *Clingman v. Beaver*, 544 U.S. 581, 581 (2005).

42. If the candidate's name does not appear on the primary ballot, state regulations determine whether a write-in candidacy will be recognized by the state.

43. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

44. *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-195 (1986).

45. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997). *See also* *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality) (citing *Storer v. Brown*, 415 U.S. 724 (1974); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) *and* *Jenness v. Fortson*, 403 U.S. 431 (1971)).

46. In popular parlance, all political parties other than the Democratic and Republican parties are third parties. Thus, the third-party label applies equally to established minor parties, small parties, and the new political parties that occasionally arise.

support,<sup>47</sup> most third parties are not.<sup>48</sup> Political parties without guaranteed ballot access must expend considerable resources seeking ballot access.<sup>49</sup>

In general, four categories of political parties may attempt to gain ballot access for their candidates during a partisan election:

- major,
- minor,
- small, and
- new.

The Democratic and Republican parties are the two major national political parties, although other parties may achieve major party status in individual states.<sup>50</sup> Major political parties have automatic access to the general election ballot for every partisan office if the party decides to run a candidate.<sup>51</sup>

Pursuant to state statute, minor political parties are established political parties that qualify for automatic ballot access for *some* partisan offices because of past levels of voter support for their candidates or because a threshold number of the state’s voters registered as members of the party.<sup>52</sup> Unlike major political parties,

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47. Although ballot access is guaranteed for the major party’s candidate, candidate ballot access restrictions, such as disaffiliation, age, experience, residence, or citizenship requirements impact the candidate selection choices of major parties as well as third parties. *See Thebeau v. Smith*, 148 So.3d 233 (La. Ct. App. 2014) (when the qualifications for an office include a residency or domicile requirement, requirement is mandatory); ALASKA STAT. § 15.25.105 (2021) (sets age requirement); TEX. ELEC. CODE ANN. § 141.001 (West 2020).

48. *See, e.g.*, Renée Steinhagen, *Giving New Jersey’s Minor Political Parties A Chance: Permitting Alternative Voting Systems in Local Elections*, N.J. LAWYER at 15, n.15 (Aug. 2008) (citing N.J.S.A. 19:1-1) (“[N]o third party has met New Jersey’s current standard since it was established in 1920; and New Jersey remains the only state in . . . which a third party has not been recognized since that time”).

49. Celia Curtis, *Cross-Endorsement By Political Parties: A “Very Pretty Jungle”?*, 29 PACE L.R. 765, 781-82 (2009) (when they do “manage to circulate a petition and receive the required number of signatures, those signatures can be challenged and the candidate will then have to go through a court battle, which can be very costly. . .”) (quoting Amber J. Juffer, Note, *Living in a Party World: Respecting the Role of Third Party and Independent Candidates in the Equal Protection Analysis of Ballot Access Cases*, 56 DRAKE L. REV. 217, 220-21 (2007)).

50. Minnesota recognizes four major political parties: Democratic-Farmer-Labor Party, Grassroots-Legalize Cannabis Party, Legal Marijuana Now Party, and Republican Party of Minnesota. *Political Parties*, Office of the Minn. Sec’y of State Steve Simon (2021), <https://www.sos.state.mn.us/elections-voting/how-elections-work/political-parties>. Colorado amended their ballot position statute to reserve the top tier of the ballot for up to ten major parties. *Libertarian Party of Colorado v. Buckley*, 8 F. Supp.2d 1244 (D. Colo. 1998).

51. *See, e.g.*, COLO. REV. STAT. § 1-5-404 (2019) (reserving the first group on the ballot for major parties); NEV. STAT. X§ 293.263 (2021) (providing details for major party primary ballots).

52. Jessica A. Levinson, *Is the Party Over? Examining The Constitutionality of Proposition 14 As It Relates To Ballot Access For Minor Parties*, 44 LOY. L.A. L. REV. 463, 479-496 (2011) (explaining constitutionality of minor party ballot access requirement).

minor parties have not demonstrated sufficient public support to automatically qualify a candidate for the ballot for *all* partisan offices.<sup>53</sup> If minor parties do not have automatic ballot access for a particular office, their minor party status may nonetheless allow them to qualify their candidate under less stringent requirements than those applicable to small or new political parties.<sup>54</sup>

Small political parties may be established local, regional, or national parties that regularly run candidates for office, but do not poll sufficient voter support in any election to qualify for automatic ballot access for any partisan office and must re-qualify for ballot access every election cycle.<sup>55</sup>

New political parties are those that have not yet qualified a candidate for the ballot.<sup>56</sup>

Courts are likely to hear ballot access challenges in two contexts, both of which occur prior to the election. In the first, the dispute concerns whether the party fully complied with the requirements such that ballot access should be granted. In the second, the party challenges the constitutionality of the access regulation itself.

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53. See Steinhagen, *supra* note 47.

54. In Wyoming for example, a new political party must circulate a petition; the secretary of state will determine whether sufficient signatures have been obtained. WYO. STAT. ANN. § 22-4-405 (2021). Minor political parties need sufficient party officers in place and may then nominate their candidates. WYO. STAT. ANN. § 22-4-302 (2021).

55. Regional variations in party support mean that a minor political party in one state may be a small party in another or vice versa.

56. See *Citizens to Establish a Reform Party in Ark. v. Priest*, 970 F. Supp. 690, 695 (E.D. Ark. 1996).

## A. Compliance-based Challenges

Compliance-based challenges arise in several contexts. First, a party candidate may contest the primary election results or the political party's nomination process.<sup>57</sup> In general, absent a primary election contest, courts refuse to become involved in intra-party disputes over who should represent the party in the general election.<sup>58</sup> If the political party uses a convention or caucus permitted by state law to select its nominee, then the party's choice is generally considered an internal party matter best decided by the party itself, especially when multiple individuals or groups claim they speak for the party.<sup>59</sup> In general, intra-party disputes over which faction is entitled to use the official emblem is settled within the party and does not involve the courts.<sup>60</sup>

If the political party uses a convention or caucus permitted by state law to select its nominee, then the party's choice is generally considered an internal party matter best decided by the party itself ...

57. See *infra* Chapter 9: Election Contests for additional information. See, e.g., *Ex parte Baxley*, 496 So. 2d 688 (Ala. 1986).

58. See, *O'Brien v. Brown*, 409 U.S. 1, 4 (1972) (staying relief granted by the Court of Appeals because of a lack of precedent for such relief and the large public interest in allowing the political processes to function free from judicial supervision) ("It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties.").

59. *But see Jordan v. Kusper*, 518 N.E.2d 432 (Ill. App. Ct. 1987). In this unique case, the court resolved an intra-party dispute over the identity of the official party nominee. *Id.* No one formally filed to run for the party's nomination to a circuit court judgeship and the elections board certified the name of a write-in candidate even though the five votes he received did not satisfy statutory requirements to win. *Id.* A self-proclaimed candidate, who filed an untimely election contest, and a party-selected nominee challenged the write-in candidate's certification to the general election ballot. *Id.* The court dismissed the election contest because it was filed by a non-candidate, dismissed the challenge by the party "nominee" because statutes required primary winners to be certified for the general election ballot, and upheld the certification of the write-in candidate. *Id.*

60. *Reform Party of Conn. v. Bysiewicz*, 760 A.2d 1257, 1261 (Conn. 2000); *Am. Indep. Party of Mich. (Morse-Smith Faction) v. Sec'y of State*, 247 N.W.2d 17 (Mich. 1976).

Second, aggrieved individuals—usually candidates, but also voters as state statutes allow<sup>61</sup>—may challenge election officials’ decision to grant or deny ballot access to a political party’s candidate, with one side claiming all statutory requirements were met while another claims they were not.<sup>62</sup> The alleged deficiencies may involve candidate qualifications,<sup>63</sup> compliance with petition requirements, or the prospective political party’s ability to satisfy statutory requirements to become established and to demonstrate a party structure.<sup>64</sup> Because election officials usually lack discretion to deny ballot access to a political party or its candidate that met all ballot access requirements,<sup>65</sup> the court is generally able to issue a writ of mandamus to compel election officials to add a candidate’s name to the ballot when it was denied in error.<sup>66</sup> The court may also be able to enjoin the use of a ballot that lists an unqualified candidate.<sup>67</sup>

Third, because primary election and general election ballot access are usually separate processes, a third party may dispute the state’s failure to allow its candidate’s name to appear on the general election ballot because the candidate failed to garner sufficient votes to qualify.<sup>68</sup> If the court finds that the political

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61. When statutes do not grant express a right to challenge these decisions, some courts have held that appellants do not have standing to sue. *See, e.g.*, *Thiel v. Oaks*, 535 S.W.2d 1 (Tex. App. 1976) (“[H]is interest in seeing that unqualified candidates are not included on the primary ballot is not particular to him, but is shared with any other citizen constituting the general public. Appellant has no prospective right, protectible by temporary injunction, to avoid being challenged in the party primary by an unqualified candidate.”); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (“[P]laintiff has no standing to challenge Senator McCain’s qualifications. Plaintiff is a mere candidate hoping to become a California elector pledged to an obscure third-party candidate whose presidential prospects are theoretical at best. Plaintiff has, therefore, no greater stake in the matter than a taxpayer or voter.”).

62. Before turning to the courts, the plaintiff may be required to exhaust all available administrative review options.

63. *See supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access for additional information.

64. In one instance, a political party that was denied ballot access sued over the appropriate voter registration figures to use when determining if enough voters identified themselves as party members for the party to qualify for automatic ballot access. *Peace & Freedom Party v. Shelley*, 8 Cal. Rptr. 3d 497, 499 (Ct. App. 2004) (holding that counting only those voters in the active voter registration file was a “reasonable, nondiscriminatory restriction” that furthered protection of the integrity and stability of elections because the inactive file contained unreliable and duplicative information that the state was prevented from purging).

65. If a political party is unable to qualify its candidate for ballot access under the party’s label, its candidates might nonetheless qualify to run as independents.

66. 31B TEX. JUR. ELECTIONS § 25(3) (2021) (citing *In re Parsons*, 110 S.W.3d 15 (Tex. App. 2002)).

67. *See Polly v. Navarro*, 457 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1984); *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Risner v. Harris Cty. Republican Party*, 444 S.W.3d 327, 346 (Tex. App. 2014).

68. *Whittaker v. Mallott*, 259 F.Supp.3d 1024 (D. Alaska 2017).

party fulfilled the public support requirements, it can order election officials to add the party's candidates' names to the general election ballot.<sup>69</sup>

## B. Constitutional Challenges

In addition to compliance-related challenges, political parties may challenge the constitutionality of a state's ballot access regulations. Although the state need not remove all hurdles facing third parties,<sup>70</sup> the state's ballot access requirements should be reasonable and allow ballot access that is "genuinely open to all."<sup>71</sup> A state's legitimate interests in regulating elections mean the regulations will necessarily burden individuals' rights to vote and associate for political purposes.<sup>72</sup> Thus, no "litmus-paper test" exists to separate valid from invalid state regulations,<sup>73</sup> nor is strict scrutiny the appropriate level of review for all election regulations.<sup>74</sup>

Although the state need not remove all hurdles facing third parties, the state's ballot access requirements should be reasonable and allow ballot access that is "genuinely open to all."

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69. *See Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (allowing only third party to remain on the ballot and not mandating the inclusion of another because a large quantity of the ballots have already been printed and forcing a change could cause voter confusion such that Ohio citizens could be disenfranchised). *Cf. Breck v. Stapleton*, 259 F. Supp. 3d 1126 (D. Mont. 2017) (issuing a preliminary injunction to bar enforcement of and reduce the signature requirements but did not issue an order to add the candidate's names on the ballot when many ballots had already been printed in a special election). *But see, Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687 (8th Cir. 2011) (denying plaintiff's preliminary injunction).
  70. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (holding that while parties have the right to select their "standard bearer," parties are not "absolutely entitled to have their nominee appear on the ballot as the party's candidate.").
  71. *Lubin v. Panish*, 415 U.S. 709, 719 (1974), *distinguished by Crawford v. Marion*, 553 U.S. 181 (2008) (holding that the Indiana Voter ID requirement did not substantially burden voters).
  72. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). *See also Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). The Supreme Court has recognized the right of citizens to create and develop new political parties and the state may limit new parties' access to the ballot only to the extent that a sufficiently weighty state interest justifies the restriction. *See Norman v. Reed*, 502 U.S. 279 (1992); *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1978).
  73. *Celebrezze*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).
  74. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (noting that strict scrutiny review for all election regulations would "tie the hands" of states in their efforts to ensure equitable and efficient elections).

Courts evaluating constitutional challenges to political party ballot access use the *Anderson-Burdick* test described in Section II of this Chapter.<sup>75</sup> Courts have declared state ballot access regulations unconstitutional when their combined effect made it impossible for new political parties to gain ballot access regardless of the party's widespread public support.<sup>76</sup> For example, the U.S. Supreme Court applied strict scrutiny and found an unconstitutional infringement on associational rights by state ballot access regulations that:

- forbade independent candidacies,
- required new political parties to obtain supporting signatures from 15% of the voters in the last gubernatorial election (while the Democratic and Republican parties only needed to obtain 10%),
- required nominating petitions be signed by individuals who had never voted before, and
- required the new party's nominating convention delegates to have been unaffiliated with any political party for four years.<sup>77</sup>

In another ballot access challenge, the First Circuit Court of Appeals applied strict scrutiny and overturned a regulation in Puerto Rico that required new political parties to have each of the 100,000 required petition signatures individually

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75. *Supra* Section II. The framework was first established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and later refined in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“[A] court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”). *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App’x 170, 171 (6th Cir. 2020) (affirming the lower court’s *Anderson-Burdick* analysis to determine that the state’s strict enforcement of its ballot access requirements and its stay-at-home order during the COVID-19 pandemic imposed a severe burden on the plaintiff’s ballot access, requiring the application of strict scrutiny); *Timmons*, 520 U.S. at 364 (using the *Anderson-Burdick* test to determine that the burdens placed on political party’s ballot access rights by Minnesota’s antifusion laws are not severe and do not mandate strict scrutiny) (citations omitted); *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016) (using the *Anderson-Burdick* test to determine that Kentucky’s law requiring third parties to obtain voter petition signatures to access the ballot do not severely burden ballot access rights, and does not require strict scrutiny).

76. *Williams v. Rhodes*, 393 U.S. 23 (1968) (holding that the combination of code provisions favoring established two parties and making it virtually impossible for a third party to qualify for ballot access was unconstitutional); *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003) (holding that the combination of burdens on third party ballot access—especially the requirement that every petition signature had to be notarized when only lawyers could serve as notaries—was unconstitutional when the government failed to demonstrate they were narrowly tailored to serve a compelling state interest).

77. *Williams*, 393 U.S. at 25-26 (describing the Ohio law at issue).



notarized.<sup>78</sup> The notarization requirement severely burdened the political party's rights because it:

- inserted a third party—the notary—into the communication channel between the petition circulator and voter,
- reduced significantly the political party's likelihood of success because state regulations created entry barriers to potential notaries, thereby limiting total available notaries
- added at least \$1,500,000 to the cost of ballot access.<sup>79</sup>

In contrast to the above examples where courts applied strict scrutiny, the U.S. Supreme Court held that the state's interests in promoting political stability and electoral integrity were sufficiently weighty to permit it to prohibit fusion candidacies.<sup>80</sup> Fusion candidacy prohibitions are constitutional because they do not prevent a political party or its members from endorsing, supporting, or voting for its favorite candidate, nor do they interfere with the party's internal structure governance, or policymaking ability.<sup>81</sup>

## V. CONCLUSION

States have the power to regulate political parties, determine the manner in which they choose their nominee, and set ballot access requirements for both the primary and general elections. Individuals and political parties can challenge candidate qualifications alleging ballot access or party recognition requirements were not met. Courts apply a sliding-scale approach to determining the level of scrutiny for constitutional challenges, depending on the severity of the restriction. In both scenarios, courts are often faced with conflicting interests of protecting individual rights and states' authority to set the time, place, and manner of elections.

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78. *Perez-Guzman*, 346 F.3d at 245.

79. *Id.* at 240.

80. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). *See supra* Chapter 2: State Regulations of Candidacies and Candidate Ballot Access for additional information on fusion candidacies, where one person runs for an office as the nominee of two different political parties.

81. *Timmons*, 520 U.S. 351.



## CHAPTER 4

# State Regulation of Ballot Measures

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## CHAPTER 4: STATE REGULATION OF BALLOT MEASURES

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# I. INTRODUCTION

Twenty-six states confer on voters the ability to engage in direct democracy through initiative or popular referendum.<sup>1</sup> These measures are typically drafted by citizens or organizations and are regulated as to form and content by state statute. This chapter discusses the varied kinds of ballot measures available in different states, how ballot measures are regulated, and common challenges to ballot measures.

## II. GENERAL OVERVIEW

### A. Nature of Ballot Measures

Many, but not all,<sup>2</sup> states recognize a citizen's right to place measures on the ballot by one or more of the processes known as initiative,<sup>3</sup> referendum,<sup>4</sup> and recall.<sup>5</sup> In some states, these exercises in direct democracy are a reserved power of the people recognized by the state constitution,<sup>6</sup> while in others the ability to propose ballot measures exists only through a legislative grant of authority.<sup>7</sup>

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1. See NAT'L CONF. STATE LEGISLATURES, Initiative and Referendum States, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx>, (last visited Mar. 10, 2021) (listing state-by-state information on the initiative and referendum processes available).
  2. *Id.*
  3. A voter-proposed statute or constitutional amendment that is placed on the ballot by petition. Citizens use initiatives to bypass their governmental representatives and enact change directly.
  4. A process by which voters may petition to demand a popular vote on a new law passed by the legislature.
  5. A process where citizens may attempt to remove an elected official from office at any time. Typically, the recall process consists of gathering a certain number of signatures on a petition in a certain amount of time.
  6. MONT. CONST. ART. 5, § 11.
  7. ALASKA STAT. § 15.45.040; see, e.g., *Hoyle v. Priest*, 59 F. Supp. 2d 827, 835 (W.D. Ark. 1999) (After removal of amendment from ballot for insufficient signatures, plaintiff sued secretary of state for alleged deprivation of right to petition government, violation of Voting Rights Act, and violations of U.S. Const. Court dismissed, holding claims did not implicate Voting Rights Act because signing petition was not tantamount to voting. No violation of Const. because laws requiring petition signers be voters did not restrict core political speech).

The U.S. Constitution does not mandate that states allow their citizens to propose ballot measures,<sup>8</sup> but neither does the Constitution prohibit these powers.<sup>9</sup> If states offer their citizens the right to propose ballot measures, then the right receives federal constitutional protections because it implicates core political speech.<sup>10</sup> Any subsequent state regulation of the ballot measure process is subject to due process, equal protection, political association, and free speech-based constitutional challenges.<sup>11</sup>

In general, states regulate ballot measures to further their interests in:

- preventing fraud,<sup>12</sup> and
- promoting electoral integrity.<sup>13</sup>

## B. Types of Ballot Measures

States offer up to three types of ballot measures: initiative, referendum, and recall. Initiatives are the most common type of ballot measure and the information in this chapter is primarily based on requirements for and challenges to the initiative process.<sup>14</sup>

The U.S. Constitution does not mandate that states allow their citizens to propose ballot measures, but neither does the Constitution prohibit these powers.

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8. *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997). *See Pac. States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) (challenging the initiative process as a violation of the Guarantee Clause because it was an exercise in direct democracy, not republican government, and holding that whether initiative powers violate the Guarantee Clause is a non-justiciable political question).
  9. *See Pac. States Telephone & Telegraph Co.*, 223 U.S. at 118 (finding legal challenges to state's recognition of ballot measures premised on the Constitution's Guarantee Clause are non-justiciable political questions).
  10. *See Gallivan v. Walker*, 54 P.3d 1069, 1101 (Utah 2002) (Thorne, J., dissenting).
  11. *Id.*
  12. *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 204 n.23 (1999).
  13. *Doe v. Reed*, 561 U.S. 186, 197 (2010).
  14. *See NAT'L CONF. STATE LEGISLATURES*, *supra* note 1.

Voters can usually use their initiative power to propose legislation,<sup>15</sup> amendments to existing legislation,<sup>16</sup> or amendments to the state constitution.<sup>17</sup>

Citizens' initiative-based legislative power is frequently considered "coequal, coextensive, and concurrent and of equal dignity" with state legislative power.<sup>18</sup> Courts that review challenges to these powers generally construe the powers liberally and resolve doubts in favor of granting them to citizens if it is reasonable to do so.<sup>19</sup>

Citizens use their power of *referendum* to challenge legislative enactments. A successful referendum prevents the targeted legislation from taking effect. If a referendum petition is not filed within the limited time available for it, or if the referendum fails to pass, the legislation becomes effective.<sup>20</sup>

Voters use their *recall* power to hold an election whose goal is unseating an elected official whose term has not yet expired.

### III. STATE REGULATION OF BALLOT MEASURES

States have great leeway in regulating ballot measures to protect the integrity and reliability of the ballot measures.<sup>21</sup> States commonly regulate the process required for the proposed measure to qualify for the ballot and also specify the amount of electoral support a ballot measure must receive in order to pass. To pass, the ballot measure may need to receive:

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15. See, e.g., ME. CONST. ART. IV, pt. 3, § 18(1) ("The electors may propose to the Legislature for its consideration any bill ...").
  16. See, e.g., NEV. CONST. ART. 19, § 2 ("[T]he people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes...").
  17. See, e.g., ARIZ. CONST. ART. 21 § 1 ("Any amendment or amendments to this constitution may be proposed in either house of the legislature, or by initiative petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for governor at the last preceding general election...").
  18. *Gallivan*, 54 P.3d at 1080 (citation omitted).
  19. *Legis. Of State of Cal. V. Deukmejian*, 669 P.2d 17, 35 (Cal. 1983) (per curiam) (Richardson, J., dissenting).
  20. See *Initiative and Referendum Process*, NAT'L CONF. STATE LEGISLATURES. <https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx#/> (last visited Mar. 11, 2021).
  21. *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 191 (1999) (noting agreement with *Am. Const. Found., Inc. v. Meyer*, 120 F.3d 1092 (1997), which upheld Colorado's age restriction, six-month circulation limit, and affidavit requirements on initiative petitions).

- a majority of the total votes cast specifically for or against the ballot measure,<sup>22</sup>
- a super-majority of the votes,<sup>23</sup>
- approval from a majority of voters who voted on any issue or race on the ballot, not necessarily the specific ballot measure,<sup>24</sup> or
- approval in two election cycles.<sup>25</sup>

States usually establish a multi-step process that ballot measure proponents must follow to place their proposed measure on the ballot. This section provides a generic overview of the most common requirements to qualify an initiative proposal for the ballot. Referendum or recall proponents may need to follow slightly different processes.

In general, ballot measure proponents must:

- present election officials with their intent to propose a ballot measure,
- receive official approval for the proposal, assign a title to the proposed measure, and create a signature petition,
- meet public support requirements,
- receive certification for ballot access, and
- provide election officials with voter education information about the proposal.

Ballot access requirements are challenged on compliance or constitutional grounds. In this section, the legal issues specific to a particular ballot qualification requirement are discussed along with the requirement.<sup>26</sup>

## A. Presentation of Intent

State statutes commonly require ballot measure proponents to notify election officials of their intent to propose a ballot measure. Proponents may also be required to register the proposal or classify its operation as:

- creating a new law,
- amending the state constitution, or

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22. IDAHO CODE ANN. § 34-1801C.

23. M.G.L.A. CONST. AMEND. ART. 48, Init., Pt. 4, § 5.

24. ILL. CONST. ART. 14, § 3.

25. NEV. CONST. ART. 19, § 2.

26. Common general procedural and substantive ballot measure legal challenges are discussed in Section III of this chapter.

- amending an existing law.<sup>27</sup>

Because a referendum seeks to void legislative enactments, state statutes governing them typically allow only a short time after the legislation’s passage during which its opponents must use the referendum process to overturn the legislation.<sup>28</sup> If the referendum proponents’ fail to gather and present the requisite number of petition signatures in the allotted time, no referendum is held, and the legislation becomes effective as scheduled.<sup>29</sup>

## **B. Measure Approved/ Title Assigned/ Petition Created**

Registered ballot measures are given a title that should convey the proposal’s function,<sup>30</sup> but generally does not need to outline every provision.<sup>31</sup> Once the title is assigned, ballot measure proponents create and circulate signature petitions.

State statutes usually specify the signature petitions’ format, including their size, structure, wording, layout, and contents.<sup>32</sup> In addition, signature petitions generally must provide prospective signers with enough information about the proposal to allow them to understand what they are being asked to support.<sup>33</sup>

State statutes usually specify the signature petitions’ format, including their size, structure, wording, layout, and contents.

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27. If ballot measure proponents fail to classify their measure when required to do so, the failure may be fatal to their efforts because the lack of classification prevents petition signers from knowing what they are supporting. *See Stumpf v. Lau*, 839 P.2d 120, 124 (Nev. 1992) (finding that the ballot measure proponent, not the Secretary of State, is responsible for crafting the proposal into proper legislative or constitutional form).
  28. *See Initiative, Referendum and Recall*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> (last visited Mar. 11, 2021).
  29. *See State ex rel. Alexander v. Brown*, 554 N.E. 2d 125 (Ohio Ct. App. 1988).
  30. *See Wyo. Nat’l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 290 (Wyo. 1994).
  31. ARIZ. REV. STAT. § 19-102.
  32. OKLA. CONST. ART. 5, § 2; OKLA. STAT. ANN. tit. 34, § 2; MISS. CODE ANN. § 23-17-17; § 23-17-19; WYO. STAT. ANN. §§ 22-24-304, 310-11 (1977).
  33. *See Stumpf*, 839 P.2d at 124 (holding that proposed state constitutional amendments must be presented to would-be petition signers as amendments and not as “mere laws nor as a loosely worded aggregate of ideas and philosophical ruminations.”).



Petitions are frequently invalidated if they fail to follow form and content requirements.<sup>34</sup>

### C. Petition Circulation

The power to propose initiative, referendum, or recall measures is meaningless if the proposals never gain ballot access.<sup>35</sup> Circulating petitions to gather voters' signatures is usually an essential step to qualify a ballot measure for the ballot because it is the most common method ballot measure proponents must use to demonstrate the public's support for their proposal.<sup>36</sup> A state's interest in electoral integrity and preventing fraud allow it some latitude to regulate petition circulation. Common petition-related state regulations include those that govern the following:

- A. circulators,
- B. signatures, and
- C. petition witnesses.

State laws that substantially restrict ballot access by imposing burdensome petition requirements are subject to strict scrutiny<sup>37</sup> because petition signature gathering is constitutionally protected "core political speech."<sup>38</sup> Strict scrutiny requires the state to demonstrate that its regulation is narrowly drawn and the least restrictive means possible to achieve a compelling state interest.

State statutes that cannot meet this test are unconstitutional.<sup>39</sup>

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- 34. *See State ex rel. Vickers v. Summit County Council*, 777 N.E.2d 830, 834 (Ohio 2002) (per curiam) (holding that the city council was not legally required to submit the measure for voter approval where the petition's obsolete election falsification statement was more than mere technical non-compliance).
  - 35. *See Gallivan v. Walker*, 54 P.3d 1069, 1081 (Utah 2002) (finding that signing a petition is "inextricably connected" to the voter's right to vote because signing the petition serves a "gate keeping function" on the right to vote).
  - 36. *See* NAT'L CONF. STATE LEGISLATURES, *supra* note 20.
  - 37. *Hoyle v. Priest*, 59 F. Supp. 2d 827, 836 (W.D. Ark. 1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988)).
  - 38. *Meyer*, 486 U.S. 414, 421-22 (1988). *But see Hoyle v. Priest*, 59 F. Supp. 2d at 836 (finding petition requirements that do not impact the ability to communicate a message, restrict petition circulation, impact the ability to communicate with voters, or regulate the content of speech do not impact core political speech).
  - 39. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest); *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring).

## 1. Circulator Requirements

The Constitution protects petition circulation because petition circulators engage in one-on-one political communication when they ask individuals to sign a petition supporting a proposed ballot measure.<sup>40</sup> State regulation of petition circulation that discourages or limits the number of potential petition circulators directly impact the ballot measure proponent’s ability to communicate its message, and may be unconstitutional.<sup>41</sup> Courts analyze the impact of a state’s petition circulator regulations by considering how many potential petition circulators would be disqualified if the regulation is given its full force and effect.<sup>42</sup>

Petition circulators are nonetheless subject to some state regulation and can be held personally accountable if they fail to comply with legitimate controls.<sup>43</sup> To date, the Supreme Court has ruled on the following state petition circulation regulations:

- limitations on payments to petition circulators,<sup>44</sup>
- identification requirements,<sup>45</sup>
- registered voter requirements,<sup>46</sup> and
- age requirements.<sup>47</sup>

The Supreme Court has ruled that states may not prohibit all payment to petition circulators,<sup>48</sup> but has not specifically addressed whether states can prohibit per signature payments. One federal court held a

The Constitution protects petition circulation because petition circulators engage in one-on-one political communication when they ask individuals to sign a petition supporting a proposed ballot measure.

40. *Meyer v. Grant*, 486 U.S. 414, 415 (1988).

41. *Buckley*, 525 U.S. at 199.

42. *See Meyer*, 486 U.S. 414 (striking down a ban on the use of paid petition circulators under threat of criminal penalty because, among other things, it would limit the number of voices who could speak on behalf of the proposed measure.); *Buckley*, 525 U.S. at 193 n.15 (striking down requirements that petition circulators be registered voters and wear name tags because the requirements would limit the pool of potential circulators by 400,000–964,000 individuals, and thus the voices who could convey the proponent’s message).

43. *Buckley*, 525 U.S. at 192 n.11.

44. *Meyer*, 486 U.S. at 415.

45. *Buckley*, 525 U.S. at 186.

46. *Id.* at 195–96.

47. *Id.* at 191.

48. *Meyer*, 486 U.S. 414 (striking down a statute criminalizing the use of paid petition circulators for ballot measures and noting that no such ban was in force for candidacy petition circulators).

state's per signature payment ban constitutional because it alleviated known fraud.<sup>49</sup> Another federal court overturned a state ban on per signature payments because the state could only speculate that allowing per signature payment would increase fraud.<sup>50</sup>

Because the First Amendment protects the right to engage in anonymous political speech, states may not require petition circulators to wear name tags.<sup>51</sup>

States also cannot require petition circulators to be registered voters.<sup>52</sup> Those who are not, however, cannot sign the petition's validating affidavit if state law requires validation by a registered voter.<sup>53</sup>

States may require petition circulators to be adults because age is a common proxy for maturity, and the circulator's maturity is reasonably related to a state's interest in preserving electoral integrity.<sup>54</sup> In addition, age is a neutral standard that only temporarily postpones an individual's petition circulation opportunities.<sup>55</sup>

## 2. Signature Requirements

State petition signature-related regulations commonly include the following:

- numerical requirements,
- geographic distribution requirements, and
- restrictions on who may sign the petition.

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49. *See* Prete v. Bradbury, 438 F.3d 949 (9th Cir. 2006) (finding the prohibition on per signature payment served the important state interest in preventing forgery and fraud).
  50. *See* Term Limits Leadership Council, Inc. v. Clark, 984 F. Supp. 470 (S.D. Miss. 1997) (granting summary judgment to plaintiffs and finding a constitutional violation in prohibition on per signature payments and requirement that petition circulators be qualified electors of the state because the state offered only speculation and not proof that these requirements were necessary to deter fraud).
  51. *Buckley*, 525 U.S. at 197-98 (opining that the desire to engage in anonymous speech is greatest when the ballot proposal is controversial).
  52. *Id.* at 194 (requiring the circulator to be a registered voter diminishes the potential for political speech and the state's interest in deterring lawbreakers among circulators can be accomplished in other ways, but not addressing whether the state could require petition circulators to be state residents because the issue was not raised).
  53. *Stumpf v. Lau*, 839 P.2d 120, 124 (Nev. 1992).
  54. *Buckley*, 525 U.S. at 191 n.10 (noting *Am. Const. Found., Inc. v. Meyer*, 120 F.3d 1092 which upheld the state's requirement that petition circulators must be at least eighteen years old was not appealed).
  55. *Id.* at 191 n.10 (noting this portion of *Am. Const. Found., Inc. v. Meyer*, 120 F.3d 1092 was not appealed).

Some states require ballot measure proponents to gather supporting signatures from throughout the area that would be affected by the enacted measure.

### a. Numerical Requirements

State law specifies how many signatures ballot measure proponents must gather to gain ballot access for their proposal. The number is commonly a specified percentage of registered voters<sup>56</sup> or a percentage of those who voted in a recent election<sup>57</sup> of the last gubernatorial election. Ballot measure proponents may be prohibited from filing amended or supplemental petitions after the initial deadline to submit signatures passes,<sup>58</sup> so it is essential they initially submit the proper number of signatures.

Ballot measure proponents who must submit a number of signatures equal to a percentage of voters who participated in a past election may ask the court to determine the appropriate measuring election when the signature collection period extends over more than one election. One court held that the measuring election was the one that occurred directly preceding the petition submission date, rather than the election held directly preceding the date the petition process began.<sup>59</sup> In this case, voter turnout had significantly increased during the second election, the ballot measure's proponents did not submit enough signatures to meet the higher requirement, and the proposed ballot measure failed to earn ballot access.<sup>60</sup>

### b. Geographic Distribution Requirements

Some states require ballot measure proponents to gather supporting signatures from throughout the area that would be affected by the enacted measure.<sup>61</sup> These geographical distribution requirements are vulnerable to Equal Protection Clause challenges,<sup>62</sup> especially if the signature distribution requirements give sparsely populated rural areas a disproportionate veto power even when the measure

56. ARK. CONST. ART. 5, § 1.

57. ARIZ. CONST. ART. 21 § 1.

58. IDAHO CODE § 34-1813.

59. *See Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281 (Wyo. 1994) (finding the ballot measure proponents failed to meet higher petition signature requirements because the date of final petition submission controlled the election to which the signature requirement was benchmarked, which here enjoyed greatly increased voter turnout).

60. *See id.*

61. OHIO CONST. ART. II, § 1; UTAH CODE ANN. § 20A-7-201 (LexisNexis 2021).

62. The state constitution may provide greater Equal Protection guarantees than the U.S. Constitution.

enjoys widespread overall support.<sup>63</sup> For example, an Equal Protection violation occurred when ballot measure proponents were required to submit supporting petitions from half the state’s forty-four counties, notwithstanding the fact that sixty percent of the state’s population was concentrated in only nine counties.<sup>64</sup>

When reviewing geographic signature distribution requirements for potential constitutional violations, a court analyzes:

- the number of political subdivisions that must be represented,
- the signature requirements for each subdivision compared to the total statewide requirement, and
- the state’s population distribution.<sup>65</sup>

### **c. Restrictions on Who May Sign the Petition**

States commonly require petition signers to be legal voters. Courts may be asked to determine the qualifications a legal voter must possess. One court held that a newly registered voter was not a legal voter until the permanent voter registrar received and acknowledged the voter registration form.<sup>66</sup> Under this definition, individuals who signed a petition at the same time they completed their voter registration applications were not legal voters, hence their petition signatures were invalid.<sup>67</sup> Another court held that a voter who moved without updating his voter registration application was not qualified to sign a petition because he was no longer a “registered qualified voter.” Although registered at his old address, he was no longer qualified to vote there and though he was qualified to vote in his new precinct, he was not registered there.<sup>68</sup>

## **3. Witness/Attestation Requirements**

Individual petition signatures or the petition as a whole may need to be witnessed or attested. State statutes may set qualification requirements for the individual

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63. See *Idaho Coal. United for Bears v. Cenarrussa* 342 F.3d 1073 (9th Cir. 2003); *Gallivan v. Walker*, 54 P.3d 1069, 1095 (Utah 2002).

64. *Idaho Coal. United for Bears*, 342 F.3d 1073. See also *Gallivan*, 54 P.3d at 1088 (finding state Equal Protection and uniform operation of laws violations in a petition signature requirement that gave disproportionate power to lightly populated rural counties).

65. See *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004) (finding no valid distinction between ballot access for a candidate and ballot access for an initiative measure when determining if an equal protection violation exists).

66. See *Hoyle v. Priest*, 59 F. Supp. 2d 827, 830 (W.D. Ark. 1999).

67. See *id.*

68. See *Schaaf v. Beattie*, 265 Cal. App. 2d 904, 910 (Ct. App. 1968) (noting voter’s remedy was to register in his precinct and then to sign the petition).

who serves as a witness.<sup>69</sup> Failure to comply with these requirements may invalidate individual signatures or the entire petition.<sup>70</sup>

## D. Certification for Ballot Access

If timely submitted petitions meet all format, content, circulator, signature, attestation, and other requirements, then the ballot measure should be certified and placed on the ballot.

## E. Required Ballot Information

State laws usually specify the information voters must receive about ballot measures before they vote.<sup>71</sup> States generally require this information to be printed on the ballot and posted or otherwise available at the polling place.<sup>72</sup>

# IV. COURT INVOLVEMENT IN BALLOT MEASURE ISSUES

Ballot measure-related challenges come before the court as procedural or substantive challenges. Before courts evaluate ballot measure challenges, however, they must first consider whether review is appropriate.<sup>73</sup> In general, pre-election review of procedural challenges is appropriate.<sup>74</sup> Many courts take a different approach to pre-election review of substantive challenges, although the majority of them conduct pre-election review under some circumstances.<sup>75</sup>

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69. OR. REV. STAT. § 250.045 (2021).

70. *See State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135, 1142 (Ohio 2001) (per curiam) (Douglas, J., dissenting) (holding where wife signed petition for her husband, witness's claim to have witnessed both signatures was incorrect and entire part-petition was stricken for failure of proper witnessing); *Stumpf v. Lau*, 839 P.2d 120, 124 (Nev. 1992) (finding where a petition circulator did not have to be a registered voter, but all "signers" did, when circulator signed the validating affidavit, his signature invalidated the entire petition).

71. *See, e.g.*, UTAH CODE ANN. §§ 20A-7-207-09; § 20A-6-107.

72. CAL. ELEC. CODE § 9004 (West 2021).

73. *State ex rel. Fidanque v. Paulus*, 688 P.2d 1303 (Or. 1984) (discussing the ballot qualification process for initiatives and limitations on the court's pre-election review of initiatives); *see Tilson v. Mofford*, 737 P.2d 1367 (Ariz. 1987) (en banc) (noting the court's pre-election authority to intervene and enjoin a ballot measure is limited to situations where the measure is defective in form, fails to meet signature requirements or is procedurally deficient).

74. *Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224, 1228 (Nev. 2006).

75. *Calzone v. Ashcroft*, 559 S.W.3d 32, 34 (Mo. Ct. App. 2018).

## A. Procedural Challenges

Procedural challenges to a state’s ballot measure process generally take one of two forms:

- disputes over whether the proponents met the compliance requirements, and
- constitutional challenges to the requirements themselves.

A ballot measure’s proponents or opponents<sup>76</sup> may file a compliance-based procedural challenge to an administrative decision permitting or denying initial approval of a ballot measure or a subsequent decision on ballot access.<sup>77</sup> In such instances, ballot measure proponents usually claim that the ballot measure satisfied all applicable requirements for approval or ballot access but was nonetheless denied a spot on the ballot. The ballot measure’s opponents, on the other hand, claim the ballot measure failed to qualify for ballot access and should be denied ballot access or be removed from the ballot.<sup>78</sup> Unless election officials’ decisions to grant or deny ballot access to a ballot measure is administratively unreviewable, states may require plaintiffs to exhaust all administrative review avenues before filing a compliance-based lawsuit.

Occasionally, even if all administrative review is exhausted, court review may be limited or unavailable.<sup>79</sup>

Compliance-based procedural ballot measure challenges may be subject to laches, even when they are filed before the election. Laches arises when the plaintiff’s

Compliance-based procedural ballot measure challenges may be subject to laches, even when they are filed before the election.

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76. In some states, any registered voter may object to a ballot measure. *See Ellis v. Roberts*, 725 P.2d 886, 889 (Or. 1986) (noting that because the potential plaintiff pool exceeded one million registered voters, determining if any individual plaintiff had standing was a waste of time).

77. In addition to the procedural steps outlined earlier in this chapter, any additional procedures the state requires can also provide the basis for a compliance-based challenge.

78. Note that opponents sue the state officer, generally the Secretary of State, who authorized the ballot measure, and not the ballot measure proponents, although they may be able to intervene.

79. *See Hoyle v. Priest*, 59 F. Supp. 2d 827, 831 (W.D. Ark. 1999) (finding that the court could not review the decision of the Secretary of State to deny to the petition on insufficient signature grounds because the court only had authority to do so after the petition was fully certified in all respects, including signature requirements and ballot title, and that the court could not offer the requested relief).

delay in suing prejudices another party.<sup>80</sup> For example, a court applied laches to dismiss a lawsuit because the plaintiff waited more than two months before challenging election officials' decision that the referendum petition contained too few valid signatures to qualify for the ballot.<sup>81</sup> In addition, compliance-based procedural disputes may be mooted if they are not filed until after the election.<sup>82</sup>

When courts hear these compliance-based procedural challenges, they may issue an order to compel ballot access for a measure that was wrongfully denied or to compel denial of approval or removal of a measure from the ballot where approval was granted in error.<sup>83</sup>

A second type of procedural challenge attacks the constitutionality of the procedural requirements. Constitutional challenges to specific requirements are addressed in the discussion of individual ballot measure requirements, above.<sup>84</sup>

Additionally, some courts have granted procedural relief in the face of emergencies, such as with the COVID-19 pandemic.<sup>85</sup>

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80. Laches occurs when the plaintiff's delay in bringing a lawsuit prejudices—harms—another party. In an election context, prejudice may occur when election deadlines pass. *See State ex rel. Fidanque v. Paulus*, 688 P.2d 1303, 1307-08 (Or. 1984) (expressing a wariness of last-minute challenges because of prejudice to the defendant and petition circulators and the unreasonable burden placed on the court, which is placed in the position of having to “steamroll” through “delicate legal issues,” so the deadline for fixing the ballot can be met) (citation omitted). *See infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.

81. *See State ex rel. Alexander v. Brown*, 554 N.E.2d 125, 127-28 (Ohio Ct. App. 1988) (finding the ballot creation deadlines and immovable election date justified laches).

82. *See, e.g., Quarles v. Kozubowski*, 507 N.E.2d 103 (Ill. App. Ct. 1987) (noting the validity of petitions is supposed to be challenged pre-election so that the trouble and expense of an election is spared if the petition fails and to ensure the challenger does not gamble on the outcome of the election, but allowing the post-election challenge to a liquor control petition to proceed because its passage damaged the challenger and the case had substantial public interest).

83. *See, e.g., Election Litigation: Ballot Measures*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/content/ballot-measures> (showing a variety of federal cases that both grant and deny ballot access for ballot measures).

84. <sup>84</sup> *See Montero v. Meyer*, 13 F.3d 1444, 1448 (10th Cir. 1995) (concluded appellees lacked any legitimate liberty interest entitlement to participate in title board hearings); *and Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997) (Appellants had no constitutionally protected right to place issues before the electorate or any state right to prior notice of exact number of signatures required to place an initiative on ballot); *Hoyle v. Priest*, 59 F. Supp. 2d 827, 837 (W.D. Ark. 1999) (finding no federal constitutionally protected right to have one's own ballot title used).

85. The requirement for ballot qualification for initiatives and referendums became more difficult to satisfy in light of COVID-19 and the related shutdowns and restrictions. Many groups asked for relief in light of the pandemic, yet the courts, often applying the *Anderson-Burdick* test, have lacked sympathy, disregarding pleas for leniency for the most part. *See Sinner v. Jeager*, Case No.3:20-cv-00076 (D. N. Dakota 2020); *Morgan v. White*, 964 F.3d 649, 651 (7th Cir. 2020); *Miller v. Thurston*, 967 F.3d 727, 732 (8th Cir. 2020).



## B. Substantive Challenges

Many states do not allow their citizens to propose initiatives on the full range of issues addressable by state legislators. States that restrict their citizens' legislative authority frequently impose subject matter requirements that limit initiatives to defined arenas, such as enacting laws or proposing constitutional amendments, or limit proposals to a single subject or amendment.<sup>86</sup> Substantive challenges usually allege that the ballot measure's topic or function oversteps these state-imposed boundaries. Although ballot measures should generally receive ballot access if their proponents satisfied all necessary procedural requirements, the measure's substantive validity may be considered separately, and ballot access may be denied for substantive flaws.<sup>87</sup>

Unlike most other areas of election law where pre-election review is universally favored, pre-election review of an initiative's substance may be disfavored. In many, but not all, states substantive or content-based challenges are commonly reserved for post-election review,<sup>88</sup> unless the measure is clearly invalid<sup>89</sup> or serious consequences "will result" if the review were postponed until after the election.<sup>90</sup>

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86. See MICH. CONST. ART. 2, § 9 (initiative power extends only to laws which the legislature may enact); NEB. REV. ST. § 32-1408 (no measures that interfere with the legislature's ability to direct taxation of necessary revenues); OR. CONST. art. IV, § 1 (single-subject restriction).

87. See *State ex rel. Fidanque v. Paulus*, 688 P.2d 1303, 1307 (Or. 1984); *Lowe v. Keisling*, 882 P.2d 91, 99 (Or. Ct. App. 1994) (en banc); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 286 (Wyo. 1994) (finding pre-enactment challenges are justiciable "if the initiative addresses subject matter that is excluded from or proscribed by the initiative process as delineated in the constitutional measure"); *Foster v. Citizens for Union Avenue*, 790 P.2d 1, 4 (Or. 1990) (finding proper compliance alone is insufficient to place a measure on the ballot where it is otherwise legally insufficient to qualify, here because the measure proposes an administrative, and not a legislative, matter).

88. See *Tilson v. Mofford*, 737 P.2d 1367, 1370 (Ariz. 1987) (en banc) (noting that a procedural violation must be reviewed pre-election, while substantive legality is reviewable only post-election and then only when it is an issue in a specific case).

89. *Legislature of the State of Cal. v. Deukmejian*, 669 P.2d 17, 33 (Cal. 1983) (per curiam) (Richardson, J., dissenting); *Am. Fed. of Labor-Congress of Indus. Orgs. v. Eu*, 686 P.2d 609, 615 n.11 (Cal. 1984) (finding that although the court based its review on the grounds that the initiative exceeded the people's initiative powers, other cases have suggested that under its equitable discretion powers, courts may conduct a pre-election review "upon a compelling showing that the substantive provisions of the initiative are clearly invalid.") (citations omitted). Note that the majority rule allows pre-election review under these circumstances. See also *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 286 (Wyo. 1994) (noting that courts with a history of denying ballot access to proposed initiatives because the electorate has no right to enact an unconstitutional law may review proposed initiative on that basis alone).

90. See *Legislature of the State of Calif.*, 669 P.2d at 20-21 (noting that if review of the proposed redistricting plan was postponed until post-election, upcoming elections based on the redistricting plan would be significantly impacted, the special election called to vote on the plan would cost fifteen million dollars and the proposed changes would be difficult to implement and publicize in time for orderly elections).

A measure may be clearly invalid because its proposal is unconstitutional under the state or federal Constitution or because the proposal strays outside the recognized topics for ballot measures.<sup>91</sup> Thus, courts may deny ballot access to ballot measures that do not propose laws, constitutional amendments, or referenda, especially where the proposed measure is primarily designed to allow voters to “express themselves”<sup>92</sup> in a straw poll.<sup>93</sup>

Courts that conduct pre-election substantive reviews of proposed initiatives sometimes highlight the distinctions between the initiative process and the legislative process to distinguish why the court will conduct a pre-enactment review of the initiative although it would defer a pre-enactment review of pending legislation. One difference courts have mentioned is that once an initiative has been submitted to the voters, its language is unalterable, but legislation can be amended at any point in the legislative process until it is enacted.<sup>94</sup> Courts may also conduct pre-election review because of institutional concerns, particularly—as mentioned above—when the initiative is advanced to assess popular opinion.<sup>95</sup>

When courts defer their review until after the election, they commonly do so based on the following grounds:

- a pre-election opinion would be advisory only,<sup>96</sup>
- judicial economy is preserved by waiting to see if the measure passes before reviewing it,<sup>97</sup> or
- separation of powers requires the court to limit its pre-election review of initiatives just as the court does not conduct a pre-enactment review of the legislature’s actions.<sup>98</sup>

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91. *See Am. Fed. of Labor-Congress of Indus. Orgs.*, 686 P.2d at 615.

92. *See Stumpf v. Lau*, 839 P.2d 120, 122 (Nev. 1992) (holding term limits initiative did not fall into proper subject matter and thus was not qualified to appear on the ballot); *American Federal of Labor-Congress of Indus. Orgs.*, 686 P.2d at 613 (noting that initiatives are the means to enact legislation and are not public opinion polls).

93. *Straw poll*, BLACK’S LAW DICTIONARY (8th ed. 2004) (defining a straw poll as a “nonbinding vote, taken as a way of informally gauging support or opposition but usu. without a formal motion or debate”).

94. *See Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 289 (noting the amendment processes and compromises inherent in the legislative process that are missing in an initiative because once the initiative has been enacted by the voters, its language is immutable).

95. *See Stumpf*, 839 P.2d at 126.

96. *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 286; *Lowe v. Keisling*, 882 P.2d 91, 99 (Or. App. 1994) (en banc); *Foster v. Citizens for Union Avenue*, 790 P.2d 1, 4 (Or. 1990).

97. *Foster v. Clark*, 790 P.2d 1, 4 (Or. 1990).

98. *See Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987) (en banc).

The most frequently alleged substantive violations of the citizenry’s initiative power are discussed below.

## 1. Single Issue

States frequently require that initiative proposals create a single statute or constitutional amendment.<sup>99</sup> Single-issue<sup>100</sup> requirements prevent logrolling by allowing voters to separately approve or reject each proposition or amendment.<sup>101</sup> Single-issue rule violations occur when multiple amendments or statutes masquerade as one. A single-issue rule violation is suggested when a proposed amendment or statute’s subparts:

- do not need to stand or fall as a whole,
- do not add to the consistency or workability of the entire constitution, or
- do not appear likely to gather equal voter support if separately presented.<sup>102</sup>

Some states allow pre-election review for single-issue violations<sup>103</sup> and some do not.<sup>104</sup> In states that allow review, courts can order initiative proposals that violate single-issue requirements kept off or removed from the ballot.<sup>105</sup>

Some states allow pre-election review for single-issue violations and some do not.

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99. *See id.* at 1370 (state constitution contains a single-issue requirement). Note that closely related subparts may be included in the proposal.

100. Sometimes known as “single subject” requirements.

101. *Tilson*, 737 P.2d at 1370; *McFadden v. Jordan*, 196 P.2d 787, 797 (Cal. 1948) (en banc). Logrolling combines dissimilar propositions into a single statute or amendment in the hopes that voters will support the whole because they favor one distinct part of it.

102. *Id.* at 1370.

103. *See Or. Educ. Ass’n v. Roberts* 721 P.2d 833, 834 (finding that a change in the wording of the state constitution now requires the Secretary of State to determine whether an initiative complies with the single subject rule before voters adopt it).

104. *See Tilson*, 737 P.2d at 1369 (stating court’s power to enjoin an initiative proposal is limited to cases where the petition 1) is defective in form, 2) contains an insufficient number of signatures, or 3) procedure was not followed).

105. *See Roberts*, 721 P.2d 833, 834.

## 2. Constitutional Amendment vs. Revision

Citizens can generally use their initiative power to amend, but not revise, the state constitution.<sup>106</sup> Amendment and revision are two distinct procedures.<sup>107</sup>

Amendments operate “within the line” of the original constitution<sup>108</sup> by bringing changes that must logically stand or fall as a whole and make the amended constitution consistent and workable in its entirety.<sup>109</sup> Amendments improve or better carry out the constitution’s original purpose.<sup>110</sup> Constitutional revisions, in contrast, operate “beyond the line” of the existing constitution<sup>111</sup> by substantially altering the original constitution’s purpose or objective.<sup>112</sup>

A court may need to determine whether a proposed initiative would amend or revise the state constitution. One court determined a challenged proposal—which ran to fifty-six pages—was either a revision or a new constitution and not an amendment because the proposal thoroughly overhauled the existing constitution and was a complete constitution in itself.<sup>113</sup> Another court determined a challenged proposal was not an amendment in part because the proposal would have entirely repealed or substantially altered fifteen of the twenty-five articles in the existing constitution.<sup>114</sup>

A court may need to determine whether a proposed initiative would amend or revise the state constitution.

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106. Special rules may also apply when the state legislature wants to revise the constitution.

107. *McFadden*, 196 P.2d at 797-98 (noting that the electorate may vote on amendments presented by initiative, but that constitutional revisions must first be articulated and ratified by a constitutional convention before they are presented to the electorate for final approval).

108. *Id.* at 799.

109. *Tilson*, 737 P.2d at 1370.

110. *McFadden*, 196 P.2d at 799.

111. *Id.* at 796 (noting that where fifteen of the twenty-five articles in the existing state constitution would be entirely repealed or substantially altered by the proposed amendment, at least four new topics would be added, and both the judicial and legislative branches would have powers extensively curtailed, the proposition was not an amendment as was claimed, but a wholesale revision of the state constitution that could not be presented via initiative).

112. *Id.* at 799.

113. *Holmes v. Appling*, 392 P.2d 636, 639 (Or. 1964) (en banc).

114. *McFadden v. Jordan*, 196 P.2d 787, 796 (Cal. 1948) (en banc).

### 3. Measure Exceeds Legislative Authority

Many states limit their citizen's legislative power. Depending on an individual state's constitution and statutes, a proposed initiative may exceed the citizenry's legislative ability when it:

- appropriates funds,<sup>115</sup>
- performs administrative tasks,<sup>116</sup>
- expresses wishes rather than directly enacts legislation,<sup>117</sup>
- renders an administrative decision,<sup>118</sup>
- adjudicates a dispute,<sup>119</sup> or
- seeks to repeal or rescind existing legislation.<sup>120</sup>

In states that recognize pre-election administrative or judicial review of an initiative to ensure it remains within legal limits, courts can remove a non-complying measure from the ballot or uphold an administrative decision denying ballot access.<sup>121</sup>

### 4. Constitutionality

State courts differ in whether they have the authority to conduct a pre-election review of a proposed ballot measure's constitutionality. Although a majority of courts will only review the constitutionality of an initiative after it has been enacted,<sup>122</sup> other courts have decided they will:

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115. *Dorsey v. D.C. Bd. of Elections & Ethics*, 648 A.2d 675 (D.C. 1994) (seeking to reduce parking fines and providing amnesty for other parking violations).

116. *Foster v. Citizens for Union Avenue*, 790 P.2d 1 (Or. 1990) (renaming a street). Although it may be difficult to distinguish legislative from administrative matters, as a rule, legislative matters make permanent laws of general applicability while administrative matters implement the general rules.

117. *Am. Fed. of Labor-Congress of Indus. Orgs v. Eu*, 686 P.2d 609, 623 (Cal. 1984) (ordering the state legislature to apply for a constitutional convention). If the topic can be enacted directly through an initiative, citizens should do so directly rather than utilize an initiative to order the legislature to act on their behalf.

118. *Id.* at 627.

119. *Id.*

120. *Schaefer v. Vill. Bd. of Vill. of Potosi, Grant County*, 501 N.W.2d 901, 902 (Wis. Ct. App. 1993) (using referendum powers that were no longer available to the electorate).

121. *Dorsey v. D.C. Bd. of Elections & Ethics*, 648 A.2d 675 (D.C. 1994).

122. *See Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 286 (Wyo. 1994) (listing cases in which state courts have decided that pre-election challenges to an initiative's constitutionality are not justiciable).

- review, but allow the ballot measure to appear on the ballot even if the court believes the ballot measure to be unconstitutional in whole or in part,<sup>123</sup>
- review and prohibit a *clearly* unconstitutional ballot measure from appearing on the ballot.<sup>124</sup>

Whether courts may review a proposal’s constitutionality may also depend on whether it is alleged to violate the state or the federal Constitution.<sup>125</sup>

## V. CONCLUSION

Direct democracy states regulate the ballot measure process, often extensively, and at every stage. Regulations vary state by state. These nuances impact the nature of litigation—procedural or substantive—brought before the courts.

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123. See *Greater Las Vegas Chamber of Commerce v. Del Papa*, 802 P.2d 1280, 1281 (Nev. 1990) (noting the court has never voided a ballot measure because it might violate the U.S. Constitution in the future); *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 289 (finding proposed ballot measure needed to be unconstitutional *in toto* before it would be enjoined from the ballot, especially where it had a severability clause); *Stumpf v. Lau*, 839 P.2d 120, 127 (Nev. 1992) (Steffen, J., dissenting) (finding that the court’s own prior decisions hold that it *may* enjoin the measure when it is unconstitutional, “nugatory,” or “incapable of being made operative,” but is not required to do so) (emphasis in original).

124. See *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 286 (listing cases in which state courts have allowed pre-election constitutional challenges because the electorate has no right to enact unconstitutional laws).

125. *Stumpf*, 839 P.2d at 122 (review federal and state); *Legislature of State of Cal. v. Deukmejian*, 669 P.2d 17, 26 (Cal. 1983) (per curiam) (review federal and state); *Wyo. Nat’l Abortion Rights Action League*, 881 P.2d at 288 (review federal and state); *Greater Las Vegas Chamber of Commerce v. Del Papa*, 802 P.2d 1280, 1281-82 (Nev. 1990) (review state only as it is “unwise” to void a ballot measure that might be in violation of the federal constitution).



## CHAPTER 5

# State Regulation of Voters and Their Votes

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## CHAPTER 5: STATE REGULATION OF VOTERS AND THEIR VOTES

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Courts commonly acknowledge that the right to vote is fundamental because it is preservative of all other rights.

## I. INTRODUCTION

Courts commonly acknowledge that the right to vote is fundamental because it is preservative of all other rights.<sup>1</sup> Yet the right to vote is not absolute.<sup>2</sup> Instead, a state’s power to regulate local, state, and federal elections includes the power to set voter qualification standards<sup>3</sup> and to regulate the time, place, and manner of a voter’s electoral participation.<sup>4</sup> The state’s power to regulate voters is itself limited by state and federal statutory and constitutional provisions.<sup>5</sup> This chapter examines voter eligibility requirements and voter registration processes.

In general, states can condition the right to vote on the voter’s ability to meet the traditional qualification criteria—residence, age, citizenship—and may be able to establish other participation criteria subject to constitutional restraints.

## II. STATE REGULATION OF VOTER ELIGIBILITY

States regulate the right to vote by establishing criteria voters must meet before they can participate in elections. The criteria range from established and traditional categories that many states use to criteria—such as party affiliation requirements—that are applicable to limited circumstances, such as partisan primary elections.<sup>6</sup> This section discusses the multiple varieties of state regulation of the right to vote and voter participation.

1. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see United States v. Classic*, 313 U.S. 299 (1941) (finding the right to vote applies equally to primary and general elections).
2. *See Bush v. Gore*, 531 U.S. 98 (2000) (holding that individual citizens have no federal constitutional right to vote for presidential electors); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (holding that the fundamental nature of voting does not mean that the right to vote in any manner or to associate for political purposes are absolute). Note that state constitutions are an additional source of voting rights and protections.
3. *See* U.S. CONST. art. I § 2 *and* U.S. CONST. amend. XVII.
4. U.S. CONST. art. I § 4.
5. State constitutions may offer greater voting rights protections than the U.S. Constitution.
6. *See, e.g.*, 26 Okl. St. § 1-104 (prohibiting registered voters from voting in a primary election or runoff primary election of any political party they are not registered as unless they meet specified exceptions).

Generally speaking, states have sought to regulate the individual right to vote to further state interests in:

- electoral integrity,<sup>7</sup>
- preventing “party raiding,”<sup>8</sup>
- preventing fraud,<sup>9</sup>
- limiting participation to individuals within the political community,<sup>10</sup>
- ensuring voters are informed,<sup>11</sup> and
- political stability.<sup>12</sup>

## A. Traditional Voter Criteria

In general, states can freely confine the right to vote to those individuals who satisfy the traditional voter qualification criteria of age, citizenship, and residency.

### 1. Age Requirements

The U.S. Constitution prohibits states and the federal government from denying anyone eighteen or older the right to vote due to age.<sup>13</sup> Because the Constitution does not establish a minimum voting age, it appears that states may allow minors to vote if the state wishes to do so.<sup>14</sup>

Although states may not use age to disqualify voters who are eighteen or older, elderly voters face barriers to voting if they do not qualify for an absentee ballot,

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7. *Burdick v. Takushi*, 504 U.S. 428 (1992).

8. *Id.*

9. *Marston v. Lewis*, 610 U.S. 679, 680 (1973) (States have valid and sufficient interests in... prepar[ing] adequate voter records and protect its electoral processes from possible frauds.”).

10. *Sugarman v. Dougall*, 413 U.S. 634, 643, 649 (1973) (stating that states have “broad power to define [their] political community...” and that “...implicit in many of th[e] Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.”).

11. *See Lassiter v. Northampton Cnty. Bd. Of Elections*, 360 U.S. 45, 51-52 (1959) (“The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot....in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.”) (mooted by Voting Rights Act, §10101(a)(2)(C)).

12. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989) (“Maintaining a stable political system is, unquestionably, a compelling state interest.”).

13. U.S. CONST. amend. XXVI.

14. *Voting Age for Primary Election*, NAT'L CONF. STATE LEGISLATURES (Jan. 5, 2021) <https://www.ncsl.org/research/elections-and-campaigns/primaries-voting-age.aspx> (noting that, while the federal age limit for voting is eighteen years of age, some states have independently set the voting age requirement to as low as sixteen). *See also* Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447 (2012) (discussing minimum voting age requirements).

are not independently mobile, lack access to transportation, or if the polling place is otherwise inaccessible to them.<sup>15</sup> Elderly voters may also lose the right to vote subject to state laws concerning voter capacity.<sup>16</sup>

## 2. Residency Requirements

States typically require prospective voters to satisfy residency requirements before they can register to vote.<sup>17</sup> Residency requirements usually encompass three components: geographic residency, bona fide residency status, and durational residency. Special district elections may establish different residency rules than those generally applicable, as discussed later in this chapter.<sup>18</sup>

### a. Geographical Residency Requirements

Geographical residency requirements restrict voting to individuals who live within a political subdivision. Individuals who live outside a political subdivision's boundaries have no constitutional right to vote in its elections, even if they are subject to some of its laws.<sup>19</sup> For example, although a city's policing, business licensing, and sanitary district powers extended three miles into the adjacent county, county residents who lived within the overlap zone had no constitutional right to vote in the city's elections.<sup>20</sup> A locality may allow non-resident landowners to vote in municipal elections but are not required to do so.<sup>21</sup>

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15. See N.Y. *ex rel.* Spitzer v. Cnty. of Schoharie, 82 F. Supp. 2d 19 (N.D. N.Y. 2000) (suing to bring polling places into compliance with the Americans with Disabilities Act). For more information on election law practices that effect elderly populations, see Brian K. LaFratta & Jamie Lake, *Inside the Voting Booth: Ensuring the Intent of the Elderly Voter*, 9 ELDER L.J. 141 (2001). See also Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1495 (2016).

16. See Melissa Deutschman, *Incapacity by Status Versus Functional Ability: Preserving the Right to Vote for Elderly Americans with Diminished Mental Capacity While Upholding the Integrity of Elections*, 24 ELDER L.J. 429, 437-52 (2017) (describing differing state approaches to determining mental capacity to vote).

17. In states without voter registration requirements, residency may need to be established at the polling place before the voter is permitted to vote. The ability of homeless individuals to meet residency requirements may also be litigated. See *Collier v. Menzel*, 176 Cal. App. 3d 24 (Ct. App. 1985) (finding homeless individuals who listed a park as their residence satisfied voter registration requirements notwithstanding the fact that overnight camping in the park was prohibited).

18. See *infra* Section V.

19. *Holt Civic Club v. Cty. of Tuscaloosa*, 439 U.S. 60 (1978) (holding that, contrary to the general rules on residency requirements, special district elections may allow non-residents to vote—or prevent some residents from voting); see *supra*, Section IV: Special District Elections.

20. See *Holt Civic Club*, 439 U.S. 60.

21. See *Millis v. Bd. of Cnty. Comm'rs of Larimer Cnty.*, 626 P.2d 652 (Colo. 1981) (holding that the state constitution may permit localities to allow non-resident landowners to vote, but localities are not required to do so). This situation typically arises in resort towns where a significant portion of the property may be owned by non-residents.

## b. Bona Fide Resident Requirements

States have a legitimate interest in limiting voting rights to bona fide residents.<sup>22</sup> Bona fide residency requires more than the voter’s presence in the locality on election day by requiring the voter to make the locality the voter’s domicile.<sup>23</sup> Domicile is the union of physical residency and the present intent to remain in the location indefinitely,<sup>24</sup> or the absence of a present intent to leave.<sup>25</sup>

A prospective voter’s bona fide residency status may be of special concern in areas that experience the significant and regular turn-over of an identifiable population subset compared to the rest of the community, such as communities that are home to colleges, universities, military bases, or federal enclaves.<sup>26</sup>

States may not “fence out” some classifications of residents because of concerns about how the residents will vote.<sup>27</sup> Instead, localities must make individualized determinations as to whether a prospective voter satisfies bona fide residency requirements.<sup>28</sup> To assist them in this determination, states may require prospective voters to demonstrate they are bona fide residents before extending voting rights to them. States may require prospective voter registrants to objectively establish the necessary domiciliary intent by:

States have a legitimate interest in limiting voting rights to bona fide residents.

22. *Carrington v. Rash*, 380 U.S. 89, 93–94 (1965) (“We stress—and this a theme to be reiterated—that [the state] has the right to require that all military personnel enrolled to vote be bona fide residents of the community”).

23. *Evans v. Cornman*, 398 U.S. 419, 421 (1970) (“Maryland may, of course, require that ‘all applicants for the vote actually fulfill the requirements of bona fide residence.’ . . . ‘But if they are in fact residents, with the intention of making (the State) their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation.’”) (internal citations omitted).

24. *Carrington*, 380 U.S. at 94.

25. *See Putnam v. Johnson*, 10 Mass. 488, 501 (1813) (stating that measuring domicile by the absence of a present intent to leave rather than a present intent of “*always staying there*” best fits the nature of “this new and enterprising country” where youth will settle in a location to see if it fits them but are open to moving on if a move is to their advantage) (emphasis in original) (citations omitted).

26. *See generally Carrington*, 380 U.S. 89 (1965) (holding that states may not deny voting rights to bona fide residents merely because they are in the military, but that they may take “reasonable and adequate steps” to ensure that all who register are bona fide residents.); *Evans v. Cornman*, 398 U.S. 419 (1970) (holding that states may not deny voting rights to bona fide residents of a federal enclave located within the state boundaries).

27. *Id.*

28. *Lloyd v. Babb*, 251 S.E.2d 843, 852, 853 (N.C. 1979) (students); *Carrington*, 380 U.S. at 93 (members of the armed forces).

- acquiring a dwelling,<sup>29</sup>
- obtaining a driver’s license,<sup>30</sup> or
- registering an automobile.<sup>31</sup>

Some localities may allow homeless individuals to register to vote and identify a voting precinct based on the location where the individual spends most nights.<sup>32</sup> Other localities have broadened their definition of “residence” to accommodate the homeless population by allowing the listing of a park bench or any other nontraditional accommodation where they sleep or a shelter.<sup>33</sup>

At least as early as 1813, students have sued for the right to vote in elections held by the locality where their college is located.

At least as early as 1813, students have sued for the right to vote in elections held by the locality where their college is located.<sup>34</sup> In 1972, the Supreme Court affirmed a lower court ruling that held a Texas registrar’s uniform practice of refusing to register college students unless the student established intent to remain in the area after graduation was a violation of the Twenty-Sixth Amendment.<sup>35</sup> However, states still maintain domicile requirements that college

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29. *See, e.g.,* *People ex rel. Moran v. Teolis*, 169 N.E.2d 232, 238 (Ill. 1960) (“A real and not an imaginary abode occupied as a home or dwelling is essential to satisfy the residential qualifications for voting prescribed by law.”).
30. *See* *Park v. Tsiavos*, 679 F. App’x 120, 122 (3d Cir. 2017) (referencing, among other things, the defendant’s driver’s license when establishing domicile for the purposes of a civil action).
31. *Dunn v. Blumstein*, 405 U.S. 330, 352 (1972) (explaining that durational residency requirements are unnecessary because fraudulent voters are unlikely to take the steps necessary to establish bona fide residency if their goal is to be present within the jurisdiction only long enough to attempt to throw the election).
32. *See* *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (noting voter registration deadlines reflect the legislature’s judgment of the amount of time necessary to prepare for an election).
33. *Pitts v. Black*, 608 F. Supp. 696, 707-08 (holding that the New York City Board of Elections’ application of state election law as to refuse to allow homeless individuals to register to vote on ground that they did not have inhabit fixed premises violated equal protection clause and citing Washington, D.C. and Philadelphia as examples of where homeless voters can register with nontraditional addresses). *See also* *Committee for Dignity and Fairness for the Homeless v. Tartaglione*, 1984 U.S. Dist. LEXIS 23612 (E.D. Pa. Sept. 14, 1984); *In re Application for Voter Registration of Willie R. Jenkins* (D.C. Bd. Of Elections and Ethics, June 7, 1984); *Collier v. Menzel*, 221 Cal. Rptr. 110 (App. 2d Dist. 1985); *Northeast Ohio Coalition for the Homeless v. Husted*, 2017 WL 1531811 \*6 (S.D. Ohio 2017) (holding that the term “shelter or other location” in a voting residency requirement “does not limit addresses to locations tied to buildings”) (emphasis in original); *Fischer v. Stout*, 741 P.2d 217, 221 (Alaska 1987) (“A residence need only be some specific locale within the district at which habitation can be specifically fixed. Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient.”).
34. *See* *Putnam v. Johnson*, 10 Mass. 488 (1813) (theological student at Andover sued after being denied the right to vote in elections for governor, lieutenant governor, and state senate).
35. *United States v. State of Tex.*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff’d sub nom.* *Symm v. United States*, 439 U.S. 1105 (1979).

students—and the larger voting age population—must meet. States take a variety of approaches in deciding whether college students may vote in elections held in the college community. Some states may presume the student’s domicile is identical to the student’s parents’ domicile but allow the student to rebut the presumption.<sup>36</sup> Others have no such presumption.<sup>37</sup>

In most states, a key factor in determining the student’s voting status is whether the state measures domicile by the intent to remain in the community indefinitely versus a lack of present intent to leave.<sup>38</sup> If an intent to remain is necessary, then students who intend to move after graduation might be unable to form the necessary intent to establish domicile while they are in college, but if the measure is the lack of a present intent to leave, then these students can establish domicile—even if they intend to move immediately after they graduate—because they do not presently intend to leave.<sup>39</sup>

In 2012, the New Hampshire state legislature introduced and passed legislation that affected the ability of out-of-state students to vote in the state.<sup>40</sup> In 2015, the state supreme court held that language included on the voter registration form violated the right to vote because of a significant likelihood of voter confusion.<sup>41</sup> In 2021, the New Hampshire state supreme court struck a revised version in its entirety as a violation of the right to vote.<sup>42</sup> The revised statute required proof of domicile if registering to vote more than 30 days before an election and required

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36. *See Lloyd*, 251 S.E.2d at 860 (finding no Equal Protection violation in the rebuttable presumption that the student’s domicile is at his parent’s house because it is merely a more specialized application of the rule that the individual who wishes to change domicile bears the burden of proving the change and discussing domicile as it pertains to students and other student-voter court cases).

37. *See, e.g., Hershkoff v. Bd. of Registrars of Voters of Worcester*, 321 N.E.2d 656, 663 (Mass. 1974) (“It seems to us, as it seemed to the Attorney General, that it is a corollary of eighteen-year old voting that the young voter is to be independent for voting purposes and therefore must have capacity to choose his domicil [sic] for voting purposes, regardless of his emancipation for other purposes . . .”).

38. *Lloyd*, 251 S.E.2d at 860.

39. *See id.* at 860 (noting that the latter definition is routinely applied to non-students, otherwise many individuals could not establish domicile for voting purposes).

40. *See Yael Bromberg, Youth Voting Rights & the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1138-41 (2019) (mentioning a number of bills the New Hampshire state legislature passed that effect college student’s ability to register to vote).

41. *Guare v. State*, 117 A.3d 731, 737-78 (2015) (“[T]he challenged language inaccurately states New Hampshire law. The challenged language informs a potential voter that, upon declaring New Hampshire as her domicile, she is ‘subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire[ ] driver’s license within 60 days of becoming a resident.’ Laws 2012, 285:2. This is inaccurate. A person who has only a New Hampshire domicile, but who does not meet the statutory definition of ‘resident,’ is *not* ‘subject to the laws of the state of New Hampshire which apply to all residents.’”).

42. *New Hampshire Democratic Party v. Sec’y of State*, No. 2020-0252, 2021 WL 2763651 (N.H. July 2, 2021).

a separate form to prove verification if registering less than 30 days before an election.<sup>43</sup> The court found sufficient evidence that the law caused voter confusion and that the state failed to demonstrate substantial relation to the interests the state claimed justified the burden.<sup>44</sup>

### c. Durational Residency Requirements

Durational residency requirements establish the amount of time a new resident must live in the community before becoming eligible to vote in its elections. Durational residency periods may be created specifically by state statute or they may result from the operation of a pre-election registration deadline.

Independent statutory durational residency requirements receive strict scrutiny because they:

- burden the right to vote,
- burden the right to travel, and
- treat newly arrived bona fide residents less favorably than established residents.<sup>45</sup>

Under a strict scrutiny analysis, states cannot justify durational residency requirements on a need for electoral integrity or the necessity of an informed electorate.<sup>46</sup> Courts have held that durational residency requirements do not enhance electoral integrity if the state makes no effort to verify the information given it and if “informed electorate” justifications raise concerns that the state’s true interest is in excluding new voters whose political sensibilities potentially differ from those of longer-term residents.<sup>47</sup>

States may, however, establish pre-election voter registration deadlines to provide election officials sufficient time to prepare voter records and to protect elections from fraud.<sup>48</sup> State voter registration deadlines act as *de facto* durational

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43. *Id.* at \*1-\*2.

44. *Id.* at \*10-\*11 (“[T]he anecdotal evidence at trial was [ ] supported by the persuasive and credible expert testimony offered by Plaintiffs, for which the State had no effective rebuttal.[ ]”).

45. *Dunn v. Blumstein*, 405 U.S. 330, 341-42 (1972) (“In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are ‘necessary to promote a compelling governmental interest.’”).

46. *Id.* at 345-46, 355-56.

47. *Id.*

48. *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam) (noting voter registration deadlines reflect the legislature’s judgment of the amount of time necessary to prepare for an election).

residency requirements because residents who move into the community after the deadline cannot register to vote in the upcoming election.<sup>49</sup>

Federal statutes and Supreme Court decisions set the following parameters on state durational residency requirements:

- *For presidential elections:* state durational residency requirements cannot exceed thirty days, and states must allow voters who register to vote thirty days before a presidential election to vote in their new state of residence or to vote in-person or by absentee ballot for president in their old state if the individual misses the voter registration deadline in their new state of residence.<sup>50</sup>
- *For non-presidential elections:* state durational residency requirements of one-year in-state and three-months in-county are unconstitutional,<sup>51</sup> but durational residency requirements longer than thirty-days may be constitutional if the state's election administration needs justify the period.<sup>52</sup> The constitutionality of durational residency requirements whose length is between fifty and ninety days is unknown.

States may constitutionally restrict the right to vote to citizens, although the Constitution does not require it.

### 3. Citizenship Requirements

States may constitutionally restrict the right to vote to citizens,<sup>53</sup> although the Constitution does not require it.<sup>54</sup> The U.S. Supreme Court held that states have an interest in limiting governmental participation to individuals who are within the political community, which does not include non-citizens.<sup>55</sup> In that case, the Court

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49. State law governs whether a voter who relocates within the state between the closing of voter registration and the election may vote in his old locality.
  50. 52 USCA § 10502 (2014).
  51. *See Dunn*, 405 U.S. 330 (finding requirements are excessive burdens on the right to vote and the right to travel).
  52. For example, one state's fifty-day durational residency requirement, which corresponded to its fifty-day voter registration deadline for non-presidential elections, was constitutional because the state's primary election was late in the year, and the state used volunteer deputy voter registrars whose error-prone work required extra effort by election officials to correct and verify. *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (per curiam). Note that states with an early voter registration deadline for non-presidential elections more than thirty days before Election Day must maintain separate records for each election and must provide a different ballot for voters who fail to meet the non-presidential deadline but meet the presidential registration deadline.
  53. *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (finding no Equal Protection violation occurs when non-citizens are not allowed to vote).
  54. *See Elise Brozovich, Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLIN J. PUB. L. & POL'Y 403 (discussing the history of non-citizen voting in the United States).
  55. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) ("There is no question about the legitimacy or importance of a State's interest in counting only eligible voters' votes.").



found that the state did not violate the rights of the non-citizen parents of school-aged children when it denied the parents an opportunity to vote in a local school board election.<sup>56</sup>

The federal National Voter Registration Act (NVRA) voter registration form requires prospective voters to affirm their citizenship but does not require registrants provide documentation of citizenship. In 2013, the Supreme Court held that the NVRA preempts states from requiring citizens to provide documentary proof of citizenship as a condition of registering to vote in federal elections.<sup>57</sup>

#### 4. Requirements Relating to Felony Conviction History

In general, states do not violate the U.S. Constitution if they disenfranchise people with felony conviction histories.<sup>58</sup> However, state statutes that conditioned the restoration of the right to vote on payment of any financial obligation may be deemed unconstitutional because they impose a property qualification affecting the right to vote.<sup>59</sup> More commonly, state statutes that restrict the right to vote based on the prospective voter's felony conviction history are analyzed under the rational basis test, which they generally satisfy.<sup>60</sup> For example, states do not violate equal protection guarantees even if they prohibit people with felony conviction histories who have completed sentence and parole conditions from voting.<sup>61</sup> On occasion, however, a felon disenfranchisement statute is found to have no rational relation to any state interest. Such was the case with a state statute that imposed a five-year voter registration ban on persons newly released from incarceration who had not registered to vote before incarceration but

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56. *Skaft v. Rorex*, 553 P.2d 830 (1976).

57. *Gonzalez v. Arizona*, 2008 WL 11395512 (D. Ariz. 2008); *Gonzalez v. Arizona*, 624 F.3d 1162 (9<sup>th</sup> Cir. 2010); *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9<sup>th</sup> Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 133 (2013) (“[W]e must hold that the registration provision, when applied to the Federal Form, is preempted by the NVRA . . .”). *See also* *Fish v. Schwab*, 957 F.3d 1105 (10<sup>th</sup> Cir.), *cert. denied*, 141 S. Ct. 965 (2020) (holding that a Kansas law requiring documentary proof of citizenship was preempted by the NVRA).

58. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (“As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment....We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.”). *See also* *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (clarifying that “§2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment” of laws that disenfranchised felons).

59. *See* *Comm. Success Initiative v. Moore*, No. 19 CVS 15941, 2020 WL 10540947 (N.C. Super. Sep. 04, 2020), <https://www.democracydocket.com/wp-content/uploads/2021/09/order-re-pi.pdf>.

60. *E.g.*, *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1216 (11<sup>th</sup> Cir. 2005).

61. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

allowed those newly released who *had* registered to vote before incarceration to resume voting immediately.<sup>62</sup>

States vary widely in their approaches to voting rights for people convicted of felonies. In Maine and Vermont, people may vote while incarcerated.<sup>63</sup> Other states automatically restore the right to vote to those who finish their sentence.<sup>64</sup> In yet other states, people with felony convictions must petition the state for the right to vote once their sentence is complete. Recently, some states like Virginia have streamlined the process of restoring voting rights to people with felony conviction histories.<sup>65</sup> In 2018, Florida voters amended the state constitution to eliminate the requirement to petition the governor for rights restoration, restoring voting rights automatically to people convicted of nonviolent crimes who have completed their sentence.<sup>66</sup> The state legislature later confined that amendment to those who had paid all court fines and fees—a restriction the 11<sup>th</sup> Circuit upheld in 2020.<sup>67</sup>

States vary widely in their approaches to voting rights for people convicted of felonies. In Maine and Vermont, people may vote while incarcerated.

## B. Non-Traditional Voter Criteria

States also regulate—or have regulated—voter participation by qualifications or requirements that go beyond the traditional age, residency, citizenship, and felony conviction classifications discussed above. The most common of these other criteria are:

- wealth,
- literacy,

62. *Mixon v. Commonwealth*, 759 A.2d 442 (Pa. Commw. Ct. 2000), *aff'd per curiam*, 783 A.2d 763 (Pa. 2001) (finding no rational basis to condition voting on the voter's registration date).

63. *See Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (January 8, 2021).

64. *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/5-5-5 (c); HAW. REV. STAT. ANN. § 831-2 (West).

65. For additional information on state approaches to voting rights for felons, *see* Jean Chung, *Felony Disenfranchisement: A Primer*, Sentencing Project (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

66. Tim Mak, *Over 1 Million Florida Felons Win Right To Vote With Amendment 4*, NPR (Nov. 7, 2018, 2:46 AM), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4>.

67. Fla. Stat. Ann. § 98.0751 (West); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1043 (11th Cir. 2020) (upholding the statute against constitutional challenge).

- capacity, and
- party affiliation.

Some of these requirements or conditions have been declared unconstitutional or prohibited by federal statute, as discussed below.

## 1. Wealth Requirements

A voter's wealth has no relationship with the voter's ability to participate intelligently in voting.<sup>68</sup> State restrictions that condition voting on satisfying wealth-based requirements—such as the payment of a poll tax—are unconstitutional.<sup>69</sup> In addition, the Voting Rights Act explicitly prohibits states from conditioning voting on the payment of poll taxes.<sup>70</sup>

## 2. Literacy Requirements

In the 1959 U.S. Supreme Court case, *Lassiter v. Northampton County Board of Elections*, the court held that non-discriminatory literacy tests serve the state's rational interest in the intelligent use of the ballot and do not violate Equal Protection.<sup>71</sup> They have, in fact, never been ruled unconstitutional, but their use (and the use of other tests<sup>72</sup>) was banned by an amendment to the Voting Right Act in 1970.<sup>73</sup> Later that same year, the Court upheld this ban in *Oregon v. Mitchell*.<sup>74</sup>

## 3. Capacity Requirements

The limits on a state's ability to disenfranchise voters because of the voter's mental capacity have not been clearly established. States have a compelling interest in making sure that all voters understand the nature and effect of voting, and state statutes or constitutions may specify whether persons adjudicated

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68. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (classifying wealth along with race, creed, or color as improper means to qualify voters).

69. U.S. CONST. amend. XXIV.

70. 52 U.S.C.A. § 10306.

71. 360 U.S. 45, 51 (1959).

72. See 52 U.S.C.A § 10501 (defining what constitutes a prohibited "test").

73. 52 U.S.C.A. § 10303.

74. 400 U.S. 112 (1970).

mentally incompetent can or must be disenfranchised.<sup>75</sup> Courts have found that otherwise eligible voters who have been adjudicated mentally incompetent may not lose the right to vote without due process, including notice and the opportunity to be heard.<sup>76</sup> The state’s failure to provide due process to voters who are the subject of incapacity hearings may be unconstitutional.<sup>77</sup>

State statutes that selectively disenfranchise the incapacitated are vulnerable to an equal protection challenge. For example, a federal district court found that a Maine statute that disenfranchised all individuals under guardianship because of mental illness, even if they understood the nature and effect of voting but did not disenfranchise individuals under guardianship because of mental retardation, regardless of its severity, violated equal protection guarantees

At least one court has held that courts conducting incapacity determinations must make individual determinations regarding the subject’s ability to understand the nature and effect of voting and should not allow mental illness or any other label to serve as a proxy for the individual’s ability to participate in the electoral process.<sup>78</sup>

#### 4. Party Affiliation Requirements

Some states require voters to declare a political party affiliation or their non-affiliated status when they register to vote.<sup>79</sup> The affiliation information is used to determine the voter’s eligibility to vote in primary elections. These states frequently seek to protect their interest in political stability by imposing deadlines voters must meet if they wish to change their party affiliation—that is, to

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75. *See, e.g.*, WASH. CONST. art. VI, § 3 (1988) (“[A]ll persons while they are judicially declared mentally incompetent are excluded from the elective franchise.”); WASH. REV. CODE ANN. § 11.88.010(2), (5) (West 2017) (“Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice.”); *see also* Doe v. Rowe, 156 F. Supp. 2d 35 (D. Me. 2001) (noting problems with statutes that attempt to classify the mental disorders that can lead to disenfranchisement).

76. *See* WASH. REV. CODE ANN. § 11.88.010 (West 2017); *Rowe*, 156 F. Supp. 2d at 47.

77. *See Rowe*, 156 F. Supp. 2d 35.

78. *Id.* at 55.

79. *See, e.g.*, KY. REV. STAT. ANN. § 116.055 (West) (requiring a primary voter be “a registered member of the party in whose primary he or she seeks to vote on December 31 immediately preceding the primary . . .”); LA. STAT. ANN. § 18:107 (“An applicant need not be a member of a political party or declare a party affiliation in order to be registered, but in such case the words “no party” or an abbreviation thereof on the application form shall be circled.”); ARIZ. REV. STAT. ANN. § 16-152.

disaffiliate with their existing political party and affiliate with a different party—and participate in their new political party’s primary election.<sup>80</sup>

A state’s voter disaffiliation requirement’s constitutionality is assessed by the burden it imposes on the voter’s right to associate for political purposes to elect the preferred political party’s nominee.<sup>81</sup> Using this criteria, the U.S. Supreme Court upheld an eleven-month disaffiliation requirement because a voter could vote in a different political party’s primary every year as long as the voter met the registration deadline,<sup>82</sup> but struck as unconstitutional a twenty-three-month disaffiliation requirement because it “locked” the voter into a now unwanted party affiliation and prevented the voter from voting in the voter’s new party primary during an entire primary cycle.<sup>83</sup>

### C. Special District Elections

States and localities establish special districts to manage narrow activities—such as water, pollution, or pest control—that disproportionately affect property holders in a limited geographic area.<sup>84</sup> Special districts do not act legislatively and do not perform traditional government functions, such as running schools. Special districts are usually funded through taxes or assessments on the land within the district.

The unique nature of special districts may allow them to establish voting eligibility criteria for elections to their governing boards that might ordinarily be unconstitutional. For example, voting in special district elections may be restricted to landowners, excluding bona fide residents who rent, or may be extended to corporations.<sup>85</sup>

Voter qualification standards for special interest elections are subject to rational basis review, and will be upheld unless the challenger can prove the requirement is not relevant to the state’s objective.<sup>86</sup> The U.S. Supreme Court has held that

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80. States may also condition a candidate’s ability to switch political parties or run as an independent. *See supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access for additional information.

81. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

82. *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

83. *Kusper*, 414 U.S. 51.

84. City bond issue elections do not qualify as special interest elections because they broadly affect all the city residents. *See Cipriano v. City of Houma*, 395 U.S. 701 (1969) (revenue bond elections); *City of Phoenix v. Kolodziejek*, 399 U.S. 204 (1970) (general obligation bonds).

85. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

86. *Id.* at 730.

denying the right to vote in special purpose district elections to residents who are merely “affected” by the district’s operations is not an equal protection violation if the costs and benefits of decisions made by the elected special district officials disproportionately accrue to landowners.<sup>87</sup>

School board elections<sup>88</sup> and general revenue bond elections<sup>89</sup> are not special district elections in which voting can be restricted to landowners. Instead, the U.S. Supreme Court has found that these types of elections implicate traditional government functions and restrictions on voting rights must be reviewed under strict scrutiny.<sup>90</sup>

**In most, but not all, states, prospective voters must register to vote in advance of the election and by a state-set deadline.**

### III. VOTER REGISTRATION PROCESSES

In most, but not all, states, prospective voters must register to vote in advance of the election and by a state-set deadline.<sup>91</sup> Although states regulate and administer voter registration—generally at the local level—voter registration must conform to federal constitutional protections and federal statutes.<sup>92</sup> Failure to allow otherwise qualified individuals to register to vote can void an election.<sup>93</sup> Although federal regulation of voter registration is extensive, states have some latitude to customize their registration procedures and requirements to meet local needs. For example, the U.S. Supreme Court blessed a fifty-day pre-election new voter

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87. *Millis v. Bd. of County Comm. of Larimer County*, 626 P.2d 652 (Colo. 1981).

88. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

89. *City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204 (1970).

90. *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1299 (Ill. 1990) (“Absent a showing that an elected body [in this case a school board] serves a special limited purpose, a restriction which operates to dilute a citizen’s vote must meet a strict scrutiny test of justification.”).

91. As of February 2021, North Dakota does not require voters to register and California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Maryland, Maine, Minnesota, Montana, Nevada, Utah, Washington, Wisconsin, Wyoming, and Vermont allow for some form of same-day registration on the day of election at the polling place registration. For a list of state voter registration deadlines, see *Register and Vote in Your State*, ELECTION ASSISTANCE COMMISSION, [http://www.eac.gov/register\\_vote\\_deadlines.asp](http://www.eac.gov/register_vote_deadlines.asp) (last visited February 21, 2021).

92. 52 U.S.C.A. § 20507 (West).

93. *Hamer v. Campbell*, 358 F.2d 215 (1st Cir. 1966) (using the court’s equitable powers to set aside an election that the federal district court should have enjoined for the locality’s failure to allow qualified individuals to register to vote). See also *Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014) (holding that practice of not providing voter registration forms to applicants who left declination form blank did not violate NVRA); *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (holding that the Texas could require state residency and county appointment for volunteer deputy registrars).

registration cut-off for voting in state and local elections because the state demonstrated that, given the requirements in its election code, it needed that much time to produce accurate voter lists for use in the upcoming election.<sup>94</sup>

## A. Federal Statutory Regulation of State Voter Registration

The federal government regulates state voter registration processes through statutory provisions in the:

- Voting Rights Act (VRA),<sup>95</sup>
- National Voter Registration Act of 1993 (NVRA),<sup>96</sup>
- Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),<sup>97</sup>
- Help America Vote Act (HAVA),<sup>98</sup>
- Americans with Disabilities Act (ADA),<sup>99</sup> and, to a lesser extent,<sup>100</sup>
- Rehabilitation Act (RA),<sup>101</sup> and
- Voting Accessibility for the Elderly and Handicapped Act (VAEHA).<sup>102</sup>

Because voter registration is a threshold voting requirement in most states,<sup>103</sup> the inability to register results in the prospective voter's disenfranchisement. These federal statutes protect the franchise by removing barriers that prevent or

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94. *Burns v. Fortson*, 410 U.S. 686 (1973).

95. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.A. §§ 10101-702).

96. Pub. L. 103-21, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501-20511).

97. Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 52 U.S.C.A. §§ 20301-10); *see also infra*, Subsection 2 Expanding voter registration opportunities for UOCAVA's impact on voter registration.

98. Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C.A. §§ 20901-21145 and 36 U.S.C.A §§90101-111).

99. 42 U.S.C.A. §§ 12101-12213 (2009).

100. Lesser because the Americans with Disabilities Act generally offers greater protections than these earlier statutes.

101. 29 U.S.C.A. §§ 701-796 (2014).

102. 52 U.S.C.A. § 10302 (2014).

103. *Voter Registration*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx> (Oct. 5, 2020) (stating that North Dakota is the only state that does not require voter registration ahead of an election).

prohibit otherwise qualified<sup>104</sup> individuals from registering to vote or maintaining their registration status. They accomplish this by:

- 1) prohibiting discrimination,
- 2) expanding voter registration opportunities, and
- 3) regulating voter registration databases, including list maintenance of voter registration records.

Although plaintiffs suing under these statutes<sup>105</sup> are likely to sue in federal court, state courts should be cognizant of the federal statutory requirements because any state court-imposed voter registration-related remedy may not conflict with federal requirements.<sup>106</sup>

## 1. Prohibiting Discrimination

The Voting Rights Act (VRA) explicitly prohibits states from denying an otherwise qualified individual the opportunity to register to vote solely on account of race, color, or previous condition of servitude.<sup>107</sup> Under a separate provision, the VRA requires “covered” states and localities to obtain preclearance for proposed changes in voting practices, laws, or regulations which would include voter registration rules.<sup>108</sup> However, following *Shelby County v. Holder*, the Court

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104. See *Hill v. Stone*, 421 U.S. 289 (1975) (finding that, “[a]s long as the election is not one of special interest, any classification restricting the [voting] franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest”).

105. Some of these statutes have a provide an explicit or implied right of private right of action. See *United States v. Georgia*, 546 U.S. 151, 159 (2006) (Title II of the Americans with Disabilities Act of 1990 (ADA) validly abrogates state sovereign immunity “insofar as [it] creates a private cause of action ... for conduct that actually violates the Fourteenth Amendment”); *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) (recognizing an implied private right of action in the VRA consistent with the purposes of the Act); *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (recognizing an implied right of action in the VRA); 42 U.S.C. § 1973gg–9(b)(1) (authorizing “person[s] ... aggrieved by a violation of this subchapter” to sue for its enforcement); *Krieger v. Loudon Cty.*, No. 5:13CV073, 2014 WL 4923904, at \*5 (W.D. Va. Sept. 30, 2014), *aff’d sub nom.* *Krieger v. Virginia*, 599 F. App’x 112 (4th Cir. 2015) (“The VAEHA provides a private right of action for declaratory or injunctive relief “[i]f a State or political subdivision does not comply” with the Act. 52 U.S.C. § 2105(a).”). Courts have generally held that private parties can enforce HAVA under § 1983. See, e.g., *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (HAVA is enforceable under § 1983); *Colon-Marrero v. Velez*, 813 F.3d 1 (1st Cir. 2016) (HAVA created individual private right subject to enforcement through a § 1983 claim).

106. Congressional action preempts state regulation of elections with respect to federal elections. See Article I § 4, (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations.*” (emphasis added)).

107. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.A. §§ 10101-702). See also U.S. CONST. amend. XV, § 1.

108. For the version of the statute, prior to *Shelby Cnty v. Holder*, see 42 U.S.C. § 1973c (2000).



invalidated the formula used to determine covered states and localities, rendering Section 5 unusable unless Congress updates the coverage formula.<sup>109</sup>

Separate from its Section 5 preclearance provisions, the VRA requires all states and localities to provide bilingual voter registration materials and assistance in completing them to members of single language minority population groups that meet size, illiteracy, and limited English proficiency criteria.<sup>110</sup>

Finally, the VRA requires states to allow otherwise eligible prospective voters to register for the presidential election up until thirty days before the election.<sup>111</sup>

Lawsuits challenging a state's implementation of or compliance with the VRA are generally brought by the U.S. Attorney General or private citizens suing in federal district court.<sup>112</sup> Unless and until the preclearance formula is reworked by Congress, no suits can be brought under Section 5 unless a court “bails in” a jurisdiction, a process enabled under VRA Section 3(c).<sup>113</sup>

## 2. Expanding Voter Registration Opportunities

Several federal statutes are designed to *expand* voter registration opportunities. The National Voter Registration Act of 1993 (NVRA)<sup>114</sup> requires states to:

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109. 570 U.S. 529 (2013). This formula, outlined in Section 4(b), covered jurisdictions that maintained any voting test or device and had less than 50 percent of eligible voters registered or less than 50 percent voter turnout as of 1968. 42 U.S.C. § 1973c (2000). For a list of jurisdictions that were covered by Section 5 before *Shelby v. Holder*, see *Jurisdiction Previously Covered by Section 5*, U.S. Dep't of Just., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> (last visited March 17, 2021).

110. 52 U.S.C.A. § 10503 (covering all states wherein single language minority population groups meeting the requisite criteria reside).

111. *Id.*

112. 52 U.S.C.A § 10302.

113. This provision allows federal judges to require a jurisdiction that violated the Fourteenth or Fifteenth Amendment to submit for preapproval any “voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting” for any length of time “it may deem appropriate.” See 42 U.S.C. § 1973a(c). For a list of jurisdictions that were “bailed-in” by Section 3(c), see Brief for the Federal Respondent app. A, *Shelby County*, 133 S. Ct. 2612 (No. 12-96), 2013 WL 315242 (listed 18 jurisdictions “bailed-in” between 1979 and 2006). For a comprehensive analysis of the bail-in process, see Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010).

114. Pub. L. 103-21, 107 Stat. 77 (codified as amended at 52 U.S.C.A. §§ 20501-11). This Act is better known by its “motor voter” nickname. The Act is not applicable in states that do not require registration to vote in federal elections or which permit polling-place registration on Election Day.

- allow qualified citizens to register to vote in federal elections when they apply for a driver’s license,<sup>115</sup>
- automatically use a driver’s license change of address form to update the driver’s voter registration record unless the driver opts out,<sup>116</sup>
- offer voter registration by mail for federal elections,<sup>117</sup>
- provide voter registration forms at all state-funded offices that provide public assistance or services to persons with disabilities,<sup>118</sup> and
- allow for public inspection of voter registration records.<sup>119</sup>

The U.S. Attorney General enforces UOCAVA through civil actions for declaratory or injunctive relief brought in federal district court.

The U.S. Attorney General or private citizens can enforce the NVRA by suing in federal district court.<sup>120</sup> For example, plaintiffs have challenged state voter

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115. 52 U.S.C.A. § 20504. Requiring proof of citizenship for voter registration applications to be complete violates § 5 of the NVRA. *See Fish v. Schwab*, 957 F.3d 1105, 1111 (10th Cir.), *cert. denied*, 141 S. Ct. 965 (2020).
116. 52 U.S.C.A. § 20504.
117. 52 U.S.C.A. § 20505.
118. 52 U.S.C.A. § 20506.
119. 52 U.S.C. § 20507(i)(1) (“Each State shall maintain for at least 2 years and shall make available for public inspection and, where available...”). *See also* *Illinois Conservative Union v. Illinois*, No. 20 C 5542, 2021 WL 2206159, at \*5 (N.D. Ill. June 1, 2021) (citing to following case examples as proof that voter list data is included in this section: *Project Vote/Voting for Am., Inc. v. Long* (“*Project Vote II*”), 682 F.3d 331, 335–36 (4th Cir. 2012) (registration applications qualify as records under Section 8(i)); *Judicial Watch, Inc. v. Lamone* (“*Lamone I*”), 399 F. Supp. 3d 425, 439–41 (D. Md. 2019) (voter registration lists fall within Section 8(i) because the lists compile multiple individual voter registration applications); *Pub. Int. Legal Found. v. Boockvar*, 431 F. Supp. 3d 553, 558– 61 (M.D. Penn. 2019) (reading Section 8(i) disclosure provision broadly to allow disclosure of voter-related documents, including voter lists); *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1341 (N.D. Ga. 2016) (“The Court concludes that, in addition to requiring records regarding the processes a state implements to ensure the accuracy and currency of voter rolls, considering the NVRA as a consistent whole, individual applicant records are encompassed by the Section 8(i) disclosure requirements.”); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 719 (S.D. Miss. 2014) (“[T]he term ‘all records,’ as the Fourth Circuit has observed, has an ‘expansive meaning,’ and encompasses a variety of voter registration and removal documents.” (quoting *Project Vote II*, 682 F.3d at 336))). However, a district court can order the redaction of uniquely sensitive information in otherwise disclosable documents. *Pub. Int. Legal Found., Inc. v. N. Carolina State Bd. of Elections*, 996 F.3d 257, 268 (4th Cir. 2021).
120. 52 U.S.C.A. § 20510 (stating private individuals must follow notice requirements before they can sue in court). If a plaintiff wishes to assert an NVRA claim, they must sue directly under that statute and cannot sue under § 1983. *Isabel v. Reagan*, 394 F. Supp. 3d 966 (D. Ariz. 2019), *aff’d* on other grounds, 987 F.3d 1220 (9th Cir. 2021).

registration maintenance procedures,<sup>121</sup> or lack thereof,<sup>122</sup> and proof of citizenship requirements.<sup>123</sup> Organizations too can successfully assert standing to sue under the NVRA if its interests in the suit do not render it outside of the zone of interests protected by the NVRA.<sup>124</sup> The NVRA allows attorney fee awards to prevailing parties other than the United States.<sup>125</sup>

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)<sup>126</sup> requires states to accept and process otherwise valid absentee voter applications received from uniformed and overseas voters<sup>127</sup> if the application is received at least thirty days before a federal election.<sup>128</sup> The U.S. Attorney General enforces UOCAVA

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121. In 2018, the Supreme Court upheld Ohio’s process to remove voters from registration rolls—which involved removing voters who did not vote in any election for four years after failing to return address verification form— against an NVRA challenge. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1836 (2018). The Court held that even though Ohio used the failure to vote as a trigger to send an address verification form, the failure to vote was not the sole criterion for removing the registrant. *Id.* at 1841-444. See § 20507(d)(1)(B). Similarly, a court upheld a New York state law that removed “inactive” voters from local poll books and required them to vote by provisional ballot instead of a regular ballot after mail sent to the voter was returned undeliverable or the postal service received notice that the voter moved without leaving a forwarding address. *Common Cause/New York v. Brehm*, 344 F. Supp. 3d 542 (S.D.N.Y. 2018). This method is permissible because the voters were not removed from the official list of eligible voters, but only from the local poll books. *Id.*

122. Plaintiffs have also filed suit alleging that election officials have not satisfied their obligations to maintain voter registration rolls under the NVRA. For example, in 2016, a nonprofit organization brought suit in the U.S. District Court for the Southern District of Florida held that the Supervisor made reasonable efforts to remove only those voters who become ineligible because of death or change of address as required by the NVRA despite claims to the contrary. *Bellitto v. Snipes*, 268 F. Supp. 3d 1328 (S.D. Fla. 2017), *aff’d sub nom.* *Bellitto v. Snipes*, 935 F.3d 1192 (11th Cir. 2019).

123. *Gonzalez v. Arizona*, 677 F.3d 383, 402 (9th Cir. 2012), *aff’d sub nom.* *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013). The courts rejected Arizona’s argument that HAVA (1) gave it the authority to impose additional requirements to voter registration when using the uniform federal form because it in directing the state to verify the accuracy of the driver’s license or social security numbers on the form, it must also be able to verify the accuracy of the claim of citizenship on the form and (2) the explicit statement that the requirements outlaid by HAVA are the minimum threshold, it allows states to impose stricter requirements. *Id.*

124. See *Pub. Int. Legal Found. v. Boockvar*, 370 F. Supp. 3d 449, 456 (M.D. Pa. 2019) (describing the NVRA’s interests as “(1) ‘increas[ing] the number of eligible citizens who register to vote’; (2) ‘enhanc[ing] the participation of eligible citizens as voters in elections for Federal office’; (3) ‘protect[ing] the integrity of the electoral process’; and (4) ‘ensur[ing] that accurate and current voter registration rolls are maintained.’”).

125. 52 U.S.C.A. § 20510 (c).

126. Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 52 U.S.C.A. §§ 20301-10).

127. *About the Laws*, FED. VOTING ASSISTANCE PROGRAM, <https://www.fvap.gov/info/laws> (last visited Feb. 22, 2021) (defining overseas citizens as U.S. citizens who reside outside the United States, and uniformed services members as citizens who are members of the Army, Air Force, Navy, Marine Corps, Coast Guard, the commissioned corps of the Public Health Service or National Oceanic and Atmospheric Administration, or the merchant marine, and their spouses and dependent family members).

128. 52 U.S.C.A. § 20302.

through civil actions for declaratory or injunctive relief brought in federal district court.<sup>129</sup>

The Help America Vote Act (HAVA)<sup>130</sup> sets forth the following requirements for state processing of voter registration applications for federal elections:

- states cannot accept or process voter registration applications for federal elections unless the applicant included a driver's license number if the applicant has one, the last four digits of the applicant's social security number if the applicant has no driver's license number, or affirmatively attests that the applicant has neither a driver's license nor a social security number,<sup>131</sup>
- if the voter attests that the voter has neither a driver's license nor a social security number, then the state must issue a unique voter identification number,<sup>132</sup>
- if the mail-in application does not contain all the required voter registration information, then the state cannot process the voter registration application, but should notify the applicant of this disposition.<sup>133</sup>

The language of HAVA provides that these requirements are a floor; states may establish “election technology and administration requirements that are more strict . . . so long as such State requirements are not inconsistent with the Federal requirements under [HAVA] or any law described in section 15545 of this title.”<sup>134</sup> However, HAVA does preempt some state laws that do not match the statute's purposes.<sup>135</sup>

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129. 52 U.S.C.A. § 20307.

130. Pub. L. No. 107-252, 116 Stat. 1666 (codified at 52 U.S.C.A. §§ 20901-21145 and 36 U.S.C.A §§90101-111) (requiring states to be able to identify voters who registered by mail but did not provide the required identification so that precinct workers can request the necessary identification—even if the state does not require identification from all voters).

131. 52 U.S.C.A. § 21083.

132. *Id*

133. *Id*

134. 42 U.S.C. § 15484.

135. *See, e.g.*, Washington Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264 (W.D. Wash. 2006) (holding that a state law requiring the matching of a potential voter's name to either the Social Security Administration or the Department of Licensing before registration was preempted by HAVA). However, one state court determined that state laws governing illegal voting prosecutions of ineligible voters are not preempted by HAVA because Congress did not have the explicit or implicit intent to preempt such laws. *Mason v. State*, 598 S.W.3d 755 (Tex. App. 2020), petition for discretionary review granted (Mar. 31, 2021). Additionally, the provisional-ballot procedure mandated by HAVA was created to assist voters who would otherwise be eligible, not to place a burden on state officials charged with counting provisional ballots to determine a voter's eligibility. *Id.* at 783.

HAVA limits enforcement actions to U.S. Attorney General civil lawsuits requesting injunctive or declaratory relief filed in federal district court.<sup>136</sup> HAVA does not create a private cause of action.<sup>137</sup>

The final set of federal statutes attempt to remove barriers that make it difficult for individuals with disabilities to access registration locations or understand and complete registration forms without accommodation.<sup>138</sup> In chronological order by date of passage,<sup>139</sup> these statutes are the Voting Accessibility for the Elderly and Handicapped Act (VAEHA),<sup>140</sup> and Americans with Disabilities Act (ADA).<sup>141</sup>

The VAEHA provides a restricted private cause of action for declaratory or injunctive relief against a non-compliant state or political subdivision.<sup>142</sup> Its voter registration-related provisions<sup>143</sup> require states to:

- offer a “reasonable number” of permanent voter registration facilities accessible by the elderly and the handicapped unless each voter can register by mail or in their residence,<sup>144</sup> and
- provide large print and TDD devices at voter registration sites.<sup>145</sup>

In the voter registration context, the ADA prohibits discrimination against disabled individuals on account of their disabilities in the provision of public

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136. 52 U.S.C.A. § 21112.

137. See *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 459 (E.D. Tex. 2020); *Bellitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 2019) (Congress “established only two HAVA enforcement mechanisms”); *Am. Civ. Rts. Union v. Phila. City Comm’rs*, 872 F.3d 175, 184–85 (3d Cir. 2017) (“[T]he HAVA does not include a private right of enforcement. By its text, ... HAVA only allows enforcement via attorney general suits or administrative complaint.”); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (“HAVA does not itself create a private right of action.”). See also *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008) (holding that Congress likely did not authorize district courts to enforce HAVA when cases are brought by private litigants).

138. See Joan L. O’Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. HEALTH CARE L. & POL’Y 325 (2001) (discussing the impediments disabled or frail elderly face in voting).

139. The Rehabilitation Act, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C), is actually the oldest federal statute in this category, but it was never very effective in protecting voting-related activities because its provisions prohibiting states from denying services on account of disability were narrow, (29 § 701 (2000)), and superseded by the ADA. Rehabilitation Act-based suits are rare and the Act will not be discussed further in this chapter. See Christina J. Weis, Note, *Why the Help America Vote Act Fails to Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 421, 427 (2004-2005).

140. 52 U.S.C.A. § 20102-07.

141. 42 U.S.C. §§ 12101-12213 (2000 & Supp. IV 2004).

142. 52 U.S.C.A. § 20105 (requiring the elderly or disabled plaintiff to first notify the state’s chief election officer of the non-compliance and then wait forty-five days before bringing suit).

143. 52 U.S.C.A. § 20102-07.

144. 52 U.S.C.A. § 20103.

145. 52 U.S.C.A. § 20104.

services, programs, or activities,<sup>146</sup> and in the enjoyment of goods, services, facilities, privileges, advantages or accommodations provided to the public.<sup>147</sup> In the realm of inhibiting voter registration, this typically involves challenges to the accessibility of voter registration offices or the election officials' failure to read or otherwise provide registration forms accessible to individuals with vision impairments or learning disabilities.<sup>148</sup>

### 3. Regulating Voter Registration Databases

HAVA requires states to establish and maintain a single, uniform, centralized, interactive, statewide voter registration database in which every voter's registration record has a unique identification number.<sup>149</sup> Voting registration records become outdated when voters move without transferring their registration, die, or become ineligible because of a felony conviction or mental incapacity adjudication.<sup>150</sup> To avoid problems associated with outdated voter registration information, many states periodically update their voting registration records by removing ineligible voters.<sup>151</sup> HAVA specifies that voters may be removed from the registration list only in accordance the NVRA, specifically, a state must:<sup>152</sup>

- make “reasonable” efforts to remove *only* ineligible persons from voter registration database,
- not remove a voter solely for failure to vote,<sup>153</sup> and

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146. 42 U.S.C. § 12182 (2000).

147. *Id.*

148. Lawsuits brought under the ADA have tended to supersede those brought under the VAEHA as well as the Rehabilitation Act. *See* 28 C.F.R. § 35.150 (requiring the program as a whole, and not each individual facility, to be accessible).

149. 52 U.S.C.A. § 21083 (exempting states from this requirement that do not require voter registration to vote in federal elections).

150. State law determines whether and for how long voting eligibility is lost under either of these two circumstances. *See* *Peace and Freedom Party v. Shelley*, 8 Cal. Rptr. 3d 497 (Ct. App. 2004) (discussing how a voter registration database can contain outdated information and the appropriate basis on which to measure a political party's public support for primary election ballot access).

151. An improper or illegal purge can affect the results of the subsequent election. *See* *Crow v. Bryan*, 113 S.E.2d 104 (Ga. 1960) (holding election must be rerun because an illegal voter registration purge eliminated more voters than the margin of victory).

152. 52 U.S.C.A. § 21082.

153. 52 U.S.C.A. § 20507 (West). However, states can implement voter registration list maintenance procedures that are triggered by an individual's failure to vote and then remove individuals from voter registration lists who fail to follow those procedures and then continue not to vote. *See* *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

- provide notice to those voters at risk of being removed from the state’s voter rolls before removing their names from the registration database.<sup>154</sup>

In some states, local voting officials remove ineligible voters, while in others list maintenance is conducted at the state level. In still others, list maintenance is a joint effort.<sup>155</sup>

As cyber security threats have increased, states have passed laws to address these concerns. For example, Maryland has a law that requires elections administrators to report security violations.<sup>156</sup>

## **B. State Statutory Regulation of Voter Registration Processes**

### **1. Voter Registration Deadlines**

Most states mandate would-be voters to register to vote before a prescribed deadline. These deadlines vary by state, but typically fall between 8 and 30 days before the election.<sup>157</sup> Plaintiffs have challenged voter registration deadlines as a burden on the right to vote. Most of the challenged statutes have been upheld.<sup>158</sup> Generally speaking, while judges have the power to determine that a voter registration deadline statute is unconstitutional, courts cannot grant elections officials the authority to accept voter registration applications past the statutory deadline.<sup>159</sup> However, in times of emergencies or technical errors, courts have

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154. *Id*

155. *See generally Voter List Accuracy*, NAT’L CONF. STATE LEGISLATURE, <https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx> (last visited Feb. 22, 2021).

156. MD. CODE ANN., ELEC. LAW § 2-108 (LexisNexis 2021). *See also* 10 ILL. COMP. STAT. ANN. 5/1A-55; OKLA. STAT. ANN. tit. 26, § 3-131 (West).

157. *Same Day Voter Registration*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 20, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

158. *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 480 Mass. 27, 100 N.E.3d 326 (2018) (holding that the voter registration deadline 20-days before election day was constitutional after applying the rational basis test); *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119 (D. Conn. 2005) (holding that the voter registration deadline 7-days before election day was constitutional); *Marston v. Lewis*, 410 U.S. 679 (1973) (holding that the voter registration deadline 50-days before election day was constitutional); *Diaz v. Cobb*, 475 F. Supp. 2d 1270 (S.D. Fla. 2007) (holding that “Florida’s requirement that registrations be complete twenty-nine days before an election is a reasonable, nondiscriminatory restriction that does not impose severe burdens on the right to vote.”).

159. *In re Gen. Election*, Nov. 8, 1988, 126 Pa. Cmwlth. 450, 560 A.2d 260 (1989).

issued temporary restraining orders to enjoin election officials from enforcing the voter registration deadline.<sup>160</sup>

State statutes that limit voters who change their residence from one county to another on or within 30 days of the election to vote only for president and vice president while permitting those who move within the same period within their county to access the entire ballot do not violate equal protection.<sup>161</sup> States can also require different registration periods to become a qualified voter for those voting in person and those voting by absentee ballot. For example, Ohio was permitted to require those voting in person be registered to vote for 30 days before the election, while allowing absentee voters to request and complete absentee ballots before they have been registered for 30 days.<sup>162</sup>

## 2. Automatic Voter Registration

Nearly half of U.S. states have automatic voter registration processes which automatically register eligible individuals that transact with the DMV or other NVRA agency to vote.<sup>163</sup> States use several methods. In Oregon, the first state to implement automatic voter registration, eligible voters who interact with the DMV are registered to vote and have the option of opting out by returning a mailed

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160. Fla. Democratic Party v. Scott, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (Democratic party was entitled to temporary restraining order enjoining Secretary of State from enforcing voter registration deadline after hurricane); New Virginia Majority Educ. Fund v. Virginia Dep't of Elections, No. 3:20-CV-801, 2020 WL 6051855 (E.D. Va. Oct. 14, 2020) (issuing a temporary restraining order and emergency injunctive relief to extend the voter registration deadline by two days due to an outage out the Virginia voter registration deadline). *But see* Namphy v. DeSantis, 493 F. Supp. 3d 1130 (N.D. Fla. 2020) (preliminary injunction to extend the voter registration deadline denied after the online voter registration system crashed); Bethea v. Deal, No. CV216-140, 2016 WL 6123241 (S.D. Ga. Oct. 19, 2016) (refusing to extend the voter registration deadline in one county because the office was closed one the last day of the voter registration period due to a mandatory evacuation).

161. Gallagher v. Indiana State Election Bd., 598 N.E.2d 510 (Ind. 1992).

162. State *ex rel.* Colvin v. Brunner, 120 Ohio St. 3d 110, 2008-Ohio-5041, 896 N.E.2d 979 (denying a writ of mandamus to compel the issuance of a directive instructing county boards of elections to void any application for absentee ballots accepted by election officials after the registration of persons but before the 30-day registration period has passed and that that 30 days must elapse following registration before an absentee-ballot application may be accepted from the registered person). *See also* Deutsch v. New York State Bd. of Elections, No. 20 CIV. 8929(LGS), 2020 WL 6384064 (S.D.N.Y. Oct. 30, 2020) (denying a request for an injunction to require New York state county election boards to accept emailed voter registration application from international applicants that were sent after the voter registration deadline had passed even through mail-in applications would be accepted if received five days after the deadline as long as they were post marked by the deadline because the law treats all voters equally no matter how they are registering by having one uniform send by date).

163. For a chart listing agencies that participate in automatic voter registration, *see Automatic Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 8, 2021), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.



notification.<sup>164</sup> Some states provide other means to allow eligible voters to opt in or out during or after their transaction.<sup>165</sup>

Very few courts have heard cases challenging automatic voter registration policies.

Very few courts have heard cases challenging automatic voter registration policies. However, in 2020, the Michigan Court of Appeals held that the Secretary of State's policy of automatically registering eligible voters 17 ½ years or older does not unduly burden the right to vote by not automatically registering those under 17 ½ years old to vote because only those who are 17 ½ years old and older are eligible to be registered to vote and only those who are 18 years old and older have the right to vote.<sup>166</sup> Some courts have held that registering to vote in a state with automatic voter registration is not an indication of that individual's intent to register to vote in that state, and therefore does not prohibit such voter from maintaining voter registration status in another state.<sup>167</sup>

### 3. Same-day Voter Registration

A little less than half of the state have implemented same-day voter registration practices.<sup>168</sup> This practice allows qualified residents of the state to register to vote and cast a ballot on the same day.<sup>169</sup> Some states that allow same day registration vary on details. For example, Montana allows same-day registration during part of its early voting period, but does not allow same-day registration on Election Day.<sup>170</sup>

164. Oregon HB 2177; Alaska Ballot Measure 1.

165. See, e.g., R.I. GEN. LAWS § 17-9.1-7(b)(3) (2021); CAL. ELEC. CODE § 2263 (b)(1)(J) (West 2015); DEL. CODE ANN. tit. 15, § 2050(a)(2) (2021). See also *Automatic Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 12, 2021), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx>.

166. *Promote the Vote v. Sec'y of State*, 333 Mich. App. 93, 126-27, *appeal denied*, 946N.W.2d 782 (2020), and *appeal denied sub nom. Priorities USA v. Sec'y of State*, 946 N.W.2d 785 (2020) (stating that the AVR law was consistent with state laws stipulating only those who were 17 ½ years old were eligible to be registered to vote and only those 18 and older were qualified electors with the right to vote).

167. See *Terese v. 1500 Lorene LLC*, No. 09-4342, 2013 WL 308988, at \*10 (E.D. La. Jan. 25, 2013).

168. *Same Day Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

169. *Id.*

170. MONT. CODE ANN. § 13-2-304 (West).

All states that offer same-day registration require would-be voters to prove residency at the time of registration or soon thereafter.<sup>171</sup> All states permit the use of a driver's license or ID card, but some allow a utility bill or paycheck with an address.<sup>172</sup>

Plaintiffs have challenged rollbacks of same-day registration rules, meeting with varying success. In 2016, the U.S. Court of Appeals held that removing the state's same-day voter registration practice did not violate § 2 of the VRA or the Equal Protection Clause.<sup>173</sup> In 2017, the 4<sup>th</sup> Circuit prevented the elimination of same-day voting as a violation of § 2 of the Voting Rights Act and the Fourteenth Amendment.<sup>174</sup>

#### 4. Proof of Citizenship Requirements

In 2011, Kansas adopted a documentary proof of citizenship requirement for voter registration in state elections. The law took effect in 2013.<sup>175</sup> Under that law, if a registrant did not provide proof of citizenship, the application was deemed incomplete. The individual had 90 days to provide proof of citizenship, or the application was canceled requiring re-application.<sup>176</sup> After years of court battles, the Tenth Circuit held in 2020 that the proof of citizenship requirement violates the Fourteenth Amendment and could not be enforced.<sup>177</sup> Using the *Anderson-Burdick* balancing test, the court found a significant burden on registrants that the interests set forth by the Secretary did not justify.<sup>178</sup> The court also held that the proof of citizenship requirement also violated Section 5 of the NVRA because the state failed to show that substantial numbers of non-citizen voters attempted to register or vote.<sup>179</sup>

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171. *Same Day Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

172. *See, e.g.*, D.C. CODE § 1-1001.07 (2020); IDAHO CODE § 34-408A (2021); 10 ILL. COM. STAT. 5/5-50 (2021).

173. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 624 (6th Cir. 2016).

174. *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

175. Kan. Stat. Ann. § 25-2309(l), 2011 Kan. Sess. Laws at 812.

176. Kan. Admin. Regs. § 7-23-15.

177. *Fish v. Schwab*, 957 F.3d 1105, 1121-36 (10th Cir.), *cert. denied*, 141 S. Ct. 965 (2020).

178. *Id.*

179. *Id.* at 1136-44.

States cannot require proof of citizenship to register to vote while using the Federal Form provided by the NVRA.<sup>180</sup> However, they can request that the EAC include state-specific information on the Federal Form.<sup>181</sup>

States can require proof of citizenship for registrants who were born outside of the United States.<sup>182</sup>

## IV. CHALLENGES TO STATE REGULATION OF THE RIGHT TO VOTE

Challenges to state regulation of the right to vote and voting opportunities are likely to take one of two forms. The first is a compliance-based challenge that generally occurs when a prospective voter claims that she satisfied all voter qualification requirements but was denied an opportunity to register to vote. The second type of challenge claims that the challenged state regulations violate the state or federal law.<sup>183</sup>

### A. Compliance-Based Challenges

Prospective voters may raise claims that they met voter qualification or registration requirements but were nonetheless denied the opportunity to register.<sup>184</sup> If the voter met all the criteria, including satisfying

Prospective voters may raise claims that they met voter qualification or registration requirements but were nonetheless denied the opportunity to register.

180. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

181. *Id.* See also *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014) (holding that the EAC Director's decision to deny Arizona's and Kansas's request to include state-specific instructions on the federal voter registration form requiring proof of citizenship was procedurally valid and that the EAC is not compulsorily mandated to approve state-requested changes to the federal form); *League of Women Voters of United States v. Harrington*, No. CV 16-00236 (RJJ), 2021 WL 4206778 (D.D.C. Sept. 16, 2021) (holding that the EAC's decision to grant Kansas's, Georgia's, and Alabama's requests to include state-specific instructions on the federal voter registration form requiring proof of citizenship violated the APA because the Director failed to apply the appropriate statutory standard in approving the requests).

182. *State v. Superior Ct. of Washington for King Cty.*, 193 P. 226, 228 (Wash. 1920).

183. Many challenges based on federal constitutional or statutory grounds will likely be filed in federal court.

184. But state code may authorize sanctions against challengers who bring willful and malicious challenges. See, e.g., R.I. GEN. LAWS § 17-9.1-29 (2007).

registration deadlines, a court can issue an order instructing the registrar to add the voter to the rolls.<sup>185</sup> Because voter registration is an administrative process, state statute may require the aggrieved individual to pursue available administrative review processes before pursuing a court remedy.<sup>186</sup>

Some states allow registered voters or local officials to file a pre-election challenge to another voter's registration eligibility.<sup>187</sup> Typically such challenges must target individual voters and not voters as a class.<sup>188</sup> State law determines where and how voter registration challenges, which are generally administrative processes, are heard.<sup>189</sup> Depending on the state or the size of the locality, challenges may be heard by the local board of elections or a designated local official.<sup>190</sup> State law also determines the extent of an appeals process.<sup>191</sup>

Because voter registration challenges are administrative processes, court involvement is typically limited or nonexistent unless the voter registration challenge statute itself is challenged,<sup>192</sup> or a voter seeks a writ of mandamus to compel election officials to permit the voter's registration.<sup>193</sup>

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185. See, e.g., VA. CODE § 24.2-422 (explaining the voter registration denial appeals process).

186. See, e.g., *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1120 (D. Kan.), *aff'd*, 691 F. App'x 900 (10th Cir. 2016), and *aff'd*, 840 F.3d 710 (10th Cir. 2016), and *order enforced*, 294 F. Supp. 3d 1154 (D. Kan. 2018) (“A person who receives notice of an incomplete voter registration application due to failure to provide DPOC can provide their DPOC in person at the county election office for inspection, by mailing a copy of the document to the county election officer or to the Secretary of State's Office, or by faxing, emailing, and in some counties, texting a copy of the documents. In addition, the Secretary of State's office checks approximately monthly with the Kansas Department of Vital Statistics ('KDHE') to see if individuals missing DPOC were born in the State of Kansas and will complete those registrations if so. Almost half of the voter registration applications on the suspense list have had citizenship confirmed through these monthly checks; many others submit their DPOC after receiving notice.”).

187. See WISC. STAT. ANN. § 6.48 (2003); R.I. GEN. LAWS § 17-9.1-28 (2007); WASH. REV. CODE ANN. §§ 29A.08.810-.850 (2011); see also *infra* Chapter 7: Election Day for additional information on Election Day challenges to an individual's eligibility to vote.

188. *Lloyd v. Babb*, 251 S.E.2d 843, 852 (N.C. 1979) (noting domicile of student voters must be individually ascertained and cannot be a group determination).

189. See, e.g., 52 U.S.C.A. § 21112.

190. See, e.g., WASH. REV. CODE ANN. § 29A.08.840 (West) (permitting for decisions by the county auditor or the canvassing board); GA. CODE ANN. § 21-2-229 (West) (requiring challenges to be filed with board of registrars); W. VA. CODE ANN. § 3-2-28 (West) (“The challenge shall be filed as a matter of record in the office of the clerk of the county commission.”).

191. See, e.g., R.I. GEN. LAWS § 17-9.1-30 (2007).

192. See, e.g., *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012).

193. See, e.g., *Mullins v. Cole*, 218 F. Supp. 3d 488 (S.D.W. Va. 2016). *But see, e.g., Ballas v. Symm*, 351 F. Supp. 876, 892 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) (“Also, because state procedures for review of the rejections are available, mandamus relief is inappropriate.”).

## B. Constitutional and Statutory Challenges

State regulation of voter qualifications is sometimes challenged on state or federal Constitutional or federal statutory grounds.<sup>194</sup>

State statutes that impose voter qualifications other than the traditional categories of age, residency, citizenship, and non-felon status are not presumed constitutional,<sup>195</sup> but neither do they automatically receive strict scrutiny.<sup>196</sup> Courts hearing challenges to an election law “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate ‘against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’”<sup>197</sup> This balancing approach is widely referred to as the *Anderson-Burdick* test.<sup>198</sup>

Challenges to state restrictions on voter eligibility and registration in U.S. history are too plentiful to catalogue here.<sup>199</sup> More recently, federal Constitutional and statutory challenges to state voter eligibility and registration statutes have met with mixed success. Voter ID statutes are illustrative. In 2008’s *Crawford v. Marion County Election Board*, the Supreme Court held an Indiana law requiring the presentation of a government issued photo ID did not violate the Equal Protection Clause.<sup>200</sup> Using the *Anderson-Burdick* test, the court determined there was not enough evidence to show anyone was excessively burdened because the

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194. Federal statutes that protect voting rights include the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C. §§ 10301–10701), the National Voter Registration Act of 1993, Pub. L. 103-21, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501 -20511), the Uniformed and Overseas Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-09, 39 U.S.C. § 3406 & 52 U.S.C.A. §§ 20301-10), the Voting Accessibility for the Elderly and Handicapped Act of 1984, 52 U.S.C. §§ 20102-07, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000 & Supp. IV 2004).

195. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969).

196. *See Burdick v. Takushi*, 504 U.S. 428, 433, 434 (1992). *See also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating a poll tax on equal protection grounds because owning property was economically discriminatory and wealth is not germane to electoral participation).

197. *Burdick*, 504 U.S. 428 at 434.

198. *See, e.g.*, Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655 (2017); Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836 (2013).

199. *See, e.g.*, ALEXANDER KEYSSAR *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2nd ed. 2009); CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018); RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

200. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

ID was free and voters could vote by provisional ballot and the state had an interest in protecting the electoral process from fraud.<sup>201</sup>

Several claims challenging voter ID law have been challenged under the VRA, both pre-and post-*Shelby County*.<sup>202</sup> For example, the 5<sup>th</sup> Circuit held a Texas law requiring the presentation of a photo ID to vote because the policies underlying the bill's passage—legislatures knowing that the law negatively impacted minority voters and using an expedited schedule to pass the bill—were only tenuously related to the state's interests in preventing fraud and remanded the case during which time the state legislature passed a law designed to cure flaws.<sup>203</sup>

The right to vote is not absolute. A state has the ability to set standards for voter participation in elections and to determine how individual votes are weighted.

## V. CONCLUSION

The right to vote is not absolute. A state has the ability to set standards for voter participation in elections and to determine how individual votes are weighted. The state typically exercises this power through voter eligibility requirements. However, a state's power is limited by statutory and constitutional provisions which protect voters from state regulations that unconstitutionally burden the right to vote or effect disparate groups of voters.

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201. *Id.* at 190.

202. *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).

203. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018) (reversing the lower courts permanent injunction barring the enforcement of the state's voter ID law). For other voter ID cases, *see Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, 357 Wis. 2d 469, 851 N.W.2d 262; *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *Stewart v. Marion Cty.*, No. 1:08-CV-586-LJM-TAB, 2010 WL 1579672 (S.D. Ind. Apr. 16, 2010).



## CHAPTER 6

# Election Administration

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## CHAPTER 6: ELECTION ADMINISTRATION

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# I. INTRODUCTION

States administer elections for local and state ballot measure elections and local, state, and federal offices. State election administration requires regulations that inevitably burden rights.<sup>1</sup> Nonetheless, important state regulatory interests justify reasonable and non-discriminatory restrictions.<sup>2</sup>

Courts have identified numerous state electoral interests supporting the regulation of elections including, for example:

- combating fraud,<sup>3</sup>
- fostering an informed and educated electorate,<sup>4</sup>
- preserving the overall integrity of the electoral process,<sup>5</sup>
- avoiding overcrowded ballots,<sup>6</sup>
- avoiding voter confusion,<sup>7</sup> and
- being able to clearly identify the winner of each election.<sup>8</sup>

In early U.S. history, political parties managed the bulk of election administration. After progressive reforms beginning in the late 1800s (including universal adoption of the secret ballot), states took over responsibility for administering elections.<sup>9</sup> Some of the responsibilities states undertake in election administration include:

- 1) ballot creation,
- 2) absentee voting,
- 3) polling place selection,
- 4) poll worker selection and training,
- 5) voting technology selection, and
- 6) as necessary, rescheduling an election because of a disaster or emergency.

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1. For example, signature or residency requirements that burden the right of candidates to run for office; registration rules that burden voters' right to cast ballots; and campaign contribution limits that burden the rights of contributors to give money to their favorite candidates.
  2. *Peace and Freedom Party v. Shelley*, 8 Cal. Rptr. 3d 497, 503 (Ct. App. 2004); *see also* *Bullock v. Carter*, 405 U.S. 134, 141 (1972) (holding the state's regulatory power must be exercised consistent with equal protection).
  3. *Burdick v. Takushi*, 504 U.S. 428, 440 n.9 (1992) (citation omitted).
  4. *Id.*
  5. *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986).
  6. *Id.*
  7. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).
  8. *Id.*
  9. *See* RICHARD P. MCCORMICK, *THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664–1911*, 114 (1953).

States establish requirements that must be fulfilled before candidates, political parties, and voters can participate in an election or before ballot measures can appear on the ballot.

This chapter discusses some of the main areas of state election administration.

States regulate ballots through statutes that govern the ballot's form, content, and layout.

## II. BALLOT CREATION

Ballots are the means voters use to record and communicate their candidate and ballot measure preferences. States regulate ballots through statutes that govern the ballot's form, content, and layout.<sup>10</sup> Ballot requirements vary by state. Variables include whether the ballot is used in a primary, general, special, or run-off election;<sup>11</sup> whether the ballot is paper or electronic;<sup>12</sup> or whether it is used for early or absentee voting versus polling place voting on election day;<sup>13</sup> and how candidates are listed on the ballot (e.g., with or without party affiliation).<sup>14</sup> Statutes that do not themselves establish ballot criteria may delegate this responsibility to designated state or local officials.<sup>15</sup>

This section discusses the most common types of state regulation of ballots and their associated legal challenges.

10. *See, e.g.*, ALA. CODE § 17-6-24 (2007); *see also* MONT. CODE ANN. § 13-12-202 (2019) (directing the secretary of state to adopt uniform ballot form requirements).
11. *See, e.g.*, *Nicolits v. Nicosia*, 682 So.2d 663 (Fla. Dist. Ct. App. 1996) (noting statutory authorization for an incumbency designation on a ballot applied only to primary election and not general election ballots).
12. *See, e.g.*, TEX. ELEC. CODE ANN. § 52.001-.008 (Vernon 2003 & Supp. 2006) (paper ballots) *and* TEX. ELEC. CODE ANN. § 124.001-.006 (Vernon 2003 & Supp. 2006) (electronic ballots).
13. *See, e.g.*, VT. STAT. ANN. tit. 17, § 2535 (2014) (allowing for variations in the ballot for certain absentee voting purposes); *see also* ARIZ. REV. STAT. ANN. § 16-545 (2017) (requiring ballots used in early voting to be marked “early”).
14. *See, e.g.*, VA. CODE ANN. § 24.2-613(B) (2019) (“For elections for federal, statewide, and General Assembly offices only, each candidate who has been nominated by a political party or in a primary election shall be identified by the name of his political party.”).
15. *See, e.g.*, VT. STAT. ANN. tit. 17, § 2471 (2014) (stating circumstances under which the town clerk may become involved in determining the color or layout of a ballot); N.M. STAT. ANN. § 1-10-3 (West 2007) (authorizing the secretary of state to determine a uniform ballot layout); S.C. CODE ANN. § 7-13-320 (2006) (noting the ballot's size and color are set by the State Election Commission); ALASKA STAT. § 15.15.030 (2013) (requiring the director to prepare all official ballots).

## A. Ballot Form Requirements

Ballot form requirements may regulate the size, weight of paper, and type of ink<sup>16</sup> used for paper ballots. If the ballot is electronic, statutes may specify whether the ballot scrolls or is presented as complete on a single screen.<sup>17</sup> They may also specify the font size used on the screen.<sup>18</sup>

## B. Ballot Content Regulations

Ballot content regulations control the information ballots must or may contain. Depending on the state, these regulations may address the appropriate use of:

- 1) candidates' and political parties' names,
- 2) political party emblems, and
- 3) ballot measure descriptions.

Ballot content regulations may also specify whether any mandatory additional language—such as certifications,<sup>19</sup> voter instructions,<sup>20</sup> or voter options in judicial retention elections<sup>21</sup>—should be included on the ballot. Ballot content statutes may also address the information that can be omitted from the ballot, such as uncontested offices.<sup>22</sup>

Finally, jurisdictions covered by the Section 203 minority language provisions of the federal Voting Rights Act must provide ballots using the required additional languages.<sup>23</sup>

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16. See VT. STAT. ANN. tit. 17, § 2471 (2014) (requiring black ink).

17. See, e.g., CO. CODE ANN. § 1-5-704 (2020).

18. See, e.g., *id.* (requiring a minimum of fourteen points to a maximum of twenty-four points).

19. See S.C. CODE ANN. § 7-13-320(C)(b) (2006) (requiring an identified facsimile of the State Election Commission Executive Director's signature to be printed at the bottom of the ballot); TEX. ELEC. CODE ANN. §52.064 (Vernon 2003) (requiring "Official Ballot" to be printed on ballots); IND. CODE § 3-11-2-7 (West 2007) (requiring a "cautionary statement" that it is a crime to falsify the ballot or violate election laws); see also VT. STAT. ANN. tit. 17, § 2472 (2020).

20. See N.J. STAT. ANN. § 19:14-4 (2019).

21. ALASKA STAT. § 15.15.030 (2007).

22. Sometimes only one candidate runs for the office or only the primary election is contested. In those instances, some states do not include the office on the general election ballots. If the office is a Congressional seat, however, the candidate's name must appear on the general election ballot even though the election is a foregone conclusion, because omitting the candidate's name violates uniform Federal Election Day requirements. See *Foster v. Love*, 522 U.S. 67, 73 (1997).

23. See 52 U.S.C.A. § 10503 (2021).

## 1. Candidate and Political Party Names

As for candidate names, commonly known derivations of a candidate's given name are usually acceptable,<sup>24</sup> while misleading and deceptive names may be kept off the ballot.<sup>25</sup> Some states may allow, but not require, a candidate's nickname to be listed.<sup>26</sup>

Unless expressly authorized by statute, professional or courtesy titles and other characterizations or designations generally are not permitted on an official ballot,<sup>27</sup> even if they appeared on the nominating certificate.<sup>28</sup> Exceptions are frequently made when two or more candidates have indistinguishable names or when additional information is necessary to avoid voter deceit, deception, or confusion,<sup>29</sup> such as distinguishing between father and son candidates.<sup>30</sup>

In addition to ballot regulations governing candidates' names, state statutes commonly regulate political party names. For example, similar or confusing party names can be prohibited.<sup>31</sup> If different candidates or groups of candidates claim the same party affiliation, the order in which the potential nominees file the required papers may determine which candidate gets to use the party name.<sup>32</sup>

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24. *Stevenson v. Ellisor*, 243 S.E.2d 445 (S.C. 1978) (upholding decision allowing a candidate with a given name of "Ferdinan" to use "Nancy" because "Nancy" was a properly acquired derivative name the candidate had been using in good faith for honest purposes).
  25. *None of The Above v. Hardy*, 377 So.2d 385 (La. Ct. App. 1979) (holding that despite meeting other qualifications to run for governor, the candidate's new legal name—"None of The Above"—could be kept off the ballot because it was misleading and deceptive).
  26. *State ex rel. Sterne v. Bd. of Elections of Hamilton County*, 252 N.E.2d 641 (Ohio 1969) (requiring a showing that election officials abused their discretion in not printing a candidate's nickname on the ballot before the court will order it included).
  27. *Sooy v. Gill*, 774 A.2d 635 (N.J. Super. Ct. App. Div. 2001); *Lewis v. N.Y. State Bd. of Elections*, 678 N.Y.S.2d 809 (App. Div. 1998); *Douville v. Docking*, 501 P.2d 778 (Kan. 1972); *People ex rel. Richter v. Telford*, 242 N.E.2d 464 (Ill. App. Ct. 1968).
  28. *Tiogo v. Columbia Bd. of Elections*, 273 N.Y.S.2d 781 (Sup. Ct. 1966) (prohibiting the use of a candidate's title and academic degree).
  29. *Sooy*, 774 A.2d. 635.
  30. *Foley v. Donovan*, 144 N.W.2d 600 (Minn. 1966).
  31. *McCarthy v. Lawley*, 314 N.Y.S. 2d 626 (App. Div. 1970) (holding "Conservation Party" too similar and confusing to "Conservative Party").
  32. *Fenerty v. Lawrence*, 27 Pa. D. & C. 640 (Ct. Com. Pl. 1936).

## 2. Political Party Designations and Emblems

Some states allow party designations and emblems to appear on the ballot, although their use may be restricted to specific elections.<sup>33</sup> Where party emblems are allowed, they must usually satisfy the following criteria:

- be a proper symbol,<sup>34</sup>
- not be misleading,<sup>35</sup>
- not be words or phrases,<sup>36</sup> and
- not constitute electioneering.<sup>37</sup>

In general, intra-party disputes over which faction is entitled to use the official emblem are settled within the party and do not involve the courts.<sup>38</sup>

## 3. Ballot Measure Descriptive Language

State statutes may require that ballot measures be limited to one question and that voters be provided sufficient information on the ballot measure to know what they are being asked to decide.<sup>39</sup>

### C. Ballot Layout

Although the concept is simple—place the names of the candidates on the official ballot so that voters may select among them—the laws governing ballot layout are detailed, complex, and varied.<sup>40</sup> Ballot layout statutes regulate the order in which

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33. Some states will not allow party emblems to be used in general elections for judicial offices, even if the emblems are available for use in judicial primary elections. *See State ex rel. MacHale v. Ayers*, 105 P.2d 686 (Mont. 1940) and *Suessman v. Lamone*, 862 A.2d 1 (Md. 2004).

34. *Steinberg v. Meisser*, 314 N.Y.S. 2d 717 (Sup. Ct. 1970) (holding that a picture of a skyscraper, surrounded by a circle with a slash through it, was not a proper symbol).

35. *In re Ingraham*, 201 N.Y.S. 765 (Sup. Ct. 1923) (holding a pointing hand was not a proper emblem and gave the candidate an unlawful advantage).

36. *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936 (Ind. Ct. App. 2004) (finding that the phrase “The A Team,” was not a proper party emblem).

37. *McNulty v. May*, 387 N.Y.S.2d 489 (App. Div. 1976); *Sadler*, 811 N.E.2d 936; *Schiff v. Griffin*, 639 N.W.2d 56 (Minn. Ct. App. 2001); *Robinson v. Hare*, 145 N.W.2d 254 (Mich. Ct. App. 1966). *See infra* Chapter 7: Election Day for additional information on electioneering.

38. *Am. Indep. Party of Michigan (Morse-Smith Faction) v. Sec. of State*, 247 N.W.2d 17 (Mich. 1976).

39. *See, e.g., ALASKA STAT. § 15.45.040* (2021); *Ohio Revised Code, Title XXXV, Chapter 3519.01(A)*; *see also* Chapter 4: State Regulation of Ballot Measures for more information on ballot measure requirements.

40. Yet sometimes they are not complex enough given the political climate. *See Brown v. DeGrace*, 751 N.Y.S.2d 150 (Sup. Ct. 2002) (deciding a ballot order deadlock where the state law permitted overlapping minor party endorsements which resulted in a ballot that did not conform to “tradition” that the court decided was not “legally sacrosanct...[and] not of legal moment”).

the elective offices and political parties appear on the ballot,<sup>41</sup> the order in which political parties appear under each elective office,<sup>42</sup> the order in which candidates' names appear,<sup>43</sup> and the location and order in which ballot measures appear.<sup>44</sup>

Ballot order requirements vary not only between states but may also vary depending on whether an election is a primary<sup>45</sup> or general election, and whether the ballots are paper or machine-based.<sup>46</sup>

Common statutory methods of determining the order in which the candidates' names will be placed on the ballot are by random drawing of names<sup>47</sup> and alphabetical order.<sup>48</sup> Once the initial ballot order has been determined, all ballots may retain that order,<sup>49</sup> the order of the names may rotate throughout the list,<sup>50</sup> or new drawings may be held to randomly select the order of the names in other voting areas.<sup>51</sup> Election officials may need to hold a new drawing to affix the candidates' name order on run-off election ballots.<sup>52</sup> Some states also place candidates on the ballot in order based on political party—with a lower place given to independent candidates and higher places given to major parties.<sup>53</sup>

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41. Two common ballot formats exist. Under the “Indiana” or “party-column” format, party affiliation constitutes the first grouping, with all offices for which the party is running a candidate appearing underneath the party column. This arrangement facilitates voting by party. The second common ballot format is the “Massachusetts” or “office block” format, in which candidates are grouped based on the offices they seek. *See* Sadler, 811 N.E.2d at 939.

42. *See* VA. CODE ANN. § 24.2-613 (2003) (requiring in non-primary elections, political party order determined by lot with “recognized political parties” order determined before independent candidacies).

43. *See* MONT. CODE ANN. § 13-12-205 (2005).

44. *See* MONT. CODE ANN. § 13-12-207(4) (2005).

45. *See* CAL. ELEC. CODE § 13112 (West Supp. 2007) (requiring three separate drawings for a randomized alphabet to held per year, with provisions for additional randomized drawings as necessary to accommodate special elections).

46. *See, e.g.*, Ariz. Rev. STAT. ANN. §16-446 (2017).

47. *See* Bradley v. Perrodin, 131 Cal. Rptr. 2d 402 (Ct. App. 2003); CAL. ELEC. CODE § 13112 (2007); ARK. ELEC. CODE § 7-5-207 (2021).

48. *See* NEV. REV. STAT. ANN. §§ 293.256-2565 (LexisNexis 2007) (noting exceptions are allowed when the candidates have same or similar names); VA CODE ANN. § 24.2-613 (2021).

49. *See* NEV. REV. STAT. ANN. § 293.256-68 (LexisNexis 2007) (making no provision to rotate names).

50. *See* CAL. ELEC. CODE § 13111 (West Supp. 2007).

51. *See id.*

52. *Guiliano v. Richardson*, 266 A.2d 154 (N.J. Super. Ct. Law Div. 1970) (holding clerk's failure to select new candidate designations and bracketing in a run-off election amounted to impermissible discretion).

53. *Sarvis v. Judd*, 80 F. Supp. 3d 692 (E.D. Va. 2015), *aff'd sub nom. Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708 (4th Cir. 2016) (holding that the state's assignment of a lower place on the ballot for independent candidates and candidates from smaller parties does not violate the First and Fourteenth Amendments).

State statutes may explicitly list the order in which offices should appear on the ballot.<sup>54</sup> In general, ballots list the elections for political offices in descending order based on the size of the political jurisdiction.<sup>55</sup> Thus, in state elections, a gubernatorial election is listed before a state legislative election, which is listed before a mayoral election, and so on through all available local offices.<sup>56</sup> States may allow candidates with similar political beliefs to group themselves together, “bracket[ing],” on the ballot.<sup>57</sup> However, some states do not allow county clerks to give preferential treatment in placement on the ballot to those who are bracketed or who are not bracketed.<sup>58</sup>

Perhaps the most well-known ballot design challenge occurred during the 2000 *Bush v. Gore* presidential election. The design of ballots used in Palm Beach County, Florida, caused much confusion and led to numerous legal challenges.<sup>59</sup> These “butterfly,” punch card ballots were organized with two columns of names separated in the middle by a line with dots corresponding to alternating candidates in the two columns.<sup>60</sup> Some of these ballot cards were not adequately punctured for the ballot reading machines to register the votes—either because the perforated section that was supposed to be pushed out was still attached (commonly referred to as a hanging chad) or the dot was only indented.<sup>61</sup>

When these challenges finally reached the Florida Supreme Court, the Court held that the technical deviations the butterfly ballots showed from the statutorily prescribed ballot form did not rise to the level of substantial noncompliance—a

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54. See VT. STAT. ANN. tit. 17, § 2471(a) (2002).

55. See N.C. GEN. STAT. § 163-165.6 (2005).

56. *Amarino v. Canary*, 480 N.Y.S.2d 920 (App. Div. 1984) (noting county officers are listed before candidates before town boards).

57. *Gillen v. Sheil*, 416 A.2d 935, 938 (N.J. Super. Ct. Law Div. 1980) (citation omitted).

58. *Andrews v. Rajoppi*, No. A-4005-07T1, 2008 WL 1869869 (N.J. Super. Ct. App. Div. Apr. 29, 2008).

59. Steven J. Mulroy, *Substantial Noncompliance and Reasonable Doubt: How the Florida Courts Got It Wrong in the Butterfly Ballot Case*, 14 STAN. L. & POL'Y REV. 203, 205 (2003). Some legal challenges alleged the ballot design departed from state statutory requirements. See *Fladell v. Palm Beach County Canvassing Board*, 772 So. 2d 1240 (Fla. 2000), No. CL 00-10965 AB (filed Nov. 8, 2000); *Gibbs v. Palm Beach County Canvassing Board*, No. CL 00-11000 AH (filed Nov. 9, 2000); *Horowitz v. LePore*, No. CL 00-10970 AG (filed Nov. 9, 2000); *Rogers v. Election Canvassing Commission*, No. CL 00-10992 AF (filed Nov. 9, 2000); *Elkin v. LePore*, No. CL 00-10988 AE (filed Nov. 12, 2000); “The People” (Boswell) v. Bush, No. CL 00-11240 AB (filed Nov. 13, 2000); *Adrien v. Department of Elections*, No. CL 00-11146 AB (filed Nov. 14, 2000); *Haitian American Bureau & International Liason v. Palm Beach County Canvassing Board.*, No. CL 00-11084 AH (filed Nov. 14, 2000); *Lichtman v. Bush*, No. CL 00-11098 AO (filed Nov. 14, 2000); *Katz v. Election Canvassing Commission*, No. CL-11302 AD (filed Nov. 17, 2000); and *Green v. LePore*, No. CL 00-11290 AB (filed Nov. 17, 2000). Others challenged the standard of ballot computation.

60. Mulroy, *supra* note 59, at 205-06. Designed to allow larger type and to keep all candidates for one office on the same page.

61. *Bush v. Gore*, 531 U.S. 98, 105 (2000).

threshold issue plaintiffs had to prove to void the election results due to unintentional misconduct by election officials.<sup>62</sup>

Subsequently, some state legislatures have changed or added ballot design measures.<sup>63</sup>

#### **D. Ballot Creation Deadlines**

State statutes or administrative regulations may establish a deadline by which the ballot must be finalized,<sup>64</sup> be made available for public inspection prior to the election,<sup>65</sup> and be made into distributable samples.<sup>66</sup>

If a general election includes a federal office, absentee ballots must be made available to deployed uniformed military and overseas voters thirty days before the election or the state must accept a standardized federal write-in absentee ballot for federal office.<sup>67</sup>

Statutory deadlines to create and disseminate absentee ballots pressure the timeframe for, and limit a court's ability to hear, many pre-election lawsuits.

State statutes or administrative regulations may establish a deadline by which the ballot must be finalized.

62. *Id.* at 209 (2003).

63. See Martha Kropf, *The Evolution (or Not) of Ballot Design Ten Years After Bush v. Gore*, in ELECTION ADMINISTRATION IN THE UNITED STATES 157-74 (Cambridge Univ. Press 2014). See, e.g., N.D. CENT. CODE ANN. § 16.1-06-07.1 (West); ALASKA STAT. ANN. § 15.15.030 (West); ALA. CODE § 17-6-24; DEL. CODE ANN. tit. 15, § 4502 (West).

64. See, e.g., N.J. STAT. ANN. § 19:14-1 (West 1999) (requiring a copy of ballot to be ready for the printer on or before the forty-third day before the election); see also N.J. STAT. ANN. § 19:14-18 (West 1999) (requiring county clerks to have the printed ballots on hand no later than noon on the fifth day preceding the general election); N.M. STAT. ANN. § 1-10-4 (West 2007) (requiring county clerk to prepare the ballot no less than forty-nine days before a primary or fifty-three days before a general election) and N.M. STAT. § 1-10-5 (West 2007) (requiring county clerks to have ballot labels no less than thirty days before the election).

65. See MINN. STAT. ANN. § 204D.16 (2021) (“At least 46 days before the state general election, the county auditor shall post sample ballots for each precinct in the auditor’s office for public inspection and transmit an electronic copy of these sample ballots to the secretary of state.”).

66. See N.C. GEN. STAT. § 163-165.2 (2005) (“The county board of elections shall produce sample ballots, in all the necessary ballot styles of the official ballot, for every election to be held in the county. The sample ballots shall be given an appearance that clearly distinguishes them from official ballots.”).

67. 52 U.S.C.A. § 20302 (West).



## E. Legal Challenges

Ballot-related challenges include claims of statutory non-compliance<sup>68</sup> or violations of a candidate's constitutional rights.<sup>69</sup> Ballot-related objections should be filed before the election. Pre-election challenges are time-critical because of looming statutory deadlines governing ballot printing<sup>70</sup> or set up, posting sample ballots,<sup>71</sup> and mailing absentee and military ballots.<sup>72</sup>

### 1. Compliance-Based Challenges

In designing the ballot and placing candidates, ballot measures, and political parties on it, election officials perform non-discretionary<sup>73</sup> ministerial duties.<sup>74</sup> Ballot-related compliance lawsuits allege that election officials did not follow statutory or administrative requirements when creating the ballot. Election officials may have approved an incorrect party emblem, listed the candidate's name improperly, placed a candidate or political party's name in the wrong location, or failed to follow candidate name order statutes.<sup>75</sup> In addition, the

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68. *Mochary v. Caputo*, 494 A.2d 1028 (N.J. 1985); *Brown v. DeGrace*, 751 N.Y.S. 2d 150 (Sup. Ct. 2002) (noting that “case law suggests that where the Board of Elections is claimed to have made an error in establishment of the ballot, an aggrieved candidate may challenge the manner in which the Board constituted the ballot”) (citation omitted).
  69. *DeNardo v. Municipality of Anchorage*, 105 P.3d 136 (Alaska 2005) (holding plaintiff's political associational rights were not violated by the randomly drawn, non-rotated order of candidates' names on the ballot).
  70. *See* Miss. Code. Ann. § 23-15-649 (West).
  71. *See* VT. STAT. ANN. tit. 17, § 2522 (Supp. 2006) (requiring sample ballots to be posted no later than twenty days prior to any primary or general elections and no later than ten days before municipal elections); ARIZ. REV. STAT. ANN. § 16-503 (2007) (requiring sample ballot to be available to the public at least ten days before general elections and five days before city or town elections).
  72. *Austin v. City of Alice*, 193 S.W.2d 290 (Tex. Civ. App. 1946); *Brown v. DeGrace*, 751 N.Y.S.2d 150 (Sup. Ct. 2002) (indicating that the mailing of military ballots had already been delayed and the timely mailing of absentee ballots was jeopardized).
  73. *State ex rel. Smith v. Kozer*, 229 P. 679 (Or. 1924); *Burr v. Voorhis*, 128 N.E. 220 (N.Y. 1920); *Stuart v. Carr*, 106 N.E. 158 (Ill. 1928).
  74. *See State ex rel. Gengo v. Cudden*, 168 S.E.2d 541 (W.Va. 1969) (finding that ministerial capacity lies with the board of elections); *Stuart*, 106 N.E. 158 (holding that ballot printer does not operate in a ministerial capacity); *Sadler v. State*, 811 N.E.2d 936 (Ind. Ct. App. 2004) (finding that voting technology vendor does not operate in a ministerial capacity).
  75. Litigation over whether candidate order has complied with statutory requirements is motivated by concerns that undecided voters are more likely to vote for the first candidate listed; thus, the first ballot position potentially provides that candidate an unfair advantage. *See* Daniel E. Ho & Kosuke Imai, *Estimating Causal Effects of Ballot Order From A Randomized Natural Experiment: The California Alphabet Lottery, 1978–2002*, 72 PUB. OP. Q. 216 (2008), <https://imai.fas.harvard.edu/research/files/alphabet.pdf> (discussing the supposed effects of ballot order on election results and finding some ballot order affect for first two candidate positions in primary elections); R. Michael Alvarez, Betsy Sinclair & Richard L. Hasen, *How Much is Enough? The “Ballot Order Effect” and the Use of Social Science Research in Election Law Disputes*, 5 ELECTION L. J. 40 (2006) (finding little evidence that candidates systematically benefit from their name being placed first on the ballot).

descriptive language used for initiatives, referenda, and amendments, bond or debt authorizations, and judicial retention elections may be challenged. Before filing a ballot order-based court challenge, aggrieved candidates or registered voters may be first required to pursue administrative remedies.<sup>76</sup>

Plaintiffs generally ask the court to order election officials to create ballots that remedy the deficiencies the plaintiffs' identified. They may also ask the court to enjoin the election until the ballot is reworked.<sup>77</sup> The court's ability to do so may be limited, especially when the electoral board did not abuse its discretion or exceed its statutory authority.<sup>78</sup> A court may decline to order corrective action if it is not satisfied that acceptable changes can be made within the time available and at a reasonable cost, considering how egregious the administrative error is.<sup>79</sup> In general, trial courts order non-compliant ballots reprinted when their form violates statutory requirements and sufficient time exists to reformat and distribute them.<sup>80</sup>

Finally, where ballot-related statutes have not kept pace with changes in voting technology, the court may be asked to interpret the statutory ballot requirements in light of the existing capabilities.<sup>81</sup>

## 2. Constitutional Challenges

In general, most courts have not found constitutional violations when ballot order statutes did not require rotation of a candidate's name.<sup>82</sup>

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76. *See, e.g.*, ALA. CODE § 41-22-20(a) (1973); CONN. GEN. STAT. § 4-183(a) (1971); GA. CODE ANN. § 50-13-19(a); IND. CODE § 4-21.5-5-4(a) (1947); IOWA CODE § 17A.19(1).

77. *Sadler*, 811 N.E.2d 936 (enjoining an election because the electoral board violated state law by changing the ballot's format without first determining that the voting equipment would not support the prescribed format).

78. *Sooy v. Gill*, 774 A.2d 635 (N.J. Super. Ct. App. Div. 2001) (finding failure to do more than place the candidate's name on the ballot was not subject to judicial review).

79. *Mattson v. McKenna*, 222 N.W.2d 273 (Minn. 1974).

80. *Johnston v. Ing*, 441 P.2d 138 (Haw. 1968) (holding that courts may leave the sample ballot uncorrected even if they order the official ballots reprinted); *see Millman v. Kelly*, 410 A.2d 283 (N.J. Super. Ct. Law 1979) (finding that paper-based ballots may be corrected through the use of stickers as an alternative to reprinting the ballot).

81. *Axtell v. Caputo*, 204 A.2d 7 (N.J. Super. Ct. App. Div. 1964); *Sadler*, 811 N.E.2d 936; *Millman v. Kelly*, 410 A.2d 283 (N.J. Super. Ct. Law Div. 1979) (holding statute applied to paper ballots only in the face of uncontradicted testimony that the statutorily specified "yes" and "no" block was not possible given the voting equipment in use).

82. *See DeNardo v. Municipality of Anchorage*, 105 P.3d 136 (Alaska 2005) (holding plaintiff's political associational rights were not violated by the randomly drawn, non-rotated order of candidates' names on the ballot); *see also Sonneman v. State*, 969 P.2d 632 (Alaska 1998) (finding no Equal Protection violation in the statute that required name rotation).

### III. ABSENTEE VOTING

Absentee voting, which the Constitution does not require the states to offer,<sup>83</sup> allows registered voters to cast their ballots early, by mail or in person, when the voter will be unable to vote in person on election day because of out-of-town travel,<sup>84</sup> illness or disability, or other state-approved reasons.<sup>85</sup> The availability of absentee voting dates back to the Civil War.<sup>86</sup> Its use has dramatically increased in the modern era.<sup>87</sup>

The availability of absentee voting dates back to the Civil War. Its use has dramatically increased in the modern era.

Absentee voting that occurs outside a polling location or administrative office is usually unsupervised, giving rise to concerns about fraud.<sup>88</sup> These concerns prompt states to regulate absentee voting more extensively than in-precinct

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83. See *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004). Some state constitutions grant a right to vote by absentee ballot. See, e.g., HAW. CONST. art. II, § 4 (“The legislature shall provide for the registration of voters and for absentee voting”); N.H. CONST. pt. I, art. 11 (“The general court shall provide by law for voting by qualified voters who . . . are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person, in the choice of any officer or officers to be elected or upon any question submitted at such election.”).
84. See TEX. ELEC. CODE ANN. §§ 106.001-.02 (Vernon 2003 & Supp. 2006) (creating provisions to permit person in space on Election Day the opportunity to vote); see also *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT’L CONF. OF STATE LEGISLATURES (July 12, 2022), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited Sept. 14, 2022).
85. Many states offer “no excuse” absentee or early voting wherein any registered voter can vote by absentee ballot or in-person at designated precincts. See *States with No-Excuse Absentee Voting* NAT’L CONF. OF STATE LEGISLATURES (July 12, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> (last visited Sept. 14, 2022)(detailing state no-excuse absentee laws).
86. Edward B. Moreton, Jr., *Voting by Mail*, 58 S. CAL. L. REV. 1261, 1261 (1985).
87. The percentage of ballots cast by mail has been steadily on the rise well before 2020, jumping from 4% in 1972 to 30% in 2008. Patty Ferguson-Bohnee & James Thomas Tucker, *Voting During A Pandemic Vote-by-Mail Challenges for Native Voters*, ARIZ. ATT’Y, July/August 2020, at 24, 26. That percentage jumped to 46% in 2020, likely due to the COVID-19 pandemic. *The Voting Experience in 2020*, PEW RESEARCH CENTER (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020>.
88. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J. L. REFORM 483 (2003). A recent example of absentee voter fraud occurred in North Carolina. The State Board of Elections unanimously voted to hold a new election for the state’s Ninth Congressional District after a hearing revealed a large-scale election fraud operation that involved stuffing the ballot boxes with absentee ballots in one candidate’s favor. See David A. Graham, *North Carolina Had No Choice*, THE ATLANTIC (Feb. 22, 2019), <https://www.theatlantic.com/politics/archive/2019/02/north-carolina-9th-fraud-board-orders-new-election/583369/>.

voting, including limiting its availability.<sup>89</sup> States regulate some or all of the following aspects of absentee voting:<sup>90</sup>

- eligibility requirements, including the information that must be included on an absentee ballot application,
- how, and by whom, absentee ballots are distributed to voters and how they are returned to election officials,
- who, if anyone, can assist an absentee voter in voting,
- whether and how an absentee ballot must be witnessed, and
- the postmark or receipt deadline for the returned ballot to be counted.

In addition to following state absentee voting regulations, election officials must also comply with federal absentee ballot regulations in federal elections. Federal statutes require states to:

- permit former residents who moved out-of-state less than thirty days before a presidential election to vote by absentee ballot for President and Vice-President only,<sup>91</sup>
- limit the amount of medical information voters must provide to qualify for absentee voting,<sup>92</sup>
- permit absentee voting by uniformed and overseas voters in general, special, primary, or runoff elections for federal office,<sup>93</sup>
- accept the standardized federal write-in absentee ballot in general elections for federal offices,
- notify federal election absentee ballot applicants if their applications are rejected and provide the reason for the rejection,<sup>94</sup> and
- accept as valid write-in votes for federal office candidates if the ballot meets UOCAVA criteria, including the standardized federal oath or affirmation if the state requires one of these.<sup>95</sup>

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89. See *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (noting “working mother” is not a protected classification, thus no equal protection violation occurs when the states does not extend absentee voting eligibility to individuals meeting this description).

90. *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited Feb. 20, 2021).

91. 52 U.S.C. § 10502 (2021). The state must also allow the former resident meeting these criteria to vote in-person at their old precinct if the former resident prefers that to absentee voting. If the citizen moves to another state thirty or more days before the election, another VRA provisions requires his new state to register him to vote for the upcoming federal election.

92. 52 U.S.C. § 10502 (2021).

93. 52 U.S.C. 20301 (2021).

94. *Id.*

95. *Id.*

Courts become involved in absentee voting issues when a plaintiff challenges some aspect of the state’s absentee ballot process. Direct attacks on state absentee ballot processes and regulations generally occur in various forms. First, the plaintiff may claim that election officials failed to follow proper state or federal procedures in approving, issuing, or denying voters’ ability to cast absentee ballots. As with other compliance-related election law claims, state statutes or regulations may require that the initial challenge be filed as an administrative complaint, with court review available only on limited grounds. Courts can issue writs of mandamus to compel election officials to grant absentee ballots to qualified individuals who were improperly denied absentee ballots<sup>96</sup> or may issue injunctions to prevent election officials from approving or distributing absentee ballots in contravention of governing statutes.<sup>97</sup>

Federal constitutional challenges to state absentee voting regulations are typically reviewed under the rational basis test.

Second, plaintiffs may challenge the constitutionality—usually on equal protection grounds—of a state absentee ballot regulation. Federal constitutional challenges to state absentee voting regulations are typically reviewed under the rational basis test.<sup>98</sup> These challenges succeed when the plaintiff proves that no rational basis supports the state’s distinctions. For example, absentee ballot statutes that allowed absentee voters to vote a replacement ballot if the voter picked up the ballot from the election office or if the voter went to the polls to vote but did not allow replacement ballots to be mailed to housebound absentee voters violated equal protection guarantees by treating similarly situated voters differently without a rational explanation.<sup>99</sup> Another type of challenge to absentee voting administration involves states sending absentee ballots and ballot applications automatically (i.e., without the voter first submitting a request).

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96. See *In re State of Texas*, No. 20-0394 (May 20, 2020), <https://www.txcourts.gov/media/1446711/200394.pdf>.

97. *League of Women Voters of S.C. v. Andino*, No. 2:20-3537-RMG, 2020 U.S. Dist. LEXIS 203341 (D.S.C. Oct. 27, 2020).

98. See, e.g., *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003).

99. *Id.* at 731-32. See also *O’Brien v. Skinner*, 414 U.S. 524 (1974) (holding state statutes that allowed absentee voting for county residents who were jailed out-of-the-county but denied absentee voting to county residents who were jailed in-county even though the in-county inmates had no alternative means of voting, were arbitrary and without a rational basis).

Plaintiffs have successfully challenged the practice of automatically mailing absentee ballot applications to all registered voters<sup>100</sup> and invalidated votes cast by absentee ballot when automatically sent to voters.<sup>101</sup>

The third way absentee voting can spur litigation is when a candidate dies, withdraws, or otherwise becomes ineligible after the absentee ballots have been mailed, but before election day itself.<sup>102</sup> Under these circumstances, courts may need to decide how to count, if at all, the ballots cast for the now ineligible candidate and the circumstances.<sup>103</sup> If absentee ballots cannot be reissued with a replacement candidate's name, the court may be asked to consider whether an absentee voter can void his earlier ballot by appearing at the polls and voting in person.<sup>104</sup>

Absentee ballot considerations may play a role in many pre-election legal challenges, even when they are not the central issue.<sup>105</sup> The deadline to print and mail absentee ballots, which may be as much as a month prior to election day, may operate as a de facto deadline on court decisions that may directly affect the ballot or voting.<sup>106</sup> In addition, certain absentee ballot deadlines may affect a court's ability to grant relief in lawsuits involving other aspects of the election.<sup>107</sup>

A few courts have heard cases challenging state law and procedure as to when to begin counting early and absentee voting. In 2020, plaintiffs sought to prevent the New Jersey Secretary of State from canvassing ballots starting ten days before the

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100. *State v. Hollins*, 620 S.W.3d 400 (Tex. 2020).

101. *Gross v. Albany County Bd. of Elections*, 819 N.E.2d 197 (N.Y. 2004) (voiding absentee ballots sent to voters for special election that were solely based upon voters' absentee ballot application for prior, regular general elections). *But see Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020) (denies request to strike "indefinitely confined" voters as class, without regard to whether any individual voter was in fact indefinitely confined, because request lacked basis in reason or law).

102. *See Erlandson*, 659 N.W.2d at 731-32 (discussing the effect of the death of incumbent Senator Paul Wellstone eleven days before the election).

103. *See id.* (requiring absentee ballots returned before the candidate died to be counted as cast for all offices and issues).

104. *See id.*

105. *See infra* Chapter 9: Election Contests for additional information on post-election challenges to absentee ballots.

106. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam) (holding the election could not be enjoined to hear challenge to voting technology because the election began when absentee voting started); *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff*, 804 N.E.2d 419 (Ohio 2004) (denying candidate's petition to amend his challenge to another candidate's qualifications to run for office because the passing of the absentee ballot statutory deadline made laches applicable).

107. For example, one court dismissed a challenge to a ballot measure in part because the deadline to mail absentee ballots had passed. *See State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135 (Ohio 2001) (per curiam).

election, as permitted by state law, claiming federal law does not grant States discretion on the timing of the uniform election day and that canvassing must take place only on election day.<sup>108</sup> A federal district court denied the plaintiffs request for a preliminary injunction and held that the Federal Election Day statutes did not prevent all election-day processing activity prior to election day, including the canvassing of mail-in ballots, so long as the activity did not reveal the final results of the canvassing until after the close of polls on Election Day.<sup>109</sup>

The use of ballot drop boxes<sup>110</sup> to collect absentee ballots expanded during the 2020 presidential election due to the COVID-19 pandemic. That year, plaintiffs lodged a number of challenges related to absentee ballot drop boxes.<sup>111</sup> For example, the Ohio Court of Appeals interpreted a state statute concerning the return of absentee ballots to give the Secretary of State authority to restrict or increase the number of absentee drop boxes installed to collect absentee ballots.<sup>112</sup> Also in 2020, the U.S. District Court for the Western District of Pennsylvania held that plaintiffs claiming the use of drop boxes without mandated security was unconstitutional because it could lead to election fraud did not have standing because the chance of potential voter fraud was not a concrete, imminent injury.<sup>113</sup> Additionally, the court held that even if plaintiffs did have standing, the court found that the claim would fail on the merits, as “suggest[ing] election improvements” is outside the sphere of federal judge decision making.”<sup>114</sup> When state statutes require local governments providing election services to supply

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108. Donald J. Trump for President, Inc. v. Way, 492 F. Supp. 3d 354, 367 (D.N.J. 2020).

109. *Id.* at 369.

110. Drop boxes are “secure, locked structure[s] operated by election officials where voters may deliver their ballots from the time they receive them in the mail up to the time polls close on Election Day.” *Ballot Drop Box*, ELECTION ASSISTANCE COMM’N, [https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot\\_Drop\\_Box.pdf](https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf). They are emptied regularly, some states requiring drop boxes be monitored by security cameras. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 2-305 (West) (requiring monitoring by security camera); MICH. COMP. LAWS ANN. § 168.761d (West); MINN. STAT. ANN. § 203B.082 (West).

111. *See* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 360-61 (Pa. 2020) (interpreting a Pennsylvania state statute to permit county boards of election to create satellite drop off locations for mail-in ballots but holding that an equal protections claim was premature as the counties had not yet counted any votes or used satellite locations); *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911 (Tex. 2020) (holding that the Governor’s proclamation preventing county officials from designating multiple mail-in ballot hand-delivery sites prior to election day was constitutional and did not discriminate against voters in large counties).

112. Ohio Democratic Party v. LaRose 159 N.E.3d 1241 (Ohio Ct. App. 2020). *See also* Pa. Democratic Party v. Boockvar, 238 A.3d 345, 360-61 (Pa. 2020) (interpreting a Pennsylvania state statute to permit county boards of election to create satellite drop off locations for mail-in ballots but holding that an equal protections claim was premature as the counties had not yet counted any votes or used satellite locations).

113. Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020).

114. *Id.* at 343.

more drop boxes, the local government cannot refuse to comply because they do not have the available funds.<sup>115</sup>

In cases where the state fails to provide absentee ballots to those entitled to them, the deadline for receipt may be extended.<sup>116</sup> However, courts are split about when absentee ballot receipt deadlines can be extended in light of other emergencies such as the COVID-19 pandemic.<sup>117</sup> The Supreme Court has not weighed in on the question of whether a court can extend an absentee ballot deadline without interfering with the legislature's power over elections.<sup>118</sup>

## IV. ELECTION OBSERVATION

Election observers can be deployed by parties, candidates, citizen groups, or independent organizations to watch the electoral process. State statutes often provide access to pre-election and post-election processes in addition to Election Day activities.<sup>119</sup> In 2008, the Supreme Court of Ohio granted a writ of mandamus to compel the Secretary of State to direct that duly appointed observers were permitted in all active polling places, so long as they met statutory requirements, despite the Secretary of State's recently-issued advisory opinion stating that boards of elections were not required to allow election observers during the 35-

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115. See *Gessler v. Doty*, 272 P.3d 1131 (Colo. Ct. App. 2012).

116. See, e.g., *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Md. 2010) (granting preliminary injunction extending the deadline for receipt of absentee ballot from absent uniformed services and overseas voters).

117. *Compare* *DCCC v. Ziriak*, 487 F. Supp. 3d 1207, 1231-34 (N.D. Okla. 2020) (holding the absentee ballot receipt deadline was not unconstitutional), *and* *League of Women Voters of Delaware, Inc. v. Dep't of Elections*, 250 A.3d 922, 936 (Del. Ch.), judgment entered sub nom. *League of Women Voters of Delaware, Inc. v. State* (Del. Ch. 2020) (holding that expanding the right to vote by mail but failing to extend the deadline for receipt of ballots did not violate the state constitution because it was not unreasonable), *with* *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), cert. denied sub nom. *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021) (holding that the three-day extension of absentee and mail-in receipt deadline was warranted).

118. *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 209 L. Ed. 2d 164 (2021) (Alito, J., dissenting) ("I agree with Justice Thomas that we should grant review in these cases. They present an important and recurring constitutional question: whether the Elections or Electors Clauses of the United States Constitution, Art. I, § 4, cl. 1; Art. II, § 1, cl. 2, are violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted. That question has divided the lower courts, and our review at this time would be greatly beneficial.").

119. For a state-by-state breakdown of policies governing election observation access, see *Policies for Election Observers*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx#>; *Who Can Observe U.S. Elections?*, THE CARTER CENTER (2020), <https://www.cartercenter.org/resources/pdfs/peace/democracy/u.s.-observer-%20policies-2020.pdf>.



day, in-person absentee voting period for the November 4 election.<sup>120</sup> In some circumstances, judges may be required to interpret statutes governing election observer access to election processes not explicitly covered by statute.<sup>121</sup> For example, the Pennsylvania Supreme Court held in 2020 that the plain meaning of the applicable state statute did not set a minimum distance between observers and the election process they were watching.<sup>122</sup> Election observers must establish statutory or common-law standing.<sup>123</sup>

State statutes outlining who can observe and what observers can do and see vary widely. Almost all states allow for partisan citizen election observers appointed by political parties, candidates, or issue groups.<sup>124</sup> Often partisan observers must go through an appointment process in which their names are submitted to officials.<sup>125</sup> In addition to partisan observers, most states allow nonpartisan citizen observers.<sup>126</sup>

The VRA also allows for the appointment of federal observers to monitor election in localities or states that have been certified by the Attorney General when there are concerns about compliance with federal laws.<sup>127</sup> The Department of Justice can also send its own staff to observe elections if granted permission from the local jurisdiction where they are observing.<sup>128</sup>

In some circumstances, judges may be required to interpret statutes governing election observer access to election processes not explicitly covered by statute.

120. State *ex rel* Stokes v. Brunner, 898 N.E.2d 23 (Ohio 2008).

121. *In re* Canvassing Observation, 241 A.3d 339 (Pa. 2020), cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid, 141 S. Ct. 1451, 209 L. Ed. 2d 172 (2021).

122. *Id.*

123. Bickham v. Dallas Cty., 612 S.W.3d 663 (Tex. App. 2020), review denied (Oct. 15, 2021).

124. *Policies for Election Observers*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 13, 2020), <https://www.ncsl.org/research/elections-and-campaigns/policies-for-election-observers.aspx#>.

125. *See, e.g.*, ARK. CODE ANN. §7-5-312 (2015); ARK. CODE ANN. §7-5-904 (2018). A few states also have formal appointment processes for nonpartisan citizen observers. *See, e.g.*, 10 ILL. COMP. STAT. 5/17-23; MD. CODE, ELECTION LAW, §10-311; N.M. STAT. ANN. §1-2-21-27; Wisc. Stat. Ann. § 7.41 (West 2016). For more information on state laws outlining qualification requirements for poll watchers, please *see* *Poll Watchers and Challengers*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/poll-watcher-qualifications.aspx>.

126. *Id.* States also allow international and academic election observation. *Id.*

127. 52 U.S.C.A. § 10305(a)(2) (West).

128. U.S. Dep't of Justice, C.R. Div., Fact Sheet On Justice Department's Enforcement Efforts Following *Shelby County* Decision, <https://www.justice.gov/crt/file/876246/download>.

## V. POLLING PLACE SELECTION

Local election officials should comply with state and federal laws when they select polling locations. Among other requirements, state law may set standards for how many voters should be allocated to vote at a facility<sup>129</sup> and may prohibit the use of some buildings as polling locations.<sup>130</sup> Federal laws require that polling locations be accessible to physically disabled voters, with some exceptions if alternative voting opportunities, such as curbside voting, are provided.<sup>131</sup>

Although court challenges to polling place selection are rare, they do occur.<sup>132</sup> Complaints and legal challenges have occurred over the following polling location-related issues:

- the use of a new, different polling location specifically for a special election,<sup>133</sup>
- the reduction in the number of polling places or the moving of a polling place along race lines,<sup>134</sup>

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129. See *Ury v. Santee*, 303 F. Supp. 119, 126 n.3 (N.D. Ill. E.Div. 1969) (citing existing state standard as no more than 500 voters per facility unless the election is uncontested).

130. See *Van Lengen v. Town Bd. of Onondaga*, 253 N.Y.S.2d 865, 866 (Sup.Ct. 1964) (citing state law prohibiting polling locations on property owned or leased by candidates for public office in primary or general elections).

131. See *N.Y. ex rel. Spitzer v. County of Schoharie*, 82 F. Supp. 2d 19 (N.D.N.Y. 2000); 42 U.S.C. § 1973ee-1 (2000) (requiring polling places to be accessible to handicapped and elderly unless it's an emergency situation; if no polling place can be made accessible, even temporarily, then the locality must provide an alternative voting means on election day).

132. See *Van Lengen v. Town Bd. of Onondaga*, 253 N.Y.S. 2d 865 (Sup. Ct. 1964) (challenging the candidate's office selected as polling location); *Application of Held*, 363 N.Y.S. 2d 205 (Sup. Ct. 1974) (challenging selection of polling place in contest of village incorporation election); *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (voiding election for federal constitutional rights violation in substantially unequal sized precincts when precincts reduced from thirty-two to six in village election); *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio Ct. Com. Pl. 1984) (finding no abuse of discretion in relocation of polling place in contest of councilmanic election); *Rabinowitz v. Anderson*, No. 06-81117 (S.D. Fla. filed Dec. 1, 2006) (alleging violation of the Establishment Clause over polling place located in church where religious imagery was on display around the voting booth).

133. Everett Cats, *Sandy Springs Cleared but Fulton County Blamed for 2016 Special Election Issues*, NORTHSIDE NEIGHBOR (Georgia), Feb. 22, 2021, [https://www.mdjonline.com/neighbor\\_newspapers/northside\\_sandy\\_springs/news/sandy-springs-cleared-but-fulton-county-blamed-for-2016-special-election-issues/article\\_f5427554-7541-11eb-ba47-0bc74aff313b.html](https://www.mdjonline.com/neighbor_newspapers/northside_sandy_springs/news/sandy-springs-cleared-but-fulton-county-blamed-for-2016-special-election-issues/article_f5427554-7541-11eb-ba47-0bc74aff313b.html)

134. See *Prescod v. Bucks Cty.*, No. CIV.A.08-3778, 2009 WL 3617751, at \*1 (E.D. Pa. Nov. 2, 2009); *Jacksonville Coal. For Voter Prot. v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004); Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, NPR (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

- the use of churches as polling locations generally,<sup>135</sup>
- the use of buildings that are inaccessible to those with mobility disabilities,<sup>136</sup>
- the selection of a building outside of city limits for that city's only polling place,<sup>137</sup>
- the failure to establish polling locations on Native American reservations,<sup>138</sup> and the consolidation of polling locations.<sup>139</sup>

When election officials have clearly violated a statutory provision in the selection of a polling location, courts can order them to select a more appropriate location.<sup>140</sup> However, if election officials have not violated a statutory provision in selecting a polling location, then their choice can be reviewed for abuse of discretion,<sup>141</sup> but generally only if the decision was “arbitrary, unreasonable, and capricious.”<sup>142</sup> Finally, where the established precincts are of substantially unequal size, federal equal protection violations may occur if the size disparities led to a number of voters being unable to vote.<sup>143</sup>

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135. See *Rabinowitz v. Anderson*, No. 06-81117 CIV, 2007 WL 9701794 (S.D. Fla. July 31, 2007); *Voting While God Is Watching – Does Having Churches As Polling Stations Sway The Ballot?*, THE CONVERSATION (Sept. 22, 2020), <https://theconversation.com/voting-while-god-is-watching-does-having-churches-as-polling-stations-sway-the-ballot-144709>.

136. *Kerrigan v. Philadelphia Bd. of Election*, No. CIV. A. 07-687, 2008 WL 3562521 (E.D. Pa. Aug. 14, 2008); *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189 (2d Cir. 2014).

137. *Rangel-Lopez v. Cox*, 344 F. Supp. 3d 1285 (D. Kan. 2018).

138. *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016).

139. *Sutton v. Howe*, 128 N.Y.S.3d 431 (N.Y. Sup. Ct. 2020).

140. *Van Lengen v. Town Bd. of Onondaga*, 253 N.Y.S.2d 865, 870-71 (Sup. Ct. 1964) (finding an error of law in the town board's selection of a polling location and ordering them to call a meeting, attend the meeting, and designate another polling place).

141. See *Application of Held*, 363 N.Y.S.2d 205 (Sup. Ct. 1974); *Mirlisena v. Fellerhoff*, 463 N.E.2d 115 (Ohio Ct. Com. Pl. 1984). See also, Jonathan Weisman, *Ruling Keeps DeLay on Ballot; Judge Sides with Democrats, Says Former Lawmaker Can't Quit*, WASH. POST, July 7, 2006, at A5, and Marc Meredith & S. Christian Wheeler, *Can Where People Vote Influence How They Vote? The Influence of Polling Location Type on Voting Behavior* (Stanford Graduate School of Business, Research Paper Series, Research Paper No. 1926, 2006), available at <https://gsbapps.stanford.edu/researchpapers/library/RP1926.pdf> (suggesting that polling locations may influence voting behavior). Currently, whether and how polling place selection, designed to garner a preferred electoral outcome, results in a finding of abuse of discretion is unknown.

142. *Mirlisena v. Fellerhoff*, 463 N.E.2d 115, 118 (Ohio Ct. Com. Pl. 1984) (citation omitted).

143. *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (voiding election for Equal Protection violations resulting from precinct overcrowding that led to many voters' inability to vote where a township had consolidated thirty-two precincts into six precincts, resulting in substantial population deviations).

Poll worker error may not save the state from allegations of constitutional violations.

## VI. POLL WORKERS

Election officials select and train poll workers. State statutes<sup>144</sup> may provide guidance in this area, as well as establish working hours,<sup>145</sup> job responsibilities,<sup>146</sup> pay scales,<sup>147</sup> and training requirements.<sup>148</sup> Where inadequate training of poll workers continues to occur in the face of known problems with it, state and local elections officials may be civilly liable for any ensuing constitutional rights violations.<sup>149</sup> Poll worker error may not save the state from allegations of constitutional violations.<sup>150</sup>

State election officials have routinely faced poll worker shortages in modern elections.<sup>151</sup> The 2020 pandemic election witnessed particular concerns about poll worker shortages.<sup>152</sup>

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144. *State-by-State Compendium: Election Worker Laws & Statutes*, U.S. ELECTION ASSISTANCE COMMISSION (2020), [https://www.eac.gov/sites/default/files/electionofficials/pollworkers/Compendium\\_2020.pdf](https://www.eac.gov/sites/default/files/electionofficials/pollworkers/Compendium_2020.pdf).

145. GA. CODE ANN. § 21-2-405 (West).

146. UTAH CODE ANN. § 20A-5-605 (West).

147. ALA. CODE § 17-8-12 (West).

148. GA. CODE ANN. § 21-2-99 (West).

149. *See* League of Women Voters of Ohio v. Blackwell, 432 F. Supp. 2d 723, 729, 730 (N.D. Ohio 2005) (holding that plaintiff's claim of a constitutional rights violation survives defendant's motion to dismiss because plaintiff met the threshold test that defendant's failure to train might amount of "deliberate indifference" because of the history of training problems and the due process violations that were likely to occur as a result) (citation omitted).

150. *See, e.g.*, Hunter v. Hamilton Cty. Bd. of Elections, 850 F. Supp. 2d 795 (S.D. Ohio 2012) (county elections board's decision not to count some provisional ballots because of poll worker error violated Equal Protection Clause). *See contra* State ex rel. Painter v. Brunner, 2011-Ohio-35, ¶ 35, 128 Ohio St. 3d 17, 28, 941 N.E.2d 782, 794 ("These statutes do not authorize an exception based on poll-worker error to the requirement that ballots be cast in the proper precinct in order to be counted.").

151. Matt Vasilogambros, *Few People Want to be Poll Workers, and That's a Problem*, THE PEW CHARITABLE TRUSTS (Oct. 22, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/22/few-people-want-to-be-poll-workers-and-thats-a-problem> (citing 2016 U.S. Election Assistance Comm'n report that two-thirds of jurisdictions had a hard time recruiting enough poll workers on Election Day).

152. *See, e.g.*, Scott Bauer and Steve Peoples, *Wisconsin Moves Forward with Election Despite Virus Concerns*, AP NEWS, Apr. 6, 2020, <https://apnews.com/article/primary-elections-ap-top-news-elections-wisconsin-public-health-97db30e6564b9b5eedfc300234ea6630> ("More than 2,500 National Guard troops were dispatched to staff the polls."); Davis Winkie, *National Guard Election Day Update: More Than 4,700 Troops Active in 18 States*, MILITARYTIMES (Nov. 3, 2020), <https://www.militarytimes.com/news/election-2020/2020/11/03/national-guard-election-day-update-more-than-4700-troops-active-in-18-states/> ("At least 4,700 National Guard troops in 18 states have been activated as of Tuesday afternoon to support the Nov. 3 general election in several capacities.").

## VII. VOTING TECHNOLOGY

State election officials choose the method voters will use to cast their ballots. The Help America Vote Act (HAVA) set minimum requirements that must be met by voting equipment used in federal elections. This equipment must:

- allow the voter to verify the voter’s selections before the ballot is cast,
- allow the voter to change the ballot or correct errors, and
- notify the voter if an over vote<sup>153</sup> exists and allow it to be corrected.<sup>154</sup>

HAVA also requires states to offer voting equipment with an audit capability,<sup>155</sup> and to make one voting station per polling location accessible to individuals with disabilities<sup>156</sup> for use in federal elections. States must also offer voting systems that can satisfy the alternate language requirements of the Voting Rights Act.<sup>157</sup> Finally, HAVA requires states to use voting technology that complies with error rate standards set by the Federal Election Commission.<sup>158</sup>

Even within the broad standards set by HAVA, election officials can choose from different voting systems.<sup>159</sup> Their choice of voting method—as well as the subsequent ballot designed for that method—can affect an election because different voting technologies have been shown to have different residual vote rates.<sup>160</sup> Residual vote rates measure the difference between the number of voters and the number of valid votes cast for a given contest.<sup>161</sup>

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153. “Over votes” occur when voters cast votes for more than one candidate for a single office.

154. 52 U.S.C. § 21081 (2021) (permitting localities whose voting equipment cannot notify the voter of an over vote, to meet federal voting standards if the locality establishes a voter education program which includes information on the effect of an over vote and how to correct the problem if it arises).

155. 52 U.S.C. § 21081 (2021).

156. *Id.*

157. *Id.*

158. *Id.*

159. For more information on managing voting technology, see *Managing Election Technology*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/voting-equipment/managing-election-technology> (last visited Feb. 14, 2022). For more information on election infrastructure security, see *Election Infrastructure Security*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/election-security> (last updated Jan. 31, 2022).

160. Stephen Ansolabehere & Charles Stewart III, *Residual Votes Attributable to Technology*, 67 J. POL. 365 (2005), [https://www.vote.caltech.edu/documents/168/residual\\_votes\\_attributable\\_to\\_tech.pdf](https://www.vote.caltech.edu/documents/168/residual_votes_attributable_to_tech.pdf).

161. In addition to over votes, residual votes include under votes where the voter fails to make a discernable selection.

Courts may become involved in challenges to voting equipment selection decisions.<sup>162</sup> Several courts have allowed equal protection challenges to voting technology with different residual vote rates to proceed.<sup>163</sup> One court characterized the use of voting technologies with different error rates in different precincts as allowing local election officials to assign different levels of importance to different voters unequally based on the choice of voting equipment.<sup>164</sup> Yet, questions remain as to the effect of the Supreme Court’s admonishment that states cannot value one person’s vote over another’s in the voting technology arena.<sup>165</sup> Additionally, it is unclear on what scale votes must be “equally weighted” before an Equal Protection violation no longer exists. Courts may also find that due process violations exist if a law allows election officials to impose significantly inaccurate voting systems on some portion of the voting public without a rational basis.<sup>166</sup>

Some election security experts have recommended phasing out electronic voting without a paper trail, believing that it can be difficult to detect errors in voting machine counting because there is a lack of redundant records to verify the vote totals.<sup>167</sup> Most states use paper ballots<sup>168</sup> or provide some other auditable form of

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162. *See, e.g.*, *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. Ct. 2007) (holding that electors had standing to sue to compel the Secretary of the Commonwealth to decertify various electronic voting systems and to establish uniform testing criteria); *Chavez v. Brewer*, 222 Ariz. 309, 214 P.3d 397 (Ct. App. 2009) (holding that electors could sue the Secretary of State and county recorders for certifying voting machines that violated state constitution and failed to comply with statutes governing voting machine standards); *Curling v. Raffensperger*, 493 F. Supp. 3d 1264, 1335 (N.D. Ga. 2020) (granting a preliminary injunction requiring state to conduct expanded review of optical scan hand-marked ballots); *Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019) (denying preliminary injunction mandating election officials to use hand marked ballots in upcoming election and granting preliminary injunction mandating election officials to use hand marked ballots in future elections).

163. *Black v. McGuffage*, 209 F. Supp. 889 (N.D. Ill. 2002) (denying most of the defendant’s motions to dismiss voting machinery challenges); *see also Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (finding an Equal Protection violation in use of punch card and central processed optical scan ballots because of their higher residual vote rates), vacated (after the state abandoned the challenged voting equipment), 473 F.3d 692 (6th Cir. 2007).

164. *McGuffage*, 209 F. Supp. at 901 (observing that unless election officials used the same voting equipment through all precincts, some voters would have a greater chance and others would have a lesser chance of their votes counting).

165. *Bush v. Gore*, 531 U.S. 98 (2000).

166. *Id.* (refusing to dismiss defendant’s motion to dismiss plaintiff’s substantive due process claim).

167. *See, e.g.*, Raj Karan Gambhir & Jack Karsten, *Why Paper is Considered State-of-the-Art Voting Technology*, BROOKINGS (Aug. 14, 2019) <https://www.brookings.edu/blog/techtank/2019/08/14/why-paper-is-considered-state-of-the-art-voting-technology/>.

168. *See, e.g.*, COLO. REV. STAT. ANN. § 1-5-802; FLA. STAT. ANN. § 101.56075; GA. CODE ANN. §21-2-300; IOWA CODE ANN. § 52.2; MICH. COMP. LAWS § 168.795; MISS. STAT. ANN. § 206.80; MONT. CODE ANN. § 13-17-103; N.H. REV. STAT. § 656:1-a; N.H. REV. STAT. § 656:41; N.M. STAT. ANN. § 1-9-7.1; OR. REV. STAT. § 246.560; R.I. GEN. LAWS § 17-19-3; S.D. CODIFIED LAWS § 12-17B-1; VT. STAT. ANN. tit. 17, § 2478, § 2481, § 2493; WASH. REV. CODE § 29A.12.085.

paper trail.<sup>169</sup> However, it is not necessarily an equal protection clause violation when states use electronic voting systems that do not provide a paper trail and also allow for paper ballots.<sup>170</sup>

Straight-ticket, or straight-party, voting enables voters to vote for an entire party's roster of candidates by pushing one button or making one ballot mark. Only seven states<sup>171</sup> allow for straight-ticket voting, with a few abolishing the practice in recent years.<sup>172</sup> In some states, the secretary of state does not have the authority to unilaterally reinstate straight-ticket voting in a general election.<sup>173</sup>

## VIII. RESCHEDULING AN ELECTION DUE TO DISASTER

Sometimes disasters that strike before Election Day<sup>174</sup> lead to requests to postpone an upcoming election.<sup>175</sup> State law may govern when an election can be postponed,<sup>176</sup> who has the authority to postpone it,<sup>177</sup> and how quickly the

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169. See, e.g., ALASKA STAT. § 15.15.032 (c); ARIZ. REV. STAT. § 16-446; ARK. CODE ANN. § 7-5-301, § 7-5-532; § 7-1-101, § 7-5-504, § 7-5-532; WEST'S ANN. CAL. ELEC. CODE § 19270; CONN. GEN. STAT. ANN. § 9-242; D.C. CODE § 1-1001.09; HAW. REV. STAT. § 16-42; IND. CODE § 34-2409; 21-A; ME. STAT. tit. 14, § 812; MD. CODE, ELEC. LAW § 9-102; NEV. REV. STAT. § 293.2696, § 293B.084, § 293B.103; N.J. STAT. ANN. 19:48-1; N.Y. ELECTION LAW § 7-202 (McKinney 2021); OHIO REV. CODE ANN. § 3506.10; UTAH CODE ANN. § 20A-5-302; W. VA. CODE § 3-4A-9; WISC. STAT. ANN. 5.91. See also Voting System Paper Trail Requirements, NAT'L CONF. OF STATE LEGISLATURES (June 27, 2019), <https://www.ncsl.org/research/elections-and-campaigns/voting-system-paper-trail-requirements.aspx>.

170. See *Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011).

171. Alabama, Indiana, Kentucky, Michigan, Nevada, Oklahoma, and South Carolina. See Straight Ticket Voting, NAT'L CONF. OF STATE LEGISLATURES (June 25, 2021), <https://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx>.

172. See S.B. 421, 2019-2020 Leg., Reg. Sess. (Pa. 2019); H.B. 70, 63rd Leg., Gen. Sess. (Utah 2020).

173. *Unite New Mexico v. Oliver*, 438 P.3d 343 (N.M. 2019).

174. See *infra* Chapter 7: Election Day for additional information on disasters which strike on Election Day.

175. See Ed Anderson, *Blanco seeking to put off election; Statewide ballot not feasible now, she says*, TIMES-PICAYUNE (New Orleans), Jan. 25, 2006, at 5 (Hurricane Katrina in Louisiana); Jane Sutton, *Primary election delayed in devastated Dade*, UNITED PRESS INTERNATIONAL, Aug. 29, 1992 (Hurricane Andrew in Florida); Bill Moss, *Election is still on*, ST. PETERSBURG TIMES (Florida), Aug. 27, 1992, at 4B (Hurricane Andrew in Mississippi and Hurricane Hugo in North Carolina). See also John C. Van Gieson, *Dade Sues to Delay Tuesday's Election; Plaintiffs Say Thousands Wouldn't be Able to Vote—Judge Hears Arguments*, ORLANDO SENTINEL (Florida), Aug. 29, 1992 at A6 (discussing disagreements between the Secretary of State who wanted to hold elections as scheduled and county elections supervisor who wanted them postponed one week).

176. VA. ELEC. CODE § 24.2-603.1 (2021).

177. *Id.*

election must be rescheduled.<sup>178</sup> State or local law may also specify how the offices to be voted on during the postponed election will be filled in the interim.<sup>179</sup>

If a disaster<sup>180</sup> strikes shortly before an election, the election's outcome may be altered no matter what action is taken. The disaster may affect the logistics of registering qualifying voters before an election<sup>181</sup> or holding an orderly election as scheduled because polling places may be unusable,<sup>182</sup> election workers may be unavailable,<sup>183</sup> and voters may be displaced or otherwise unable to get to the polls.<sup>184</sup> If the election is postponed, however, voter turnout may still be low,<sup>185</sup> and poorly-funded candidates disadvantaged.<sup>186</sup> In the absence of controlling statutes or case law, courts that hear cases concerning the scheduling of elections following a disaster may need to balance competing concerns of voter disenfranchisement and concerns related to the government's legitimacy if the election's postponement leads to office holders carrying over past their terms because their successors have not been elected.

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178. *Id.*; see also Chapter 7: Election Day for additional information. See also Press Release, US States News, Gov. Barbour Postpones Special Election, Sept. 3, 2006 (governor postponed elections post-Katrina).

179. Frank Donze & Robert Scott, *Officials May Stay on Past Normal 4 Years; Feb. 4 Election is Latest Storm Victim*, TIMES-PICAYUNE (New Orleans), Dec. 3, 2005, at National 1 (noting city law extended the terms of the current officeholders).

180. Despite the threat of cyber-attacks, most state emergency statutes don't directly address the possibility of cyber-attacks. See Election Emergencies, NAT'L CONF.OF STATE LEGISLATURES (Sept. 9, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx>. See also Amanda Zoch, *Don't Sleep on Election Cybersecurity (Cyber Criminals Won't)*, NAT'L CONF.OF STATE LEGISLATURES (Apr. 6, 2021), <https://www.ncsl.org/research/elections-and-campaigns/don-t-sleep-on-election-cybersecurity-cyber-criminals-won-t-magazine2021.aspx>.

181. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 574 (2018) (noting that 2016's Hurricane Matthew prevented an estimated "hundred thousand aspiring eligible Florida voters' from registering to vote in the 2016 election").

182. *Id.* (noting that even six months after Katrina, 202 of 442 voting precincts in New Orleans remained destroyed and numerous election commissioners "had not reported in with the clerk.").

183. *Id.* at 553 (noting that police, who were required to be at polling places, were called away to aid the Ground Zero evacuation after the 2001 September 11<sup>th</sup> terrorist attack which occurred roughly three hours after the polls opened for the state's primary elections).

184. *Id.* (noting that after the 2001 September 11th terrorist attack, public transportation was interrupted and voters and inspection workers were not able to get to the polls).

185. Even years after Hurricane Katrina struck, New Orleans was missing between 27% and 48% of its voting population. Maya Roy, *The State of Democracy After Disaster: How to Maintain the Right to Vote for Displaced Citizens*, 17 S. CAL. INTERDISC. L.J. 203, 205 (2007).

186. Morley *supra* note 181 at 557 (noting that New York City's campaign finance board candidates by precluded publicly-funded candidates from spending any remaining funds in the weeks leading up to the new election date, except to recreate their election day operations).



## IX. CONCLUSION

States have a clear interest and duty in the appropriate administration of local, state, and federal elections. This includes ballot creation and layout, choice and upkeep of voting technology, selection of polling places, and training of election workers. All of these responsibilities are managed in different ways across the states. As described above, courts are frequently called upon to address election administration issues to ensure that elections are administered in accordance with state and federal law.

Courts are frequently called upon to address election administration issues to ensure that elections are administered in accordance with state and federal law.



## CHAPTER 7

# The Role of Courts on Election Day

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## CHAPTER 7: THE ROLE OF COURTS ON ELECTION DAY

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# I. INTRODUCTION

Published opinions from election day litigation are surprisingly sparse. A few reasons explain why. First, Election Day irregularities often do not surface until after the polls have closed, such as when a voting machine malfunction is only discovered after polls have closed.<sup>1</sup> Second, local election boards, voter registrars, the secretary of state, or other election officials may resolve Election Day problems, thus keeping them out of court.

The third reason for the paucity of reported Election Day cases is that Election Day court decisions may not be decided by courts of record and the fourth is because courts of record that do hear and decide Election Day lawsuits may not issue written opinions. It is also worth mentioning that fewer and fewer voters—even before the 2020 COVID-19 pandemic—cast ballots on Election Day, substantially reducing the pressure on voting during that limited window.<sup>2</sup>

A number of events can complicate elections during the hours the polls are open on Election Day, such as:

- polls can open late or close early,
- eligible voters can be turned away at the polls,
- long lines can form and lengthy waits can occur,
- conduct in or near the polling place can impede the voting process, and
- disasters or emergencies can strike and interfere with voting.

These events may cause petitioners to seek remedies in court on Election Day, including (but not limited to):

- an order that the polls open or reopen,

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1. For example, in 2019, officials in Northampton County, Pennsylvania, discovered shortly after the polls closed that the electronic voting machines had severely underreported votes for one candidate after conducting a count of the paper backups. Nick Corasantini, *A Pennsylvania County's Election Day Nightmare Underscores Voting Machine Concerns*, N.Y. TIMES (Nov. 30, 2019), <https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html>. The issue was recognized after the candidate received a near impossibly low vote total. *Id.* If this electronic failure had been known to voters during the election, voters might have been able to sue to vote by paper ballots instead of using the faulty voting machines. *See also*, Shannon v. Jacobowitz, 301 F. Supp. 2d 249, 258 (N.D.N.Y. 2003) (issuing a preliminary injunction enjoining the certification of the winning candidate in response to a voting machine malfunction); Buonanno v. Di Stefano, 430 A.2d 765, 771-72 (R.I. 1981) (denying the candidate's petition of certiorari and affirming the special election ordered by the Board of Elections in response to voting machine malfunctions during the voting period).

2. *See* Deidre McPhillips, *Voting by Mail Had Been on the Rise Before Coronavirus*, U.S. NEWS (May 21, 2020), <https://www.usnews.com/news/elections/articles/2020-05-21/voting-by-mail-had-been-on-the-rise-before-coronavirus>.

- an order that the petitioner or a class of potential voters be allowed to vote,
- an order extending polling hours,
- an order enforcing proper conduct at the polling location, or
- an order suspending or postponing—or reviewing a government official’s decision to suspend or postpone—the election.

In the absence of specific statutory authorization, courts may find remedial options limited. In general, the court’s power to fashion Election Day relief may be limited to its power to issue injunctions and writs of mandamus. These remedies are not interchangeable. Injunctions are generally used to restrain action while mandamus is used to compel the performance of a specific legal duty. In addition, injunctive relief is commonly available against private parties as well as government officials, while election-related mandamus actions are reserved for government officials who refuse to perform an officially required duty.

This Chapter begins with a discussion of the most common remedial requests courts receive on Election Day and concludes with brief discussions of two special considerations for courts as they hear Election Day cases. The first special consideration involves the pressure courts experience by the sense of urgency attendant in Election Day disputes and the second is how to best communicate courts’ Election Day rulings to ensure that relief granted is implemented as required.

In general, the court’s power to fashion Election Day relief may be limited to its power to issue injunctions and writs of mandamus.

## II. ELECTION DAY REMEDIES SOUGHT

Individuals may seek remedies for Election Day harms for a variety of reasons. This section describes some but by no means all of the most common types of Election Day remedies sought.

### A. Order to Open or Reopen the Polls

State statutes establish the times that polls must open and close<sup>3</sup> and election officials must comply with these statutorily-mandated opening and closing times.

3. *E.g.*, VA. CODE ANN. § 24.2-603; OHIO REV. CODE § 3501.32; ARIZ. REV. STAT. ANN. § 16-565.

Despite these requirements, polls may fail to open on time or may close prematurely.<sup>4</sup>

Voters can be disenfranchised if their polling place is not open as legally required. If the polls fail to open or close early, voters, candidates, or political parties have standing to file a lawsuit requesting that the court issue a writ of mandamus or an injunction to compel election officials to obey the statutory opening and closing times.<sup>5</sup> Unless specific statutory remedies exist to address late-opening, non-opening, or early-closing polls,<sup>6</sup> courts limit their remedies to ordering officials to act within the scope of their official duties.<sup>7</sup>

Many state statutes require that polls should remain open to allow voters waiting in line to vote, but note that election officials should not allow new voters to join the line after the statutory closing time has passed.<sup>8</sup> If such a statute is in place and election officials permit additional voters to join the existing line of voters after the poll's official closing time, petitioners may ask the court to issue a writ of mandamus or an injunction to halt this practice, which courts typically issue

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4. During the November 2020 general election, several polling locations in Georgia opened late due to various reasons including issues with workers and technical problems. Jason Braverman, *These Precincts Will Stay Open Past 7 p.m. Due to Issues Earlier in the Day*, 11 ALIVE (Nov. 3, 2020), <https://www.11alive.com/article/news/politics/elections/georgia-polling-locations-staying-open-late-due-to-problems/85-d59cfef7-7445-4afb-a89c-40ec68c9dc63>.
  5. NAACP v. Gwinnett Cnty. Bd. of Registration and Elections, 446 F. Supp.3d 1111, 1118-19 (N.D. Ga. 2020) (holding that an organization has standing through either division of resources or associational standing theory); Jacksonville Coalition for Voter Protection v. Hood, 351 F. Supp.2d 1326, 1331 (M.D. Fla. 2004) (“an association or organization has standing to assert claims based on injuries to its members”). *But see* Anderson v. Raffensperger, 497 F. Supp.3d 1300, 1309 (N.D. Ga. 2020) (individual plaintiffs failed to establish an imminent injury—the possibility of long lines without evidence was not enough).
  6. *E.g.*, VA. CODE ANN. § 163-166.01 (if the polls open late, the State Board of Elections can grant an extension equal to the time of delay); S.D. CODIFIED LAWS § 12-2-4 (the superintendent of an election precinct may request an extension of the polling hours in the face of unforeseen events constituting an election emergency, including voting machine failures).
  7. *See, e.g.*, Southerland v. Fritz, 955 F. Supp. 760, 762 (E.D. Mich. 1996) (denying a preliminary injunction seeking to extend voting hours after delays were caused by malfunctioning polling machines).
  8. *See* VA. CODE ANN. § 163-166.01 (“No voter shall be permitted to vote who arrives at the voting place after the closing of the polls.”); CONN. GEN. STAT. ANN. § 9-174 (“No elector shall be permitted to cast such elector's vote after the hour prescribed for the closing of the polls in any election unless such elector is in line at eight o'clock p.m. An election official or a police officer of the municipality, who is designated by the moderator, shall be placed at the end of the line at eight o'clock p.m. Such official or officer shall not allow any electors who were not in such line at eight o'clock p.m. to enter such line.”); MINN. STAT. ANN. § 204C.05 (“No individual who comes to the polling place or to a line outside the polling place after the time when voting is scheduled to end shall be allowed to vote.”).

unless state statutes explicitly authorize election officials to extend polling hours.<sup>9</sup> If a court decides against issuing the requested relief, it may consider requiring late-coming voters to vote by provisional ballot so the question of the validity of such ballots can be determined by the appropriate decision maker.<sup>10</sup>

## B. Order Directing Election Officials to Permit a Voter to Vote

The duty of election officials to ensure fair, honest, and lawful elections includes the responsibility to ensure that only eligible voters vote.<sup>11</sup> State statutes require election officials (and sometimes party and/or candidate-designated challengers) to challenge suspected ineligible voters who present themselves to vote.<sup>12</sup> Voters deemed ineligible after they have been given an opportunity to defend their eligibility are not allowed to cast a regular ballot although, as discussed below, they are likely eligible to vote by provisional ballot.

A variety of circumstances prompt challenges to a voter's eligibility. The voter may, for example, fail to produce required identification.<sup>13</sup> While voter

While voter identification requirements vary from state to state, many states require *all* voters to show identification each time they vote in person.

9. *E.g.* State ex rel. Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410 (Mo. Ct. App. 2000); MINN. STAT. ANN. § 204C.05 (The local election official may extend polling place hours to accommodate voters that would have been in line at the regular polling place if the polling place had not been combined or moved on election day pursuant to section 204B.14, subdivision 2, or 204B.175. Polling place hours may be extended at the new polling place for one hour.); *contra* IC 3-11-8-8 (A county election board or a board of elections and registration does not have the power to extend the hours that the polls are to be open in any precinct or vote center of the county.”).
10. St. Louis Cnty. Bd. of Election Comm’rs v. McShane, 492 S.W.3d 177, 180 (Mo. Ct. App. 2016) (allowing provisional ballots, as long as they are sequestered from regular votes and only available to those who orally affirm they tried to vote during regular hours). *See* Southerland v. Fritz, 955 F. Supp. 760, 762 (E.D. Mich. 1996) (ordering an extension of absentee voting procedures rather than opening up the polls longer). *But see* Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410, 412 (Mo. Ct. App. 2000) (“[Circuit court judge] has no authority to authorize voters who did not come to the polls during the hours established by the legislature to participate in the election”).
11. 29 C.J.S. Elections § 113 (2022).
12. *See, e.g.*, 29 C.J.S. ELECTIONS §§ 113, 344; MICH. COMP. LAWS SERV. § 168.509aa (“The clerk shall instruct the board of election inspectors to challenge the voter at the first election at which the voter appears to vote”); *Dumstre v. Fisher*, 195 So. 25, 28 (La. Ct. App., Orleans 1940) (“Ordinarily, voters who receive assistance to which they are not entitled, or whose names are not on the poll list, or who are otherwise disqualified, should be challenged at the time they offer to vote”).
13. The Help America Vote Act (HAVA) mandates that states require first time voters for federal office who registered by mail, but did not submit identification with their registration form, to vote in person and present identification when they do. 42 U.S.C. § 15483(b) (Supp. IV 2004).

identification requirements vary from state to state, many states require *all* voters to show identification each time they vote in person.<sup>14</sup> A voter's eligibility may also be questioned if the voter's name does not appear in the poll book,<sup>15</sup> the voter registration database indicates the voter has already voted in the election,<sup>16</sup> or poll workers or a partisan challenger believe the voter fails to meet one or more voter qualification requirements.<sup>17</sup> Each state establishes its own voter qualification requirements,<sup>18</sup> subject to certain constitutional limitations.<sup>19</sup>

For primary elections, states can also require that voters be a registered member of the political party holding the primary, or an independent, if party rules allow independents to participate.<sup>20</sup>

14. *See Voter Identification Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> (noting that thirty-six states have voter ID requirements). Several states' photo identification requirements have been held unconstitutional on the grounds they violated equal protection guarantees or amount to an unconstitutional poll tax, to limited success. *See, e.g.*, *Holmes v. Moore*, 840 S.E.2d 244 (N.C. Ct. App. 2020); *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014); *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (blocking voter identification laws in Missouri); *Am. C.L. Union of Minnesota v. Kiffmeyer*, No. 04-CV-4653 MJR/FLN, 2004 WL 2428690 (D. Minn. Oct. 28, 2004). Courts have upheld voter identification laws in other cases. *See, e.g.*, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444* (2007); *Am. C.L. Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008).
15. North Dakota is the only state without a voter registration requirement. *See Voter Registration Deadlines*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2022), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration-deadlines.aspx> N.D. CENT. CODE § 16.1-01-04.1 (requiring only valid identification to receive a ballot for voting). However, North Dakota permits cities to impose their own registration requirements. N.D. CENT. CODE § 40-21-10 ("The governing body of any city may require the registration of voters in any election held or conducted within the municipality at such time and place or places as the governing body may designate."). Many states and the District of Columbia offer same day voter registration. *See Same Day Voter Registration*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.
16. *White v. Blackwell*, 418 F. Supp. 2d 988 (N.D. Ohio 2006) (granting an injunction against the state after a voter who requested, but did not receive an absentee ballot, was subsequently denied a ballot when she appeared at the polls to vote in person).
17. *See, e.g.*, UTAH CODE ANN. § 20A-3A-805; S.D. CODIFIED LAWS § 8-3-7; MICH. COMP. LAWS SERV. § 168.509CC.
18. *See supra* Chapter 5: State Regulation of Voters for additional information on voter eligibility standards.
19. *See* U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); U.S. Const. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); U.S. Const. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."). *See also supra* Chapter 5: State Regulation of Voters and Their Votes.
20. *See Clingman v. Beaver*, 544 U.S. 581 (2005) (holding that the state can prevent party from opening its primary to voters affiliated with other parties).



Although some states allow partisan poll watchers to initiate voter eligibility challenges,<sup>21</sup> the decision on whether or not the voter meets qualification requirements reside solely with election officials. Before election officials make their decision, the voter may be given an opportunity to establish her qualifications.<sup>22</sup> State law may require a voter who claims eligibility to vote in the face of a challenge to take an oath or make an attestation.<sup>23</sup> No matter the state procedure, the Help America Vote Act requires those voters to be given a provisional ballot.<sup>24</sup>

Before seeking judicial relief, a voter who has been denied the opportunity to vote may be able (or required) to pursue administrative remedies.<sup>25</sup> Alternately, the voter may be able to speak with or visit the local voter registrar or board of elections workers to resolve the situation that led to the voter being denied a regular ballot.<sup>26</sup>

Before seeking judicial relief, a voter who has been denied the opportunity to vote may be able (or required) to pursue administrative remedies.

## 1. Provisional Voting in Federal Elections

The federal Help America Vote Act (HAVA) requires local election officials to proactively offer provisional ballots to voters in federal elections when the voter claims to be registered and eligible to vote in the election, but:

- the voter's name does not appear on the precinct's voter registration list,<sup>27</sup>
- the voter's name appears on the voter registration list, but the voter's eligibility is nonetheless challenged by an election official,<sup>28</sup>

21. *E.g.* R.I. Gen. Laws § 17-19-22 (1956) (in Rhode Island, partisan poll watchers can challenge voters); N.J. STAT. ANN. 19:7-1 (political parties may appoint challengers).

22. *See, e.g.*, Mich. Comp. Laws Ann. § 168.509cc (West); Ga. Code Ann. § 21-2-230 (West).

23. *E.g.* N.H. REV. STAT. § 659:13 (challenged voters must execute a “challenged voter affidavit”); IND. CODE § 3-11-8-22.1 (certain challenged voter must execute a “challenged voter affidavit”); N.Y. ELECTION LAW § 8-504 (McKinney) (challenged voters in New York shall take an oath based on the grounds of the challenge).

24. 52 U.S.C.A. § 21082.

25. *E.g.* N.Y. ELECTION LAW § 8-506 (McKinney) (New York election law provides that a board of inspectors of election adjudicate challenges of absentee, military, special federal and special presidential ballots).

26. *See, e.g.*, CAL. ELEC. CODE § 14310(d) (West 2018) (“The Secretary of State shall establish a free access system that any voter who casts a provisional ballot may access to discover whether the voter's provisional ballot was counted and, if not, the reason why it was not counted”).

27. 52 U.S.C.A. § 21082(a).

28. *Id.*

- the voter is a first-time federal election voter *in that state*, registered to vote by mail, and neither included identification with the mail registration nor brought identification to the polls,<sup>29</sup> or
- the voter arrived at the polling place after the normal statutory poll closing time, but the polling place was still open because a court or other order extended its hours.<sup>30</sup>

If a voter who falls into one of the above categories signs an affirmation of eligibility, then HAVA allows the voter to cast a provisional ballot.<sup>31</sup> For this reason, few if any voters should be turned away from the polls during a federal election.<sup>32</sup>

However, prospective voters in federal elections, including primary elections, are ineligible for provisional ballots if (1) they refuse to sign the necessary affirmation, or (2) they do not claim they are eligible to vote in the precinct, even if they claim eligibility to vote elsewhere in the jurisdiction.<sup>33</sup>

Although HAVA provides a voter the opportunity to cast a provisional ballot, state law ultimately determines whether the voter has met the state's eligibility requirements for that vote to be counted.<sup>34</sup>

## 2. Provisional Voting in State Elections

HAVA sets provisional ballot eligibility for federal elections only.<sup>35</sup> State law may also authorize or require the use of provisional ballots in state and local elections,<sup>36</sup> but states have no obligation to provide provisional ballots in state and local elections. Prospective voters may, therefore, be turned away from the polls for apparent failure to meet voter eligibility requirements when only state and

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29. 52 U.S.C.A. § 21083(b).

30. 52 U.S.C.A. § 21082(c).

31. 52 U.S.C.A. § 21082.

32. For example, in 2004, a federal court held that HAVA required election officials to provide a provisional ballot to a prospective in-precinct voter whose absentee ballot never arrived. *White v. Blackwell*, 418 F.Supp. 2d 988 (N.D. Ohio 2006). The court issued a temporary injunction (later made permanent) requiring election officials to offer a provisional ballot to the voter and others similarly situated. *Id.* at 990 (holding that R.C. § 3509.09(B)(1) mooted the case, “but that Plaintiffs were still prevailing parties entitled to attorneys' fees.”).

33. *See Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (per curiam).

34. *See id.*; *Isabel v. Reagan*, 394 F.Supp.3d 966 (D.Ariz. 2019).

35. 52 U.S.C.A. § 21081(a).

36. *See Ohio Rev. Code Ann. § 3505.181* (detailing a number of circumstances in which voters qualify for provisional ballots, including those who requested absentee or armed forces absentee ballots but appear at the polls and those whose signatures do not match the signature on file).

local offices are on the ballot if state election law does not provide for provisional voting.<sup>37</sup>

### 3. Remedies for Denial of a Provisional Ballot

When a court finds a provisional ballot-eligible voter was denied the right to vote provisionally under applicable federal or state law, the court may issue an injunction ordering election officials to provide the voter a provisional ballot.<sup>38</sup> The court may also prevent election officials from denying provisional ballots to similarly situated voters.

#### C. Order Extending Polling Hours

Long lines at polling places may result in prospective voters leaving the polling place without voting, particularly if family or job commitments require them to leave. Although many state statutes require employers to provide their employees time off to vote,<sup>39</sup> the waiting time to vote may exceed the employee's time off.

Long lines and lengthy waits occur for a number of reasons. These include:

- higher than anticipated voter turnout,
- lengthy or confusing ballots,
- unfamiliarity with new voting equipment,
- power or equipment failures, and
- voter eligibility challenges.

Lengthy waits to vote can lead to lawsuits by political parties, candidates, or individuals who ask courts to extend polling hours to ensure all eligible voters may cast ballots.

Absent explicit statutory authority granting courts the ability to extend polling place hours,<sup>40</sup> courts generally refrain from ordering the polls to stay open longer

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37. Sometimes referred to as “conditional” ballots.

38. *See Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073 (N.D. Fla. 2004) (issuing a preliminary injunction requiring distribution of provisional ballots when voters are at the wrong polling place).

39. *See States That Require Employers to Grant Employees Time Off to Vote, 2020*, BALLOTPEDIA (2020), [https://ballotpedia.org/States\\_that\\_require\\_employers\\_to\\_grant\\_employees\\_time\\_off\\_to\\_vote,\\_2020](https://ballotpedia.org/States_that_require_employers_to_grant_employees_time_off_to_vote,_2020) (listing time off to vote statutes by states as of 2020).

40. *E.g.*, VA. CODE ANN. § 163-166.01 (if the polls open late, the State Board of Elections can grant an extension equal to the time of delay); S.D. CODIFIED LAWS § 12-2-4 (the superintendent of an election precinct may request an extension of the polling hours in the event of unforeseen events constituting an election emergency including voting machine failures).

than their statutorily set closing time.<sup>41</sup> Most, if not all, states have statutes that permit voting by voters waiting in line at the statutory closing time.<sup>42</sup> These statutes prevent the disenfranchisement of voters because of unexpected delays and long waits. However, judicial orders extending polling place hours without explicit legislative authority are typically reversed on appeal on grounds that the court exceeded its jurisdiction,<sup>43</sup> particularly if state law permits voting by those persons already in line at the statutory poll closing time.<sup>44</sup>

If a court does decide to extend polling hours, voters in a federal election who arrive at the polls after the normal closing time must vote by provisional ballot, and those ballots must be kept separate from other provisional ballots.<sup>45</sup> State statutes may contain similar provisional ballot requirements if judges extend polling hours in state and local elections.<sup>46</sup> Segregating these late-cast provisional

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41. See *Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 412 (Mo. Ct. App. 2000).

42. See, e.g., VA. CODE ANN. § 24.2-603 (“At 6:45 p.m. an officer of election shall announce that the polls will close in fifteen minutes. The officers of election shall list the names of all qualified voters in line before the polling place at 7:00 p.m. and permit those voters and no others to vote after 7:00 p.m.”); IOWA CODE ANN. § 49.74 (“Every voter who is on the premises of the voter’s precinct polling place at the time the polling place is to be closed for any election shall be permitted to vote in that election.”); TEX. ELEC. CODE ANN. § 41.032 (“A voter who has not voted before the time for closing the polls is entitled to vote after that time if the voter is inside or waiting to enter the polling place at 7 p.m.”); N.C. GEN. STAT. ANN. § 163-166.01 (“If any voter is in line to vote at the time the polls are closed, that voter shall be permitted to vote.”).

43. *In re 2016 Primary Election*, 836 F.3d 584 (6th Cir. 2016) (holding that a preliminary injunction from the United States District Court for the Southern District of Ohio requiring polling places to remain open for an additional hour was invalid because the court was without jurisdiction to issue an order without a plaintiff). See *Bush-Cheney 2000*, 34 S.W.3d 410 (holding that lower court must follow and apply the law as written by the legislature, which acted within its legislative power when it specified polling hours); *Republican Party of Ark. v. Kilgore*, 98 S.W.3d 798 (Ark. 2002) (per curiam) (holding that the court exceeded its jurisdiction in extending polling hours because state law does not authorize this court action); *but see St. Louis County Board of Election Commissioners v. McShane*, 492 S.W.3d 177 (Mo. Ct. App. 2016) (extending voting hours at polling locations and distinguishing from its *Bush-Cheney 2000, Inc.* decision because “[a]lthough we are obligated to follow and apply the law as written by the legislature, even Bush–Cheney recognized that we are not so obligated if the law is constitutionally infirm.”; “a writ of mandamus is proper where it is necessary to prevent injustice or great injury”).

44. See *Bush-Cheney 2000, Inc.*, 34 S.W.3d 410 (Mo. Ct. App. 2000) (extending the polling hours only benefited individuals who were not entitled to vote because they did not come to the polls during the voting hours set by the legislature because state statutes already allowed those already in line at the poll closing time to vote).

45. 52 U.S.C.A. § 21082.

46. See e.g., N.M. STAT. ANN. § 1-12-27.1 (“If polling hours are extended by court order or any other order pursuant to a state law in effect at least ten days before the date of that election, during the extended hours, a voter shall vote only on a provisional paper ballot.”); VA CODE ANN. § 24.2-653.2 (“Whenever the polling hours are extended by an order of a court of competent jurisdiction, any ballots marked after the normal polling hours by persons who were not already in line at the time the polls would have closed, notwithstanding the court order, shall be treated as provisional ballots under this section.”); LA. REV. STAT. ANN. § 18:566.1 (“If the poll hours in an election for federal office are extended...an individual who votes during the extension shall vote by provisional ballot...”).

ballots facilitates voiding them if the court order extending the polling hours is vacated or overturned on appeal.

If requested, courts can issue injunctive relief or writs of mandamus requiring election officials to obey state statutes permitting voters in line by the poll's normal closing time to cast ballots.<sup>47</sup> Also, if requested, courts can issue injunctive relief or writs of mandamus to prevent election officials from allowing additional voters to join the line after the official poll closing time.<sup>48</sup>

If a court believes voters warrant relief from long polling place lines, the court's equitable powers may permit it to order election officials to offer voters the option of voting by paper ballot rather than waiting to vote on voting equipment. A federal district court opted for this remedy during the 2004 election when voters in several Ohio counties experienced lengthy waits because the number of voters exceeded the capacity of the voting equipment.<sup>49</sup> State statutes may also authorize paper ballot voting when voting machines malfunction or experience other problems,<sup>50</sup> and judges may be able to order election officials to comply with such statute upon refusal to do so.

## **D. Order Enforcing Proper Conduct at the Polling Location**

One aspect of the state's regulatory power over elections involves the regulation of polling place conduct. Although such regulations vary by state, they are generally designed to:

- guard against disruptions to an election and
- prevent voter intimidation, harassment, coercion, and bribery from threatening the integrity of an election.

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47. See *Kinney v. Putnam C'ty Canvassing Bd.*, 253 So.3d 1254, 1255-56 (holding that the ballots cast by people after close but who were in line by the close were not in dispute). *But see* *Boone v. Humphrey*, 349 S.W.2d 822 (Ct. App. Ky. 1961) (holding that allowing voters in line at the closing to vote violated statute regarding poll closing times).

48. See *Mitchell v. Wolcott*, 83 A.2d 762, 765 (Del. 1951) (allowing voters to vote past statutory deadline was a clear election law violation); *Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000) (holding that a circuit court judge could not extend the hours of voting, but that people already in line when the polls closed had a right to vote); *Southerland v. Fritz*, 955 F. Supp. 760 (E.D. Mich. 1996) (holding that malfunctioning of polling machines resulting in long lines was not reason enough to extend voting hours beyond their statutory limitation).

49. *Ohio Democratic Party v. Blackwell*, No. C2 04 1055, slip op. (S.D. Ohio Nov. 2, 2004) (ordering paper ballots be offered to voters who waited in hours-long lines because of too few voting machines).

50. See, e.g., MO. ANN. STAT. § 115.265 (allowing voting by paper ballots if inoperable voting machine cannot be replaced or repaired).

States regulate polling place conduct by limiting both the types of activities allowed<sup>51</sup> and the proximity to the polling place<sup>52</sup> wherein only certain activities are permitted.<sup>53</sup>

Election Day challenges to polling place conduct regulations typically involve:

- constitutional challenges to polling place activity restrictions,
- enforcement of electioneering activities,
- poll watchers' and election officials' conduct,
- restrictions on the media's ability to interact with voters.

## 1. First Amendment Challenges

Although it is unlikely courts will be asked to hear substantive constitutional challenges on Election Day because these types of lawsuits are usually filed in advance of the election,<sup>54</sup> it is possible a state court could hear a constitutionally-based challenge on Election Day.

Constitutional challenges may attack election regulations in their entirety, or they may attack the regulation's applicability to the specific circumstances of the election. In addition to a federal constitutional challenge, the state's constitution may support a constitutional challenge.<sup>55</sup>

When analyzing First Amendment challenges to a state's polling place regulations, courts first determine the nature of the forum—the public place in which the speech occurs—which controls the appropriate level of scrutiny to apply to the state regulation. For example, courts have held that polling places themselves are nonpublic forums, at least on Election Day, and restrictions on otherwise

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51. See, e.g., ALASKA STAT. § 15.15.170 (prohibiting influencing voters); 15 DEL. CODE ANN. tit. 15, § 4942 (prohibiting wearing anything referring to issues, candidates, or partisan topics); see also *Electioneering Prohibitions*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx>.

52. The regulated area adjacent to polling place entrances or exits is commonly called an “electioneering-free” or “contact-free” buffer zone.

53. *Id.*; *Electioneering Prohibitions*, *supra* note 51.

54. Except for “as applied” constitutional challenges brought by individuals who were asked to refrain from wearing or carrying campaign-related materials inside the polling place or who were denied entry if they refused to comply with the request. See, e.g., *Schirmer v. Edwards*, 2 F.3d 117, (5th Cir. 1993) (finding Plaintiffs were rightfully turned away from voting because their clothing advertised the recall of the state governor which violated Louisiana's 600-foot campaign-free zone.).

55. See *Picray v. Sec'y of State*, 916 P.2d 324 (Or. Ct. App. 1996) (overturning electioneering statute on state constitutional grounds).

protected speech are constitutional if they are reasonable in light of the purpose served by the forum.<sup>56</sup>

Courts have generally agreed that the outside of the polling place is a public forum, however, the Supreme Court has said that, under some circumstances, the sidewalks and parking areas outside of polling locations may be considered nonpublic fora.<sup>57</sup> Polling place speech restrictions targeting speech that interferes with “the act of voting itself,” are evaluated under a state-friendly strict scrutiny analysis.<sup>58</sup> Generally, restrictions on Election Day speech that target voters at the polls immediately *before* they vote—polling place electioneering—are permitted if the speech regulation does not “significantly impinge on constitutionally protected rights.”<sup>59</sup> However, at least one court has held this lesser standard does not apply to state regulation of exit polling because exit polling occurs *after* the voter has voted and does not implicate the voting-integrity concerns that motivate electioneering restrictions.<sup>60</sup>

Constitutional challenges to electioneering-free buffer zone statutes frequently attack the size of the buffer zone, claiming it is so large that it restricts too much protected speech. The Supreme Court has found that some amount of electioneering-free buffer zone is necessary to protect voters from intimidation and to preserve the election’s integrity.<sup>61</sup> These buffer zones, while typically permitted, become unconstitutional at some unspecified size<sup>62</sup> and statutes that severely restrict speech and lack sufficient state justification—such as buffer

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56. In 2018, the Supreme Court held that a Minnesota Statute prohibiting individuals from wearing “political” apparel inside a polling place violated the First Amendment because the restriction was unreasonable, providing no “objective, workable standards” guiding its enforcement. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (evaluating this law as a speech restriction in a nonpublic forum, which permits reasonable content-based restrictions on speech).

57. *See Burson*, 504 U.S. at 197 (referring to outside the polling place as a “quintessential” public forum). *Id.* at 198. *See also* *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004).

58. *Burson*, 504 U.S. at 209 n.11. This modified burden of proof means that in some instances involving state regulation of First Amendment protections, the state does not need to empirically demonstrate that the boundary is perfectly tailored to counter voter intimidation or election fraud. *Id.* at 191.

59. *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (emphasis omitted)).

60. *Id.*

61. *Id.* at 206.

62. *Id.* at 210-11 (noting that at some “measurable distance” the burden would be impermissible, but also noting the Court’s general reluctance to establish “litmus-paper tests” separating valid from invalid state regulation of elections) (citations omitted).

zones that restrict speech in private homes and businesses<sup>63</sup> or on adjacent streets and sidewalks<sup>64</sup>— have been found to be unconstitutional.

Courts have not established a bright-line rule for determining if the size of a post-voting no-contact zone satisfies constitutional standards.<sup>65</sup> Thus, restrictions on third-party non-electioneering speech directed towards people who have already voted and who are outside the polling place are generally constitutional in the absence of demonstrated voter intimidation, harassment, or threats that cannot be addressed through statutes that prohibit disruptive conduct at the polls.<sup>66</sup> In jurisdictions where restrictions on exit polling are upheld, courts may enjoin individuals who are conducting exit polling from continuing to do so.<sup>67</sup>

State statutes that specifically target media activities at the polls generally fail strict scrutiny analysis.<sup>68</sup> Content-based regulations undergo strict scrutiny and must be narrowly drawn and necessary to serve a compelling state interest to

Courts have not established a bright-line rule for determining if the size of a post-voting no-contact zone satisfies constitutional standards.

63. *Clean-up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985).

64. *See Fla. Comm. for Liab. Reform v. McMillan*, 682 F. Supp. 1536, 1541 (M.D. Fla. 1988). Content-based speech on streets and sidewalks can be restricted, but the state interest must be compelling, and the restriction narrowly tailored. *Id.* at 1541-42. If content-neutral, the restriction must concern reasonable time, place, and manner. *Id.* at 1543. Here, the proffered state interest was not compelling, the restriction was not narrowly drawn nor was it content neutral. *Id.* at 1543-44.

65. *See, e.g., Am. Broad. Co., Inc. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006) (declaring the state could not bar exit polling within 100 feet of the polling place exit because the area was a traditional public forum); *CBS Broad., Inc. v. Cobb*, 570 F. Supp. 2d 1365 (S.D. Fla. 2006) (same); *Am. Broad. Cos., Inc. v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 WL 3149365 (D. Nev. Nov. 1, 2006) (same); *Am. Broad. Cos., Inc. v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009) (same); *Nat'l Broad. Co., Inc. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (declaring both a 200-foot and a 25-foot boundary unconstitutional); *Nat'l Broad. Co., Inc. v. Cleland*, 697 F. Supp. 1204 (N.D. Ga. 1988) (holding unconstitutional a 250 ft. exit poll ban).

66. *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984); *Beacon Journal Publ'g Co., Inc. v. Blackwell*, 389 F.3d 683, 685 (6th Cir. 2004); *see also Cleland.*, 697 F. Supp. 1204 (finding existing electioneering statutes would cover activities state wished to discourage). *See CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006) (noting that the statute in question was not narrowly drawn because it only prohibited exit polling and interviews with voters, even if the voters wished to talk and did not prohibit interviews with non-voters within the same area, nor did it prohibit singing a college fight song within its borders).

67. For examples of courts evaluating the constitutionality of exit polling restrictions, *see generally CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006); *ABC v. Wells*, 669 F. Supp. 2d 483 (D.N.J. 2009); *Citizens for Police Accountability Pol. Comm. v. Browning*, 572 F.3d 1213 (11th Cir. 2009).

68. *See Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984); *Beacon Journal Publ'g Co., Inc.*, 389 F.3d at 685; *see also Cleland*, 697 F. Supp. 1204 (finding existing electioneering statutes would cover activities state wished to discourage).



survive.<sup>69</sup> A state statute regulating third party contact with voters is not content-neutral if it restricts particular viewpoints or prohibits discussion of particular topics.<sup>70</sup> States do not have a compelling interest in preventing the media from projecting the election’s outcome.<sup>71</sup> In addition, state regulatory statutes cannot be enforced against the media in an attempt to obviate purely speculative harms.<sup>72</sup> In short, the media has both a right to engage voters after they have voted and a right to publish the results.

One area of election law relating to third party conduct at the polls that appears to be underdeveloped is the extent that private landowners can restrict electioneering or media conduct on their properties as a part of Election Day activities. One Ohio court upheld the right of the private landowners to restrict access to petition circulators who were outside the statutory buffer zone but who remained on their private property.<sup>73</sup>

In an “as applied” challenge, the petitioner does not challenge the statute’s underlying constitutionality. Instead, the challenger claims the electioneering regulation cannot constitutionally restrict the action against, or the circumstances in which, it was enforced. For example, voters have challenged electioneering statutes’ applicability to voters who wear campaign-related clothing inside the polling place.<sup>74</sup>

Regardless of the nature of the constitutional challenge, courts may prefer to enjoin its continued Election Day enforcement if the petitioner meets the criteria for temporary injunctive relief and has requested that remedy rather than declare

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69. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015).

70. *Burson v. Freeman*, 504 U.S. 191, 197 (1992). *See Nat’l Broad. Co., Inc. v. Colburg*, 699 F. Supp. 241 (D. Mont. 1988) (striking down statute as an unconstitutional contest-based restrictions on exit polling because the only political or election-related speech prohibited within 200 feet of polling places were exit polls).

71. *Daily Herald Co. v. Munro*, 758 F.2d 350 (9th Cir. 1984) (noting the lower court found the state’s claimed interest in protecting polling place decorum was a pretext and the real goal was to prevent early release of election projections).

72. *Beacon Journal Publ. Co. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004) (prohibiting enforcement of an anti-loitering statute against exit pollsters when the disruption the statute allegedly addressed was purely speculative).

73. *See UFCW Local 1099 v. City of Sidney*, 364 F.3d 738, 750 (6th Cir. 2004) (holding limited use of the inside of the building as a polling place did not transform all the outside space into a public forum).

74. *See, e.g., id.* (challenging a Minnesota law banning individuals from wearing a “political badge, political button, or other political insignia” inside a polling place on Election Day); *Marlin v. D. C. Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001) (challenging the Election Board’s enforcement of anti-electioneering statute against voter who wore a campaign bumper sticker on his shirt).

the statute or its application unconstitutional.<sup>75</sup> A temporary injunction, rather than a hasty declaration of unconstitutionality prevents additional immediate harm while postponing the final decision until after a full evidentiary hearing and time for thoughtful reflection.

Unconstitutional statutes are struck down and their enforcement prohibited. In some instances, courts have prohibited enforcement to the extent a statute violates a particular constitutional right.<sup>76</sup>

## 2. Enforcement of Electioneering Activities

Restrictions on polling place electioneering activities are the primary method states use to regulate voter-targeted activities on Election Day. Electioneering, which seeks to persuade voters to vote for or against a particular candidate or ballot measure, usually consists of:

- displaying or waving signs,<sup>77</sup>
- distributing campaign literature or partisan sample ballots,<sup>78</sup>
- exhorting arriving voters to vote a particular way,<sup>79</sup> and
- demonstrating support for a particular candidate or ballot measure by wearing campaign-related clothing, buttons, or other paraphernalia.<sup>80</sup>

Electioneering activities also include circulating petitions to gather the necessary support to place a candidate or ballot measure on the ballot in a future election.

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75. Injunctive relief includes temporary restraining orders, temporary injunctions, and permanent injunctions. A temporary restraining order or temporary injunction may be available if the petitioner demonstrates (1) a likelihood of success on the merits, (2) more harm will accrue to the petitioner by denying the order than will accrue to the defendant by granting it, and (3) the public will not be harmed if the order is issued. *See Am. Broad Co., Inc. v. Blackwell*, No. 1:04 750, slip. op. (S.D. Ohio Nov. 2, 2004) (adding the additional requirement that the injunction serve the public interest to the requirements listed above).

76. *See, e.g., Nat'l Broad. Co. v. Cleland*, 697 F. Supp. 1204,1217 (N.D. Ga. 1988) (permanently enjoining the operation of Georgia's electioneering statute beyond 25 feet for individuals conducting exit polls); *ABC v. Blackwell*, 479 F. Supp. 2d 719, 743 (S.D. Ohio 2006) (permanently enjoining officials from enforcing loitering laws in accordance with the Secretary of State's legislative interpretation which effectively prohibited exit polls within 100 feet of polling areas).

77. *See e.g., Tex. Code Ann. § 85.036(f)(2)* (2013) (“‘Electioneering’ includes the posting, use, or distribution of political signs or literature.”).

78. *Id.*

79. *See e.g., Utah Code Ann. § 20A-3a-501(1)(a)* (2020) (“‘electioneering’ includes any oral, printed, or written attempt to persuade persons to refrain from voting or to vote for or vote against any candidate or issue.”).

80. *See e.g., Ind. Code Ann. § 3-14-3-16* (2021) (“‘electioneering’ means . . . wearing or displaying an article of clothing, sign, button . . .”).

States typically regulate electioneering activities by statute establishing electioneering-free buffer zones around the polls in which all electioneering activity is prohibited.<sup>81</sup> Most states define the activities they consider electioneering,<sup>82</sup> while some limit the types or presence of campaign-related materials that can be carried or worn inside the polling place.<sup>83</sup> However, in 2018 the Supreme Court held unconstitutional blanket bans on wearing “political” paraphernalia inside of polling places without further defining the term and providing standards with which election officials can determine what falls within the ban.<sup>84</sup>

Officials may be accused of overzealous enforcement, such as when electioneering laws are enforced outside of designated “campaign-free zones.”<sup>85</sup> Officials may also be accused of lax enforcement if the delineated buffer zone is smaller than the statute specifies or if supporters of some candidates or ballot measure positions are campaigning inside the electioneering-free zone.<sup>86</sup>

Upon a petitioner’s request and proper showing, courts may issue a temporary injunction, restraining order, or preliminary injunction to prevent or enforce electioneering statutes within the polling place buffer zone.<sup>87</sup>

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81. *See e.g.*, N.Y. Elec. Law § 17-130(4) (buffer zone of 100 feet from the building).
82. *See e.g.*, AS § 15.15.170 (prohibited activities include soliciting votes and influencing voters); La. Stat. Ann. § 18:1462 (prohibited activities include circulating petitions and loitering); Nev. Rev. Stat. § 293.740 (prohibited activities include campaign apparel and materials and projecting sounds referring to candidates or issues).
83. *See e.g.* A.C.A. § 7-1-103(8) (prohibitions include “(d) Displaying a candidate's name, likeness, or logo; (e) Displaying a ballot measure's number, title, subject, or logo; (f) Displaying or dissemination of buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information.”; N.Y. Elec. Law § 8-104(1) (prohibits “political banner[s], button[s], poster[s] or placard[s] . . . in or upon the polling place”). *See also Electioneering Prohibitions*, NAT’L CONF. OF STATE LEGISLATURES (Apr. 1, 2021), (Apr. 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx>.
84. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018).
85. *See, e.g.*, *UFCW Local 1099 v. City of Sidney*, 364 F.3d 738, 752 (6th Cir. 2004) (remanding the case for further findings on whether Plaintiff’s First Amendment rights were violated when Plaintiff was threatened by an officer for attempting to solicit signatures just outside of the campaign-free zone).
86. *See, e.g.*, *Witten v. Butcher*, 794 S.E.2d 587, 596 (W. Va. 2016) (noting that poll workers erroneously cordoned off an area of 225 feet instead of the statutorily required 300 feet but holding that electioneering outside the boundaries of an incorrectly drawn restricted area was no fault of the electioneers and therefore did not impose criminal penalties.).
87. *See, e.g.*, *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213 (11th Cir. 2009) (reversing a preliminary injunction holding that Florida’s statute banning exit solicitations did not violate the First Amendment); *ABC v. Ritchie*, No. 08-5285 (MJD/AJB), 2008 U.S. Dist. LEXIS 83909 (D. Minn. Oct. 15, 2008) (granting a preliminary injunction enjoining defendants from enforcing the second sentence of Minnesota’s electioneering statute which prohibited exit polls within 100 feet of polling places); *ABC v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 U.S. Dist. LEXIS 80030 (D. Nev. Nov. 1, 2006) (granting Plaintiff’s Emergency Motion for Preliminary Injunction, prohibiting the restriction of exit polling activities within 100 feet of polling places on election day).

### 3. Conduct Inside Polling Places

Election officials have a duty to ensure the election is fair, honest, and orderly, and that voters' rights are safeguarded. To these ends (and among their other responsibilities) election officials have a responsibility to:

- guard the integrity of the election and
- protect voters from intimidation and harassment.

These duties are sometimes in tension. The duty to safeguard the election's integrity means election officials should ensure that only legal voters are able to cast ballots.

Election officials must also safeguard voters from intimidation. Election officials must ensure that eligibility challenges are based on bona fide voter qualification concerns—such as failure to meet citizenship, residency, age, or applicable non-felon status requirements—and do not target prospective voters because of their race or assumed political affiliation.<sup>88</sup>

Many state statutes permit poll watchers to observe election processes inside polling places.<sup>89</sup> Poll watchers must comply with all applicable state and federal laws, including Voting Rights Act prohibitions on voter intimidation and harassment.<sup>90</sup> Some state statutes also enable designated individuals to challenge voter eligibility inside polling places.<sup>91</sup> Often called “challengers,” such individuals must comply with state and federal law, particularly those governing voter intimidation. Challenges to an individual voter's eligibility must follow a

Poll watchers must comply with all applicable state and federal laws, including Voting Rights Act prohibitions on voter intimidation and harassment.

88. See *United States v. McElveen*, 180 F.Supp.10 (E.D. La. 1960).

89. Depending on what a state's statutes permit, poll watchers may represent political parties, independent candidates, or they may represent the proponents or opponents of a ballot measure. Some states permit poll watchers inside the polling place to monitor the election's conduct for fairness, observe and note voter trends for their colleagues to use in “get out the vote” efforts. See *Coray v. Ariyoshi*, 506 P.2d 13 (Haw. 1973) (noting that partisan poll watchers who did not interfere with officials' duties when the poll watchers kept their own tally of voters and communicated it to their colleagues off-site did not violate anti-electioneering or anti-loitering statutes). For ease in describing them, when this section uses the phrase “partisan poll watcher” it means either candidate, party, or ballot measure supporters or opponents appointed to observe election processes.

90. 42 U.S.C. § 1971(b) (2000).

91. See, e.g., Minn. Stat. Ann. § 204C.07 (2016); Ky. Rev. Stat. § 117.315 (2010).

prescribed process in order to protect the rights of the challenged voter.<sup>92</sup> In some instances, as described above,<sup>93</sup> federal law requires that challenged voters in federal elections who are unable to demonstrate their eligibility, must be afforded the opportunity to cast provisional ballots. Some states offer challenged voters an opportunity to either vote provisionally,<sup>94</sup> or ask a judge to issue an order requiring election officials to permit the voter to vote.<sup>95</sup>

Courts become involved in polling place conduct-related lawsuits when petitioners allege that election officials failed to perform their duties as required. The failure may result from overzealous enforcement or from lax or no enforcement,<sup>96</sup> including failure to maintain order at the polls and failure to stop biased or aggressive voter eligibility challenges by poll watchers.<sup>97</sup> In short, election officials must not only comport themselves appropriately, they must also referee others' actions to ensure they do not violate the law.

A court may issue writs of mandamus to order election officials to conform their conduct to their authorized duties.<sup>98</sup> The court may also be able to enjoin third parties, such as partisan poll watchers, from disruptive behavior. Election officials

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92. *See* *Majority Forward v. Ben Hill C'ty Bd. of Elections*, 512 F.Supp.3d 1354, 1375 (M.D.Ga. 2021) (holding that there was a demonstrated harm to voters who were targeted in a mass challenge to eligibility, that specific evidence was necessary to challenge voters eligibility, and that voters had a right to be heard and present evidence as to why the challenge to their ballot should be removed and their ballot should be counted).

93. *See supra*, Section II, Subsection B: An Order Directing Election Officials to Permit a Voter to Vote.

94. *See, e.g.*, 42 U.S.C. § 15482 (Supp. IV 2004) (recodified as 52 U.S.C.A. § 21082); IND. CODE §§ 3-11-8-23.5, 3-11.7-5-2.5; ALA. CODE 1975 § 17-10-2(a)(2); KAN. STAT. ANN. 25-409; W. VA. CODE § 3-1-41(b).

95. *See* N.J. STAT. ANN. §§ 19:15-18.3 (West 2007).

96. The compliance failures may be designated as misfeasance or nonfeasance. Misfeasance is likely to involve overzealous enforcement while nonfeasance is failure to perform their official duties.

97. *Cleveland v. City of Seneca*, Civil Action No. 8:09-626-HMH-WMC, 2010 WL 1257569 (D.S.C. Feb. 25, 2010) (holding that a poll manager acted within her authority to maintain good order at the polls when she called the police to ask the plaintiff to leave).

98. *See, e.g., In re Walker*, 595 S.W.3d 841 (Tex. App. 2020) (granting writ of mandamus to direct an election official to declare a candidate ineligible); *LaRouche v. Hannah*, 822 S.W.2d 632 (Tx. 1992) (granting writ of mandamus to direct state party chairman to certify a candidate's placement on the ballot); *State ex rel. Chambers v. County Court of Logan County*, 116 S.E.2d 125 (W. Va. 1960) (granting writ of mandamus to compel elections officials to process absent voters' ballots); *Berry v. Garrett*, 890 N.W.2d 882 (Mich. Ct. App. 2016) (granting writ of mandamus against Wayne County elections officials to remedy an erroneous placement of candidates on a ballot); *Attorney General v. Board of State Canvassers*, 896 N.W.2d 485 (Mich. Ct. App. 2016) (granting writ of mandamus to compel the Board of State Canvassers to reject a petition for recount).

in some states may also be permitted by state law to ask police officers to remove disruptive poll watchers.<sup>99</sup>

Election officials and poll watchers who harass or intimidate voters are potentially subject to state<sup>100</sup> and federal<sup>101</sup> punishment. Also, when local authorities implement voter eligibility challenges in a racially discriminatory fashion or fail to comply with other provisions of the Voting Rights Act, their acts or omissions may lead to federal election observers monitoring polling place conduct in future elections.<sup>102</sup>

#### 4. Media Access to Polling Places/Voters

For national or high-profile elections, media organizations frequently hire polling firms to poll those who have finished voting.<sup>103</sup> An exit poll's validity depends on the pollster's ability to ask a random, but standardized, sample of voters if they

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99. *Cotz v. Mastroeni*, 476 F.Supp.2d 332, 364-65 (S.D.N.Y. 2007) (noting that it was reasonable for an election official to request a poll watcher to sit and eventually be removed from the polling place when she had been disruptive to voters). *See contra* *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004) (staying temporary restraining orders against challengers at polling places because challengers were unlikely to significantly burden the right to vote.). *See also* N.J. STAT. ANN. § 19:6-15 (West); CONN. GEN. STAT. § 9-230; ME. STAT. TIT. 21-A, § 681; NEV. REV. STAT. § 293C.220; N.C. GEN. STAT. § 163-48; R.I. GEN. LAWS § 17-19-21; VA. CODE ANN. § 24.2-606.

100. *See, e.g.*, N.J. STAT. ANN. § 19:34-1.1(b) (“Any election official who: (1) knowingly and willfully intimidates, threatens or coerces, or attempts to intimidate, threaten or coerce, any person for registering to vote, voting or attempting to register to vote or vote . . . is guilty of a crime of the second degree and, in addition to any other penalties provided under the law, shall be permanently barred from serving as an election official.”).

101. 18 U.S.C.A. §§ 594, 595.

102. *See, e.g.*, *United States v. City of Hamtramck*, 2000 WL 34592762 (E.D. Mich. 2000) (finding Voting Rights Act violations where city officials failed to stop known discriminatory voter challenges targeting Arab-American voters in a municipal election). Under a subsequent consent decree, federal observers would monitor future elections for several years. During the November 2005 elections, federal observers and Justice Department personnel monitored elections in San Diego and Ventura counties, California; Boston, Massachusetts; Hamtramck, Michigan; Kings, Suffolk, Westchester, and New York counties, New York; Reading, Pennsylvania; and, Ector County, Texas. *See also* Press Release, U.S. DEP’T OF JUST., Justice Department to Monitor Elections in States Across the Nation (Nov. 7, 2005), [www.usdoj.gov/opa/pr/2005/November/05\\_crt\\_596.html](http://www.usdoj.gov/opa/pr/2005/November/05_crt_596.html) (listing jurisdictions where Justice Department employees planned to monitor elections; San Francisco County, California; Lawrence and Lowell, Massachusetts; Edison, New Jersey, and Queens and Richmond counties, New York).

103. Newspapers, television networks, and wire services conduct exit polling data. Other groups, such as educational institutions, may also conduct exit polls. *See* Drew Desilver, *Just how does the general election exit poll work, anyway?*, PEW RSCH. CTR. (Nov. 2, 2016), <https://www.pewresearch.org/fact-tank/2016/11/02/just-how-does-the-general-election-exit-poll-work-anyway/>.

are willing to fill out a questionnaire. When “no voter contact” buffer zones<sup>104</sup> are enforced as voters leave the polling place, pollsters cannot conduct exit polls.

The state’s interest in protecting the election’s integrity by limiting third-party contact with voters is weaker after a person has voted because opportunities to intimidate voters diminish significantly once voters have cast their ballots.

Some states have attempted by statute to restrict pollsters’ contact with voters who are leaving the polling location<sup>105</sup> because of concerns that:

- voter turnout is reduced if exit polls are used to project the election results before the polls close,<sup>106</sup> and
- exit polling is disruptive.<sup>107</sup>

Legal challenges to statutes that restrict media access at the polls tend to take one of two familiar forms. In the first, the petitioner alleges the state is over-or under-enforcing the statute and asks the court to order election officials to perform their duties.<sup>108</sup> In the second, the constitutionality of the statute itself, or its application to the specific circumstances, is challenged, and petitioners ask the court to declare the statute unconstitutional in whole or as applied to their specific situation.<sup>109</sup>

A court could hear challenges claiming over-or under-enforcement of the statute by election officials. Overly strict enforcement of the no-contact zone occurs when election officials prohibit exit polling in an area larger than the size specified by state statute.<sup>110</sup> Lax enforcement of the no-contact zone occurs when election officials allow exit polling activities to occur closer to the polls than the distance

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104. These areas are commonly defined by statute. *See, e.g.*, N.C. GEN. STAT. § 163-166.4(a) (“No person or group of persons shall hinder access, harass others, distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity in the voting place or in a buffer zone which shall be prescribed by the county board of elections around the voting place.”).

105. *See, e.g.*, MO. ANN. STAT. § 115.637(18); MONT. CODE ANN. § 13-35-211(4); WYO. STAT. ANN. § 22-26-113(a) (West 2021).

106. *See Nat’l Broad. Co. v. Cleland*, 697 F. Supp. 1204, 1212 (N.D. Ga. 1988) (court recognizes state interest of maintaining the sanctity and decorum of the polls, but still finds exit polling restriction not narrowly tailored to compelling state interest).

107. *Id.*

108. *See CBS Inc. v. Smith*, 681 F. Supp. 794, 796 (S.D. Fla. 1988) (media plaintiffs seeking to enjoin Secretary of State and election officials from enforcing statute).

109. *See PG Pub. Co. v. Aichele*, 705 F.3d 91, 95 (3rd Cir. 2013) (publishing company alleges First and Fourteenth Amendment violations).

110. *See Cullen v. Fliegner*, 18 F.3d 96, 102 (2d Cir. 1994) (explaining that the 100ft electioneering zone had never actually been measured, so any enforcement of it was completely arbitrary); *Am. Broad. Co. v. Blackwell*, 479 F.Supp.2d 719 (S.D. Ohio 2006) (holding an oral directive to prohibit exit polls within 100ft of the polling place was unconstitutional).

permitted by statute.<sup>111</sup> Under these circumstances, the court will likely be asked to order election officials to appropriately enforce the statute<sup>112</sup> and may order election officials to enforce the statutory zone size and no greater or lesser size zone. For example, a Texas court granted a temporary restraining order to prohibit county commissioners from enforcing electioneering prohibitions outside of the statutorily mandated 100-foot buffer zone.<sup>113</sup> In some states, courts are statutorily permitted to issue writs of mandamus when election officials have neglected their duty.<sup>114</sup>

### **E. Order to Suspend or Postpone and Reschedule an Election Due to Disaster or Emergency Conditions**

Natural disasters, terrorist attacks, or other emergencies may strike on Election Day.<sup>115</sup> They may affect a limited area—such as a flash-flood that closes several precincts;<sup>116</sup> they may affect an entire city—such as a paralyzing blizzard that leaves all roads impassable;<sup>117</sup> or, they may affect an entire state—such as the September 2001 terrorist attacks that occurred during the New York primary election season and resulted in closed polls statewide.<sup>118</sup>

In the wake of Election Day disasters or emergencies, courts may be asked to suspend or postpone an election, asked to review decisions made by state officials to suspend or postpone an election, or to review election rescheduling decisions.

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111. See *In re Attorney Gen.’s “Directive on Exit Polling: Media and Non-Partisan Public Interest Groups”*, 981 A.2d 64 (N.J. 2009) (holding 100 ft. ban on electioneering applied to exit polls after years of lax enforcement).
  112. *Id.* (providing a comprehensive scheme to properly enforce the laws).
  113. *Garza v. Starr Cty.*, 309 F. Supp. 3d 454 (S.D. Tex. 2018) (granting temporary restraining order to prohibit county commissioners from enforcing electioneering prohibitions in common areas outside the 100-foot buffer zone.).
  114. See, Cal. Elec. Code § 13314 (“(a)(1) An elector may seek a writ of mandate alleging . . . that any neglect of duty has occurred or is about to occur.”).
  115. For more information on the law of election emergencies, see Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018) and Rebecca Green, *How Many Votes Is Too Few?*, 81 OHIO STATE L.J. ONLINE 209 (2020).
  116. *In re Gen. Election—1985 Beharry*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (upholding results in election that had been postponed and rescheduled in several precincts due to Election Day flood-related emergency conditions).
  117. *State v. Marcotte*, 89 A.2d 308 (Me. 1952) (upholding results from rescheduled election where Election Day blizzard paralyzed entire city and prevented polls from opening).
  118. Dahlia Lithwick, *How Do You Cancel an Election?*, SLATE, Sept. 12, 2001, <http://www.slate.com/id/1008278> (noting that following the previous day’s terror attacks in New York City, primary elections throughout New York state were halted).



This section addresses some of the issues that arise when disasters or other emergencies occur on Election Day.

Court decisions concerning suspended and postponed elections focus on four legal issues that arise under these circumstances:

- 1) Does the state have authority to suspend or postpone an election?
- 2) When and where should an election be suspended or postponed?
- 3) Who may suspend or postpone an election?
- 4) When should the postponed election take place?

## 1. Does the State Have Authority to Postpone or Suspend an Election?

In many states, statutes or constitutional provisions address the question whether state or federal elections can be postponed or suspended because of an Election Day emergency.<sup>119</sup> If the state's authority to suspend or postpone an election is not explicitly addressed, the authority may nonetheless exist as a part of the state's general power and authority to respond to emergency situations and their aftermath.<sup>120</sup>

No federal statute or constitutional provision allows any federal official, institution, or agency to suspend or postpone state-run elections.<sup>121</sup> Thus, state actors alone determine whether to postpone or suspend a federal election, even though the decision may have national political implications.

Federal and state courts have recognized a state's apparent authority to suspend or postpone and reschedule congressional elections when exigent circumstances

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119. See *Part 7: Types of Elections, e-book on Election Law, Election Law @ Moritz*, Election Emergency Statutes for 25 Critical States in the November Election, at [http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections\\_preso6.html](http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections_preso6.html). Last viewed May 15, 2007.

120. See *New Ga. Project v. Raffensperger*, 484 F.Supp.3d 1265, 1282 (N.D. Ga. 2020) (citing emergency measures taken by Secretary of State Raffensperger in light of the COVID-19 pandemic, including postponing the primary).

121. See Jack Maskell, *CRS Report for Congress: Postponement and Rescheduling of Elections to Federal Office* CONGRESSIONAL RESEARCH SERVICE, 3-4 (Oct. 4, 2004) (noting lack of explicit federal authority to cancel state elections even when a federal office is on the ballot).

occur before or on Election Day.<sup>122</sup> The term “exigent circumstances” is construed broadly and includes circumstances beyond natural disasters.<sup>123</sup> Prior to *Shelby County v. Holder*, effectively removing the preclearance hurdle in redistricting in 2013,<sup>124</sup> courts also suspended or postponed elections due to a state congressional redistricting plan’s failure to receive Voting Rights Act preclearance.<sup>125</sup>

## 2. When Should an Election be Suspended or Postponed?

Although rare, elections have been suspended or postponed before Election Day because of natural disasters—such as flooding,<sup>126</sup> blizzards,<sup>127</sup> and hurricanes<sup>128</sup>—because of terrorist attacks,<sup>129</sup> global pandemics,<sup>130</sup> and administrative blunders.<sup>131</sup> In each instance, the natural disasters or terrorist attacks created

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122. See *Busbee v. Smith*, 549 F. Supp. 494, 526 (D.D.C. 1982) (three-judge court) (“Congress did not expressly anticipate that a natural disaster might necessitate a postponement, yet no one would seriously contend that [federal law] would prevent a state from rescheduling its congressional elections under such circumstances.”); *Craig v. Simon*, 980 F.3d 614, 618 (8th Cir. 2020) (holding that Minn. Statute allowing for postponement if a major party candidate dies was preempted by federal law, and that such postponements should only be for “real” exigent circumstances, not state-made ones); *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993) (holding that Georgia’s majority vote statute is allowed to prescribe different times for elections when they experience a legitimate failure to elect due to exigent circumstances); 2 U.S.C. § 8 (2005). See also Minn. Stat. Ann. § 373.50 (2010).
123. See *Public Citizen, Inc.*, 992 F.2d 1548 (postponing election for legitimate failure to elect).
124. See *Shelby Cnty. V. Holder*, 570 U.S. 529 (2013).
125. See *Busbee*, 549 F. Supp. 494 (noting that the Uniform Federal Election Day did not prevent the postponement of congressional elections in the face of a natural disaster). The Uniform Federal Election Day established the Tuesday after the first Monday in November in even numbered years as the date on which congressional elections are held. 2 U.S.C. § 7 (2000).
126. *In re Gen. Election—1985 Beharry*, 531 A.2d 836 (Pa. Commw. Ct. 1987).
127. *State v. Marcotte*, 89 A.2d 308 (Me. 1952) (“There was a storm of such unusual proportions and such unexpected violence that it might well be considered that there was no election due to ‘an act of God.’”); *Peterson v. Cook*, 121 N.W.2d 399 (Neb. 1963).
128. See *Tisserand v. Blanco*, No. 05-6487, 2006 WL 4045926, at \*1 (E.D. La. Aug. 18, 2006); *New Orleans Elections Postponed*, TAMPA BAY TIMES (Dec. 13, 2005), <https://www.tampabay.com/archive/2005/12/13/new-orleans-elections-postponed/>; *Schedler v. Fed. Emergency Mgmt. Agency*, No. CIV.A. 11-598-JJB, 2012 WL 1903976, at \*2 (M.D. La. May 25, 2012) (dismissing case for federal reimbursement of expenses incurred due to election postponement after Hurricane Katrina).
129. *Lithwick*, *supra* note 118.
130. See *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 174 (5th Cir. 2020) (acknowledging that Governor Abbott postponed the May primary runoff, as well as expanding the period for early voting); *Common Cause Indiana v. Lawson*, 490 F.Supp.3d 1311, 1320 (S.D. Ind. 2020) (acknowledging that the primary election was postponed from May 5 to June 2, 2020). Nick Corasaniti & Stephanie Saul, *16 States Have Postpones Primaries During the Pandemic. Here’s a List.*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html>. But see *Democratic Nat’l Comm. v. Bostelmann*, 451 F.Supp.3d 952, 975 (W.D. Wis. 2020) (holding that enjoining election day would cause more harm than it would solve).
131. *McNally v. Tollander*, 100 Wis. 2d 490 (1981).

conditions in which it was impossible for voters or election officials to get to the polls,<sup>132</sup> left the polls unsafe,<sup>133</sup> or made it impossible to fulfill mandatory prerequisites for valid elections, such as staffing polling locations.<sup>134</sup>

If the disaster's effect on the election only becomes apparent after Election Day, state statutes may authorize an additional day of voting.<sup>135</sup> Unless state statutes specify the size of the area in which an election should be postponed or suspended in response to a disaster or emergency,<sup>136</sup> this decision must be made by government officials. In making this decision, important considerations include the amount of resources committed to the election, the magnitude of the disaster or emergency, and whether continuing the election would divert necessary resources from responding to the disaster. In reviewing the decision of a lower court, one court determined that a flood that affected only a few precincts justified suspending the election in only those limited areas, but a more widespread emergency that affected a critical mass of voters and polling places could justify suspending or postponing the election throughout the voting district.<sup>137</sup>

### 3. Who Has the Authority to Suspend or Postpone an Election?

The state officer authorized to suspend or postpone elections in the face of disaster or emergency conditions varies by state but is generally a state executive branch official and possibly a judicial officer. In some states, the governor has

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132. *Marcotte*, 89 A.2d 308 (impossible to reach the polling places).

133. *In re Gen. Election—1985 Beharry*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (safety).

134. Lithwick, *supra* note 118 (unavailability of required election officials and police officers).

135. See N.Y. ELEC. LAW § 3-108 (Consol. 1986) (empowering state board of elections to order an additional day of voting if a disaster situation caused fewer than 25% of eligible voters to vote in the original election).

136. See, e.g., KY. REV. STAT. ANN. § 39A.100(1)(k); 26 OKL. ST. § 22-101(A); VA. CODE ANN. § 24.2-603.1..

137. See *In re Gen. Election—1985 Beharry*, 531 A.2d 836, 839-40 (Pa. Commw. Ct. 1987) (holding that lower court acted reasonably in suspending the election only in the precincts affected by the flood and not countywide but noting a different approach might be warranted under other circumstances). See also Order 1-3, *Ertel v. Essex Cty. Bd. of Elections* (N.J. Super. Ct. Law Div. Nov. 7, 2012), [https://www.aclu-nj.org/files/8913/5238/9713/2012\\_11\\_06\\_ORDER.pdf](https://www.aclu-nj.org/files/8913/5238/9713/2012_11_06_ORDER.pdf) (allowing displaced voters to submit a Federal Write-In Absentee Ballot).

explicit statutory power to suspend or postpone elections,<sup>138</sup> while in other states, the governor's power to act is a by-product of his power to declare a state of emergency.<sup>139</sup> In yet other states, the governor may suspend certain state operations if conducting them would interfere with or hinder disaster recovery.<sup>140</sup> Presumably, the latter provisions offer governors a mechanism to suspend or postpone an election even without express authority to do so.

In some states, the state's top election official has the power to cancel or postpone an election in the face of disaster or emergency. In Georgia, for example, the Secretary of State may postpone an election if the governor has declared a state of emergency,<sup>141</sup> while Iowa's recognition of the Secretary of State's position as the state's commissioner of elections grants the office the authority to exercise emergency power over elections affected by natural or other disasters.<sup>142</sup>

Other states allow one or more members of the State Board of Elections, or its equivalent, to suspend or postpone elections in the face of emergency. For example, New York grants this power to the State Board of Elections as a body,<sup>143</sup> while North Carolina vests the decision-making authority with the State Board of Elections' Executive Director.<sup>144</sup>

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138. See FLA. STAT. ANN. 101.733 (West 2002) (authorizing the governor to suspend or delay arises after an executive order declaring a state of emergency has been issued); L A. REV. STAT. ANN. § 18:401.1 (2006) (authorizing governor to suspend or delay any election after declaring a state of emergency and receiving certification from the secretary of state that an emergency exists); M D. CODE ANN., ELEC. § 8-103 (LexisNexis 2003) (enabling the governor to provide for the postponement of elections in an emergency proclamation); V A. CODE ANN. § 24.2-603.1 (West Supp. 2007) (allowing governor to postpone an election after declaring a state of emergency or if the federal government or another state's governor declares a state of emergency); Press Release, WTC Response Update: Governor Provides Latest Information on State Response as Rescue and Recovery Efforts Continue," Sept. 14, 2001. New York Governor George Pataki declared a state of emergency and used his emergency powers to suspend statewide primary elections after the September 11, 2001, terrorist attacks on New York City, see "WTC Response Update: Governor Provides Latest Information on State Response as Rescue and Recovery Efforts Continue," September 14, 2001, available at [http://www.state.ny.us/governor/press/01/sept14\\_5\\_01.htm](http://www.state.ny.us/governor/press/01/sept14_5_01.htm), last viewed September 22, 2006.

139. See, e.g., KY. REV. STAT. ANN. § 39A.100(1); VA. CODE ANN. § 24.2-603.1.

140. Language of these statutes is similar to that found in Illinois' Emergency Management Agency Act (20 ILL. COMP. STAT. ANN. 3305/ 7(a)(1) (West Supp. 2007)) that allows the governor "[t]o suspend the provisions of any regulatory statute prescribing procedures for conduct of State business, or the orders, rules and regulations of any State agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder or delay necessary action ... in coping with the disaster."

141. GA. CODE ANN. § 21-2-50.1 (2003).

142. IOWA CODE ANN. § 47.1 (West 2007).

143. N.Y. ELEC. LAW § 3-108 (Consol. 1986).

144. N.C. GEN. STAT. § 163-27.1 (2005).

Alternatively, Petitioners may ask the court to issue an order suspending or postponing an election. Whether a court can do so depends on its statutory or constitutional authority to act. In a Pennsylvania case in the 1980s, a reviewing court determined that a lower court’s order suspending an election in several flooded precincts was an appropriate exercise of the lower court’s general supervisory power over the election’s conduct.<sup>145</sup> The reviewing court found the lower court had properly acted to uphold the general purpose of election law, which is to ensure fair elections and an equal opportunity for eligible voters to participate.<sup>146</sup> The reviewing court further noted that if the election had not been suspended and rescheduled, some eligible voters would have been unable to vote because of circumstances beyond their control.<sup>147</sup> A New York City court ordered a primary election suspended in the aftermath of terrorist attacks on the City because a mandatory condition of holding valid elections—the presence of certain government officials inside the polling places—became impossible to meet.<sup>148</sup>

Courts can also enjoin government officials who act outside their scope of authority in suspending or postponing elections.<sup>149</sup> Because writs of mandamus only issue where a clear official duty to act exists, courts cannot issue it if suspending or postponing an election rests within the discretion of government officials.

The court’s power to suspend or postpone an election, if available, does not extend to ordering unaffected jurisdictions to withhold their election results until the rescheduled election is held.<sup>150</sup> Thus voters who go to the polls during the

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145. See *In re Gen. Election—1985 Beharry*, 531 A.2d 836 (Pa. Commw. Ct. 1987).

146. *Id.* at 839. See *Ferguson v. Ryan*, 623 N.E.2d 1004, 1008 (Ct. App. Ill. 1993) (quoting *Pullen v. Mulligan*, 561 N.E.2d 585, 605 (1990)) (“The general purpose of election laws is ‘to obtain fair and honest elections’”).

147. *Id.* See *Florida Democratic Party v. Scott*, 215 F.Supp.3d 1250, 1258 (N.D. Fla. 2016) (“[Florida] voters have already had their lives (and, quite possibly, their homes) turned upside down by Hurricane Matthew. They deserve a break, especially one that is mandated by the United States Constitution. Ensuring that they can exercise their constitutional right to vote thus promotes the public interest.”) (holding that Florida must extend their voter registration deadline in the wake of Hurricane Matthew); *Georgia Coalition for the Peoples’ Agenda, Inc. v. Deal*, 214 F.Supp.3d 1344, 1345 (S.D. Ga. 2016) (“The Court does not discount that the extension [of the voter registration date] would present some administrative difficulty. However, those administrative hurdles pale in comparison to the physical, emotional, and financial strain Chatham County residents faced in the aftermath of Hurricane Matthew.”).

148. Lithwick, *supra* note 118.

149. See *Craig v. Simon*, 980 F.3d 614, 618 (8th Cir. 2020).

150. Donna O’Neal, *Dade Waits While State Votes Today; Florida’s High Court Agrees to Delay Dade County’s Election but Allows Other Counties to Hold Their Primaries*, ORLANDO SENTINEL (Florida), Sept. 1, 1992, at A1.

rescheduled election can have full knowledge of how their fellow citizens voted on Election Day and the impact their votes will have on the outcome.

#### 4. When Should a Postponed Election Take Place?

State law may impose a deadline by which a suspended or postponed election must be resumed or rescheduled.<sup>151</sup> For example, Florida requires the rescheduled election be held within 10 days—or as soon as possible thereafter—of the original election,<sup>152</sup> Georgia allows up to forty-five days,<sup>153</sup> and Louisiana requires only that the suspended or delayed election is held as soon as “practicable.”<sup>154</sup>

In addition to state statutory requirements, courts may wish to consider how the Safe Harbor provision<sup>155</sup> “deadline”<sup>156</sup> will affect a postponed and rescheduled election in the case of a U.S. presidential election. The Electoral Count Act’s Safe Harbor provision requires Congress to grant official recognition to a state’s slate of presidential electors only if they were selected before the deadline and by the method the state legislature directed.<sup>157</sup> If the state has not selected its official electoral slate by the Safe Harbor date and more than one electoral slate claims to be the official state slate, then Congress decides which slate receives official recognition.<sup>158</sup> Therefore, if a suspended or postponed election includes a presidential election, the rescheduled election must be held by the Safe Harbor date or the state legislature must select the state’s presidential electors. Otherwise, Congress will decide how to vote the state’s electoral votes.<sup>159</sup>

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151. FLA. STAT. ANN. § 101.733(2) (West 2002) (requiring rescheduled elections to be held within ten days of the original election or as soon as possible thereafter); GA. CODE ANN. § 21-2-50.1 (2003) (prohibiting an election from being postponed more than forty-five days); LA. REV. STAT. ANN. § 18:401.1 (Supp. 2007) (requiring suspended or delayed elections to resume or be rescheduled as soon as practicable).

152. FLA. STAT. ANN. § 101.733 (West 2002).

153. GA. CODE ANN. § 21-2-50.1 (2003).

154. A. REV. STAT. ANN. § 18:401.1 (Supp. 2007).

155. 3 U.S.C. § 5 (2000).

156. *See* 3 U.S.C. § 7 (2000). The Safe Harbor provision “deadline” is not a true deadline in that it requires action by a certain date. Rather, it protects the state’s choice of presidential electors if they are selected by six days before the Electoral College meets, which by law is the Monday after the second Wednesday in December.

157. 3 U.S.C. § 5 (2000).

158. 3 U.S.C. § 15 ([I]n such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors”).

159. *Id.*

## III. SPECIAL CONSIDERATIONS

### A. Sense of Urgency

Election Day lawsuits are stressful and politically fraught. Compounding courts' limited remedial repertoire, Election Day lawsuits carry a sense of urgency; Election Day relief may be the only relief available to the petitioner as the issue raised may become moot once the election is over.<sup>160</sup> States limit post-election relief and the conditions under which it may be granted.<sup>161</sup> Circumstances that might qualify for individual relief on Election Day may not satisfy the statutory requirements for post-election redress.<sup>162</sup> Courts should be prepared to consider Election Day disputes and must understand that Election Day disputes frequently involve an underdeveloped record and offer little time for judicial reflection.<sup>163</sup>

Election Day relief may be the only relief available to the petitioner as the issue raised may become moot once the election is over.

### B. Communicating Decisions

Election Day remedies that impact more than a single voter or polling location must be quickly and clearly communicated to voters and election officials alike. Wide publication and dissemination increase the likelihood that potential voters

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160. *See, e.g.*, *Bell v. Raffensperger*, 858 S.E.2d 48, 51 (Ga. 2021) (holding that petition for writ of mandamus to compel the Secretary of State to place petitioner's name on an election ballot was moot since the ballots no longer existed and the election had already occurred); *Whitfield v. Thurston*, 3 F.4th 1045, 1047 (8th Cir. 2021) (holding appeal moot because appellant's candidacy had ended and he had not indicated whether he intended to run again.); *Berry v. Garrett*, 890 N.W.2d 882, 890 (Mich. Ct. App. 2016) ("Given the exigencies of this election matter . . . a remand order at this time would likely render plaintiff's action moot before the trial court would have an opportunity to rule. Hence, we feel compelled to consider the substantive merits and render a decision"). *But see* *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1 (1998)) (noting an exception to mootness where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again").

161. *See, e.g.*, VA CODE ANN. §§ 24.2-803—814; CAL. ELEC. CODE § 16100 (West); TEX. ELEC. CODE ANN. § 221.003 (West); MD. CODE ANN. ELEC. LAW § 12-202(b) (West).

162. For example, a voter wrongly denied the opportunity to vote can seek an Election Day order that she be allowed to cast a ballot. Unless it appears her vote would have affected the outcome, such as when the election ends in a tie or a one-vote margin of victory, she is unable to receive post-election relief because she was unable to vote.

163. *See* *State ex rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 412-13 (Mo. Ct. App. 2000) (acknowledging that in the heat of the moment, trial judges must make "difficult decisions with little time for deliberation).

who would benefit from the decision learn of it in time to get to the polls before they close. The court may be able to add notification provisions to its orders as a Texas U.S. District Court did in 2020.<sup>164</sup> In that decision, in which the court held the signature verification procedures for mail-in ballots were unconstitutional, the court required the Secretary of State to notify all local election officials of the decision within ten days of its issuance.<sup>165</sup>

## IV. CONCLUSION

The relative scarcity of published case law considering Election Day disputes is largely attributed to elections' strict timing requirements and limited forms of remedies. In addition, as states move to expand early and absentee voting, such Election Day pressures may be reduced. When Election Day disputes do arise, most claims involve the action or inaction of election officials or the conduct of individuals inside or outside of polling locations. In these cases, courts can grant relief by opening or reopening polls, validating a voter's (or class of voters') eligibility, extending polling hours, or providing alternate ballot forms. Courts may also provide injunctive relief to regulate conduct inside and outside of the polling place.

In addition to individual conduct, disasters or emergency conditions can also impact Election Day. Several state emergency or disaster statutes grant authority to delay elections to state officials. However, courts may also be able to issue an order to suspend or postpone an election or to enjoin an election official from acting outside the scope of their authority.

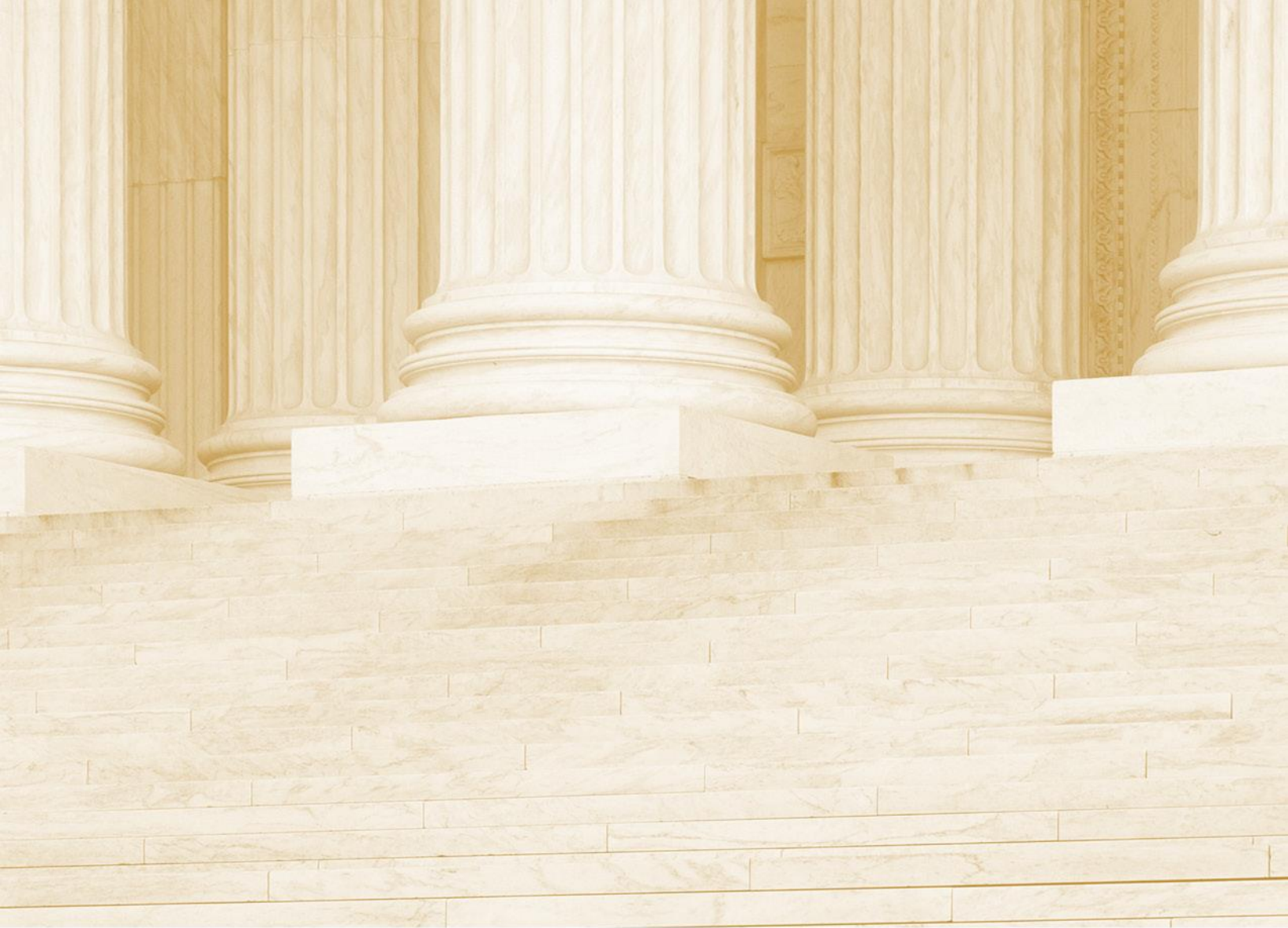
Regardless of the substantive basis for an Election Day claim, related suits often require rapid action: statutory or common-law considerations often bar claims shortly after the conclusion of an election and election officials or voters rely on the rapid communication of judicial decisions to safeguard the franchise and inform their own practices.

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164. *Richardson v. Texas Sec'y of State*, 485 F. Supp. 3d 744, 806 (W.D. Tex. 2020). *See also* *White v. Blackwell* No. 3:04 CV 7689 (N.D. Ohio 2004) (requiring the Secretary of State to immediately notify the local precincts to issue provisional ballots to those who qualify within on-half hour after receiving the decision).

165. *Id.* at 4.





## CHAPTER 8

# Canvassing, Certification, and Recounts

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## CHAPTER 8: CANVASSING, CERTIFICATION, AND RECOUNTS

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## I. INTRODUCTION

Instead of conceding victory to their opponents, defeated candidates, their supporters, or those favoring the losing side of a ballot measure may decide to challenge the election results, especially if the margin of victory is small. Though procedures vary from state to state, the most common post-election challenges are (1) the recount and (2) the election contest.

Recounts are repeat tabulations of votes cast in an election when the accuracy of the canvass has been challenged or the result is within a statutory threshold triggering an automatic recount.

Because recount results supersede those shown by the original canvass, when the recount shows a different candidate or ballot measure position won, the recount winner become the certified winner. Recounts ordinarily do not consider substantive problems—such as fraud or improper conduct—during the election. Those allegations are typically reserved for election contests.<sup>1</sup> However, each state has its own recount laws causing substantive and procedural requirements to vary widely.

This chapter describes the canvassing, certification, and recount processes and the legal issues that courts may be asked to resolve with respect to each.

Recounts ordinarily do not consider substantive problems—such as fraud or improper conduct—during the election. Those allegations are typically reserved for election contests.

## II. CANVASSING

To properly contextualize post-election challenges, an understanding of what occurs after the last voter has cast a ballot is helpful. Although the specific requirements vary by state, the following simplified description provides a generic overview of the three most common steps that begin after the polls have closed and end with certification of the official election results. The three steps are:

- Step 1: vote canvassing,
- Step 2: local review and certification of the results, and
- Step 3: state-level review and certification of the results.

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1. Election contests attack the validity or integrity of an election, a topic that will be thoroughly discussed in another document. In some states, a recount may be the necessary first step before a losing candidate can file an election contest. *See, e.g.*, *Miller v. Cnty. Comm'n of Boone Cnty.*, 539 S.E.2d 770, 776 (W. Va. 2000) (noting that permitting losing candidates to directly file an election contest and by-pass the statutory recount procedure “would thwart the legislative purpose of the recount statute and essentially render [it] irrelevant.”) (citation omitted).

Canvassing typically occurs at the polling place, or at a different location to which the ballots or voting equipment have been transported.

## Step 1

During Step 1, the ballots and voting equipment are canvassed in accordance with state law. In many states, that process begins before election day with mail-in ballots, but others do not begin canvassing mail-in ballots until election day.<sup>2</sup> Canvassing counts the votes for individual candidates and for or against ballot measures to determine who or which position won. State vote canvassing statutes may direct how votes are counted, who may count them, and if and how many observers may be present during canvassing.<sup>3</sup> Additionally, state laws may specify how ballots, vote recorders, and voting equipment should be secured post-canvass to preserve their integrity and evidentiary usefulness in case of a recount.

Canvassing typically occurs at the polling place, or at a different location to which the ballots or voting equipment have been transported. Tabulating equipment counts machine-readable ballots, such as optical scan ballots. In some instances, for example when equipment has failed and election officials have used backup paper ballots, those ballots may be counted manually.<sup>4</sup> Votes cast on electronic voting machines are canvassed by printing out or electronically transmitting the results from the vote storage unit.

In the 2020 election, due to pandemic conditions, many states expanded voter access to absentee and mail-in voting and changed rules allowing the processing of these ballots to begin earlier.<sup>5</sup> The process for counting provisional ballots (ballots cast by voters when their eligibility is questioned) is governed by state law

2. See *VOPP Table 16: When Absentee/Mail Ballot Processing and Counting Can Begin*, NAT'L CONF. STATE LEGISLATURES (Oct. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx>. Maryland, however, only begins counting absentee ballots the Wednesday after Election Day. *Id.*
3. In Pennsylvania, for example, 25 P.S. § 2650 permits political bodies or bodies of citizens that were entitled to watchers during voter registration processes and on election day to have no more than 3 watchers who are qualified electors of the county or who are that body's attorneys at any canvassing of returns.
4. Ballots should be counted in accordance with the voter's intent when it is fairly ascertainable. To facilitate determining the voter's intent when the vote markings do not fully comply with the ballot instructions, states may issue guidelines or instructions. See, e.g., *Voter Intent: Statewide Standards on What is a Vote*, WASH. SEC'Y OF STATE (2018), [https://www.sos.wa.gov/\\_assets/elections/administrators/2018\\_voter-intent\\_web.pdf](https://www.sos.wa.gov/_assets/elections/administrators/2018_voter-intent_web.pdf).
5. *Absentee and Mail Voting Policies in Effect for the 2020 Election*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-mail-voting-policies-in-effect-for-the-2020-election.aspx>.

procedures and deadlines for establishing eligibility.<sup>6</sup> State statutes may require provisional and absentee ballots to be stored apart from in-person ballots cast at polling places so that challenges to the former can be resolved more quickly and accurately.<sup>7</sup> Compliance with absentee ballot statutes must be verified before absentee ballots are counted. Verification may involve a facial review of the ballot's outer envelope to ensure that notarization, signature, witness, or attestation requirements have been met.<sup>8</sup> In other states, particularly in those that vote entirely by mail, verification can be automated by machines.<sup>9</sup>

By their nature, provisional ballots—which are used when the voter's eligibility cannot be verified at the polls—cannot be canvassed until after the voter's eligibility has been established.<sup>10</sup>

After the original canvass ends, the ballots and voting equipment are secured and stored as state statutes or agency rules dictate.<sup>11</sup> Secure storage ensures that the ballots and voting equipment remain in the same condition they were in at the end of the original canvass so that ballots can be recounted, if necessary.

The canvass results are important for several reasons. First, the canvass determines the unofficial winners of both office and ballot measure elections.<sup>12</sup> Being named the winner confers an advantage; runners-up who wish to challenge the results may have difficulty satisfying the statutory requirements governing recounts and election contests. Second, the ballots reviewed and counted in the canvass frequently define the pool of ballots that are counted during a recount. Some states may not allow ballots that were overlooked during the original canvass to be included in a recount, leaving these ballots unreviewable unless the

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6. See *e.g.*, OHIO REV. CODE ANN. § 3505.183 (West 2019); MO. REV. STAT. § 115.430 (2006); MONT. CODE ANN. § 13-15-107 (2019).

7. See *e.g.*, NEB. REV. STAT. § 32-1002 (West 2019).

8. States and courts have adopted varying standards of review. Some courts have required strict compliance with absentee voting requirements for an absentee ballot to be eligible to be counted. See, *e.g.*, *In re Contest of Gen. Election Held on Nov. 4, 2008, for Purpose of Electing a U.S. Senator from State of Minn.*, 767 N.W.2d 453, 461 (Minn. 2009). Other states have adopted a more liberal, substantial compliance standard. See, *e.g.*, *Boardman v. Esteva*, 323 So. 2d 259, 264 (Fla. 1975).

9. For example, larger counties in Colorado often use machines to verify signatures. See <https://coloradosun.com/2020/10/09/colorado-ballot-signature-questions/>. In counties that do not automate the signature verification process, they outline characteristics to look for while matching. See <https://www.sos.state.co.us/pubs/elections/docs/SignatureVerificationGuide.pdf>.

10. For example, in states that require voters to show identification before casting a ballot, those who did not bring identification to the polls must fill out a provisional ballot on election day and then verify their identity to local election officials within a set period of time after election day. See *Provisional Ballots*, NAT'L CONF. STATE LEGISLATURES (July 22, 2021), <https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx>.

11. See, *e.g.*, KY. REV. STAT. ANN. § 117.275 (West 2020).

12. Media outlets typically use these unofficial canvass results to project the winner of certain elections.

challenger qualifies for an election contest,<sup>13</sup> which is a more difficult and expensive procedure than a recount.

After the ballots are canvassed, the unofficial returns are submitted to the local election or canvassing board for review and local certification.<sup>14</sup>

## Step 2

Step 2 occurs when the local election or canvassing board meets to review the returns and the paperwork submitted to it by precinct-level canvassers.<sup>15</sup> In modern elections, this typically occurred on election night.<sup>16</sup>

Once the initial count is complete, the local election or canvassing board ensures that all precincts submitted returns and supporting documentation, and that the returns are without obvious mathematical or other errors. Although the local board does not automatically review the actual ballots, state statutes may permit them to do so (or to question the precinct canvassers) if it has concerns about the submitted returns, if some returns were omitted, or if corrections are necessary.<sup>17</sup>

The local board then verifies the precinct-level returns, combines the vote totals from each reporting precinct, and announces the official local results. These boards then submit their official local returns to the state for the final level of review, tabulation, and certification. For purely local offices or ballot measures, the local board may also be authorized to issue certificates of election to the winners.<sup>18</sup>

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13. See *Wash. State Republican Party v. King Cnty. Div. of Recs.*, 103 P.3d 725 (Wash. 2004); *McDonald v. Sec'y of State*, 103 P.3d 722 (Wash. 2004) (finding the omission of ballots from a canvass or recount can be challenged if a contest is permitted).

14. See generally, *Chapter 13: Canvassing and Certifying an Election*, U.S. ELECTION ASSISTANCE COMM'N (Aug. 26, 2010), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/EMG\\_chapt\\_13\\_august\\_26\\_2010.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/EMG_chapt_13_august_26_2010.pdf).

15. As used in this chapter, a “precinct” means the smallest voting area in which votes are separately recorded. These areas may be called “precincts” or “wards” or have another name.

16. In the 2020 election, due to a dramatically increased volume of absentee ballots in many states (as predicted prior to the election), this second step extended beyond election day in many states. See Harry Stevens, Adrian Blanco & Dan Keating, *Where Votes are Still Being Counted*, WASH. POST, Nov. 13, 2020, <https://www.washingtonpost.com/graphics/2020/elections/vote-count/>. Most states have laws on the books that allow pre-canvassing of absentee ballots to ensure their validity prior to the election. Some states, like Michigan and Pennsylvania limit or disallow processing until the day before or the day of the election, extending the time needed to count mail ballots beyond election day.

17. See MICH. COMP. LAWS § 168.823 (2013) (permitting local canvassing boards to review ballots and correct errors).

18. If the locality certified the results of local races, it may only need to send the state the winners' names and a copy of the locally issued certificate of election. See MICH. COMP. LAW. § 168.823 (2013).

### Step 3

Step 3 begins when the state board of elections<sup>19</sup> convenes to review the localities' returns and to certify the election at the statewide level in a process analogous to the one just concluded at the local level. The state boards aggregate the local returns to determine the winners of federal, multi-district, and state offices, as well as statewide ballot measures.<sup>20</sup> It then certifies all winners who were not certified at the local level. The certificate of election confers prima facie title to the office at issue.

If the election resulted in a decisive victory with few or no allegations of irregularities or illegal votes, the election's outcome is unlikely to be challenged. If the margin of victory is small or if irregular or illegal votes allegedly affected the outcome, the likelihood of a challenge—a recount or election contest—is increased.<sup>21</sup>

The amount of time between the original canvass and the final state certification varies from state to state, although it is usually several weeks. As an example, Michigan requires its local county-based canvassing boards to meet no later than 9 a.m. on the Thursday after an election to canvass the local returns.<sup>22</sup> After the count is complete, the state board of canvassers must meet to review the county-submitted returns on or before the twentieth day following the election and must finalize its results no later than the fortieth day after the general election.<sup>23</sup>

The amount of time between the original canvass and the final state certification varies from state to state, although it is usually several weeks.

## A. Legal Issues

Vote canvassing is an official, ministerial act. The original precinct-level canvassers and the later reviewing canvassing boards perform narrow ministerial

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19. The board conducting the state-level review may be a canvassing board, elections board, or the Secretary of State.
  20. See *Pullen v. Mulligan*, 561 N.E.2d 585, 592 (Ill. 1990) (discussing the meaning of “canvass” and how it applies to different boards at the local and state level). Note that regulations which govern the necessity of counting early, absentee and/or provisional ballots before a winner is announced vary by state.
  21. See *A Survey and Analysis of Statewide Election Recounts, 2000-2019*, FAIRVOTE (Nov. 4, 2020, 12:27 PM), [https://www.fairvote.org/a\\_survey\\_and\\_analysis\\_of\\_statewide\\_election\\_recounts](https://www.fairvote.org/a_survey_and_analysis_of_statewide_election_recounts). However, recounts have only resulted in three reversals: the 2008 Minnesota U.S. Senate race, the 2006 Vermont auditor race, and the 2004 Washington governor race. *Id.* at 2. The margin shifts after a statewide recount are generally low: shifting by an average of only .024% of the vote. *Id.*
  22. MICH. COMP. LAWS §§ 168.821 – 168.842 (West 2019).
  23. MICH. COMP. LAWS § 168.842 (West 2019).

duties and operate under limited grants of authority, which they may neither abdicate nor exceed. Administrative remedies may be available to address canvassing failures. If available, a petitioner may need to exhaust those remedies before seeking redress in court. To the extent courts become involved, their involvement is likely limited to circumstances where a canvassing body:

1. fails to act,
2. acts in excess of its authority, or
3. seeks to amend its returns.

## 1. Fails to Act

A canvassing board abdicates its authority when it refuses to canvass votes or to submit its returns as statutes direct.<sup>24</sup> Under these circumstances, the court, if requested, may issue a writ of mandamus<sup>25</sup> ordering the board to complete its official duties.<sup>26</sup> Absent the canvassing board's failure to act, however, courts should not intervene in post-election disputes until the initial canvass concludes.<sup>27</sup>

## 2. Acts in Excess of its Authority

Canvassing boards exceed their authority when they investigate allegations of fraud or irregularity, scrutinize tally sheets for evidence of tampering, or throw out the election results unless these actions are specifically authorized.<sup>28</sup> Courts can enjoin canvassing boards from acting in excess of their authority and issue writs of mandamus to compel them to perform their statutory duties.

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24. *State ex rel. Bodine v. Elkhart Cnty. Election Bd.*, 776 (Ind. Ct. App. 1984) (holding canvassing boards have a statutory duty to conduct a canvass without being ordered to do so).
  25. Mandamus is an extraordinary writ issued to compel the performance of official, nondiscretionary duties. *See infra* Chapter 11: Extraordinary and Equitable Relief for additional information on writs of mandamus. Some states may use mandamus-equivalents rather than a writ mandamus or may call the action by another name. When this manual refers to a writ of mandamus, it includes these other actions.
  26. *See Sears v. Carson*, 551 So.2d 1054, 1056 (Ala. 1989).
  27. A Michigan canvassing board found itself receiving national attention in 2020 when two members of a four-member local canvassing board signaled intent to refuse to certify county results (they ultimately signed off). Had they not done so, the dispute would have fallen to the Michigan legislature to resolve. Michigan law states that “[w]hen the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected.” MICH. COMP. L. § 168.846. *See Annie Grayer, Jeremy Herb, & Chandelis Duster, Michigan Certifies Biden’s Win as Trump Challenges in Other Key States Fizzle*, CNN (Nov. 23, 2020), <https://www.cnn.com/2020/11/23/politics/michigan-certify-election-results-monday/index.html>. He instead wanted the Board to delay certification until an audit was conducted to investigate allegations of voter fraud in the state’s largest county, Wayne County. *Id.*
  28. *Sears*, 551 So.2d at 1056.



### 3. Seeks to Amend its Returns

Occasionally, a canvassing board discovers errors in its initial canvass and may seek to recanvass the votes or submit amended returns without waiting for a candidate-initiated recount. The canvassing board's amendment of its returns may be challenged. In one example, a 1962 Minnesota court permitted several local canvassing boards to substitute amended returns for their originally certified ones because the canvassing boards voluntarily undertook the action to correct only "obvious errors" before the state board of elections meeting began.<sup>29</sup> In another case a 2004 Washington court allowed a local canvassing board to recanvass ballots that had been set aside for further review and then forgotten.<sup>30</sup> The court first determined that the statutory language that authorized a recanvass to correct inconsistencies or discrepancies in election returns was not limited to fixing only mathematical errors.<sup>31</sup>

Statute, however, might limit the type of correction that a canvassing board can make. In one 2009 case, a Minnesota court found that a county canvassing board could not correct alleged errors that election officials made in the acceptance or rejection of absentee ballot return envelopes.<sup>32</sup> The court found that the statute limited the authority of the canvassing board to correct only errors in "the counting or recording of the votes."<sup>33</sup>

Courts may also issue writs of mandamus to order a board to withdraw its unauthorized amended returns.

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29. *See In re Application of Andersen*, 119 N.W.2d 1 (Minn. 1962) (noting, by two dissenting judges, that no reason existed to believe similar errors were not lurking in the results filed by the 3100+ other precincts and expressing concern that allowing voluntary amendments from some precincts would encourage partisanship amounting to selective recounts).

30. *Wash. State Republican Party v. King Cnty. Div. of Recs.*, 103 P.3d 725, 727-28 (Wash. 2004).

31. *Id.*

32. *Coleman v. Ritchie*, 762 N.W.2d 218 (Minn. 2009).

33. *Id.*

### III. CERTIFICATION

The ministerial act of certification occurs after a local or state canvassing board finalizes the election results and declares an official winner. State statutes may authorize local canvassing boards to issue certificates of election for local offices. State canvassing boards or other state officials issue certificates of election for multi-district, state, and federal offices. The candidate holding a certificate of election has a prima facie right to the office and takes office unless successfully challenged.

Because certification is a ministerial act, declared official winners should automatically receive a certificate of election.

Because certification is a ministerial act, declared official winners should automatically receive a certificate of election. If the announced official winner is not issued a certificate of election, the winner may need to pursue and exhaust any available administrative remedies before resorting to a lawsuit. If administrative remedies are unavailing, courts can issue a writ of mandamus to compel appropriate officials to issue the winner's certificate of election. If no winner has been officially declared, however, no duty to certify the election results may exist and mandamus is unavailable.<sup>34</sup>

### IV. RECOUNTS

Recounts are intended to uncover specific instances of erroneous vote allocation or mathematical errors that led to the wrong candidate being declared the winner. Recounts are not “fishing expeditions”<sup>35</sup> to uncover general problems with the election. Although some states involve courts in recounts at the outset, recounts are typically administrative affairs in which all or a portion of the ballots counted in the original canvass are counted again to verify the accuracy of the initial canvass. Courts may play a role in a recount when state statutes direct their participation or when a candidate seeks court review of an administrative decision that granted or denied a recount, or a decision made during the recount. The information candidates gather while attending the recount or inspecting voting equipment may form the basis of an election contest.<sup>36</sup>

34. See *Williamson v. State Election Bd.*, 431 P.2d 352 (Okla. 1967).

35. *Akaka v. Yoshina*, 935 P.2d 98, 104 (Haw. 1997) (citation omitted).

36. See *Miller v. Cnty. Comm'n of Boone Cnty.*, 539 S.E.2d 770, 776 (W. Va. 2000) (stating that where a contest is premised on specific votes cast, the recount “plays an integral and indispensable role tantamount to fundamental principles of due process”).

Because a recount's role and qualifying prerequisites vary greatly by state, a court that becomes involved in a recount request should ensure that it understands the role the recount plays in the state's statutory scheme for post-election challenges.<sup>37</sup> There are no federal recount requirements, but there are statutory deadlines for Presidential elections.<sup>38</sup>

All candidates for the office being recounted and their agents can typically attend the recount, observe the process, and protest what they consider to be wrongly counted ballots.<sup>39</sup> Media, voters, and political groups may also request access to ballots or other election materials, such as ballot box tapes and poll signature cards, if state statute delineates ballots are public records subject to open record laws.<sup>40</sup> Some state courts have interpreted state open record statutes to allow such access; other states have denied it, balancing the state's interest in keeping election materials secure and private against the public's right to access information.<sup>41</sup>

During a recount, elections officials, their employees, and designated assistants recheck vote tabulations, ensure votes were correctly attributed to the voter's intended candidate, and verify the results were tallied correctly. State statutes may allow officials to duplicate bent or ripped ballots that the counting machinery would otherwise be unable to read.<sup>42</sup> Recount boards may also need to ascertain the voter's intent, which they do by looking at the ballot markings.

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37. A recount may be required before an election contest can be filed, it may be one step in an election contest, or it may be a stand-alone procedure. Some states require "discovery recounts" in which a limited number of ballots are reviewed to search for irregularities before a full recount is available. *See* Jennifer A. Harris, Commentary, *The 2002 Gubernatorial Election Controversy: The Legality of a Pre-Contest Recount in Alabama*, 55 ALA. L. REV. 193 app. (West 2003) (listing automatic recount provisions by state).

38. *See* 3 U.S.C. § 5 (creating a safe-harbor deadline by which all election disputes over presidential votes must be resolved before the Electoral College meeting).

39. *See, e.g.*, ARIZ. REV. STAT. §16-602(B) (West 2020) (stating that partisan observers are permitted to view election recounts and film it themselves, but that the state does not stream the process); NEV. REV. STAT. § 293B.353 (1995) (permitting the public and each candidate or the candidate's representative to watch the recount).

40. *See, e.g.*, COLO. REV. STAT. §§ 24-72-205.5 (West 2012).

41. *See* Marks v. Koch, 284 P.3d 118 (Colo. App. 2011); Kibort v. Westrom, 862 N.E.2d 609 (Ill. App. Ct. 2007); Milton v. Hayes, 770 P.2d 14 (Okla. 1989). In the 2020 Presidential election cycle, the Trump campaign brought a number of lawsuits in state courts alleging their canvass observers did not have meaningful access to the in-person and absentee ballot canvassing processes. *See, e.g.*, In re Canvassing Observation, No. 30 EAP 2020, 2020 WL6737895 (Pa. Nov. 17, 2020); Kraus v. Cegavske, No. 82018, 2020 WL 6483971 (Nev. Nov. 3, 2020); Donald J. Trump for President, Inc. v. Sec'y of Pa., No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020). These and other legal challenges failed because the state officials were in fact complying with state law, because the plaintiffs lacked standing, because the relief sought is unavailable, or because the plaintiffs did not support their claims with enough evidence. *See id.*

42. *See* WASH. REV. CODE. § 29A.60.125 (West 2018).

State recount statutes typically set the level of applicable review, which may vary depending on whether the vote was tabulated by a machine or by hand,<sup>43</sup> was cast in-precinct or absentee,<sup>44</sup> or was cast in a single-precinct or at a voting center.<sup>45</sup> Courts may also need to determine if ballot-marking statutes are mandatory or directory.<sup>46</sup> This section discusses:

- A. Types of recounts,
- B. Procedural prerequisites for recounts,
- C. Substantive issues with recounts, and
- D. Ballot measure recounts.

## A. Types of Recounts

The common law did not recognize recounts. Thus, losing an election, by itself, does not confer recount eligibility on candidates. Instead, the availability of a recount is determined by state statutes, with most states allowing at least some losing candidates to request recounts.<sup>47</sup> States that allow recounts offer one or both of the two types:

- 1. Automatic qualification recount or
- 2. Discretionary or petition recount.<sup>48</sup>

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43. See *Huber v. Reznick*, 437 N.E.2d 828 (Ill. App. Ct. 1982) (holding that standards for validly cast hand-marked ballots are more stringent than those for stylus-marked ballots).

44. See *McDunn v. Williams*, 620 N.E.2d 385 (Ill. 1993) (holding the initialing requirement mandatory for valid in-precinct votes, but directory for absentee ballots). For additional information on the distinction between mandatory and directory, see Chapter 9: Election Contests.

45. *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (finding a vote valid which was marked as an out-of-precinct ballot in a polling location that served multiple precincts because it could have been mistakenly put in the wrong box, but finding votes invalid which was marked with another precinct label where votes for only one precinct were cast because they were out-of-precinct votes). *But see* *Bush v. Gore*, 531 U.S. 98 (2000) (finding that using inconsistent standards to determine voter intent gives rise to an Equal Protection violation where the standards could have been standardized but were not).

46. See *Pullen*, 561 N.E.2d 585 (holding violations of mandatory provisions void ballots while violations of directory provisions do not void ballots).

47. *Election Recounts*, NAT'L CONF. STATE LEGISLATURES (Nov. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx>. Three states (Illinois, Mississippi, and Tennessee) do not have automatic or requested recount processes. *Id.* Some states allow any losing candidate to request a recount, while others limit recount requests to only those candidates who lost by a statutorily stipulated margin. *Id.*

48. In some states, statutes require a number of randomly selected precincts or randomly chosen voting machines to undergo a recount to spot verify the election results. This type of recount has not yet played a significant role in post-election challenges. *Id.* For example, California requires a public manual recount of voting-system cast ballots in a randomly selected 1% of the precincts using voting systems to count the ballots and Kentucky requires recounts of randomly selected precincts 3 – 5% of the total ballots cast. *Id.*

## 1. Automatic Qualification Recount

Under the automatic qualification recount, a candidate who loses by a statutorily specified amount—typically a percentage of the total votes cast for the office or a fixed number of votes<sup>49</sup>—automatically qualifies for a recount. Automatic qualification recounts may be self-executing, or the qualifying candidate may need to request that the recount proceed. Automatic qualification recounts may include all precincts or only select ones.<sup>50</sup> Losing candidates are generally not required to pay for the costs of automatic qualification recounts.

## 2. Discretionary or Petition Recount

Where recognized, discretionary or petition recounts allow candidates who do not qualify for an automatic recount to receive a recount if they successfully allege that specific errors in vote counting or tabulation led to incorrect results in the original canvass.<sup>51</sup> In some states, candidates may elect to bring a recount request to court, rather than file a formal request to the state’s chief election officer.<sup>52</sup>

### B. Procedural Prerequisites for Recounts

Strong election law presumptions favor the validity of the election’s original results. This preference supports denying recounts to petitioners who fail to

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49. See *Automatic Recount*, NAT’L CONF. STATE LEGISLATURES (Nov. 3, 2020), <http://www.ncsl.org/legislatures-elections/elections/automatic-recount-thresholds.aspx>; ARIZ. REV. STAT. § 16-661 (2012) (requiring a recount when no more than fifty votes separate the candidates in a state election in which fewer than 25,000 votes were cast, or if 200 or more votes separate the candidates in a state election in which more than 25,000 votes were cast); ALA. CODE § 17-16-20 (2012) (requiring a written waiver to halt the automatic recount provision when not more than 0.5% of the total votes cast in a candidate or ballot measure election separates the winner from the loser).
  50. See, e.g., 10 ILL. COMP. STAT. 5/22-9.1 (West 2012). Illinois conducts a discovery recount of not more than 25% of the precincts that voted for the office being recounted, with at least one precinct recounted, if the margin of victory falls within established limits. The recount is limited to discovery only; it cannot change the election’s results. If the discovery recount uncovers errors in vote tabulation that favor the losing candidate, a full recount, which can change the election’s results, may be available.
  51. Massachusetts candidacy recount applications contain a preprinted statement that the applicant believes the election results are in error and a recount will affect them, although applicants are informed, they need to list the particular reason for their recount request. See *Election Recounts*, SEC’Y COMMONWEALTH OF MASS. (2017), <https://www.sec.state.ma.us/ele/elepdf/Election-Recounts.pdf>.
  52. See, e.g., Tristan Scott, *Judge Orders Statewide Recount in School Superintendent Race*, MISSOULIAN (Dec. 11, 2012), [http://missoulian.com/news/local/updated-judge-orders-statewide-recount-in-school-superintendent-race/article\\_4bd58b48-40c8-11e2-9793-0019bb2963f4.html](http://missoulian.com/news/local/updated-judge-orders-statewide-recount-in-school-superintendent-race/article_4bd58b48-40c8-11e2-9793-0019bb2963f4.html) (describing a court ordered recount where the judge found probably cause that an erroneous count occurred).

satisfy all of the statutory procedural requirements.<sup>53</sup> Although procedural requirements vary by state, the most common include filing a recount request within the limitations period, paying a fee or posting a bond,<sup>54</sup> filing with a designated official,<sup>55</sup> and detailing the reasons why the petitioner believes she is the election's true winner. Common procedural failings used to dismiss a recount petition are failing to meet the eligibility criteria, failing to file within the statute of limitations period, and failing to specify where mistakes occurred.<sup>56</sup>

## 1. Eligibility Criteria

Eligibility for an automatic recount is based solely on the margin of victory and does not require the losing candidate to allege that counting errors changed the election's result. A losing candidate is ineligible for an automatic recount when the winner's margin of victory exceeds the statutory standards.<sup>57</sup> Losing candidates who do not qualify for an automatic recount may be eligible for a discretionary recount if they are able to make the specific allegations and pay the fees required.

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53. For example, a court held that a petitioner's failure to notarize his recount petition as required created an incurable jurisdictional defect that warranted its dismissal. *See In re Recanvass of Certain Voting Machines and Absentee Ballots For Democratic Primary Election For Candidates For Council For City of Monessen*, 887 A.2d 330 (Pa. Commw. Ct. 2005).
54. IDAHO CODE § 34-2302 (West 2011) (requiring \$100 fee per recounted precinct); N.J. STAT. ANN. §19:28-2 (West 2012) (requiring \$25 per recounted district); OR. REV. STAT. § 258.161 (West 2001) (requiring \$15 per recounted precinct to a maximum of \$8000). In some states, the petitioning candidate is refunded the recount fees if the recount changes the election's outcome. *See* IDAHO CODE §34-2306 (West 2011) (allowing that if recount results, when projected across all precincts, indicate the results would be changed, the recount fees are refunded to the candidate and assessed against the locality or the state).
55. *See* IDAHO CODE § 34-2301 (West 2011) (requiring a recount petition to be filed with the state attorney general); (with the town clerk or election commissioner), *see Election Recounts*, NAT'L CTR STATE LEGISLATURES (Nov. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx> (listing specific rules by which recounts must be conducted such as who can request a recount and deadlines by which these requests must be made); N.J. STAT. ANN. § 19:28-3 (West 2012) (judge); OR. REV. STAT. § 258.161 (West 2001) (with the state's Secretary of State).
56. *Supra note 55, Election Recounts*.
57. Automatic qualifying recount eligibility is easy to determine when the margin of victory is measured as a fixed number of votes separating the winning and losing candidates or positions. When eligibility is expressed as a percentage of the total votes cast for the office subject to the recount, however, the universe of votes included in the "total votes cast" pool can determine if the petitioner qualifies for the recount or falls short. One court, when faced with a decision as to which votes to include in the "total votes cast" pool, decided that only valid votes for validly declared candidates were included in the pool. This approach eliminated from the "total votes cast" pool the votes cast for a write-in candidate who failed to declare and register her candidacy as required. Because these votes were omitted, the second-place finisher received ten votes more than the one-percent vote total difference allowed under the automatic qualifying recount statutes and was ineligible for this type of recount. *See State ex rel. Travers v. McBride*, 607 S.W.2d 851, 854 (Mo. Ct. App. 1980).

Petitioners desiring a discretionary recount must generally specify the precise reasons they believe the original canvass was incorrect.

## 2. Statute of Limitations

The statute of limitations period for recount petitions is typically short,<sup>58</sup> and most commonly accrues from Election Day,<sup>59</sup> the last meeting day of a canvassing board,<sup>60</sup> or the date the results were certified.<sup>61</sup> Because final canvassing and certification for the various elected offices may occur at different times depending on whether the office is local or statewide, it is important to determine when the triggering date has occurred. If the losing candidate does not petition for a recount in time, the court or administrative body cannot grant the request.

## 3. Specifying Mistakes

Petitioners desiring a discretionary recount must generally specify the precise reasons they believe the original canvass was incorrect. Thus, the petitioner seeking a discretionary recount may be required to specify the precincts wherein the mistakes occurred as well as their nature.<sup>62</sup> Courts should deny recount petitions that fail to make the required showing.<sup>63</sup>

### C. Substantive Issues with Recounts

Even if a losing candidate meets the procedural prerequisites, a recount is not guaranteed. For it to proceed, the ballots subject to the recount must have been kept in secure storage.<sup>64</sup> Additionally, voter intent standards and the scope and

58. IOWA CODE § 50.48 (West 2019) (limiting the period to three days); W. VA. CODE § 3-6-9 (West 2009) (limiting the period to 48 hours); WIS. STAT. § 9.01 (West 2017) (limiting the period to three business days).

59. IOWA CODE § 50.48 (West 2019).

60. WIS. STAT. § 9.01 (West 2017).

61. W. VA. CODE § 3-6-9 (West 2009).

62. Depending on the state, the petitioner may need to allege either that the recount will change the election's result or that the recount has a likelihood of changing the election's result.

63. *See In re Van Noort*, 85 A. 813 (N.J. 1912). So essential is the requirement that the recount is based on the petitioner's belief that the recount will demonstrate the petitioner was the actual winner that one court based, in part, its decision not to expand a limited recount statewide—even though it had reserved the right to do so at the initial hearing—on the fact that when the limited recount increased the winner's margin of victory, the petitioner could no longer claim he believed the recount would show he was the actual winner. *Id.*

64. "Ballots" may be physical hard copy ballots, voting machine vote recorders, or "paper trails" from electronic voting machines as statutes dictate.

nature of the recount must be established, usually by statute or by courts or election officials if not explicitly expressed in statute.<sup>65</sup>

## 1. Ballot Security

After determining the petitioner is eligible for a recount, the court must determine if the ballots are able to be recounted, generally by determining if they were properly preserved as legally required. Because post-election fraud and vote tampering foreclose a recount,<sup>66</sup> election officials are obliged to comply with post-election ballot security and preservation statutes. Improper ballot preservation, which includes allowing unauthorized persons to have access to the ballots, casts suspicion on or destroys the ballots' integrity and may prevent a recount.<sup>67</sup> Properly preserved ballots are controlling evidence of how the electorate voted.<sup>68</sup>

Election officials' failure to comply with all ballot security requirements is not always fatal to a recount request because the violated statute may be evaluated under a directory rather than a mandatory construction. Although all election statutes are "mandatory" because compliance is required, courts are frequently able to use a directory construction<sup>69</sup> to overlook compliance failures that did not result in harm. This flexible approach protects the finality of elections as well as political stability because it protects elections from being voided for statutory lapses that do not affect the outcome. Courts generally utilize a directory construction for an election statute when the:

- violated statute does not specify a penalty for noncompliance,<sup>70</sup>
- statutory deviation only becomes an issue post-election, and
- statute's purpose was upheld in spite of the deviation.

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65. See *Bush v. Gore*, 531 U.S. 98 (2000).

66. Or an election contest.

67. *Henderson v. Maley*, 806 P.2d 626, 628 (Okla. 1991) (finding no trial court error in denying recount where evidence suggested ballot integrity was compromised through insufficient post-canvas security).

68. *Id.* at 632.

69. See *Telles v. Carter*, 262 P.2d 985, 989 (N.M. 1953) (explaining when courts decide an election code is mandatory, it is usually a code that requires a specific performance by the voter, while directory codes are those that require action from election officers when that election officer's failure to act did not prevent a fair election, believing that to interpret the later codes to also be mandatory would "disfranchise the voter because of the mistakes or omissions of election officers [and] would [] put him entirely at the mercy of political manipulators.") (quoting MCCRARY ON ELECTIONS, 4th Ed., sec. 724, p. 522).

70. See *e.g., id.* at 988 (explaining a code was interpreted to be mandatory when it "direct[ed] voters how to vote when there are two or more candidates nominated in a group for an office, concludes that in case of a violation 'his ballot shall not be counted for any candidate for said office.'").



Post-canvass ballot security becomes an issue only if the winning candidate and the challenger do not stipulate that ballot security statutes were satisfied. When the candidates agree that the post-canvass ballot security measures satisfied the statutory requirements for a recount, court or administrative review of the security measures is unnecessary.

When courts evaluate post-election ballot security, they focus on:

- a. whether the ballots have been adequately secured and,
- b. if not, whether a recount is possible despite the security failures.

### **a. Adequacy of Ballot Security**

State election codes frequently require election officials to follow detailed post-canvass ballot and voting machine security requirements that may include chain-of-custody,<sup>71</sup> vote recorder,<sup>72</sup> and ballot box sealing and recording<sup>73</sup> storage provisions. Whether these requirements have been satisfied is a factual question that courts determine from the evidence presented.<sup>74</sup>

The recount proponent bears the burden of proving that the ballots<sup>75</sup> condition did not change after election officials secured them following the initial canvass.<sup>76</sup> The recount opponent overcomes the proponent's evidence by showing that actual ballot tampering occurred or that ballot storage conditions offered the possibility for tampering.<sup>77</sup> Because actual tampering can be difficult to demonstrate, courts often refuse to order a recount if the opportunity for ballot tampering existed.<sup>78</sup> Tampering opportunities exist when election officials have engaged in action that constitutes a "radical departure" from statutory ballot security requirements, such as tying the ballot box keys to the locks, failing to

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71. See *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1204 (Ill. App. Ct. 2005) (nunc pro tunc) (determining prerequisites before three absentee ballots discovered in a different precinct's warehouse would be counted).

72. Vote recorders store information on votes cast on electronic voting machines. Additional ballot security concerns center on vote tampering at the time the votes are cast so the voter's choice is recorded for a different candidate than the one selected, the security of computerized voting machines' memory units, and the extent that electronic transmission of voting results from the precinct to an administrative office is vulnerable to data corruption or hacking.

73. See *Ryan v. Montgomery*, 240 N.W.2d 236, 237 (Mich. 1976) (noting that an unrecorded seal could not provide assurance that ballots had not been removed from or added to the ballot container).

74. *McConnell v. Salmon*, 141 So. 73, 74 (La. 1932).

75. For ease of reading, when this section refers to "ballots," the term is meant to include vote recorders, voting machine memory sticks, flash drives, or other vote recording and storage devices and sometimes the entire voting machine itself.

76. *McConnell*, 141 So. at 74.

77. See *id.* at 75 (discussing burdens of proof when ballot security and preservation is at issue).

78. See *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1204 (Ill. App. Ct. 2005).

prevent the possibility that unauthorized persons could have access to ballot boxes or voting machines, and leaving ballots with individuals who had no legal obligation to protect them.<sup>79</sup>

Statutory ballot security requirements, which vary by voting method and by state, are not always updated when voting technology changes. If ballot security requirements have not kept pace with changes in voting technology, courts must identify the applicable requirements before they can decide if the requirements have been met and the recount can proceed. For example, in the absence of specific statutes governing post-canvass security for machine-counted punch card ballots, one court decided that security statutes written for hand-counted paper ballots applied.

Because these requirements were unmet, the court held that the recount was properly denied.<sup>80</sup>

### **b. Whether a recount is possible despite ballot security failures**

Substantial compliance with ballot security statutes sometimes redeems imperfect compliance, such as when the statute's purpose has been satisfied and the non-compliance does not appear to have resulted in harm.

If proper ballot security procedures were followed in some precincts but not others, a recount can generally take place in those precincts where the ballots were properly secured. The recount results supersede the initial returns in the recounted area while the original canvass results remain in the areas that were not recounted.<sup>81</sup>

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79. See *McConnell*, 141 So. at 76.

80. *Henderson v. Maley*, 806 P.2d 626 (Okla. 1991).

81. *Scholl v. Bell*, 102 S.W. 248, 256 (Ky. Ct. App. 1907); *McDunn v. Williams*, 620 N.E.2d 385, 402 (Ill. 1993).

## 2. Standards for Ascertaining “Voter Intent”

Ascertaining voter intent so a vote can be properly attributed is a longstanding consideration in recounts.<sup>82</sup> Counting votes when the intended candidate or ballot position is clearly, if irregularly, expressed limits the number of voters who become disenfranchised because they made innocent, minor deviations from statutory ballot marking requirements. If the voter’s intent is not clear, however, the vote should not be counted.<sup>83</sup>

Problems frequently arise when the legislature has not clearly defined “voter intent,” as the Florida recount following the 2000 presidential election demonstrated. In the situation that resulted in the United States Supreme Court’s *Bush v. Gore*<sup>84</sup> decision, the Florida Supreme Court ordered a manual recount during an election contest but did not specify recount standards beyond the statutory “voter intent” standard. Thus, no standard definition of a legal vote uniformly applied throughout the state with each precinct inferring intent in different ways. The United States Supreme Court held that the absence of specific standards for ascertaining voter intent violated Equal Protection guarantees because identical votes were not treated equally.<sup>85</sup>

In 2010, when Alaska Senator Lisa Murkowski ran for re-election as a write-in candidate, the Alaska Supreme Court found that “minor variations” such as misspellings or abbreviations did not invalidate ballots as long as election officials could ascertain voter intent. The court found that in order to ascertain voter

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82. *O’Brien v. Bd. of Election Com’rs [sic] of City of Boston*, 153 N.E. 553, 556 (Mass. 1926) (“The cardinal rule for guidance of election officers and courts in cases of this nature is that if the intent of the voter can be determined with reasonable certainty from an inspection of the ballot, in the light of the generally known conditions attendant upon the election, effect must be given to that intent and the vote counted in accordance therewith, provided the voter has substantially complied with the requisites of election law; if that intent cannot thus be fairly and satisfactorily ascertained, the ballot cannot rightly be counted.”); *Bloedel v. Cromwell*, 116 N.W. 947, 948 (Minn. 1908) (“Election laws are to be construed so as to secure to every voter reasonable opportunity to vote and to have his vote counted as cast, when his intention can be ascertained from the ballot without violating statutory provisions....The intent of the voter, accordingly, to be effective, must be shown and indicated by markings on the official ballot substantially in the manner provided by such law, and in bona fide attempt at compliance therewith.”).

83. Voter intent is determined on an election-by-election basis, where the “election” is each individual candidate race and each ballot measure. Thus, uncertain voter intent in one race only voids the vote for that particular race, it does not void the entire ballot.

84. *Bush v. Gore*, 531 U.S. 98 (2000) (halting a manual recount conducted as part of an election contest after finding that its lack of specific standards for “voter intent” violated Equal Protection guarantees).

85. *Id.*

intent, the state applied an identical method to every ballot, and thus, the state did not violate the Equal Protection Clause.<sup>86</sup>

Although the Court in *Bush v. Gore* explicitly limited its holding to the facts of that case problems can arise if no standard definition of a valid vote exists. Some legislatures, on notice since *Bush v. Gore*, have acted to ensure that voter intent standards are spelled out so that all recounted ballots are reviewed using the same standard.<sup>87</sup>

One way in which voter intent cannot be ascertained—unless statutes direct otherwise—by recount boards is through outside evidence. Recount boards may only use the ballot itself. One court held that a recount board exceeded its authority when it added forty votes to a candidate’s totals after considering affidavits from voters who claimed a faulty voting machine prevented them from casting valid votes.<sup>88</sup> An appellate court determined that the affidavits constituted improper extrinsic evidence that the board should not have considered.<sup>89</sup> If a recount board uncovers fraud or irregularities while conducting the recount, it should refer its discovery to a court or grand jury rather than launch its own investigation or make accommodations for the problems.<sup>90</sup> The impact of fraud or irregularities on an election’s results may be raised in an election contest proceeding.

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86. *Miller v. Treadwell*, 245 P.3d 867, 8769-73 (2010).

87. *See e.g., Washington Responds to Bush v. Gore*, WASH. SEC’Y OF STATE, (Mar. 13, 2002), <https://www.sos.wa.gov/office/news-releases.aspx#/news/155> (explaining the state’s adoption of new rules in the wake of *Bush v. Gore* that “create consistent standards for all canvassing boards...”). *See also State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, 145 N.M. 563, 569-570 (2009) (highlighting state election codes passed after *Bush v. Gore* that establish a voter-intent standard); *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990) (identifying seven categories of contested ballots and noting that courts sometimes struggle to give effect to a voter’s intent); *see also Nagel v. Kindy*, 591 N.E.2d 516, 521 (Ill. App. Ct. 1992) (finding where write-in vote for candidate did not specify whether the candidate was selected for the two-or the four-year term, the lack of determinable intent invalidated the ballot, notwithstanding the fact the candidate filed for the four-year term).

88. *See Duncan v. Cnty. Court of Cabell Cnty.*, 75 S.E.2d 97, 101 (W. Va. 1953).

89. *See id.*

90. *In re Van Noort*, 85 A. 812, 813 (N.J. 1912).

### 3. Defining Recount Procedures

The exact process by which the recount is conducted is defined by state statute or agency rules and may vary based on the method used to cast the ballot.<sup>91</sup> Many states count votes if the voter’s intent “can be determined with reasonable certainty.”<sup>92</sup> Paper ballots are usually reviewed manually to ascertain the voter’s intent under this standard. Recounts of machine cast or tabulated votes, however, may consist only of rereading or reviewing the vote recorder’s count or through using a different ballot scanner to ensure the same count.<sup>93</sup> If computerized voting machines provide a paper trail and state statutes do not indicate whether the machine count or the paper trail is the official recount ballot, the court may be asked to make this determination.<sup>94</sup>

Courts may become involved in defining the nature of the recount when the statutes governing recounts reference different voting methods than those used during the election or when the statutes are silent or ambiguous. One court, when faced with a request to borrow recount language from another section of the election code and apply it to an electronic voting system, decided it could not do so because the self-contained nature of the electronic voting system statutes did not permit code borrowing.<sup>95</sup>

The exact process by which the recount is conducted is defined by state statute or agency rules and may vary based on the method used to cast the ballot.

91. See Michael A. Carrier, *Vote Counting, Technology, and Unintended Consequences*, 79 ST. JOHN’S L. REV. 645, 679 (Summer 2005) [hereinafter *Vote Counting Technology*] (noting Ohio’s requirement of a comparison between a hand count and a sample machine count to determine if the recount must be conducted manually or can be performed by machine). The inability of many types of voting machinery to provide an auditable trail to serve as an independent source on which to base a recount has led to an increased interest in voter verified paper ballots or audit trails. See VERIFIEDVOTING.ORG, *Audit Law Database*, <https://verifiedvoting.org/auditlaws/> (providing examples of manual audit provisions) (last visited Sept. 6, 2021).

92. See, e.g., *Election Recounts*, *supra* note 51 (explaining the recount process in Massachusetts).

93. For machines without an auditable trail of some sort, this may be the best one can do. See *Vote Counting Technology*, *supra* note 91, at 681. See Jessica Ring Amunson & Sam Hirsch, *The Case of the Disappearing Votes: Lessons from the Jennings v. Buchanan Congressional Election Contest*, 17 WM & MARY BILL RTS. J. 397, 401 (2008) (describing the 2006 recount in Florida’s Thirteenth Congressional District in which the electronic voting machines were incapable of producing an auditable paper trail). If the machine produces an auditable trail, but the statute does not specify whether to use the machine tally or the paper trail during the recount, the court may be asked to decide.

94. *Id.*

95. See *Manchin v. Dunfee*, 327 S.E.2d 710 (W. Va. 1985).

Courts may also be asked to decide if the recount statute allows review of ballots omitted from or rejected during the original canvass.<sup>96</sup> State statutory language may limit the recount to previously tabulated votes and exclude from the recount votes omitted from the initial canvass because of irregularities.<sup>97</sup>

Finally, when recount boards fail to act, or act in excess of their authority, courts can issue writs of mandamus to compel them to perform, and limit their conduct to, their required duties.

## D. Ballot Measure Recounts

In some states, supporters of a losing ballot measure position may be able to petition for a recount. Not surprisingly, the requirements for a ballot measure recount vary by state. In a few states, a single voter can request the recount.<sup>98</sup> In other states, multiple voters must demonstrate their support by signing a petition requesting the recount before it will be granted.<sup>99</sup>

Ballot measure recount requests, where available, must also be filed within the statute of limitations period, with the proper office, and must allege an error in the original canvass. Ballot security is also a threshold question in ballot measure recounts.

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96. *See, e.g.*, *Coleman v. Ritchie*, 758 N.W.2d 306, 307-308 (Minn. 2008) (holding that “county canvassing boards lack statutory authority to count [rejected absentee] ballots and submit amended reports . . . . But where the local election officials and the parties agree that an absentee ballot envelope was improperly rejected, correction of that error should not be required to await an election contest in district court).

97. *See McDonald v. Secretary of State*, 103 P.3d 722, 723 (Wash. 2004).

98. *E.g.*, NEV. REV. STAT. § 293.403 (2019), OKLA. STAT. tit. 26 § 8-111(b)-(c) (2013); WIS. STAT. § 9.01 (2017).

99. N.J. STAT. ANN. § 19:28-1 (2012) (ten voters); OHIO REV. CODE § 3515.01 (West 2011) (five “qualified electors”); UTAH CODE ANN. § 20A-4-401(2)(a) (West 2020) (any ten); VA. CODE ANN. § 24.2-800(C) (West 2020) (fifty or more voters “qualified to vote on the question”); WYO. STAT. ANN. 22-16-111(a)(1)(ii) (West 1999) (twenty-five electors registered in the district voting on the question, for ballot propositions only).

## V. CONCLUSION

As described above, the procedures dictating ballot canvassing, particularly for mail-in and absentee voting, vote certification, and recounts are determined by individual and varied state law. These three election mechanisms typically occur in sequential order: ballot canvassing first; local and state-level vote certification second; and (if triggered or requested as state law allows) a recount third. Recount results, when they occur, supersede original ballot canvasses and the victors of such recounts becomes the certified winner.

While courts do not typically loom large in these post-election mechanisms, there are a number of points in which courts may become involved. In the context of ballot canvassing, courts may be asked to resolve issues related to a canvassing body's failure to act, actions in excess of its authority, or amendment of its returns. Courts may be asked to step in to resolve unauthorized delays in election certification or if the certification board fails to issue a certificate of election to the announced official election winner. Finally, in the context of recounts, courts may play a more active role, especially in states where statutes direct the participation of courts. Courts also play a role in recounts when candidates or other statutorily authorized persons seek court review of administrative decisions during recounts.



## CHAPTER 9

# Election Contests



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## CHAPTER 9: ELECTION CONTESTS

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# I. INTRODUCTION

Election contests usually take place after the votes have been counted and a recount has been conducted.<sup>1</sup> Those petitioning for an election contest seek to have certified votes overturned due to election irregularities.<sup>2</sup> Election laws reflect a public policy preference for the pre-election resolution of most election-related problems, concerns, and improprieties. Nevertheless, irregularities may occur immediately before or during an election,<sup>3</sup> rendering pre-election relief unavailable. In such instances, post-election relief in the form of recounts or election contests are available.

Election contests differ from recounts in a number of ways. While contests investigate whether there were fundamental flaws in the election or its administration, recounts address errors in the tabulation of ballots.<sup>4</sup> Election contests involve allegations that fraud, illegalities, irregularities, or other problems changed the election's outcome or rendered the outcome uncertain.<sup>5</sup>

State statutes generally confine standing to contest elections to losing candidates. Some state statutes authorize voters to contest elections.<sup>6</sup> In such states, restrictions typically limit voter-initiated contests such as allowing voters to only contest the results of ballot measure elections,<sup>7</sup> or requiring a minimum number of voters to initiate a contest.<sup>8</sup> Those who contest elections are requesting a court to overturn election results or order a new election. Contestees seek to uphold the

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1. Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 4 (2013). *But see* State *ex rel.* Jordan v. Warren Cir. Ct., 157 N.E.2d 732 (Ind. 1959) (“[A] recount could be had in connection with a contest proceeding when the contest was based upon fraud or mistake in the official count, as is the case in the petition here in question.”).
  2. *Id.*
  3. *See, e.g.*, Toney v. White, 488 F.2d 310, 313-14 (5th Cir. 1973) (en banc) (holding injunctive relief was appropriate because purges occurred directly before the election and Defendants failed to prove Plaintiffs purposefully refrained from seeking pre-election relief).
  4. *See supra* Chapter 8: Canvassing, Certification, and Recounts for additional information on recounts.
  5. *See, e.g.*, COL. REV. STAT. § 1-13.5-1401; ALASKA STAT. § 15.20.540; LA. REV. STAT. § 18:1401; UTAH CODE ANN. § 20A-4-402; CAL. ELEC. CODE § 16100.
  6. *See, e.g.*, FLA. STAT. § 102.168; GA CODE ANN. § 21-2-521; MINN. STAT. § 209.02; ALA. CODE § 11-46-69; CAL. ELEC. CODE § 16100; ALASKA STAT. § 15.20.540; ARIZ. REV. STAT. ANN. § 16-674; ARK. CODE ANN. § 3-8-309; CONN. GEN. STAT. § 9-324; HAW. REV. STAT. § 11-172; KANSAS STAT. ANN. § 25-1435.
  7. *See, e.g.*, S.D. CODIFIED LAWS § 12-22-3; IOWA CODE § 57.1; KY. REV. STAT. ANN. § 120.250.
  8. *See, e.g.*, ARK. CODE ANN. § 3-8-309; ALASKA STAT. § 15.20.540.

Courts have sometimes prevented the purported winner from taking office while the court election contest is ongoing.

election results in order to take or keep office. In some states, government officials may be defendants alongside or in place of contestees.<sup>9</sup>

Courts have sometimes prevented the purported winner from taking office while the court election contest is ongoing.<sup>10</sup> Although postponing the swearing-in ceremony means voters are not represented in the challenged office, this outcome is frequently considered preferable to granting political power to an unauthorized person.<sup>11</sup>

The common law recognized election contests only when fraud infects an election.<sup>12</sup> Modern election contest statutes reflect the importance and value placed on ensuring that the will of legal voters is accurately recorded by providing expanded grounds for election contests.<sup>13</sup> This statutory expansion is not without costs: contests may result in special elections that consume public and private time and money<sup>14</sup> and the challenged office may remain vacant if the

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9. *See, e.g.*, TEX. ELEC. CODE ANN. § 232.004; TEX. ELEC. CODE ANN. § 232.005; MO. REV. STAT. § 115.553; FLA. STAT. §102.168; LA. STAT. ANN. § 18:1402.
  10. *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994) (upholding an injunction preventing the winner from taking office while the trial court on remand determined whether the election outcome should have been different had the irregularities not occurred; here, this also overturned the trial court's declaring the contestant to be the real winner because it did not adequately determine the irregularities' effects).
  11. *Id.* at 889 (noting that no candidate should be certified unless the record supports the conclusion that the named candidate would have been won without the irregularities supported sufficiently to be worthy of the electorate's confidence).
  12. Mark White, *The Election Contest*, 5 TEX. S. U. L. REV. 1, 1 (1978) ("Under the common law...the only remedy...[was] a quo warranto proceeding or an information alleging fraud or other illegalities in the particular election").
  13. *See, e.g.*, CAL. ELEC. CODE § 16100 (finding grounds of contest to include misconduct "malconduct," eligibility, bribery, illegal votes, denial of eligible voters, substantial errors made by the precinct board, or errors in the summation of ballot counts); GA CODE ANN. § 21-2-522 (finding grounds of contest to include misconduct, fraud, irregularity, ineligibility, illegal votes, errors in counting votes, or "for any other cause which shows that another was the person legally nominated").
  14. Primary election contests, for example, reduce the campaigning time available to primary winners, and general election contests shorten the preparation, organization, and transition time available to newly elected office holders. *See* The Harv. L. Rev. Ass'n, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1301 (1975) [hereinafter *Elections*] (discussing factors underlying the denial post-election relief where pre-election relief is available). *See also* *2020 Election to Cost \$14 Billion, Blowing Away Spending Records*, OPEN SECRETS (Oct. 28, 2020) <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/> (estimating 2020 election contests totaled \$6.6 billion, becoming the most costly of all time).

existing office holder’s term expires before the contest suit is decided.<sup>15</sup> Courts, therefore, usually strictly construe election contest statutes,<sup>16</sup> both because of the costs associated with election contests and because of policy preferences that favor electoral finality and political stability.<sup>17</sup>

Contest procedures are intensely state-specific and varied as between states. With this in mind, this Chapter discusses the most significant legal issues commonly raised in election contests along with the processes and analyses courts use to resolve them.

## II. WHO HEARS ELECTION CONTESTS

Depending on the type of election, contests can be decided by courts or legislators. Courts typically decide election contests for primary elections as well as general elections for county and local seats.<sup>18</sup> Election contests over legislative seats are usually heard by that legislative body. Contests over state executive officers are conducted by either the courts or the legislature.<sup>19</sup>

Decision makers hearing election contests usually confront the following three issues:

- 1) Did the petitioner follow statutorily mandated procedures to bring the contest?
- 2) Did enumerated irregularities or infractions during the election process occur?
- 3) If irregularities or infractions occurred, are they alone enough to overturn or void an election (and, relatedly, must the petitioner prove such irregularities were outcome-determinative)?<sup>20</sup>

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15. Some states have implemented procedures to prevent disruption. *See, e.g.*, N.M. STAT. ANN. § 1-14-2 (allowing the individual holding the certificate of election to assume the duties of office until the contest is decided); IND. CODE ANN. § 3-13-7-4 (providing vacancies resulting from an election contest involving an incumbent will be filled temporarily).

16. Both the strict construction of election contest statutes and the looser construction given to statutes governing most other aspects of the election work to favor the court’s upholding of the just-concluded election if at all possible.

17. *See Staber v. Fidler*, 65 N.Y.2d 529, 534 (N.Y. 1975) (“Broad policy considerations weigh in favor of requiring strict compliance with the Election Law ... [for] a too-liberal construction ... has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process”); *Heleringer v. Brown*, 104 S.W.3d 397, 404 (Ky. 2003) (identifying the public policy interests surrounding elections).

18. Elections, *supra* note 14, at 1302-03.

19. *Id.* at 1303-05.

20. *Id.* at 1305-06.

### III. STATUTORY REQUIREMENTS

Generally, election contests procedures are dictated by state statute and vary greatly.<sup>21</sup> However, most states permit losing candidate,<sup>22</sup> an eligible voter,<sup>23</sup> or both<sup>24</sup> to bring elections contests. Some states also allow political parties<sup>25</sup> or the county clerk who conducted the election to file an election contest.<sup>26</sup> A contestant encounters significant barriers to success, not the least of which are requirements to operate quickly, thoroughly, and provide specific factual allegations that validate the contestant's claims.

Courts can generally dismiss election contests that fail to meet all statutory prerequisites, the most common of which include:

- A. requesting a recount before initiating a contest action,<sup>27</sup>
- B. filing within the limitations period,<sup>28</sup>
- C. citing appropriate grounds with specific factual allegations, and<sup>29</sup>

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- 21. *Id.* at 1306-07. A losing candidate may have standing to file an election contest even if he does not seek to be declared the winner. *See* *Files v. Hill*, 594 S.W.2d 836 (Ark. 1980).
  - 22. *See, e.g.*, DEL. CODE ANN. TIT. 15, §5941; IOWA CODE § 57.1; MICH. COMP. LAWS ANN. § 168.110 (“...any candidate for such office...”); N.M. STAT. ANN. § 1-14-1 (“[a]n unsuccessful candidate...”).
  - 23. *See, e.g.*, ALA. CODE § 11-46-69; ARIZ. REV. STAT. ANN. § 16-674; CAL. ELEC. CODE § 16100; CONN. GEN. STAT. § 9-324.
  - 24. *See, e.g.*, ALASKA STAT. § 15.20.540 (allowing a candidate or ten qualified voters to bring an election contest); 10 ILL. COMP. STAT. ANN. 5/23-1.2a (allowing a candidate or a voter who submits a verified petition signed by at least as many voters as would satisfy a nominating petition to file an election contest); N.J. STAT. ANN. § 19:29-2 (allowing a candidate or twenty-five voters to contest an election).
  - 25. *See, e.g.*, HAW. REV. STAT. § 11-172 (allowing a political party directly interested in the election to file an election contest); IND. CODE ANN. § 3-12-11-1 (allowing the state chairman of the candidate's political party to file an election contest if the losing candidate fails to do so within the statutory deadline).
  - 26. *See, e.g.*, OR. REV. STAT. § 258.016 (allowing a voter, candidate, county clerk who conducted the election, or secretary of state (if the election involved a state measure, recall of a state officer, or candidate for whom the secretary of state is the filing officer) to contest the election).
  - 27. *See generally*, *Miller v. Cty. Comm'n of Boone Cty.*, 208 W.Va. 263, 270 (W. Va. 2000); *Mansfield v. McShurley*, 911 N.E.2d 581 (Ind. Ct. App. 2009); *Laite v. Stewart*, 112 Ga. App. 853, 146 S.E.2d 553 (1965) (finding that the candidate's failure to request a recount of absentee ballots foreclosed his opportunity to demonstrate that the election results would have been substantially changed).
  - 28. *See generally*, *Chastain v. James*, 463 S.W.3d 811, 821-822 (Mo. Ct. App. 2015); *McDaniel v. Cochran*, 158 So. 3d 992, 1000 (Miss. 2014); *McCastlain v. Elmore*, 340 Ark. 365 (2000); *In re Gen. Election for Twp. Supervisor*, 152 Pa. Commw. 590 (Pa. Commw. Ct. 1993); *Wadley v. Hall*, 261 Ga. 681 (1991) (finding there was no jurisdiction to hear the case because the contestant had filed the petition a day late).
  - 29. *See, e.g.*, *Bergstrom v. McEwen*, 960 N.W.2d 556, 566 (Minn. 2021); *Felker v. Sikeston*, 334 S.W.2d 754, 755 (Mo. Ct. App. 1960); *Kraft v. King*, 585 N.E.2d 308, 309 (Ind. Ct. App. 1992); *Denny v. Arntz*, 55 Cal. App. 5th 914, 918 (2020).

#### D. satisfying pleadings requirements.<sup>30</sup>

Michigan and New York don't have statutes discussing election contests but allow for quo warranto suits.<sup>31</sup> These allow for the ouster of a candidate that has taken office and operate as common law election contests.<sup>32</sup> In both states, the attorney general is responsible for screening the cases, but in Michigan private parties may bring suit when the attorney general refuses to do so while the attorney general alone decides whether to proceed in New York.<sup>33</sup> In the modern era, all other states have enacted election contest statutes.<sup>34</sup>

### A. Recount Requirement

Recounts<sup>35</sup> may be a required pre-contest process in certain jurisdictions<sup>36</sup> and may be automatic.<sup>37</sup> Recounts may always be required<sup>38</sup> or may be necessary only under certain circumstances,<sup>39</sup> for instance, when a contest is based on challenges to specific ballots or the outcome of an election is determined by a negligible

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30. See, e.g., *Napp v. Dieffenderfer*, 364 So. 2d 534 (Fla. 3d DCA 1978) (complaint challenging city council election dismissed for failing to allege that, if corrected, irregularities complained of would cause a different result); *Wiedenheft v. Frick*, 234 Iowa 51, 11 N.W.2d 561, 564 (1943) (contestant must show that alleged misconduct and corruption on part of election judges is sufficient to change the result); *Hansen v. Lindley*, 152 Kan. 63, 102 P.2d 1058 (1940) (statutes providing for election contests not contemplating that technical rules with reference to pleadings should be strictly followed); *Johnstun v. Harrison*, 114 Utah 94, 197 P.2d 470 (1948) (finding that, although two propositions set up by plaintiff failed to state sufficient facts to show cause of action, third proposition was sufficient).
  31. MICH. COMP. LAWS ANN. § 600.4501 (West 1996); N.Y. EXEC. LAW § 63-b (McKinney 2010).
  32. See Douglas, *supra* note 1 (citing Steven F. Huefner, *Just How Settled Are the Legal Principles that Control Election Disputes?*, 8 ELECTION L.J. 233, 235–36, 235 n.8 (2009); Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning From Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 183 (2001) (“Prior to the adoption of statutory election contest provisions, the primary methods of contesting elections were quo warranto and mandamus actions, common law actions to test the validity of an election and compel the performance of a duty, respectively.”)).
  33. *Id.* at 11 (citing N.Y. EXEC. LAW § 63-b(1) and MICH. COMP. LAWS ANN. § 600.4515).
  34. *Id.* at 10.
  35. See Chapter 8: Recounts from additional information on recounts.
  36. See, e.g., W. VA. CODE ANN. §§ 3-7-6, 3-6-9.
  37. See, e.g., ALA. CODE § 17-16-20 (West 2021); Alaska Stat. Ann. § 15.20.430 (West 2019). For a full list of automatic recount states, see *Election Recounts*, NAT. CENTR. FOR STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx#AR>.
  38. See, e.g., *Miller*, 539 S.E.2d at 776 (interpreting the state’s recount and contest statutes to imply sole remedy under recount where allegations regarding errors in counting are at issue).
  39. For example, in certain jurisdictions an automatic recount is triggered when a candidate wins by a specific margin. See, e.g., ALA. CODE § 17-60-20; ALASKA STAT. § 15.20.430; ARIZ. REV. STAT. § 16-661; COLO. REV. STAT. § 1-10.5-101; CONN. GEN. STAT. § 9-311a; FLA. STAT. § 102.141; N.Y. ELEC. LAW § 9-208; WASH. REV. CODE § 29A.64.021.

margin.<sup>40</sup> However, allegations involving the election’s illegality, fraud, or voter eligibility are typically not subject to a recount requirement.<sup>41</sup>

## B. Filing Within the Limitations Period

In the interest of finality and enabling new office holders to transition effectively, election contests are designed to be resolved quickly: contestants must file within a short time after the election results are canvassed or certified.<sup>42</sup> These filing deadlines range from a few days<sup>43</sup> to more than a month.<sup>44</sup> Only four states—Maine, Massachusetts, New York, and Rhode Island—do not have statutory deadlines challengers must meet if they hope to move forward with their contest claims.<sup>45</sup>

In contests, filing deadlines are strictly construed.<sup>46</sup> These deadlines can be triggered by different election-related events.<sup>47</sup> Some of these triggers have been

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40. See, e.g., ALA. CODE § 17-16-20; FLA. STAT. § 102.141(7); N.D. CENT. CODE § 16.1-16-01; but see ALASKA STAT. § 15.20.430; COLO. REV. STAT. § 1-10.5-101; D.C. CODE § 1-1001.11; OR. REV. STAT. § 258.280.
41. See, e.g., CAL. ELEC. CODE §§ 16100, 16401; ALA. CODE §§ 17-16-40, 17-16-47; 10 ILL. COMP. STAT. 5/22-9.1.
42. See, e.g., Elections, *supra* note 14 at 1307 (1975) (citing DEL. CODE ANN. TIT. 15, § 5945 (within twenty days of the result; FLA. STAT. ANN. § 102.168 (“[W]ithin ten days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election being contested.”); HAW. REV. STAT. §§ 11-173.5 (“[N]o later than 4:30 p.m. on the thirteenth day after a primary or special primary election...”); KY. REV. STAT. ANN. §§ 120.055, 120.155 (within ten days of a primary election or thirty days of a general election).
43. See, e.g., MD. CODE ANN., ELEC. LAW § 12-202(b)(2) (3 days after the election results are certified).
44. OR. REV. STAT. § 258.036 (Not later than the 40th day after the election or the seventh day after completion of a recount of votes cast in connection with the election...). In a presidential election, Oregon’s statutory deadline would authorize a contest action even after the federal safe harbor provision has passed and just before the meeting of electors. See 3 U.S.C. § 5.
45. See Douglas, *supra* note 1, at 34; R.I. GEN. LAWS § 17-19-37.4; N.Y. LEGIS. LAW § 64; ME. REV. STAT. TIT. 21-A, § 1125; MASS. ANN. LAWS CH. 54, § 134.
46. See, e.g., Pearson v. Alverson, 49 So. 756, 757 (Ala. 1909) (holding the expiration of the limitations period prevented the contestant from amending his original pleading to cure its defective omission of a statutorily-required statement that the contestant was a qualified elector); see also Donaghey v. Attorney General, 584 P.2d 557, 559 (Ariz. 1978) (noting that the public policy favoring electoral stability and finality justifies enforcing strict compliance with the statute of limitations); Pullen, 561 N.E.2d at 589 (explaining that when courts are given power to hear election contests by statute, they must do so in the manner dictates by the statute and therefore can only hear cases that were filed within the statutorily prescribed filing deadlines).
47. See, e.g., Minn. Stat. § 209.021 (allowing ten days for claims involving “a deliberate, serious, and material violation of the election laws that was discovered from the statements of receipts and disbursements” as opposed to three days for claims contesting who received the highest number of votes).

the final canvass returns<sup>48</sup> or the date the original canvassing board illegally threw out elections returns.<sup>49</sup>

Expiration of the limitations period generally forecloses both the would-be contestant's right to file an election contest and a court's power to hear it.<sup>50</sup> However, statutes or court rules may allow a court to accept *nunc pro tunc*<sup>51</sup> election contest petitions from contestants who miss the statutory filing deadline because of election officials' errors.<sup>52</sup> Timely-filed contest petitions cannot usually be defeated by a court employee's error.<sup>53</sup> But a contestant who files late based on incorrect information from an election official may be unable to salvage the contest because the contestant bears responsibility for knowing the steps and timetables governing election contests.<sup>54</sup>

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48. *Pullen*, 561 N.E.2d at 589-95 (determining the triggering event for the running of Illinois's ten-day time limit for filing the action was the state board of elections final canvass returns); *Hall v. Martin*, 208 S.W. 417 (Ky. Ct. App. 1919).
  49. *Sears v. Carson*, 551 So.2d 1054 (Ala. 1989) (imposing a five-day time limit from the date the board illegally threw out election returns).
  50. *Cooper v. Dix*, 771 P.2d 614, 617 (Okla. 1989) (holding the court was unable to hear untimely filed cross petitions); *see also* *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Commw. Ct. 2004) (en banc) ("The purposes underlying the referendum process would be eviscerated if a referendum's passage could be challenged at any time."); *Wadley v. Hall*, 410 S.E.2d 105, 107 (Ga. 1991) (denying contestant's petition that was filed after the five-day statutes of limitations period solely because election officials wrongfully withheld information essential to the petition after noting the court's liberal acceptance of amendments meant the contestant should have filed a skeleton petition that he could amend when he finally received the withheld information). A losing candidate might inadvertently foreclose her contest opportunity by filing too early, such as before a winner was officially declared or certified. *See, e.g., Tazwell v. Davis*, 130 P.400, 402 (Ore. 1913) (finding there was insufficient evidence to support the claimant's allegations); *Wells v. Noldon*, 679 S.W.2d 889, 890 (Mo. Ct. App. 1984) (holding that Plaintiff's early filing prevented the court's subject matter jurisdiction).
  51. *Nunc pro tunc*—literally “now for then”—filings operate as if they were filed on an earlier date that was within the statute of limitations period even though they are filed after the limitations period has run. Pennsylvania appears to be the only state to recognize these filings in election contests. *See* *Thomas v. York County Board of Elections*, 59 Pa. D. & C.2d 377, 379 (Ct. Com. Pl. 1972) (allowing a *nunc pro tunc* contest where the contestant had no knowledge that election officials' incorrectly transcribed precinct level tallies until it resulted in certification of his opponent as the winner). *But see in re Recanvass of Certain Voting Machs. & Absentee Ballots*, 887 A.2d 330, 333 (Pa. Commw. Ct. 2005) (finding *nunc pro tunc* filing unavailable without an electoral board error).
  52. *See* *Thomas*, 59 Pa. D. & C.2d 377, 381 (holding that contestant's late filing was excused when election returns posted at the polling place indicated he won and he was unaware the final canvass declared his opponent the winner).
  53. *See, e.g., Redding v. Balkcom*, 272 S.E.2d 324, 325-26 (Ga. 1980) (finding the claimant had timely filed a petition and that the clerk's failure to issue special process did not hinder a hearing).
  54. *See* *White v. District of Columbia Bd. of Elections and Ethics*, 537 A.2d 1133, 1135 (D.C. 1988) (per curiam) (holding that a computer coding error did not relieve the Plaintiff of observing the filing deadline).



States also vary on whether, and when, election contest-related discovery is allowed.<sup>55</sup> States that permit discovery do not always require it before an election contest can be filed.<sup>56</sup>

States have differing policies on whether contestants can amend their petitions after the contest statute of limitations period expires, with some allowing amendments at the court's discretion.<sup>57</sup> Election contest trials are generally placed on expedited calendars.<sup>58</sup> States adopt various methods to ensure the acceleration of contest proceedings. For instance, in California, a contest takes priority over all other civil litigation.<sup>59</sup> In Illinois, a circuit judge may appoint the State Board of Elections to “expedite the hearing and determination of the contest.”<sup>60</sup> During a primary contest, Texas provides for an accelerated appeal.<sup>61</sup>

Election contest trials are generally placed on expedited calendars.

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55. Compare LA. STAT. ANN. § 18:1415 (providing a period of limited discovery prior to contest), with IDAHO CODE § 34-2108 (requiring the contestant to provide a list of witnesses subject to anticipated discovery), and 10 ILL. COMP. STAT. ANN. 5/22-9.1 (allowing an optional limited discovery even if no contest is pursued).
  56. *See, e.g., In re Contest of Election for Offices of Governor and Lieutenant Governor Held at General Election on November 2, 1982*, 93 Ill.2d 463, 500 (Ill. 1983) (“[D]iscovery need not be a prerequisite to initiating an election contest...if the results of the discovery are not sufficiently favorable, the discovery effort shall not prevent the bringing of such an election contest”).
  57. *Ross v. Kozubowski*, 538 N.E.2d 623, 629 (Ill. App. Ct. 1989) (noting the court's discretionary right to grant an amendment). Courts in states that allow amendments may strictly enforce the initial limitations period because the opportunity to amend the pleading to add necessary details means the contestant should be able to file something within the limitations period. *See Wadley*, 410 S.E.2d at 105. In states that do not allow amendments, the running of the limitations period generally prevents the contestant from filing additional pleadings that state new and distinct contest grounds, even those filed in response to the contestee's answer. *See, e.g., Harmon v. Tyler*, 83 S.W. 1041, 1044 (Tenn. 1904) (noting considerations other courts weight in determining if pleadings could be amended and not considering the contestant's response to the assertion that the election fraud benefited the contestant more than the contestee). *See Pearson*, 49 So. at 757. *King v. Whitfield*, 39 Ark. 176, 189-91 (Ark. 1999) (finding a claimant could not amend their complaint with additional external facts after time for contesting the election had expired).
  58. *Elections*, *supra* note 14, at 1307-08 (1975) (citing ARK. STAT. ANN. § 3-1002 (Supp. 1973); IDAHO CODE § 34-2011 (1963); NEV. REV. STAT. § 293.413 (1973); ORE. REV. STAT. §§ 251.070, .090 (1973); TENN. CODE ANN. § 2-1706 (Supp. 1974)).
  59. CAL ELEC. CODE § 16003 (setting judgment to be rendered at least six days before the first Monday after the second Wednesday in December).
  60. 10 ILL. COMP. STAT. 5/23-1.8b (allowing the Board to recount the ballots, take testimony, examine evidence, examine records, examine equipment, record all objections heard by the circuit court, and conduct hearings as may be necessary and proper).
  61. TEX. ELEC. CODE ANN. § 232.014 (permitting judges to make orders to expedite appeals including reducing the time allowed for filing appellate briefs, refusing to permit a motion for rehearing, or reduce the time for filing a motion.).

Many contest statutes also include deadlines by which the contests must be resolved.<sup>62</sup> These deadlines are often interpreted to be mandatory and strict.<sup>63</sup> For example, Arkansas requires election contests to be “given precedence and be speedily determined.”<sup>64</sup> In response, judges may adjourn other courts, call another judge to sit in other courts, or vacate the bench of other courts, or elect a special judge to hold the court in election contest proceedings.<sup>65</sup> Other states set specific deadlines around when a decision maker must hear or decide a case.<sup>66</sup> Some even limit adjournments or continuances during election contests.<sup>67</sup>

### C. Adequate Grounds for a Contest

Complaints must specify the grounds of the contestant’s claims for two important reasons. First, the complaint notifies the contestee—who holds *prima facie* title to the office, having the most votes after the initial canvas—of the specific facts the contestant relies upon in their attempt to dislodge the contestee from office.<sup>68</sup> Second, the complaint provides information necessary to demonstrate that the

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62. See, e.g., ALA. CODE §17-13-86 (requiring primary election contests to be resolved “not later than 90 days before the general election for a county office and not later than 83 days before the general election for a state office”); TEX. ELEC. CODE § 232.012 (applying “accelerated procedures” to certain contests by limiting continuances and issuing a trial date no later than five days after an answer is filed); ARIZ. REV. STAT. § 16-676 (providing a court date within ten days of the initial filing and a decision within five days of the proceedings); LA. STAT. ANN. §18:1409 (rendering a decision within twenty-four hours of the case’s submission and limiting appellate review within forty-eight hours of the record’s lodging).
  63. See, e.g., Pullen v. Mulligan, 561 N.E.2d 585, 589 (Ill. 1990) (holding that the court did not have jurisdiction to hear an election contest that was not filed in a timely fashion).
  64. ARK. CODE ANN. § 7-5-802 (providing that cases during the regular term with sufficient facts will be speedily determined). See also, VA. CODE ANN. § 24.2-810 (2011) (judges should decide election contests “as soon as possible”); S.D. CODIFIED LAWS § 12-22-18 (2004) (allows the state supreme court chief justice to relieve lower court judges of his or her official duties so that they can hear the election contest).
  65. *Id.*
  66. N.J. STAT. ANN. §§ 19:29-3 (requiring judges to hear election contest complaints within fifteen to thirty days after filing); ARIZ. REV. STAT. ANN. § 16-676(B) (judges must make its decision within five days after the hearing); CONN. GEN. STAT. ANN. § 9-323 (election contests must be decided “before the first Monday after the second Wednesday in December”).
  67. OHIO REV. CODE ANN. § 3515.11 (adjournments cannot be allowed for more than thirty days); TEX. ELEC. CODE ANN. § 232.012(e) (continuances can only last for ten days—unless both parties consent—during election contests involving a primary or a runoff election).
  68. See *Tazwell*, 130 P. at 403 (Or. 1913) (holding general allegations afford the contestee insufficient notice); Nelson Sneed, 83 S.W. 786, 788-89 (Tenn. 1904) (“[A] contestant shall file . . . a clear statement of the grounds on which he proposes to contest the election of his opponent, presenting issues of fact or law”) (quoting Blackburn v. Vick, 49 Tenn. 377 (1871)).

true will of the electorate—which receives deference even when it is irregularly expressed—was not reflected in the official election returns.<sup>69</sup>

Some states specify grounds for election contests in very broad or specific language.<sup>70</sup> For example, Hawaii provides a short and non-exhaustive list of causes for contests that must be stated in the complaint: “such as but not limited to provable fraud, overages, or underages, that could cause a difference in the election results.”<sup>71</sup> Oregon, on the other hand, only permits election contests on the following grounds:

- 1) Deliberate and material violation of any provision of the election laws in connection with the nomination, election, recall election or approval or rejection of a measure.
- 2) Ineligibility of the person elected to the office to hold the office at the time of the election.
- 3) Illegal votes.
- 4) Mistake or fraud in the canvass of votes.
- 5) Fraud in the count of votes.
- 6) Nondeliberate and material error in the distribution of the official ballots by a local election official, as that term is defined in ORS 246.012, or a county clerk.
- 7) A challenge to the determination of the number of electors who were eligible to participate in an election on a measure conducted under sect 11(8), Article XI of the Oregon Constitution.<sup>72</sup>

These requirements are often strictly observed.<sup>73</sup> For example, a Pennsylvania court dismissed an election contest petition for lack of specificity when the

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69. *Files*, 594 S.W.2d at 839 (Ark. 1980) (upholding the election results, although irregular, when the pleadings did not specify the results would have been different nor indicate in which precincts problems existed and the nature of the “clear and flagrant” wrongs attendant to the election); *Akaka v. Yoshina*, 935 P.2d 98, 103 (Haw. 1997) (finding complaint legally insufficient in the absence of facts demonstrating the claimed irregularities exceed the winning margin and noting the court disfavors “fishing expeditions”) (citation omitted).

70. Compare N.J. STAT. ANN. § 19:29-1 (listing nine distinct grounds for contest) with MD. CODE ANN., ELEC. LAW § 12-202 (describing grounds generally as “acts” or “omissions”).

71. HAW. REV. STAT. ANN. § 11-172 (West). See also MINN. STAT. § 209.02(1) (“irregularit[ies] in the conduct of an election or canvass of votes or ... deliberate, serious, and material violations of the provisions of the Minnesota election law.”); KY. REV. STAT. ANN. §§ 120.015, .065, .165 (corrupt practice or fraud, intimidation, bribery or violence); LA. REV. STAT. ANN. § 18.364(B) (primary election only) (fraud or irregularities); N.C. GEN. STAT. §163-22, *id.* § 163-22.1 (irregularities, fraud or violations of election law); OKLA. STAT. ANN. tit. 26, § 8-118 (Supp. 1974) (fraud or irregularities).

72. OR. REV. STAT. ANN. § 258.016 (West). For other examples, see IDAHO CODE ANN. § 34-2001; ALASKA STAT. ANN. § 15.20.540.

73. See *Ward v. Story*, 258 S.W.2d 515, 516-17 (Ky. 1953) (“We have consistently recognized that election contest proceedings stand in a class by themselves and the liberal rules of practice which are observed in most other cases do not apply to this type of action.”).

petitioners failed to state how alleged illegal voter assistance was furnished and how alleged voter assistance affected the outcome.<sup>74</sup> In other examples, courts dismissed election contests when petitioners failed to state with sufficient detail, the irregularities complained of.<sup>75</sup> Many other contests have been thrown out—and petitioners have not been given the opportunity to remedy their mistakes or amend their pleadings—for noncompliance with bond requirements<sup>76</sup> or notice and service provisions.<sup>77</sup>

## D. Pleadings

Some states allow a contestee to answer the contestant's pleadings.<sup>78</sup> A contestee usually has the right to demonstrate that the contestant's claims are untrue and that the contestant did not receive a majority of the legally cast votes.<sup>79</sup> The contestee may also be permitted to allege that the contestant received fraudulent and illegal votes, that legal votes were omitted from the contestee's vote totals, or any other statutorily recognized grounds permitting votes totals to be challenged or adjusted in the contestee's favor.<sup>80</sup> Generally, however, a contestee cannot file a cross-contest because her status as the recognized winner means no one else has a right to the office; thus she has nothing to contest.<sup>81</sup>

Contestees sometimes plead laches. Laches is an equitable doctrine—frequently characterized as an equitable defense—that allows a court to dismiss a lawsuit when the plaintiff's unreasonable delay in pursuing the claim prejudiced another

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74. *In re Wilkes-Barre Election Contest*, 400 Pa. 507, 518-21 (1960).

75. *See, e.g.*, *Jones v. Etheridge*, 242 Ark. 907, 911 (Ark. 1967) (finding the contestant could not amend his petition with the names of those alleged to have illegally voted because it would be as though he had asserted his cause of action for the first time after the statutory deadline); *Haydel v. Town of Gramercy*, 154 So. 2d 504, 505-06 (La. Ct. App. 1963) (finding the petition was properly dismissed because the contestant failed to allege the number of participants illegally permitted to vote and the basis for disqualification). *But see Johnson v. May*, 305 Ky. 292, 295-98 (Ky. Ct. App. 1947) (finding contestants need only allege that the volume of voters illegally purged from the registration books could plausibly impact the outcome of the election).

76. *In re Election of Tax Collector*, 356 Pa. 60, (Pa. C.P. 1957); *In re Philadelphia Municipal Elections*, 80 Pa. D. & C. 477 (C.P. 1952); *In re McChesney's Contested Election*, 326 Pa. 438, 192 A. 415 (1937). For other cases dismissed for noncompliance with bond requirement technicalities, see *Moritz's Contested Election*, 256 Pa. 537 (1917); *In re Election in Blythe Township*, 10 Pa. D. & C. 810 (C.P. 1928); *In re Geiger's Election Contest*, 16 Leh. L.J. 360 (Pa. Quar. Sess. 1936); *Case of Hanna*, 46 Pa. C.C. 162 (Quar. Sess. 1917).

77. *Price v. Cheek*, 130 Ga. App. 506, 203 S.E.2d 751 (1973). *See also, e.g.*, *Hawkins v. Colbert*, 292 Ky. 84, 165 S.W.2d 984 (1942); *In re Contest of Special Election*, 136 Ohio St. 279, 25 N.E.2d 458 (1940).

78. *See, e.g.*, LA. STAT. ANN. § 18:1406; MINN. STAT. § 209.03; FLA. STAT. § 102.168.

79. *Id.* ([The] contestee has the right to show that [the contestant's allegations are] untrue...").

80. *Id.*

81. *Cooper*, 771 P.2d at 614 (Okla. 1989) (finding that without statutory authorization for a cross-petition, the court could not hear it). *See also Harmon*, 83 S.W. at 1046.

party, usually the defendant.<sup>82</sup> Although similar in operation to a statute of limitations, laches is separate from it.<sup>83</sup> Courts commonly use laches to dismiss election-related cases when the contestant knew of, or could have discovered and challenged, the now targeted irregularities before the election.<sup>84</sup> Laches may not apply, however, if the contestant attempted to file a pre-election complaint but was prevented from doing so.<sup>85</sup>

## IV. CONTEST TYPES

Often state contest statutes require differing procedures depending on which office or type of election is involved. This section gives an overview of how state contest statutes vary and the implications those differences have on the judiciary. The election types covered are:

- A. primary elections,
- B. state legislative elections,
- C. governor and lieutenant governor elections,
- D. judicial elections,
- E. congressional elections,
- F. presidential elections, and
- G. ballot measure elections.

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82. Loveland Camp, W. O. W. v. Woodmen Bldg. & Benevolent Ass'n, 108 Colo. 297, 305 (Colo. 1941) ("The essential element of laches is unconscionable delay in enforcing a right under the circumstances, usually involving a prejudice to the one against whom the claim is asserted...The term 'laches,' in its broad legal sense as interpreted by the courts of equity, signifies such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery").
83. Ellis v. Swensen, 16 P.3d 1233, 1241-42 (Utah 2000) (noting that laches may bar even a timely filed case). See *infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.
84. See, e.g., *Dayhoff*, 808 A.2d at 1009 (Pa. Commw. Ct. 2002) (ballot irregularities); *Thurston v. State Board of Elections*, 392 N.E.2d 1349, 1350 (Ill. 1979) (validity of winning candidate's nomination); *Tate v. Morley*, 153 S.E.2d 437, 439 (Ga. 1967) (winning candidate's nomination); *Thirty Voters v. Doi*, 599 P.2d 286 (Haw. 1979) (per curiam) (ballot measure wording); *Kilbourne v. City of Carpinteria*, 128 Cal. Rptr. 133 (Ct. App. 1976) (recall election where the successfully recalled official's name was misspelled on the ballot, which had been published before the election); *Rogers v. State Election Board of Oklahoma*, 533 P.2d 621, 623 (Okla. 1974) (winning candidate's residency as stated on his declaration of candidacy); *McKinney v. Superior Court*, 21 Cal. Rptr. 3d 773 (Ct. App. 2004) (city charter does not allow write-in votes in run-off races).
85. *D'Amico v. Mullen*, 351 A.2d 101, 104 n.6 (R.I. 1976) (finding laches inapplicable when the contestant lodged pre-election objections to another candidate's nominating papers by every reasonable means) (citing *Dupre v. St. Jacques*, 153 A. 240 (1931)).

## A. Primary Elections

Primary elections are one means by which political party nominees are selected for the general election ballot. Because of this status, primary election contests may entail additional considerations not found in general election contests. First, primary election candidates sometimes suggest they have received the party's endorsement when they have not.<sup>86</sup> Second, primary contests are conducted under the shadow of the impending general election, which intensifies the time pressures.<sup>87</sup> Third, because primary elections select a political party's nominee, voter participation is usually low, leaving a greater opportunity for contestants to claim that voting by ineligible individuals affected the outcome.<sup>88</sup> Fourth, state statutes may limit courts' participation in primary contests in favor of resolution by the political party.<sup>89</sup> Despite these additional considerations, the public has an important right to cast its general election ballot for a candidate who won the primary election.<sup>90</sup>

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86. *See In re Contest of Election in DFL Primary Election*, 344 N.W.2d 826 (Minn. 1984) (ordering a new primary election because contestee willfully circulated misleading sample ballots that suggested she was the party's preferred nominee); *Lynch v. Duffy*, 172 A.D.3d 1370 (N.Y. App. Div. 2019) (holding that Duffy had misled voters by deleting the name of the endorsed candidate from the designating petition and substituting her own).

87. *Flores v. Villarreal*, 2020 WL 5050638 at \*10 (Ct. App. Tx. 2020) (“[P]rimary election contests are subject to exceptionally strict statutory timelines . . . the trial court could have reasonably determined that any further delay of discovery deadlines or the trial date would have seriously jeopardized its ability to hear and decide the case before the general election”). *See Lazar v. Ganim*, 220 A. 3d 18, 24 (Conn. 2019) (hearing an expedited appeal due to the impending general election); *Young v. Washington*, 127 Ill. App. 3d 1094, 1097 (Ill. App. Ct. 1984) (“A primary contest must be quickly determined so that the party nominee’s name appears upon the general election ballot....If liberal amendment procedures [were applicable] to primary contests, the legislative intent of a rapid and summary disposition for all primary election contests would be significantly frustrated”).

88. *Nageak v. Mallott*, 426 P. 3d 930, 937 (Alaska 2018) (arguing that the two ballot system allowed for non-republican voters to vote in the republican primary). *See generally* *Clingman v. Beaver*, 544 U.S. 581 (2005) (finding that a state statute limiting the participation of certain parties in primary elections was constitutional as it advanced the state’s interest in preserving political parties as identifiable groups).

89. *See, e.g.*, S.C. CODE ANN. § 7-17-250 (“Appeals from decisions of the State Board shall be taken directly to the Supreme Court on petition of a writ of certiorari only based on the record of the State Board hearing and shall be granted first priority of consideration by the court...Provided, however, that when a contest or protect concerns the election of a state Senator, appeals from decisions of the State Board shall be only to the Senate and when the election of the House of Representatives is concerned, the appeal shall only be to the House of Representatives.”).

90. *Redding*, 272 S.E.2d at 326 (“The right of the public to vote in the general election on the candidates receiving the majority of the votes in the primary election is an important one. This right should not be violated because of time restraints or limitation not caused by either the candidate or the public”).

Election codes may limit the time to file primary election contests.<sup>91</sup> Some courts have declined to resolve a primary election contest before the general election.<sup>92</sup> As a result, courts may need to decide how to handle the general election if the primary contest appears unlikely to be resolved before the scheduled general election. Under these circumstances, some courts have stayed the general election,<sup>93</sup> while others have allowed the general election to proceed, with the purported primary winner’s name on the ballot, after reserving the right to continue the contest after the general election is concluded.<sup>94</sup>

Some courts have declined to resolve a primary election contest before the general election.

When a court allows the general election to proceed even though the primary contest remains unresolved, it permits the other offices on the ballot to be filled and avoids the expense of a new election should the primary contestee win.<sup>95</sup> However, allowing the general election to proceed before resolving the primary election contest is not without potential pitfalls. If the contestant prevails in the primary contest after the contestee was elected in the general election, the court must fashion an appropriate remedy.<sup>96</sup> For example, in a contested judicial primary election, the contestant was named the winner of the contest after the contestee had taken office.<sup>97</sup> The court’s remedy, upheld on appeal, was to name

91. *McDunn v. Williams*, 620 N.E.2d 385, 406 (Ill. 1993) (noting that delay did not result from a party’s bad faith nor were third-party rights adversely affected by it); *State ex rel. Edwards v. Gibson*, 680 S.E.2d 21, 27 (W. Va. 2009) (citing statutory deadline of ten days after election to file election contest, but holding that “the hearing or trial in an election contest should be held at the earliest possible time”).

92. *See, e.g., Montana Republican Party v. Graybill*, 2020 WL 4669446 (Mont. 2020) (“We have refused to engage in ‘hasty pre-election review’ of constitutional ballot questions....”); *McDunn*, 620 N.E.2d at 404 (resolving primary contest eight months after the general election).

93. Sometimes a court will stay the general election because it ordered that a new primary election was required. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (finding state’s refusal to count absentee ballots cast in violation of state statutes violated voters’ constitutional rights because the state had induced voters to vote absentee). *See also, De La Paz v. Gutierrez*, 2019 WL 1891137 (Ct. App. Tx. 2019) (urging legislatures to “explicitly authoriz[e] a primary contest tribunal to order a new general election when the originally scheduled general election takes place before the tribunal’s judgment becomes final”).

94. *See, e.g., Redding*, 272 S.E.2d 324 (allowing the general election to proceed but staying the certification of the winner until the primary contest concluded); *McDunn*, 620 N.E.2d 385.

95. *McDunn*, 620 N.E.2d at 404-05 (“Allowing the election to proceed while suppressing the results was not intended to settle the issue by rendering it moot, but intended instead to facilitate the continuance of the lawsuit without jeopardy to candidates for other offices and to possibly avoid the expense of another election if [the candidate] prevailed in the suit.”)

96. *Id.* at 395.

97. *Id.* at 389-92.

the contestant the official party nominee for the general election that took place two years *after* the contested election.<sup>98</sup>

Courts deciding to continue a primary contest until after the general election may take steps to to preserve the ability to do so.<sup>99</sup> For example, one court preserved the primary election contest while allowing both tied primary election judicial candidates' names printed on the general election ballot.<sup>100</sup>

Sometimes, the preference for pre-election resolution is so strong that a case may be dismissed when an appeal to a primary election contest's decision is not filed until after the general election, even when the general appeals statute of limitations has not run.<sup>101</sup> In one Georgia contest case, a candidate filed an appeal within the civil statute of limitations, which would have extended beyond the general election date, but because the contestant/appellant did not request a stay of the general election during the appeal, the court held that the general election mooted the contest.<sup>102</sup>

Because primary elections exist to select a political party's general election nominees, voting can be restricted to party-affiliated or non-affiliated voters, the latter at the party's invitation.<sup>103</sup> Thus, the pool of ineligible voters whose participation may provide grounds for a contest is greater in a primary election than in a general election and may include:

- unaffiliated voters,
- voters affiliated with a different political party, and

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98. *Id.* (finding the primary contest was not mooted by the general election because the trial court forbid publication of the general election results, thus preserving the status quo).

99. *See Jordan v. Cook*, 587 S.E.2d 52 (Ga. 2003) (dismissing appeal because contestant did not ask for a stay of the general election); *Keane v. Smith*, 485 P.2d 261 (Cal. 1971) (en banc) (continuing primary contest until after the general election where both candidates' names appeared on the ballot after primary resulted in a tie) and *McDunn*, 620 N.E.2d 385, 404-05 (ordering results of general election suppressed until primary contest could be determined). *But see Dawkins-Haigler v. Anderson*, 799 S.E.2d 180, 181 (Ga. 2017) (“The established rule in Georgia is that a primary election contest becomes moot after the general election has taken place.”) (citing *Payne v. Chatman*, 267 Ga. 873, 875, 485 S.E.2d 723 (1997)).

100. *Keane*, 485 P.2d at 263.

101. *Dawkins-Haigler*, 799 S.E.2d at 181; *Jordan*, 587 S.E.2d 52 (upholding dismissal of appeal ruling when one candidate met residency qualifications for position because the appeal was not filed until after the general election was held, though this was within the statutory time limits in which appeals may generally be filed; here intervening election mooted appeal. He should have requested a stay of the general election pending his appeal).

102. *Jordan*, 587 S.E.2d 52.

103. *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019) (holding “the party's policy choice to exclude all non-members from its primary and its preference to obtain signatures only from party members [did not impose a severe burden]”).



- voters who signed nominating petitions for a candidate not affiliated with the party holding the primary.<sup>104</sup>

Courts also occasionally, though rarely, void and rerun primary elections. In one instance, a court voided a primary election because one candidate distributed a sample ballot that incorrectly implied party endorsement.<sup>105</sup> Another court ordered a new primary election after election officials committed a constitutional violation.<sup>106</sup> Equally rare, courts sometimes must contend with the legal effect of votes cast for a deceased primary election winner.<sup>107</sup>

## B. State Legislative Elections

When election contests for state house and senate seats are brought, the respective state legislative body typically resolves contests brought.<sup>108</sup> A minority of states provide for a different venue. For example, North Dakota law mandates that legislative election contests be decided in court as any other election contest.<sup>109</sup> Similarly, in Hawaii, legislative house election contests must be

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104. *Lesniak v. Budzash*, 625 A.2d 1139 (N.J. Super. Ct. App. Div. 1993) (disqualifying signatures in democratic primary from republican signees); *Alfieri v. Bravo*, 172 A.D.3d 1360 (N.Y. 2019); *Hamm v. Bd. Of Elections in New York*, 194 A.D.3d (N.Y. 2021) (primary contest based off failure of ballots to specify party affiliation).
105. *Contest of Election in DFL Primary Election Held on Tues., Sept. 13, 1983 v. Hilary*, 344 N.W.2d 826 (Minn. 1984).
106. *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (finding an Equal Protection violation when election officials invalidated absentee and shut-in ballots, although the absentee and shut-in ballots had been distributed in violation of the election code, because the election officials encouraged absentee ballot use). A shut-in ballot is a ballot for those who are unable to leave their residence.
107. *See Kentucky State Bd. of Elections v. Faulkner*, 591 S.W.3d 398 (Ky. 2019) (holding winners death did not elevate third-place candidate to entitle them a spot on the general election ballot); *Barber v. Edgar*, 294 A.2d 453 (Me. 1972) (holding that votes cast for primary candidate who died on election day were valid, thus the second-place finisher was not the nominee and upholding the governor's actions in letting party personnel fill the vacancy as statutes directed).
108. Douglas, *supra* note 1, at 5. Most state constitutions allow each house to judge its members' "qualifications, elections and returns." *Id. See, e.g.*, U.S. Const. art. I, § 5, cl. 1; ALA. CONST. art. IV, § 51; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. IV, pt. 2, § 8; ARK. CONST. art. 5, § 11; CAL. CONST. art. IV, § 5; COLO. CONST. art. V, § 10; CONN. CONST. art. III, § 7; DEL. CONST. art. II, § 8; FLA. CONST. art. III, § 2; GA. CONST. art. III, § 4, para. 7; HAW. CONST. art. III, § 12; IDAHO CONST. art. III, § 9; ILL. CONST. art. IV, § 6; IND. CONST. art. IV, § 10; IOWA CONST. art. III, § 7; KAN. CONST. art. II, § 8; KY. CONST. § 38; LA. CONST. art. III, § 7; ME. CONST. art. IV, pt. 3, § 3; MD. CONST. art. III, § 19; MASS. CONST. pt. 2, ch. 1, §§ II, art. IV, III, art. X; MICH. CONST. art. IV, § 16; MINN. CONST. art. IV, § 6; MISS. CONST. art. IV, § 38; MO. CONST. art. III, § 18; MONT. CONST. art. V, § 10; NEB. CONST. art. III, § 10; NEV. CONST. art. IV, § 6; N.H. CONST. pt. II, arts. 22, 35; N.J. CONST. art. IV, § 4, para. 2; N.M. CONST. art. IV, § 7; N.Y. CONST. art. III, § 9; N.C. CONST. art. II, § 20; OHIO CONST. art. II, § 6; OKLA. CONST. art. V, § 30; OR. CONST. art. IV, § 11; PA. CONST. art. II, § 9; R.I. CONST. art. VI, § 6; S.C. CONST. art. III, § 11; S.D. CONST. art. III, § 9; TENN. CONST. art. II, § 11; TEX. CONST. art. III, § 8; UTAH CONST. art. VI, § 10; VT. CONST. ch. II, §§ 14, 19; VA. CONST. art. IV, § 7; WASH. CONST. art. II, § 8; W. VA. CONST. art. VI, § 24; WIS. CONST. art. IV, § 7; WYO. CONST. art. III, § 10.
109. N.D. CENT. CODE § 16.1-16-10 (2009).

resolved in court, but the Houses can ascertain “whether the parties have properly invoked the jurisdiction of a competent court to judge the contest”.<sup>110</sup>

Other states require courts to play a role in these election contests, though ultimate resolution is issued by the respective legislative body. In Kansas, for example, district court judges may make findings of fact as to the number of legally cast votes the candidates received.<sup>111</sup> Some states allow courts to decide election contests, while also permitting the houses to consider that decision and make its own.<sup>112</sup> Pennsylvania allows its court of common pleas in the county where the winner resides to determine election contests, which can be brought to the proper state house for a final resolution by a petition from any claimant to the seat.<sup>113</sup> Other states, like Arkansas, give fact-finding power to the Arkansas State Claims Commission which makes a nonbinding recommendation to the legislature on how to resolve the election contest.<sup>114</sup>

### C. Governor and Lieutenant Governor Elections

In this context, processes to resolve election contests provided by state statutes vary widely and can involve the judiciary,<sup>115</sup> state legislature,<sup>116</sup> and special committees.<sup>117</sup>

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110. *Akizaki v. Fong*, 461 P.2d 221, 223 (Haw. 1969).

111. KAN. STAT. ANN. § 25-1442 (2000); KAN. STAT. ANN. § 25-1451 (2000).

112. See MINN. STAT. ANN. § 209.10 (West 2009); OHIO REV. CODE ANN. § 3515.14 (West 2012); 25 PA. STAT. AND CONS. STAT. §§ 3401-3409 (West 2021).

113. 25 PA. STAT. AND CONS. STAT. §§ 3401-3409 (West 2021).

114. ARK. CODE. ANN. § 7-5-805(b)(1)(D)(2) (West 2011).

115. ALASKA STAT. § 15.20.550 (2010); ARIZ. REV. STAT. ANN. § 16-672(B) (2006); CAL. ELEC. CODE § 16400 (West 2003); CONN. GEN. STAT. ANN. § 9-324 (West 2009); FLA. STAT. ANN. § 102.168 (West 2008); GA. CODE ANN. § 21-2-523 (2008); LA. REV. STAT. ANN. § 18:1403 (2012); MASS. ANN. LAWS ch. 55, § 35 (West 2001); MONT. CODE ANN. § 13-36-103 (West 2011); NEB. REV. STAT. ANN. § 32-1102(2) (West 2008); N.J. STAT. ANN. § 19:29-2 (West 1999); N.M. STAT. ANN. § 1-14-3 (West 2003); N.D. CENT. CODE § 16.1-16-04 (West 2009); OR. REV. STAT. § 258.036(1) (West 2011).

116. MD. CONST. art. II, § 4; MISS. CONST. art. V, § 140; ALA. CODE § 17-16-65 (West 2007); ARK. CODE ANN. § 7-5-806 (2011); COLO. REV. STAT. §§ 11-205 to -207 (West 2009); IDAHO CODE ANN. § 34-2104 (West 2008); KY. REV. STAT. ANN. § 120.205(5) (LexisNexis 2004); NEV. REV. STAT. § 293.433(1) (West 2008); N.C. GEN. STAT. § 163-182.13A(a) (West 2007); TENN. CODE ANN. § 2-18-101 (West 2003); TEX. ELEC. CODE ANN. § 221.002(b) (West 2010); VA. CODE ANN. § 24.2-804 (West 2011); W. VA. CODE ANN. § 3-7-2 (West 2011). For more information see Douglas, *supra* note 1.

117. Some states—such as New Hampshire, Rhode Island, and South Carolina—have a nonjudicial body or committee hear elections contests. N.H. REV. STAT. ANN. § 665:5 (West 2008); R.I. GEN. LAWS § 17-7-5(a)(11) (2003); S.C. CODE ANN. § 7-17-250 (West 1977).

Typically, states allow losing candidates to sue in trial court,<sup>118</sup> though the appeals process varies.<sup>119</sup> Uniquely, the state supreme courts in Kansas and Minnesota must appoint a three-judge trial court to review evidence in election contests and decide the outcome.<sup>120</sup>

The state supreme courts in Hawaii,<sup>121</sup> Illinois,<sup>122</sup> Maine,<sup>123</sup> Missouri,<sup>124</sup> and South Dakota<sup>125</sup> have original jurisdiction to hear election contests for chief executives, with no opportunity for appeal. Ohio, on the other hand, requires one supreme court justice to hear the election contest and allows the decision to be appealed to the full court.<sup>126</sup> Washington permits parties to file election contests with the supreme court, the court of appeals, or a superior court.<sup>127</sup>

In some states, determining executive election contests falls to the state legislature.<sup>128</sup> In these settings, decisions are usually not reviewable<sup>129</sup> and can involve the entire legislature, or smaller groups of members review the claims and report out to the full body.<sup>130</sup> In a few states, the Board of Elections or other

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118. ALASKA STAT. § 15.20.550 (West 2010); ARIZ. REV. STAT. ANN. § 16-672(B) (West 2006); CAL. ELEC. CODE § 16400 (West 2003); CONN. GEN. STAT. ANN. § 9-324 (West 2009); FLA. STAT. ANN. § 102.168 (West 2008); GA. CODE ANN. § 21-2-523 (West 2008); LA. REV. STAT. ANN. § 18:1403 (West 2012); MASS. ANN. LAWS ch. 55, § 35 (West 2001); MONT. CODE ANN. § 13-36-103 (West 2011); NEB. REV. STAT. ANN. § 32-1102(2) (West 2008); N.J. STAT. ANN. § 19:29-2 (West 1999); N.M. STAT. ANN. § 1-14-3 (West 2003); N.D. CENT. CODE § 16.1-16-04 (West 2009); OR. REV. STAT. § 258.036(1) (West 2011); UTAH CODE ANN. § 20A-4-403 (West 2010); VT. STAT. ANN. tit. 17, § 2603 (2002 & Supp. 2011); WIS. STAT. ANN. § 9.01(6) (West 2004); WYO. STAT. ANN. § 22-17-102 (West 2011).
119. Douglas, *supra* note 1, at 10 (discussing different appeals processes).
120. KAN. STAT. ANN. § 25-1443 (2000); MINN. STAT. ANN. § 209.045 (West 2009).
121. HAW. REV. STAT. § 11-174.5 (West 2008).
122. 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010); 10 ILL. COMP. STAT. ANN. 5/23-1.8a (West 2010) (requiring the assistance of a circuit judge to oversee parts of the process).
123. ME. REV. STAT. ANN. tit. 21-A, § 737-A (10) (West 2019).
124. MO. ANN. STAT. § 115.555 (West 2003); MO. ANN. STAT. § 115.561 (West 2003) (requiring the appointment of a commissioner of the court to take testimony the supreme court specifies as points of fact).
125. S.D. CODIFIED LAWS § 12-22-7 (West 2004).
126. OHIO REV. CODE ANN. § 3515.08(B) (West 2012); OHIO REV. CODE ANN. § 3515.15 (West 2012).
127. WASH. REV. CODE ANN. § 29A.68.011 (West 2005); § 29A.68.120. *See also In re Coday*, 130 P.3d 809, 817 (Wash. 2006) (holding that despite the state constitution's conference of the legislature the power to decide election contests for governor, they had authority to decide the 2004 election contest for governor).
128. Douglas, *supra* note 1, at 12-13.
129. MD. CONST. art. II, § 4; MISS. CONST. art. V, §§ 128, 140; ALA. CODE § 17-16-65; ARK. CODE ANN. § 7-5-806; COLO. REV. STAT. §§ 11-205 to -207; IDAHO CODE ANN. § 34-2104; KY. REV. STAT. ANN. § 120.205(5); NEV. REV. STAT. § 293.433(1); N.C. GEN. STAT. § 163-182.13A(a); TENN. CODE ANN. § 2-18-101; TEX. ELEC. CODE ANN. § 221.002(b); VA. CODE ANN. § 24.2-804; W. VA. CODE § 3-7-2.
130. Douglas, *supra* note 1 at 12-13.

nonjudicial body hears election contests of statewide executive offices, all permitting, but not necessarily granting a right to, appeal.<sup>131</sup>

## D. Judicial Elections

In states that elect the members of their judiciaries, election contests may be resolved by the courts. In a few states—like Idaho, Ohio, and South Dakota—the supreme court resolves election contests concerning its own members.<sup>132</sup> Some such states differ in their approaches. For example, the Governor helps resolve these contests in Idaho if the supreme court cannot agree;<sup>133</sup> in Ohio, only one justice decides judicial election contests;<sup>134</sup> and in South Dakota, the state supreme court decides contests involving state offices and judicial officers.<sup>135</sup>

In states where the legislature resolves supreme court election contests, courts may still resolve questions of election and constitutional law. For example, in *Roe v. Alabama*, the Alabama Supreme Court resolved a certified question of state election law from the U.S. Court of Appeals for the 11<sup>th</sup> Circuit.<sup>136</sup> The judge in that case explained that while the contest must be resolved by the state legislature, the federal constitutional issues presented were best resolved by the state supreme court.<sup>137</sup>

Many other states use trial courts to decide election contests both for the state supreme court and the lower court judicial elections.<sup>138</sup> Some, like Pennsylvania,

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131. *Id.* at 19 (Winter 2013) (citing N.H. REV. STAT. ANN. § 665:5 (2008); R.I. GEN. LAWS § 17-7-5(a)(11) (2003); S.C. CODE ANN. § 7-17-250 (1977)).

132. DAHO CODE ANN. § 34-2004 (West 2008); MO. ANN. STAT. § 115.555 (West 2003); OHIO REV. CODE ANN. § 3515.08(B) (LexisNexis 2012); S.D. CODIFIED LAWS § 12-22-7 (West 2021).

133. IDAHO CODE ANN. § 34-2004.

134. OHIO REV. CODE ANN. § 3515.08(B).

135. S.D. CODIFIED LAWS § 12-22-7 (2021) (the “circuit court of a county . . . where the election or some part thereof was conducted” decide all other election contests); *see also*, Mo. Rev. Stat. §§ 115.555 (the state supreme court hears all contests for governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, constitutional amendments, state statutes submitted or referred to the voters, and questions relating to the retention of appellate and circuit judges subject to Article V, Section 25 of the Missouri Constitution).

136. 43 F.3d 574 (11th Cir. 1995) (ruling after plaintiffs—voters and unsuccessful candidates—brought a § 1983 claim in federal court).

137. *Id.* at 582 (“By certifying the question to the Supreme Court of Alabama, we can accommodate Alabama’s interest in having its high court settle the question whether a notarization or the signatures of two witnesses is required before an absentee ballot may be counted.”).

138. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/23-3 (West 2010); LA. REV. STAT. ANN. §§ 18:1403, :1409(H) (West 2012); OR. REV. STAT. §§ 258.036(1)(a), .085 (West 2011).

use panels of judges.<sup>139</sup> However, a majority of states resolve judicial election contests no differently than any other election contest.<sup>140</sup>

## E. Congressional Elections

While the U.S. Constitution expressly delegates the authority to decide congressional election contests to Congress,<sup>141</sup> state courts also have some authority in the area.<sup>142</sup> Some states have interpreted a 1972 Supreme Court case<sup>143</sup> holding that states have the power to order a recount in a congressional election to mean states can also hear congressional election contests as long as the respective congressional house has final decision-making power.<sup>144</sup> For example, the Minnesota State Supreme court decided the U.S. Senate election contest between Al Franken and Norm Coleman.<sup>145</sup> After losing his election contest appeal in the state supreme court, Coleman could have petitioned the U.S. Senate to determine the proper winner, but chose to concede the race.<sup>146</sup>

Given this reading, some states have developed procedures for handling congressional election contests.<sup>147</sup> Among these, some have developed highly specialized procedures,<sup>148</sup> while others expressly prohibit the hearing of Congressional election contests.<sup>149</sup> In the latter, candidates seeking to contest congressional elections are able to bring those challenges in federal court or the respective congressional house.<sup>150</sup> A number of states fall somewhere in the

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139. 25 PA. CONS. STAT. ANN. §§ 3351, 3377 (West 2007); see *In re Morganroth Election Contest*, 50 Pa. D. & C. 143 (Pa. Ct. C.P. 1942) (three-judge court). Although three judges hear an election contest for Class III cases (judges), two judges hear Class II cases (including judges elected statewide). §§ 3291, 3351, 3377.

140. Douglas, *supra* note 1, at 24.

141. U.S. CONST. art. I, § 5.

142. U.S. CONST. art. I, § 4; Douglas, *supra* note 1, at 26.

143. *Roudebush v. Hartke*, 405 U.S. 15, 21 (1972).

144. Douglas, *supra* note 1, at 25.

145. *Sheehan v. Franken*, 767 N.W.2d 453 (Minn. 2009) (per curiam).

146. Douglas, *supra* note 1, at 25.

147. *Id.* at 26.

148. *Id.* at 26-27 (describing how Connecticut, Indiana, Iowa, New Hampshire, and South Carolina deal with congressional election contests).

149. *Id.* at 27-28 (describing how Kansas, Nevada, Ohion, and Texas ban these types of election contests from being heard in the state). Texas courts can, however, still hear election contest for congressional primary election. TEX. ELEC. CODE ANN. § 221.001(1); *Rodriguez v. Cuellar*, 143 S.W.3d 251 (Tex. App. 2004).

150. Douglas, *supra* note 1, at 28.

middle, broadly referencing congressional elections in their contest laws<sup>151</sup> or not mentioning them at all.<sup>152</sup>

## F. Presidential Election

Voters do not vote for the President directly but vote for electors in the Electoral College “in such Manner as the Legislature thereof may direct.”<sup>153</sup> Because virtually all states appoint electors based on statewide popular vote,<sup>154</sup> most election contests resemble other statewide election contests.<sup>155</sup>

Only some of the states provide specific guidance for presidential election contests and these procedures vary.<sup>156</sup> Some allow trial courts to hear these cases,<sup>157</sup> some form special courts,<sup>158</sup> and others give their supreme courts original jurisdiction.<sup>159</sup> Other states do not use the courts, and instead resolve contests

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151. GA. CODE ANN. § 21-2-521 (West 2008); GA. CODE ANN. §§ 21-2-523, -528 (West 2008); OR. REV. STAT. § 258.036(1)(a) (West 2011) (the Circuit Court for Marion County is the proper venue); VT. STAT. ANN. tit. 17, § 2603(c) (West 2002 & Supp. 2011) (parties wishing to contest an election for a congressional seat must file in the Superior Court for Washington County); 25 PA. CONS. STAT. ANN. §§ 3291, 3351, 3401 (West 2007); ARK. CODE ANN. §§ 7-5-801(b), -810 (West 2011).
152. See, e.g., UTAH CODE ANN. § 20A-4-402(1); MASS. ANN. LAWS ch. 54, §134 (West 2021); N. M. STAT. ANN. § 1-14-1 (West 2011); 10 ILL. COMP. STAT. ANN. 5/23 (West 2021).
153. U.S. CONST. art. II, § 1, cl. 2.
154. Only Maine and Nebraska appoint their electors proportionally based on the vote in each congressional district. ME. REV. STAT. ANN. tit. 21-A, § 802 (West 2008); NEB. REV. STAT. ANN. § 32-714 (West 2008).
155. Douglas, *supra* note 1, at 30. There is no federal mechanism for resolving presidential election contests. *Id.*
156. CAL. ELEC. CODE § 16401 (West 2003 & Supp. 2012); COLO. REV. STAT. ANN. § 1-11-204 (West 2009 & Supp. 2011); CONN. GEN. STAT. ANN. § 9-323 (West 2009); DEL. CODE ANN. tit. 15, §§ 5921 -28 (2007); D.C. CODE § 1-1001.11(a)(2), (b)(1) (2011); IND. CODE § 3-12-11-19.5 (2005); IOWA CODE ANN. §§ 57.1, 60.1-.7 (West 2012); KAN. STAT. ANN. § 25-1435, -1437 (2000); MINN. STAT. ANN. § 209.01 (West 2009); MO. ANN. STAT. § 128.100 (West 2003); N.H. REV. STAT. ANN. § 665:16 (2008); OHIO REV. CODE ANN. § 3515.08(A) (LexisNexis 2012); OR. REV. STAT. § 258.036(1)(a) (2011); 25 PA. CONS. STAT. ANN. § 3291 (West 2007); S.C. CODE ANN. § 7-17-260 (1977 & Supp. 2011); S.D. CODIFIED LAWS §§ 12-22-4, -5, -6, -13 (2004); TENN. CODE ANN. § 2-17-103 (2003); TEX. ELEC. CODE ANN. § 221.002 (West 2010); VT. STAT. ANN. tit. 17, § 2603(c) (2010); VA. CODE ANN. § 24.2-805 (2011); WYO. STAT. ANN. § 22-17-114 (2011).
157. CAL. ELEC. CODE §§ 16400, 16900 (West 2003); DEL. CODE ANN. tit. 15, § 5927 (2007); OR. REV. STAT. §§ 258.036, .085 (2011); VT. STAT. ANN. tit. 17, § 2603 (2010); S.D. CODIFIED LAWS §§ 12-22-7, -25 (2004). South Dakota law provides that appeal lies directly to the supreme court as in a normal civil proceeding. See § 12-22-25.
158. 25 PA. CONS. STAT. §§ 3291, 3351; IOWA CODE ANN. § 60.1 (West 2021); MINN. STAT. ANN. §§ 209.01(2) (West 2015) (defining a “statewide office” to include presidential electors), 209.045; KAN. STAT. ANN. §§ 25-1437, -1443, -1450 (West 2000).
159. COLO. REV. STAT. ANN. § 1-11-204 (West 2009); CONN. GEN. STAT. ANN. § 9-323 (West 2011).

through boards,<sup>160</sup> tribunals,<sup>161</sup> the legislature,<sup>162</sup> or the governor.<sup>163</sup> Most states, however, do not have specific laws concerning the presidential election contests<sup>164</sup> and only one—Ohio—delegates resolution of U.S. presidential election contests to federal law.<sup>165</sup>

Congress passed the Electoral Count Act of 1887 (ECA) after the Hayes-Tilden controversy the year prior. The ECA establishes guideposts for states to follow when resolving Presidential election controversies, such as the “safe harbor” provision that requires states to resolve election contests six days before the meeting of presidential electors if the states want their electoral votes to count.<sup>166</sup> The ECA is complex and arcane, leading to many disputes as to its requirements, most notably in 2000 and 2020 leading to strident calls for ECA reform.<sup>167</sup>

## G. Ballot Measures

The results of ballot measure elections may also be contested. The circumstances and requirements for ballot measures contests can vary from those applicable to contests for elective office.<sup>168</sup> For example, state statutes frequently require explanations or other information about ballot measures to be printed on the

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160. IND. CODE §§ 3-12-11-1, -19.5 (West 2013); N.H. REV. STAT. ANN. § 665:8(II) (West 2008); S.C. CODE ANN. § 7-17-260 (West 1977 & Supp. 2011).

161. TENN. CODE ANN. § 2-17-103(a) (West 2003).

162. WYO. STAT. ANN. § 22-17-114 (West 2011).

163. TEX. ELEC. CODE ANN. § 221.002(e) (West 2010).

164. Douglas, *supra* note 1, at 33.

165. OHIO REV. CODE ANN. § 3515.08(A) (West 2012) (“The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, 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.”).

166. Douglas, *supra* note 1, at 30 (citing 3 U.S.C. § 5 (2006)) (“If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.”).

167. *See* Bush v. Gore, 531 U.S. 98 (2000); Miles Parks, *Congress may change this arcane law to avoid another Jan. 6*, NPR (Jan. 8, 2022, 7:00 AM), <https://www.npr.org/2022/01/08/1071239044/congress-may-change-this-arcane-law-to-avoid-another-jan-6>.

168. *Friends of Sierra Madre v. Sierra Madre* 19 P.3d 567 (Cal. 2001) (holding the power of the court to invalidate a ballot measure on constitutional grounds is an exception to the statutory limitation on the permissible bases for election contest proceedings). *But see*, CAL. ELECTION CODE § 16000 (West 2021) (applying general election contest provisions to ballot measure recounts).

ballot itself.<sup>169</sup> Disagreements over the sufficiency of the information provided to voters can form the basis of an election contest.<sup>170</sup> For example, a court upheld a challenge based on the measure’s description because although the ballot included the measure’s correct wording, its presentation without comparison to then existing statutes, read as if it granted powers instead of curtailed powers.<sup>171</sup> The court determined the defective language extended beyond mere non-compliance with the required form of the information because the chief purpose of the initiative was omitted.<sup>172</sup>

Ballot measure contest statutes may limit judicial review to determining if the election complied with governing laws, with an election invalidated if there was not substantial compliance. In some cases, technical noncompliance may not be enough to void an election.<sup>173</sup> In these cases, courts may be prevented from reviewing circumstances and considerations beyond statutory compliance, such as the motives behind a ballot measure.<sup>174</sup>

Ballot measure elections too may be invalidated if illegal votes affected the outcome in an election contest. In one case, a court ordered a new annexation election after determining that the illegal votes had changed the election results.<sup>175</sup>

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169. *See, e.g.*, OR. REV. STAT. ANN. § 250.035 (West 2009) (requiring “a concise and impartial statement of not more than 175 words summarizing the measure and its major effect”).

170. *See* Pippens v. Ashcroft, 606 S.W.3d 689 (Mo. Ct. App. 2020).

171. *Wadhams v. Board of County Commissioners of Sarasota County*, 567 So.2d 414 (Fla. 1990).

172. *Id.* at 416. *See also* Dotson v. Kander, 464 S.W.3d 190 (Mo. 2015) (holding that a post-election challenge to ballot language (specifically the title) may also be brought). *But see* Andrews v. City of Jacksonville, 250 So.3d 172 (Fla. Dist. Ct. App. 2018) (“The ballot summary didn’t have to contain every detail or ramification . . . to provide its chief purpose”); *People v. Scott*, 98 Cal. App. 4th 514, 519 (Cal. Ct. App. 2002) (“When a challenge to alleged deficiencies in a ballot measure is made postelection, as here, we review the matter to determine whether there was substantial compliance with the Elections Code and whether the purported deficiencies ‘affected the ability of the voters to make an informed choice.’”).

173. *Quarles v. Kozubowski*, 107 Ill. Dec. 439 (Ill. App. Ct. 1987) (a liquor control election was found to have substantially complied with petition requirements despite technical noncompliance that included inaccurately naming the targeted liquor licensees, omitting the time of the election, and inexactly describing the affected area’s boundaries).

174. *Olson v. City of Hawthorne*, 45 Cal. Rptr. 48, 52 (Ct. App. 1965) (holding whether the city’s motives behind holding an annexation election were appropriate was not justiciable); *see also* *Denny v. Arntz*, 55 Cal. App. 914 (Cal. 1st Dist. Ct. App. 2020) (refusing to invalidate a ballot measure due to misdeeds of the measures proponents unless the misdeeds affected the outcome of the election).

175. *Creamer v. City of Anderson*, 124 S.E.2d 788 (S.C. 1962).



## V. EVALUATING EVIDENCE IN ELECTION CONTESTS

In some contest proceedings, secret ballots stymie the effort to determine whether the election achieved the correct outcome. Some states allow and/or require voters to testify as to how they voted. For example, Texas allows allegedly illegal voters to be compelled to testify in election contest hearings as to whom they voted for or how they voted on a measure.<sup>176</sup> Some states do not compel voters to make public how they voted given the strong state interest in the secrecy of the ballot.<sup>177</sup> Other states—like Maine—have an evidentiary privilege that allows individuals to refuse to disclose how they voted unless a court finds that vote was cast illegally or the voter must testify pursuant to the state’s election laws.<sup>178</sup> Most

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176. TEX. ELEC. CODE ANN. § 221.009(a) (“A voter who cast an illegal vote may be compelled, after the illegality has been established to the satisfaction of the tribunal hearing the contest, to disclose the name of the candidate for whom the voter voted or how the voter voted on a measure if the issue is relevant to the election contest.”); *see also* IOWA CODE ANN. § 62.17 (West 2012) (“The court may require any person called as a witness, who voted at such election, to answer touching the person's qualifications as a voter, and, if the person was not a registered voter in the county where the person voted, then to answer for whom the person voted.”).

177. *See* Douglas, *supra* note 1, at 39 (“[A] few states have addressed whether a court can compel voters to testify as to how they voted, with some states allowing this practice and others finding it an unwarranted invasion of a voter's privacy.”); *see, e.g.*, Indiana C.L. Union Found., Inc. v. Sec. of State, 229 F. Supp. 3d 817 (S.D. Ind. 2017) (finding states interest of preserving ballot secrecy a compelling interest on its face, although the law was not necessary to serve that interest); Silderberg v. Bd. of Elections, 272 F. Supp. 3d 454, 471 (S.D.N.Y. 2017) (“There can be no doubt that the state's interest in preventing vote buying and voter intimidation through ensuring the secrecy of the ballot is a compelling one.”); Huggins v. Super. Ct. in & for Cnty. of Navajo, 788 P.2d 81, 83-84 (Ariz. 1990) (“[O]ur constitution explicitly assures secrecy in voting.”); *see also* Williams v. Fink, 2019 WL 3297254 (Ct. App. Ariz. 2019).

178. ME. R. EVID. 506. *See also* McCavitt v. Registrars of Voters, 434 N.E.2d 620, 630–31 (Mass. 1982); WASH. REV. CODE ANN. § 29A.68.100 (West 2005) (“No testimony may be received as to any illegal votes unless the party contesting the election delivers to the opposite party, at least three days before trial, a written list of the number of illegal votes and by whom given, that the contesting party intends to prove at the trial. No testimony may be received as to any illegal votes, except as to such as are specified in the list.”); MO. CONST. art. VIII, § 3 (“All election officers shall be sworn or affirmed not to disclose how any voter voted; provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, and received as evidence.”).

jurisdictions require direct evidence,<sup>179</sup> but a few accept circumstantial evidence.<sup>180</sup>

A few states stop short of requiring voter testimony but give judges special powers that allow them to order amendments to a contest petition compelling “the production of all ballot boxes, books, papers, tally lists, ballots and other documents which may be required at such hearing.”<sup>181</sup>

Courts often require a showing that the complained of acts actually altered election outcomes as courts are hesitant to provide postelection remedies.<sup>182</sup> Decision makers are also generally reluctant to remove a winning candidate from office and install a new office holder unless the petitioner can show that new officer holder would have won the election but for the complained of acts.<sup>183</sup> Other available alternatives to declaring a new winner include voiding the contested election and holding a new election<sup>184</sup> and filling the office by non-elective means.<sup>185</sup> The primary justification for permitting election

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179. *See, e.g.*, *Willis v. Crumbly*, 268 S.W. 288 (Ark. 2007); *Bradley v. Jones*, 300 S.W.2d 1, 3, 5 (Ark. 1957); *Ganske v. Independent School Dist. No. 84*, 136 N.W.2d 405, 408 (Minn. 1965); *Oliphint v. Christy*, 299 S.W.2d 933 (Tex. 1957); *Kaufmann v. La Crosse City Bd. of Canvassers*, 98 N.W.2d 422, 424 (Wis. 1959); *Fugate v. Mayor and City Council of Buffalo*, 348 P.2d 76, 86 (Wyo. 1960).

180. *See, e.g.*, *In re November 2, 2010 General Election for Office of Mayor in South Amboy, Middlesex County*, 423 N.J. Super. 190 (2011); *Canales v. City of Alviso*, 474 P.2d 417, 421 (Cal. 1970); *Leach v. Johnson*, 313 N.E.2d 636, 641 (App. Ct. Ill. 5th 1974); *Application of Murphy*, 243 A.2d 832, 833-36 (N.J. Super. 1968) (dictum).

181. N.J. STAT. ANN. §§ 19:29-5, -6; *see also* OHIO REV. CODE ANN. § 3515.12 (West 2012).

182. *Postelection Remedies*, 88 HARV. L. REV. 1298, 1315 (1975). Some state statutes require as much. *See, e.g.*, CONN. GEN. STAT. ANN. § 9-329a (2011); HAWAII REV. STAT. §§ 11-173.5, -174.5 (2019); 10 ILL. COMP. STAT. ANN. 5/7 (West 2006); ALA. CODE tit. 17, §§ 232, 375 (West 1958); ALASKA STAT. § 15.20.540 (West 1971); DEL. CODE ANN. tit. 15, § 5942 (West 1995); IDAHO CODE § 34-2001 (West 2021); IOWA CODE ANN. § 43.5 (West 2018), *Id.* § 57.1 (1973); KAN. STAT. ANN. §§ 25-308, 1411, 1412 (West 2021); NEV. REV. STAT. § 293.410 (West 2017); N.J. STAT. ANN. § 19:29-1 (West 2021); ORE. REV. STAT. § 258.026 (West 2021).

183. *Id.* (citing *Thompson v. Stone*, 205 Ga. 243, 53 S.E.2d 458 (1949); *Dupin v. Sullivan*, 355 S.W.2d 676 (Ky. 1962); *Richards v. Barone*, 114 N.J. Super. 243, 275 A.2d 771 (1971); *Pawlowski v. Thompson*, 64 S.D. 98, 264 N.W. 723 (1936)).

184. *See In re Protest of Atchison*, 666 S.E.2d 209 (Ct. App. N.C. 2008) (ordering new election due to voting irregularities); *Denny v. Doss*, 2020 WL 2071949 at \*6 (Ct. App. Tex. 2020) (ordering new election after number of disenfranchised voters exceeded the margin of difference).

185. *See United States v. Brown*, 561 F.3d 420 (Ct. App. 5th 2009) (“[V]oiding entire elections is a drastic remedy requiring sufficient need.”); *Nowakowski v. City of Rutland*, 2020 WL 619127 at \*1 (Vt, 2020) (“[V]oiding an election is ‘one of the more extreme remedial measures available to a court’”).

contests is to ensure the will of the electorate is accurately reflected in the election's results.<sup>186</sup>

Challengers generally need “but for” causation to be successful and usually cannot maintain a contest on the mere belief that an irregularity occurred or on indefinite information.<sup>187</sup> Some courts require that contestants prove that more legal votes were actually cast for the contestant than the contestee.<sup>188</sup> Others require only that contestants prove that more legal votes were probably cast for them than the announced winners.<sup>189</sup> Some courts permit contestants to claim the outcome was uncertain because of electoral fraud or irregularities, such as when the number of allegedly illegal votes exceeds the margin of victory.<sup>190</sup> Uncertain outcome claims may also occur when a sufficient numbers of legal voters were disenfranchised or enough legal votes were wrongly rejected to affect the outcome.<sup>191</sup> In these cases, contestants must prove that “no reasonable certainty”

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186. *Postelection Remedies*, *supra* note 182 at 1316-17.

187. *See Lazar v. Ganam*, 220 A.3d 18 (Conn. 2019) (holding “that the provision of § 9-329a (b) authorizing the court to order a new primary election if it finds that the result of the primary might have been different but for the improprieties complained of, without any limits on the timing of such an order, implicitly authorizes the judge to order a new general election if the first general election is invalidated by operation of the judge's order invalidating the primary election”); *Lopresti v. State*, 2019 WL 166995 (Haw. 2019); *Akaka v. Yoshina*, 935 P.2d 98, 103 (Haw. 1997); *Nelson v. Sneed*, 83 S.W. 786, 789 (Tenn. 1904).

188. *Developments in the Law-Voting and Democracy*, VI. *Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1155-56 (2006) [hereinafter *Voting and Democracy*]. *See also Jordan v. Officer*, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (stating that if the complaint does not involve improprieties by election officials, then the contestant must prove which candidate received each illegal vote as well as demonstrate that the contestee receive a sufficient number to alter the result or the contestant's petition fails); *Forbes v. Bell*, 816 S.W.2d 716, 719 (Tenn. 1991) (finding the contestant's claim she was the true winner unavailing because the contestant did not demonstrate that adjusting for the effects of illegal counted votes or wrongfully withheld votes would have changed the outcome).

189. *See Voting and Democracy*, *supra* note 188, at 1556.

190. *See Stuart v. Anderson Cnty Election Com'n*, 237 S.W.3d 297 (Ct. App. Tenn. 2007); *Voting and Democracy*, *supra* note 188, at 1155-56; *Carlson v. Oconto County Bd. of Canvassers*, 623 N.W.2d 195, 198 (Wis. Ct. App. 2000).

191. *See In re Election for Atlantic Cnty Freeholder District 3 2020 General Election*, 258 A.3d 388 (N.J. Super. 2021) (“A petitioner contesting the outcome of an election based on the rejection of legal votes ‘need not identify for whom the rejected voter voted or would have voted, only that the rejected votes were sufficient in number that, if all were credited to him, the results of the election would change.’”) (quoting *In re Contest of Nov. 8, 2005 Gen. Election for Off. of Mayor for Twp. Parsippany-Troy Hills*, 388 N.J. Super. 663, 677, 909 A.2d 1199 (App. Div. 2006) (Parsippany I), *aff'd as modified on other grounds by Parsippany II*, 192 N.J. at 572, 934 A.2d 607.); *Crow v. Bryan*, 113 S.E.2d 104, 107 (Ga. 1960); *see also United States v. City of Hamtramck*, 2000 WL 34592762 (E.D. Mich. 2000) (uncertain outcome caused by voter disenfranchisement).

exists as to the preferred candidate's identity.<sup>192</sup> They must only allege that the taint clouded the outcome and left the true winner's identity uncertain.<sup>193</sup> A successful challenge under the uncertain outcome standard results in a voided election.<sup>194</sup> The resulting office vacancy is filled as the state's statutes direct, generally by a special election or by appointment.<sup>195</sup>

## A. Tests Applied

There are a number of available methods used by courts to eliminate illegal votes to reflect legal vote totals.<sup>196</sup>

### 1. Intuitive Approach

This approach involves judges comparing the margin of victory with the number of illegal votes and ordering a new election when the number of illegal votes is significantly larger than the margin of victory.<sup>197</sup> This approach has led to varied outcomes, even in the same jurisdiction. For example, two New York state courts, heard two years apart, came to different results with similar facts: a new election was ordered in a case concerning 101 illegal votes and a 17-vote margin of victory,<sup>198</sup> while a petition for a new election was denied in a case concerning 136 illegal votes and a 62-vote margin of victory.<sup>199</sup>

### 2. Elimination of Uncertainty

Some state supreme courts—for example in Georgia, Massachusetts, South Carolina, and Hawaii—have adopted the Elimination of Uncertainty approach. In this approach the court orders a new election when the petitioner shows that the

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192. *Hardin v. Montgomery*, 495 S.W.3d 686 (Ky. 2016) (“[I]f the fraud, intimidation, bribery, irregularities, and illegalities are such, that the court cannot with reasonable certainty determine who has received a majority of the legal votes, the election should be set aside, and a candidate cannot be declared a victor, unless he can be shown to have received a majority or plurality of the legal votes cast at the election.”) (citing *Hendrickson v. Coign*, 304 Ky. 383, 200 S.W.2d 905, 907 (1947)); *Scholl v. Bell*, 102 S.W. 248, 256 (Ky. Ct. App. 1907). Note that the test is also sometimes described as “reasonably certainty,” which suggests that absolute uncertainty is not always a requirement.

193. *Scholl*, 102 S.W. at 256.

194. *See Whitley v. Cranford*, 119 S.W.3d 28 (Ark. 2003).

195. *See, e.g.*, ARIZ. STAT. § 7-7-106 (2019); TEX. CODE ANN. § 17-1-301.

196. *Voting and Democracy*, *supra* note 188, at 1155-56.

197. Kevin J. Hickey, Accuracy Counts: Illegal Votes in Contested Elections and the Case for Complete Proportionate Deduction, 83 N.Y.U L. REV. 167, 173 (Apr. 2008).

198. *Ippolito v. Power*, 241 N.E.2d 232, 233-34 (N.Y. 1968).

199. *DeMartini v. Power*, 262 N.E.2d 857, 857-58 (N.Y. 1970).

total number of illegal votes exceeds the announced winner’s margin of victory, even when there is no proof as to which candidate received the illegal votes.<sup>200</sup>

### 3. Direct Evidence

This approach requires candidates contesting the election to present direct evidence that they are the correct winner.<sup>201</sup> Contestants typically seek to provide evidence through in-court testimony of illegal voters regarding who they cast their ballot for.<sup>202</sup> However, a number of courts have rejected this method, stating the burden is too high.<sup>203</sup>

### 4. Proportional Deduction

Some courts use proportional deduction to approximate which candidates illegal votes were cast for.<sup>204</sup> This method involves determining in which precinct the illegal votes were cast and subtracting those illegal votes from candidate vote

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200. *See O’Caña v. Salinas*, 2019 WL 1414021 (Ct. App. Tex. 2019) (“If the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the court may declare the election void without attempting to determine how individual voters voted.”) (using a clear and convincing evidence standard); *but see Young v. Red Clay Consolidated School District*, 159 A.3d 713 (Del. 2017) (“Delaware Supreme Court has observed that “[w]hen illegal ballots have been voted in an election district in such numbers as to affect the result, or at least to make it uncertain, . . . there are cases where justice requires that the entire vote of that election district be rejected in making the count.”) (quoting *State ex rel. Wahl v. Richards*, 64 A.2d 400, 406 (Del. 1949)).

201. *See Noble v. Ada Cnty. Elections Bd.* 135 Idaho 495, 503 (2000) (declines to say whether plaintiff needed to prove who the votes were cast for because he did not prove a sufficient number of illegal votes to change the result); *ex rel. Wahl v. Richards*, 64 A.2d 400, 407 (Del. 1949); *Jaycox v. Varnum*, 226 P. 285, 289 (Idaho 1924); *Brown v. Grzeskowiak*, 101 N.E.2d 639, 656 (Ind. 1951); *Wilkinson v. McGill*, 64 A.2d 266, 274 (Md. 1949); *State ex rel. Brogan v. Boehner*, 119 N.W.2d 147, 151-53 (Neb. 1963).

202. *Voting and Democracy*, *supra* note 188, at 1159. It is also possible to show for whom the illegal votes were cast by means of direct evidence other than voter testimony (e.g., if a copy existed of the absentee ballot at issue), but the usual means is voter testimony. *Id.* at 1158-59.

203. *Id.* at 1159 (citing *Huggins*, 788 P.2d at 86 (“The practical impact of the [direct evidence] rule, with its virtually impossible burden on the challenger, is to let illegal votes count.”); *Young v. Deming*, 9 Utah 204, 212, 33 P. 818, 820–21 (1893); *see also Briscoe v. Between Consol. School Dist.*, 171 Ga. 820, 824, 156 S.E. 654, 656 (1931) (“[I]t would . . . be dangerous to receive and rely upon the subsequent statement of the voters as to their intentions, after it is ascertained precisely what effect their votes would have upon the result.”); *Babnew v. Linneman*, 154 Ariz. 90, 93–94, 740 P.2d 511, 514–15 (App.1987) (same); *See McCavitt v. Registrars of Voters*, 385 Mass. 833, 849, 434 N.E.2d 620, 630–31 (1982)). *See, e.g., Taylor v. Pile*, 391 P.2d 670, 673 (Colo. 1964) (noting that ballot secrecy is guaranteed by the Colorado Constitution and Colorado statutes).

204. Some state supreme courts have used this method. *See Andrews v. Powell*, 848 N.E.2d 243 (Ct. App. Ill. 2006) (taking into consideration the proportional deduction method, but deciding it is not applicable in this particular scenario); *Hammond v. Hickel*, 588 P.2d 256, 260 (Alaska 1978); *Grounds v. Lawe*, 193 P.2d 447, 453 (Ariz. 1948); *Choisser v. York*, 71 N.E. 940, 941 (Ill. 1904); *Parker v. Hughes*, 67 P. 637, 640 (Kan. 1902); *Ellis ex rel. Reynolds v. May*, 58 N.W. 483, 488-89 (Mich. 1894); *Heyfron v. Mahony*, 24 P. 93, 95-96 (Mont. 1890); *Drinkwater v. Nelson*, 187 N.W. 152, 154 (N.D. 1922); *Briggs v. Ghrist*, 134 N.W. 321, 322-24 (S.D. 1912); *cf. Russell v. McDowell*, 23 P. 183, 184 (Cal. 1890) (not broken down by precinct); *Moore v. Sharp*, 41 S.W. 587, 590 (Tenn. 1897) (allowing proportional deduction when both parties agreed to it).

totals in the same proportion as the candidates' overall vote totals in the precinct in which the illegal vote was cast.<sup>205</sup> Generally, votes should not be added to candidates' totals.<sup>206</sup> A reviewing court overturned a lower court's decision to subtract votes from one candidate's totals and add them to another's.<sup>207</sup>

Courts in some states only permit the use of proportional deduction to confirm that the announced winner actually won,<sup>208</sup> or if the party requesting its use can prove it would be impossible to show for whom the illegal votes were cast with direct evidence.<sup>209</sup> A number of courts have rejected this method, stating elections should not be overturned based on estimates.<sup>210</sup>

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205. *Voting and Democracy*, *supra* note 188, 1160 (citing *Hammond*, 588 P.2d at 260). Because the number of illegal votes can be quite large, meaning the total number of combinations of how the illegal votes could be divided between the candidates is also large, the following mathematical formula can be used:  $Z = d \times s \times k / sk$ . Michael O. Finkelstein & Herbert E. Robbins, *Mathematical Probability in Election Challenges*, 73 COLUM. L. REV. 241, 243 (Feb. 1973). Z represents the probability of reversal, which declines as the number increases. *Id.* d is the winner plurality, s is the number of votes cast for either the candidates, and k is the number of illegal votes cast. *Id.*

206. *Id.*

207. *Bradley v. Perrodin*, 131 Cal. Rptr. 2d 402 (Ct. App. 2003).

208. *See Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018) (reversing superior court's order proportionately reducing the vote total since the error was not enough to change the result of the election); *Fischer v. Stout*, 741 P.2d 217, 226 n.15 (Alaska 1987); *Huggins*, 788 P.2d at 86. If the original election results are not confirmed once courts apply proportional deduction, some courts may opt to void the election rather than announce a new winner. *Developments in the Law-Voting and Democracy*, *supra* note 188, at 1160-61 (disagreeing with this approach and refusing to adopt an arbitrary rule).

209. *See Napier v. Cornett*, 68 S.W. 1076, 1077-78 (Ky. 1902); *Berg v. Veit*, 162 N.W. 522, 523 (Minn. 1917); *Potter v. Robbins*, 290 S.W. 396, 398-99 (Tenn. 1926) ("It seems obvious that the rule of apportionment of the illegal votes between the candidates in proportion to their total votes in the precinct is a rule of expediency, for the application of which there can be no reason when evidence is available to prove for whom the illegal votes were actually cast. Proof of the ballot cast by the disqualified voter produces a certain result, while the rule of apportionment can, at best, produce only an approximate result.").

210. *See, e.g., Brogan*, 119 N.W.2d at 153 ("We do not believe that courts should adopt and apply arbitrary rules which will determine elections upon the basis of chance. This court will not substitute its judgment for that of the electorate as declared by the proper authorities unless the record shows clearly what the result of the election should be."); *see Voting and Democracy*, *supra* note 188, at 1161-64 (describing concerns with proportional deduction).

## VI. CONTEST OUTCOMES

Election contests typically result in one of the four following outcomes:

- 1) the court upholds the original results;<sup>211</sup>
- 2) the court overturns the original results and names the contestant the winner;<sup>212</sup>
- 3) the court voids the election with state statutes determining if a new election is held or if the vacant office is filled by appointment;<sup>213</sup> or
- 4) the election ends in a tie, which is broken as statutes dictate.<sup>214</sup>

When a contest is successful, courts have options that may or may not be dictated by statute. Two options include declare a new winner or voiding and rerunning the election.

### A. New Winner

Before the court may declare the contestant the winner of the election, the contestant must demonstrate that she actually received the most legal votes.<sup>215</sup> If the contestant successfully demonstrates that but for errors and illegal and invalid votes the contestant would have won, then the court generally must declare the contestant the winner.<sup>216</sup>

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211. *Pruitt v. Office of Lieutenant Governor*, 498 P.3d 591 (Alaska 2021); *Self v. Mitchell*, 327 So.3d 93 (Miss. 2021).

212. *Nageak v. Mallott*, 426 P.3d 930 (Alaska 2018).

213. *Gecy v. Bagwell*, 642 S.E.2d 569 (S.C. 2007) (illegal votes from people who no longer lived in the precinct warranted a new election).

214. *In re 2020 Municipal General Election for Office of Borough Council*, 2021 WL 5778558 (N.J. Super. Ct. App. Div. 2021) (remanding for the establishment of a runoff date).

215. *See Nageak*, 426 P.3d at 949.

216. *See Stebbins v. Gonzales*, 5 Cal. Rptr. 2d 88 (Cal. Ct. App. 1992) (requiring the contestant to be declared the winner when the disposition of the illegal votes was known and the true winner—the contestant—was ascertainable); *see also Forbes v. Bell*, 816 S.W.2d 716 (Tenn. 1991) (stating the court will declare the contestant the winner when the contestant overcomes the contestee's margin of victory after identifying each and every illegal or fraudulent ballot).

## B. Voiding the Election

Whenever possible, courts generally try to salvage a contested election rather than void it.<sup>217</sup> If a court voids an election, state statutes will control whether the resulting vacancies are filled by a new election or through appointment.<sup>218</sup> Each option has drawbacks, and these drawbacks reinforce most courts' attempts to uphold the original election, if not the original outcome.<sup>219</sup>

The drawbacks of holding a new election include:

- destabilization of the political process that disrupts governance,<sup>220</sup>
- temporary disenfranchisement of voters who cast legitimate and valid votes in the original election,<sup>221</sup>
- advantage for better financed and organized candidates,<sup>222</sup>
- cost of holding a new election,<sup>223</sup>
- second election will likely be decided by a different voter pool,<sup>224</sup> and
- the new election may also suffer irregularities and illegalities.<sup>225</sup>

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217. If the irregularities that obscured the true winner's identity are confined to a limited geographical area or do not involve all seats in a multi-seat election, a court may be able to void the results in the affected area or for the affected positions only. *See* *Buoananno v. DiStefamo*, 430 A.2d 765 (R.I. 1981); *In re the 1984 Maple Shade Gen. Election*, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985) (election reheld only where numerous irregularities occurred); *In re the Gen. Election of Nov. 5, 1991 for Off. of Twp. of Maplewood, Essex Cnty.*, 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992). *See also* *Kirk v. French*, 736 A.2d 546 (N.J. Super. Ct. Law Div. 1998) (only the winner of the second school board seat was contested). *But see In re General Election of Nov. 4, 1975* (No. 2), 71 Pa. D. & C.2d 83 (Pa. Com. Pl. 1975) (calling for county-wide rather than single precinct special election to fill single office whose results were affected by a defective voting machine).

218. *E.g.*, *In re Moffat*, 361 A.2d 74 (N.J. Super. Ct. App. Div. 1976) (state statute required the vacancy resulting from a voided election to be filled by appointment).

219. *See Huggins*, 788 P.2d at 84 (discussing the problems inherent in voiding an election and calling a new one); *Alexander v. Davis*, 58 S.W.3d 330 (Ark. 2001) ("it is a serious matter to throw out an entire election").

220. *Putter v. Montpelier Public School System*, 697 A.2d 354 (Vt. 1997) ("[C]ourts have frequently declined to order a new election where the governmental misconduct . . . did not warrant so extraordinary and destabilizing a remedy.") (citing *Saxon v. Fielding*, 614 F.2d 78, 79–80 (5th Cir. 1980); *Hennings*, 523 F.2d at 864; *Hamer v. Ely*, 410 F.2d 152, 156 (5th Cir.), *cert. denied*, 396 U.S. 942, 90 S.Ct. 372, 24 L.Ed.2d 243 (1969)).

221. *State ex rel. Olson v. Bakken*, 329 N.W.2d 575 (N.D. 1983) ("The law and equity does not favor disenfranchising voters who have complied with the law when the disenfranchisement occurs merely because of mistake, error, negligence, or misconduct on the part of election officials.") (citing *Haggard v. Misko*, 164 Neb. 778, 83 N.W.2d 483 (1957)).

222. *Huggins*, 788 P.2d at 84 (discussing the problems inherent in voiding an election and calling a new one).

223. *Id.*

224. *Id.*

225. *Id.*



If a voided election creates a vacancy that is filled through an appointment process, voters who cast legitimate and legal votes in the first election are disenfranchised.<sup>226</sup> In addition, the political views and preferences held by the appointed individual might reflect the political preferences of the person making the appointment rather than those of the electorate.<sup>227</sup>

Despite the potential shortcomings of filling vacancies after a voided election, voiding the election may be an appropriate remedy, especially when the contestant demonstrates that electoral irregularity or illegal or fraudulent votes left the election's true outcome uncertain. In general, courts void elections under the following circumstances:

- 1) the true winner of the election cannot be ascertained,<sup>228</sup>
- 2) the election's fairness or integrity is undermined by irregularities or illegalities, regardless of whether they affected the outcome,<sup>229</sup>
- 3) the original election failed to comply with mandatory prerequisites,<sup>230</sup>  
or
- 4) a statutory trigger is satisfied.<sup>231</sup>

If a court voids a contested election when it was possible to identify the true winner, then the subsequent election may be void and its winner does not take office.<sup>232</sup> Instead, the candidate who received the most legal votes in the original election takes office.<sup>233</sup>

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226. *See* *Thompson v. Merrill*, 505 F.Supp.3d 1239 (M.D. Ala. 2020) (“[It] is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment.”) (in the felony disenfranchisement context).

227. *But see* 20A M.L.E. State Government § 26 (2021) (the governor must fill the appointment through names submitted to them).

228. *See* *Jordan v. Officer*, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (noting that voiding an election is appropriate when serious electoral improprieties occurred and valid votes cannot be distinguished from invalid ones).

229. *See, e.g.*, *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (finding a new election was the appropriate remedy in the face of “gross, spectacular, completely indefensible nature of . . . state-imposed, state-enforced” unconstitutional discrimination at the polls).

230. In this instance, the court is not so much voiding the election as announcing that the original election was void from the outset for failure to follow mandatory prerequisites. *See* *Robinson v. Ehrler*, 691 S.W.2d 200 (Ky. 1985) (finding that a void election is the same as no election and that the original election was void for failure to publish an order calling for it).

231. *See* *Harreld v. Banks*, 319 So.3d 1094, 1106 (Miss. 2021) (“An election may also be invalidated ‘when there has been a ‘substantial failure’ to comply materially with the applicable statutes and the intent of the voters is impossible to ascertain.”) (citing *Boyd v. Tishomingo Cnty. Democratic Exec. Comm.*, 912 So. 2d 124, 128 (Miss. 2005) (quoting *Walker v. Smith*, 213 Miss. 255, 57 So. 2d 166, 166-67 (1952))).

232. *Id.*

233. *Id.*

Courts sometimes void a contested election when the election’s fairness or integrity is questionable. Courts may not need to establish precise standards before determining an election should be voided for fairness concerns.<sup>234</sup>

The following are some circumstances under which courts voided contested elections because of fairness or integrity concerns:

- extensive voter disenfranchisement occurred, sometimes even though the results would not have changed,<sup>235</sup>
- constitutional violations,<sup>236</sup>
- substantial failures to safeguard the election’s integrity,<sup>237</sup>
- prohibited methods used in administering the election,<sup>238</sup> or
- concerns that the election was not free and equal, for example because uniformed police officers and members of the armed forces were present in the polling places.<sup>239</sup>

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234. See *Scholl v. Bell*, 102 S.W. 248, 255 (Ky. Ct. App. 1907) (“The language of the Constitution is designedly broad, made so for the purpose of covering and meeting every condition that may arise and every condition that may be invented to prevent the substantially fair and free expression of the will of the people. A combination of two or more of these elements may render an election void, although any one of them, taken alone, might not be, in a particular case, of itself sufficient to have that effect.”) (voiding election because numerous irregularities and illegalities left the election’s fairness suspect).

235. *McNally v. Tollander*, 302 N.W.2d 440 (Wisc. 1981) (calling for new election when forty percent of the voters were disenfranchised in an election to decide if the county seat should be relocated; here, overwhelming support for the measure meant it would have passed even if the disenfranchised voters would have all opposed it).

236. *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (finding an Equal Protection violation when the defendants failed to provide substantially equal voting facilities, specifically in precincts that should have consisted of no more than 500 voters were drawn for 1539 – 3939 voters each); *Marks v. Stinson*, 19 F.3d 873, 889 (3rd Cir. 1994) (voiding election appropriate for constitutional violation even though the violation’s impact on the election’s results is unknown).

237. *Ury v. Santee*, 303 F. Supp. 119 (N.D. Ill. 1969) (finding an Equal Protection violation when the defendants failed to provide substantially equal voting facilities, specifically in precincts that should have consisted of no more than 500 voters were drawn for 1539 – 3939 voters each); *Marks v. Stinson*, 19 F.3d 873, 889 (3rd Cir. 1994) (voiding election appropriate for constitutional violation even though the violation’s impact on the election’s results is unknown).

238. *Sims v. Ham*, 271 S.E.2d 316 (S.C. 1980) (voiding an election because it was conducted using prohibited full slate voting rules, which make it more difficult for minority candidates to win office). Under full slate voting, the voter must vote for as many candidates as available offices in multi-seat elections or the vote will not be counted for any candidate. Thus, if seven candidates are running for five vacant city council seats, all voters are required to vote for five candidates. If two of the seven candidates are minorities, a minority voter cannot vote for the two candidates only but must also vote for three of the non-minority candidates. Non-minority voters, on the other hand, could vote for all five non-minority candidates and satisfy the full slate voting requirements.

239. *Scholl v. Bell*, 102 S.W. 248, 259 (Ct. App. Kent. 1907).

Courts are also generally wary of voiding elections if they believe the contestant participated in or benefited from the irregularity or if the contestant would not have challenged the irregularity if the contestant had won.<sup>240</sup>

### 1. New Election Considerations

When the vacancies created by a voided election are filled by a new election, the court may be able to structure the new election so that its parameters closely match the original election.<sup>241</sup>

### 2. Appointment Process Considerations

If, after an election is voided, the vacant offices are filled through the appointments process, and more than one office is vacant, then court may need to specify the order in which the offices are filled.<sup>242</sup> For example, following the voiding of an election because of fraud, violence, and intimidation, statutes required the vacant offices to be filled by appointment and the judge gave specific instructions about how those offices were to be filled.<sup>243</sup>

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240. *See* *Ferguson v. Brick*, 652 S.W.2d 1 (Ark. 1983); *Maschari v. Tone*, 816 N.E.2d 579 (Ohio 2004) (per curiam) (limiting holding to the unique facts of the case).

241. *See* *Sperry v. Mohegan Tribe Election Comm.*, 16 Am. Tribal Law 180 (Council of Elders of the Mohegan Tribe 2020). *In re* the 1984 General Election Office Council Township Maple Shade, County Burlington, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985). *See also* *Buoananno v. DiStefamo*, 430 A.2d 765 (R.I. 1981) (limiting new election to those precincts where voting machine failures caused an undercount of some votes cast for one candidate).

242. *Scholl v. Bell*, 102 S.W. 248, 262-263 (Ky. Ct. App. 1907).

243. *Id.* (“The Governor...must appoint the judge of the county court, all justices of the peace, a mayor... all of the aldermen and councilmen... a judge of the city court, prosecuting attorney for the city court, and the three park commissioners. The judge of the county court...must appoint the county court clerk, county attorney, sheriff, surveyor, county jailer, county superintendent of schools, county treasurer, constables, assessor, and coroner. The mayor...must appoint a city treasurer, city auditor, city tax receiver, and bailiffs of the city court. The judge of the city court...must appoint a clerk of the city court.”).

## VII. BREAKING TIES

Elections occasionally end in ties. The state constitution or election statutes may specify how ties are broken. Drawing lots<sup>244</sup> and coin tosses<sup>245</sup> are common methods. The state legislature may have exclusive authority to break ties for its seats.<sup>246</sup> If no statutory provisions exist for breaking a tied election, a new election may be necessary.<sup>247</sup>

Even when the tied results themselves are not challenged, the tie-breaking mechanism or process can be challenged. One court upheld a circuit clerk's tie-breaking coin flip, stating it satisfied the statute's requirement for a decision made by lot.<sup>248</sup>

If one of the tied candidates dies before a tie is broken, the court may be able to order a substitute to take the dead candidate's place.<sup>249</sup> One court facing this unusual scenario, specified that if the substitute won, the office would be vacant

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244. TEX. ELECTION CODE ANN. § 2.002 (West 2021); 25 PA. STAT. AND CONS. STAT. ANN. § 3168 (West 2022); MISS. CODE ANN. § 23-15-601 (2017) (drawing lots or coin toss); *Lambeth v. Levins*, 702 P.2d 320, 327 (Kan. 1985) (holding that breaking the tie by lot was constitutional and not a lottery); *Dayhoff v. Weaver*, 808 A.2d 1002 (Pa. Commw. Ct. 2002) (casting of lots led to candidate winning election).

245. MISS. CODE ANN. § 23-15-601 (2017) (drawing lots or coin toss); IDAHO CODE ANN. § 34-1210 (West 2021); *See Renshaw v. Dirnbeck*, 2017 WL 3362354 (Ill. App. 5th 2017) (citing a coin toss deciding an election in *Pullen v. Mulligan*); Michael J. Pitts, *Heads or Tails? A Modest Proposal for Deciding Close Elections*, 39 Conn. L. Rev. 739, 740 (2006) (citing Woodburn City Council Election Decided by Coin Toss, BOWLING GREEN DAILY NEWS (Nov. 13, 2004), available at [http://www.bgdailynews.com/articles/stories/public/200411/13/oeyv\\_news.html](http://www.bgdailynews.com/articles/stories/public/200411/13/oeyv_news.html) (detailing how a city council race in Kentucky was decided by a coin flip); Secretary of State of Alaska, *Your Vote Counts* (2005), <http://www.gov.state.ak.us/ltagov/elections/votecnts.htm> (detailing how a tied school board election in Alaska was decided by a coin flip)).

246. State constitutions may mirror the federal Constitution by stating that each house judges its own elections and its members' qualifications. *See* OHIO CONST. Art. III § 3. NEV. REV. STAT. ANN. § 293.400 (West 2019); MONT. CODE ANN. § 13-16-504(2021).

247. *See Lambeth*, 702 P.2d at 327 (ordering new election when the original resulted in a tie and state statutes did not provide a means to break it); *Landwersiek v. Dunivan*, 147 S.W.3d 141 (Mo. Ct. App. 2004) (ordering new election because some voters were disenfranchised and the tied winners could not informally agree on how to break their tie); *In re 2020 Municipal General Election*, 2021 WL 5778558 (Sup. Ct. N.J. 2021) (affirming a trial courts order for a runoff election where there was a tie).

248. *Huber v. Reznick*, 437 N.E.2d 828 (Ill. App. Ct. 1982).

249. *The People v. Deboice*, 37 N.E.2d 337 (Ill. 1941) (contestee died after the tie-breaking order was issued, but before the tie was broken); *see Ferrandino v. Sammut*, 185 A.D.3d 992 (App. Div. 2d N.Y. 2020) (“A vacancy in a designation or nomination caused by declination, where a declination is permitted by [Election Law article 6], or by the death or disqualification of the candidate, or by a tie vote at a primary, may be filled by the making and filing of a certificate, setting forth the fact and cause of the vacancy, the title of the office, the name of the original candidate, if any, and the name and address of the candidate newly designated or nominated.”).

and filled per statute, but if the surviving candidate won, then he would take office.<sup>250</sup>

## VIII. APPEALS

Some states send cases directly to final decision makers or do not permit election contests to be appealed.<sup>251</sup> Other states allow contests to be appealed like any other case.<sup>252</sup> Others still mandate specific courts for election contest appeals. For example, election contests that are appealed in Louisiana go to the full *en banc* court of appeals and the losers of that appeal can seek certiorari review at the state supreme court.<sup>253</sup> Some allow parties to appeal contests directly to the state’s supreme court.<sup>254</sup>

When appeals are permitted, the scope of that review is usually limited.<sup>255</sup> As with most cases, the court usually defers to the lower court’s findings of fact and only reverses on questions of law.<sup>256</sup> Appellate courts generally will not reverse findings of facts by lower court or administrative board’s unless those findings were against the “manifest weight of the evidence.”<sup>257</sup> Some states explicitly prohibits a court hearing election contest appeals from granting a new trial or a rehearing, but permits it to “correct manifest error to which its attention is

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250. *Deboice*, 37 N.E.2d at 337.

251. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010) (“The Supreme Court shall have jurisdiction over contests of the results of any [statewide] election . . . and shall retain jurisdiction throughout the course of such election contests.”); IOWA CODE ANN. § 58.7 (West 2012) (“The judgment of the committee [of the legislature] pronounced in the final decision on the election [for governor] shall be conclusive.”); S.C. CODE ANN. § 7-17-250 (1977) (“Appeals from decisions of the State Board shall be taken directly to the Supreme Court on petition for a writ of certiorari only based on the record of the State Board hearing and shall be granted first priority of consideration by the Court.”). The District of Columbia also sends election contests to its highest court, the D.C. Court of Appeals, and prohibits any appeals. D.C. CODE § 1-1001.11(b)(1), (b)(4) (2011).

252. *See, e.g.*, MINN. STAT. ANN. § 209.09.

253. LA. REV. STAT. ANN. § 1409(G), (H) (2012); cf. 2 U.S.C. § 437h (2006) (providing that district courts may certify constitutional questions regarding the Federal Election Campaign Act to the court of appeals sitting *en banc*).

254. KAN. STAT. ANN. §§ 25-1443, -1450 (2000); MINN. STAT. ANN. §§ 209.045, .09(2), .10(4) (West 2009).

255. Douglas, *supra* note 1, at 43.

256. *State ex rel. Hanna v. Milburn*, 161 N.E.2d 891, 893 (Ohio 1959) (“The test for reversing a decision of a board of elections is not necessarily whether this court agrees or disagrees with such decision, but it is whether the decision of the board of elections is procured by fraud or corruption, or whether there has been a flagrant misinterpretation of a statute or a clear disregard of legal provisions applicable thereto.”) (emphasis omitted); *Pruitt v. Lieutenant Gov.*, 498 P.3d 591 (Alaska 2021) (“Whether the conduct of election officials constitutes malconduct and whether that malconduct was sufficient to change the result of an election are questions of law”).

257. Douglas, *supra* note 1, at 44.

called.”<sup>258</sup> In other states, courts hearing appeals from special election courts, may have more leeway to review the lower court decision.<sup>259</sup>

## IX. CONCLUSION

While public policy favors the resolution of election-related problems or concerns prior to elections, doing so may not be possible. One form of post-election relief is an election contest, which investigates whether there were fundamental flaws in the election or its administration. Court may be asked to resolve election contests and ensure the true winner of an election takes office, either by upholding or voiding election results.

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<sup>258</sup> LA. REV. STAT. ANN. § 18:1409(I) (West 2012).

<sup>259</sup> W. VA. CODE ANN. § 3-7-3 (West 2011).



## CHAPTER 10

# Statutes of Limitations and Laches

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## CHAPTER 10: STATUTES OF LIMITATIONS AND LACHES

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## I. INTRODUCTION

As in other types of civil cases, a plaintiff's delay in bringing an election-related lawsuit may result in the court's refusal to hear the case because the statute of limitations period has expired. Alternatively, if laches applies, a plaintiff's delay may prevent the court from granting relief because the delay prejudiced another party. The refusal to hear a case or grant relief in the election context stems from the concern that electoral integrity and finality suffer when challenges are filed well into an election season or an inordinate amount of time after election processes have concluded.<sup>1</sup>

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1. Clark v. City of Trenton, 591 S.W.2d 257, 259 (Mo. Ct. App. 1979).



## II. STATUTES OF LIMITATIONS

Elections abound with deadlines, including those for filing candidacy<sup>2</sup> and ballot measure qualifications petitions,<sup>3</sup> registering to vote,<sup>4</sup> applying for an absentee ballot,<sup>5</sup> or challenging a candidate's<sup>6</sup> or voter's qualifications.<sup>7</sup> Deadlines also guide election officials' actions, such as when they specify the date or time frame in which officials must ascertain and declare the sufficiency of a candidacy or ballot measure petition,<sup>8</sup> fix the ballot order,<sup>9</sup> or mail absentee ballots.<sup>10</sup> Election deadlines may be expressed as fixed calendar dates or as a fixed number of days before or after a specified pre-or post-election event.<sup>11</sup>

Strictly construed and applied election deadlines may act as statutes of limitations periods.

Strictly construed and applied election deadlines may act as statutes of limitations periods. When the deadline or limitations period governs candidates and voters, their failure to complete the specified action at or within the allotted time usually limits their right to sue,<sup>12</sup> not merely the right to receive a remedy. In addition, because statutes of limitations are legislatively determined, courts usually lack

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2. *E.g.*, VA. CODE ANN. § 24.2-414.

3. *E.g.*, ME. CONST. art. IV, Pt. 3, § 18.

4. *E.g.*, ARIZ. REV. STAT. ANN. § 16-120.

5. *E.g.*, MD. CODE ANN., Elec. Law § LAW § 9-502.

6. *E.g.*, IDAHO CODE ANN. § 34-432.

7. *E.g.*, ALA. CODE § 17-3-50.

8. *E.g.*, MONT. CODE ANN. § 13-27-312.

9. *E.g.*, D.C. CODE ANN. § 1-1001.07.

10. *E.g.*, NEV. REV. STAT. ANN. § 293C.345.

11. For example, a deadline might be expressed as “June 15,” “the Tuesday after the first Monday in November,” or as “within 10 days after the election.”

12. *Cooper v. Dix*, 771 P.2d 614, 616-17 (Okla. 1989).

authority to modify them.<sup>13</sup> Thus, an untimely filed election-related challenge may deprive the trial court of jurisdiction under both statute and case law.<sup>14</sup> Failure to file within the limitations period deprives the court of equitable, as well as legal, remedies.<sup>15</sup>

## A. Post-Election Day Statutory Periods

Post-election timelines for challenging an election outcome are set by legislatures and vary by state.<sup>16</sup> These timelines may be as short as a few days to as long as a month.<sup>17</sup> They may also vary within a state based on whether the election is a primary, general, run-off, or special election.<sup>18</sup> Even with an identical limitations period, the statute's operation may affect different contested offices in the same

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13. *Cook v. Brown*, 909 So. 2d 1075, 1077 (Miss. 2005) (finding the court cannot change the time in which contested ballots may be viewed because setting the period is a legislative function). *See also* (*Donn v. McCuen*, 797 S.W.2d 455 (Ark. 1990) (noting, in a mandamus lawsuit seeking to add a prospective candidate's name to the ballot, that election law provisions are mandatory when enforcement is pursued before the election, hence the late-filed request was denied). Under unique circumstances, courts are sometimes able to extend the statutes of limitations period or allow late-filed challenges. *See In re Wilbourn*, 590 So.2d 1381, 1386 (Miss. 1991) (establishing a ten-day contest filing period beginning when the court certified the election returns because the statutory contest period expired during the time a temporary restraining order prevented the canvassing board from certifying a winner and transmitting the results to the state); *Thomas v. York Cnty. Bd. of Elections*, 59 Pa. D. & C.2d 377, 379 (Ct. Com. Pl. 1972) (granting *nunc pro tunc* petition where erroneously announced winner did not learn that he did not win in sufficient time to file a timely challenge); *Petrafeso v. McFarlin*, 207 N.W.2d 343, 346 (Minn. 1973) (refusing to allow clerk's error to defeat challenger who filed within the limitations period).
  14. *Mayor & Council of City of Wadley v. Hall*, 410 S.E.2d 105, 106 (Ga. 1991); *see also*, *Forbes v. Bell*, 816 S.W.2d 716, 718-19 (Tenn. 1916).
  15. *Mayor & Council of City of Wadley*, 410 S.E.2d at 106 (finding no equitable remedy available as an alternative because a statutory remedy was available at law and his inability to qualify for it was due to his own delay).
  16. The American Law Institute, *Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes* 188-191 (2020).
  17. *Henderson v. Maley*, 806 P.2d 626 (Okla. 1991) (contest filing deadline is 5 p.m. the Friday following the election.); *Mayor & Council of City of Wadley*, 410 S.E.2d 105 (five days after the election was untimely and deprived the trial court of jurisdiction over the contest); *In re Contest of Election for Offices of Governor and Lieutenant Governor Held at Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 172 (Ill. 1983) (filing deadline was fifteen days after the results are officially proclaimed).
  18. *See* ARK. CODE ANN. § 7-7-203; NEV. REV. STAT. ANN. § 293C.345 (West).

election differently because the triggering event, perhaps the date the winner was certified, may have occurred earlier for some offices than others.<sup>19</sup>

## B. Triggering Events

When the post-election challenge statute of limitations is not triggered on a fixed date, the court may be required to determine if the action was timely filed. For example, if the limitations statute references the “canvass” date, the court may need to determine which of multiple canvassing dates to use because without additional statutory elaboration or interpretation, “canvass” could refer to:

- the election day canvass,
- the county board of elections’ canvass,
- the date the clerk files the county board’s abstract with state election officials,
- the date the Secretary of State receives or takes action on the abstract,
- the date the state board of elections canvassed the abstracts, or
- the Secretary of State’s certification of the nominations.<sup>20</sup>

Courts may presume that all statutorily required actions were completed within the allowable time frame.<sup>21</sup>

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19. In an election with both local and statewide offices, the local results may be certified before the statewide results. Thus, the recount or contest statute of limitations period for local offices would expire before the limitations period for statewide offices, assuming an equally long limitations period for both offices. *See Noble v. Ada Cnty. Elections Bd.*, 20 P.3d 679 (Idaho 2000) (holding that state board of elections meeting was the canvass date for a state senate seat because a senatorial district could be larger than an individual county in which case the canvass would not be complete until all the constituent county results were aggregated at the state-level meeting); *Pullen v. Mulligan*, 561 N.E.2d 585, 589-90 (Ill. 1990) (holding that limitations period based on state board of elections canvass and certification of statewide results in election challenge involving a state legislative seat).
  20. Likewise, when the statute of limitations accrues on Election Day, the court may need to determine what events constitute the “election,” because the “election” could be 1) the actual voting day, 2) the day the canvassing board certifies the results, 3) the day the results are amended, or 4) the day a recount board completes its certification. *See Wills v. Iron Cnty. Bd. of Canvassers*, 455 N.W.2d 405, 408 (Mich. Ct. App. 1990) (holding that “election” referred to the date the board of county canvassers certified the election because canvassing and certification are necessary election components without which an election cannot be deemed to be completed).
  21. *Noble*, 20 P.3d at 683 (deciding that because the contestee failed to provide the actual canvassing date, the canvass was assumed to have occurred on the last date allowed under governing statutes, which in turn meant the contestant filed suit on the last day of the limitations period); *In re Feb. 14, 2017, Special Election on Moses Lake School District #161 Prop.*, 1, 413 P.3d 577, 580 (Ct. App. Wash. 2018) (holding that statute of limitations started to run when the canvassing board rectified the outcome rather than when they first certified the measure).

## C. Impact on Amendments and Counterclaims

In election-related cases, a court's discretion to allow late-filed lawsuits may be more limited than with general civil cases. For example, courts may lack discretion to allow amended complaints or the filing of exhibits once the limitations period has run.<sup>22</sup> Some states allow amendments if they are limited to technical corrections and do not state new charges.<sup>23</sup> In other states, courts may have discretion to permit amendments that flesh out previous charges.<sup>24</sup>

In general, the running of an election contest limitations period does not bar the contestee from filing an answer or a cross-petition—if the state permits them—because, as the purported winner, the contestee had no reason to file within the original limitation period.<sup>25</sup> A contestee's ability to file a response, however, is frequently narrowly construed. For example, one court held that express statutory authorization that permitted contestees to file a cross-petition on the date of the hearing that alleged electoral fraud did not impliedly authorize the contestee to file a cross-petition on the hearing date that alleged electoral irregularities.<sup>26</sup>

## III. LACHES

Driven by policy preferences that strongly favor not just pre-election resolution but early pre-election resolution of election-related disputes,<sup>27</sup> courts may apply laches to election-related lawsuits filed during all stages of the election cycle. Laches is an equitable doctrine (sometimes called an equitable defense) that

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22. See *Forbes v. Bell*, 816 S.W.2d 716, 718 (Tenn. 1916).

23. *Hollis v. Vaughan*, 237 S.W.2d 952, 953-954 (1951) (amendment "perfecting a statement in a cause of action previously stated" was proper).

24. *Forbes v. Bell*, 816 S.W.2d 716, 718 (Tenn. 1916) ("Amendments that merely allege in more detail grounds already alleged may also be allowed, in the discretion of the trial court.") (citing *Blackwood v. Hollingsworth*, 195 Tenn. 427, 260 S.W.2d 164, 166 (1953)). See also *Mayor & Council of City of Wadley*, 410 S.E.2d at 108 (Bell, J., concurring) (deciding that ability to file a skeletal petition and supplement combined with a policy of expediting election contests means the strict five-day limitations period will not be tolled).

25. *Nagel v. Kindy*, 591 N.E.2d 516, 519 (Ill. App. Ct. 1992); but see *Henderson v. Maley*, 806 P.2d 626, 634 (Okla. 1991) (holding that lack of legislative authorization for a hearing date-filed cross-petition bars the same when the original limitations period has expired).

26. See *Nagel*, 591 N.E.2d 516.

27. See *State ex rel. Vickers v. Summit Cnty. Council*, 777 N.E.2d 830, 832-33 (Ohio 2002) (per curiam) (noting that a "requirement that expedited election cases be filed with the required promptness is not simply a technical nicety."); *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Commw. Ct. 2004) (en banc) (noting that our system of government depends on the prompt resolution of election contests and timely certification of a winner so the government can continue to efficiently operate).

courts use at the defendant's request to dismiss lawsuits where the plaintiff's delay in bringing the lawsuit prejudiced another party.<sup>28</sup> In an election context, prejudice may occur when a relevant election deadline passes.<sup>29</sup> Whether or not laches is characterized as an affirmative defense, it is not waived if not asserted at the initial stages of the election-related challenge and may be raised for the first time on appeal.<sup>30</sup>

Because the application of laches is a question of fact, the trial court determines if it applies.<sup>31</sup> When laches applies, the merits of the underlying claim are not addressed.<sup>32</sup> Laches may also foreclose requests for extraordinary relief. Common applications of laches apply to the following:

- *pre-election* challenges that the court determines should have been filed *earlier* and,
- *post-election* challenges that the court determines should have been raised *pre-election*.

Challengers who wish to avoid laches must demonstrate that they acted with the utmost diligence.<sup>33</sup>

## A. Laches' Elements

The most salient feature of laches is the unity of (1) delay and (2) prejudice. Mere delay is not sufficient to trigger laches; instead, the delay must substantially disadvantage and prejudice the defendant, or another individual or entity.<sup>34</sup>

Because of the number of interdependent deadlines involved in election administration, and because elections are date-fixed events that are rarely rescheduled, prejudicial delays are commonly found in election lawsuits. Courts that analyze laches claims frequently outline the delay and review the extent to which the evidence supports that prejudice ensued.<sup>35</sup>

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28. See *Trump v. Biden*, 951 N.W.2d 568, 572 (Wis. 2020) (quoting *State ex rel. Wren v. Richardson*, 936 N.W.2d 587) (“Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party.”).

29. See *id.*

30. *State ex rel. Hill Communities, Inc. v. Clermont Cnty. Bd. of Elections*, 746 N.E.2d 1115, 1118 (Ohio 2001) (per curiam) (holding that laches is not waived if not raised in earlier court proceedings).

31. *Landwersiek v. Dunivan*, 147 S.W.3d 141, 148 (Mo. Ct. App. 2004).

32. *State ex rel. Newell v. Tuscarawas Cnty. Bd. of Elections*, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam).

33. *Summit Cnty. Council*, 777 N.E.2d at 832.

34. *Landwersiek*, 147 S.W.3d at 147.

35. See *Blankenship v. Blackwell*, 817 N.E.2d 382 (Ohio 2004) (per curiam).

## 1. Delay

The plaintiff's delay in filing the lawsuit must reflect a "want of due diligence."<sup>36</sup> A plaintiff's unreasonable or inexcusable delay in suing satisfies the delay requirement.<sup>37</sup> The court evaluates the reasonableness of the plaintiff's delay by reviewing the reasons for the delay, the relief requested, and whether the defendant, a third party, or the general public suffered prejudice because of the delay.<sup>38</sup>

This mix of considerations, as well as state precedent in laches' application, gives rise to great variability in the amount of delay that may occur between injury and lawsuit before laches applies. For example, one court noted that courts in its state had applied laches in election cases when the plaintiff delayed filing a lawsuit for nine days.<sup>39</sup> Delays that allow deadlines to pass are especially likely to be declared unreasonable and to support laches.<sup>40</sup> Although written opinions sometime suggest that laches is inapplicable if the petitioner justifies his apparent lack of diligence,<sup>41</sup> such justifications are generally difficult to prove.<sup>42</sup> Finally, the petitioner's delay is not automatically excused by others' delay, especially if the petitioner contributed to the overall delay.<sup>43</sup>

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36. See *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1998).

37. See *Thirty Voters of Cnty. of Kauai v. Doi*, 599 P.2d 286 (Haw. 1979) (per curiam) (holding that constructive notice of complained-of change to ballot language was received when the sample ballot was published).

38. Note that laches recognizes an expanded universe of individuals who the plaintiff's delay may prejudice.

39. See *State ex rel. Newell v. Tuscarawas Cnty. Bd. of Elections*, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam).

40. *State ex rel. White v. Franklin Cnty. Bd. of Elections*, 600 N.E.2d 656, 659 (Ohio 1992) (per curiam) (citing events that happened during the delay and gave rise to laches, such as absentee ballots put into use, ballots printed or the form certified, and replacement nominee deadline passed).

41. *State ex rel. Hill Communities, Inc. v. Clermont Cnty. Bd. of Elections*, 746 N.E.2d 1115, 1118 (Ohio 2001) (per curiam) (applying laches because while the plaintiff requested expedited consideration of his challenge to the sufficiency of ballot measure petitions, he himself did not act expeditiously).

42. *Ross v. State Bd. of Elections*, 876 A.2d 692 (Ct. App. Md. 2005) (Plaintiff's complaints at board meetings did not justify his laches without a formal complaint to the State Board of Elections). *But see Mi Familia Vota v. Hobbs*, 492 F.Supp.3d 980 (D. Ariz. 2020) (found COVID justification sufficient to find the claim non-laches barred).

43. *Newell*, 757 N.E.2d at 1138 (postponing hearing on challenges to qualifying signatures for ballot measure in part because the realtor did not specify all the signatures he was challenging during the initial hearing).

## 2. Prejudice

Without a showing of prejudice, laches is unavailable.<sup>44</sup> Prejudice arises when a party is harmed because of its reliance on the plaintiff's delay.<sup>45</sup> Prejudice may occur if hearing the lawsuit negatively impacts statutory election deadlines such as those governing the mailing of absentee ballots, especially if those deadlines will be missed.<sup>46</sup> However, laches may not apply to save the election of a candidate who moved outside the district line based on incorrect boundary information he received when the late challenge did not prejudice the candidate due to his ineligibility.<sup>47</sup>

The universe of parties potentially prejudiced by the plaintiff's delay is not limited to the named defendant.<sup>48</sup> Even if they are not parties to the lawsuit, prejudice may arise if the board of elections, the electorate, or the local citizenry is harmed by the delay.<sup>49</sup> These parties may be harmed by lawsuits that are not filed until after the election when the plaintiff could have filed them beforehand. Laches has been used to dismiss cases when the plaintiff's delay prejudiced the following groups:

- absentee voters,<sup>50</sup>
- counties that were facing absentee ballot mailing deadlines,<sup>51</sup>
- state elections officials, who had insufficient time to prepare their defense,<sup>52</sup>

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44. See *Landwersiek v. Dunivan*, 147 S.W.3d 141, 145 (Mo. Ct. App. 2004) (declaring that no laches were possible without a showing that ordering a new election or recount would prejudice any of the candidates); *Melendez v. O'Connor*, 654 N.W.2d 114, 117 (Minn. 2002) (per curiam) (finding that, regardless of any unreasonable filing delay, there was no prejudice to the candidate or his supporters in not permitting defendant's name on the ballot because he was ineligible due to inability to meet the residency requirements); *Polly v. Navarro*, 457 So.2d 1140 (Fla. Dist. Ct. App. 1985) (denying laches because illegal candidacy was not harmed by challenge filed seventy-four days after candidate filed his petitions).

45. *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1998) (denying laches to defendants who experienced no prejudice due to the petitioner's delay because defendants had begun spending time and money in preparation for the election as soon as they knew an election would occur and did not do so solely because of the petitioner's delay filing suit).

46. *Newell*, 757 N.E.2d at 1140 (noting in particular that statutory deadlines to mail absentee and military ballots would be missed if the case is heard).

47. *Melendez v. O'Connor*, 654 N.W.2d 114 (Minn. 2002) (per curiam) (finding an intention to comply with residency requirements was not equivalent to actual compliance).

48. *Ross*, 876 A.2d at 706 (Md. 2005).

49. *Id.*

50. *State ex rel. Demaline v. Cuyahoga Cty. Bd. of Elections*, 90 Ohio St. 3d 523, 523 (2000).

51. *Marcellus v. Va. State Bd. of Elections*, 2015 U.S. Dist. LEXIS 120584, at \*14 (E.D. Va. Sep. 9, 2015).

52. *Ariz. Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 923 (D. Ariz. 2016).

A smooth and successful election requires many interdependent steps that must occur in a precise order.

- potential future petitioners, who would lack the time to challenge any remedy,<sup>53</sup> and
- the state at-large, because its election preparations might be thrown into turmoil.<sup>54</sup>

## B. Applying Laches<sup>55</sup>

The passage of time that might not constitute a delay in a general civil case can trigger a laches bar in an elections case, especially if state election statutes specify expedited procedural schedules.<sup>56</sup> Thus, even pre-election lawsuits should be expeditiously pursued and are vulnerable to laches if they are not.<sup>57</sup> Laches is also commonly used to dispose of post-election challenges, especially when the court concludes that a pre-election challenge was appropriate.<sup>58</sup> Laches can also apply to lawsuits requesting extraordinary relief.<sup>59</sup> Though, courts sometimes refuse to apply laches if its operation would permit constitutional violations to stand.<sup>60</sup>

### 1. Pre-Election Challenges

A smooth and successful election requires many interdependent steps that must occur in a precise order. Delays or missed deadlines, including those resulting from election-related challenges, might disrupt later stages of the election

53. *Banfield v. Cortes*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007).

54. *Blankenship v. Blackwell*, 817 N.E.2d 382, 387 (Ohio 2004) (per curiam) (denying writ of mandamus to county boards of elections to compel certain actions to further third-party presidential candidate's access to the ballot on laches and other grounds); *Ademiluyi v. Md. State Bd. of Elections*, 181 A.3d 716 (Ct. App. Md. 2018) (doctrine of laches barred unsuccessful candidate's claim that successful candidate was constitutionally unqualified to serve as judge); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310 (N.D. Ga. 2020) (doctrine of laches barred voter claim alleging violations of equal protection, due process, and election and electors clauses).

55. For a deeper discussion of the laches doctrine, see Chapter 12.

56. See Richard Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, WASH. & LEE L. REV. 937, 998 (2005); see also *Liddy v. Lamone*, 919 A.2d 1276, 1283 (quoting *Ross*, 876 A.2d at 704).

57. See Hasen, *supra* note 56, at 998.

58. *Id.* at 998; *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 926 (7th Cir. 2020).

59. *State ex rel. White v. Franklin Cnty. Bd. of Elections*, 600 N.E.2d 656, 659 (Ohio 1992) (per curiam); see ANTINEAU, *THE PRACTICE OF EXTRAORDINARY REMEDIES* 301, (laches may bar a writ of mandamus), 501 (stating that laches bars a writ of prohibition.), 598-99 (laches bars a petition for quo warranto brought by a private party, but ordinarily does not bar quo warranto brought by the government).

60. *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1998) (finding that laches did not bar a lawsuit that challenged a judicial election that was scheduled at the same time as a general election in violation of the state constitution).



preparation.<sup>61</sup> As the election draws near and election officials make more irrevocable decisions and commit substantial resources towards it, the state's interest in proceeding with the election increases.<sup>62</sup> As a result, laches may bar even pre-election challenges when the potential relief would prejudice a later election-related step,<sup>63</sup> such as holding the election in a timely manner.<sup>64</sup> Thus, filing a pre-election lawsuit is not necessarily sufficient to avoid the application of laches and the closer the impending election, the quicker the plaintiff must act.<sup>65</sup>

## 2. Post-Election Challenges

The availability of post-election relief for election law violations may be restricted.<sup>66</sup> Lawsuits filed after an election are particularly scrutinized when the basis for the challenge was known or discoverable pre-election. Because of public policy preferences for expeditious challenges rather than last minute ambushes by candidates who wait to see if they win the election before they sue, plaintiffs generally cannot disregard pre-election remedies in favor of post-election

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61. *State ex rel. Newell v. Tuscarawas Cnty. Bd. of Elections*, 757 N.E.2d 1135, 1140 (Ohio 2001) (Douglas, J., dissenting) (per curiam).
  62. *Ross*, 876 A.2d at 705; *see Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff*, 804 N.E.2d 419 (Ohio 2004) (holding that laches was appropriate where the statutory deadline to mail absentee ballots had passed before the elections board was named as a party).
  63. *See Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (holding that laches apply to recall election where although voting equipment had been previously decertified, election had effectively begun with mailing of absentee ballots and halting it would be unprecedented); *Winters v. Kiffmeyer*, 650 N.W.2d 167, 170 (Minn. 2002) (finding that although office should be on the ballot, filing the action mid-way through the nominating petition acceptance period prejudiced the current office holder and other potential candidates, and, combined with the significant effect of ordering an election, meant laches was appropriate).
  64. *Save the Ill. River v. Okla. ex rel. Okla. State Election Bd.*, 378 P.3d 1220, 1224 (Okla. 2016).
  65. In addition, state law or court practice rules govern the availability of expedited procedural schedules for election lawsuits. *See State ex rel. Willke v. Taft*, 836 N.E.2d 536 (Ohio 2005) (finding that state supreme court practice rules made the challenge an expedited case). Expedited schedules, whether triggered automatically or available only upon request, can either benefit or harm the relator's case. Expedited processes benefit a relator if they allow the lawsuit to be heard when the normal court calendar could not accommodate it before the election. Expedited processes harm the relator's case if they provide the prejudice necessary to trigger laches. *See State ex rel. Comm. for the Charter Amendment, City Trash Collection v. City of Westlake*, 776 N.E.2d 1041, at 19-20 (Ohio 2002) (deciding that laches was inapplicable because statutorily-mandated expedited briefing and evidence presentations concluded before the absentee ballot printing and mailing deadline passed); *Campaign to Elect Larry Carver Sheriff*, 804 N.E.2d at 422 (finding that because late pre-election filing made it unlikely the expedited briefing schedule mandated by statute could be met before the election, providing more impetus for a laches determination.); *White*, 600 N.E.2d at 659 (finding that there was a prejudicial delay present when after the expedited briefing schedule was completed, insufficient time was available for the board of elections to make any necessary changes to absentee ballots by the statutory deadline).
  66. *McKinney v. Super. Court*, 21 Cal. Rpt. 3d 773, 777 (Ct. App. 2004).

lawsuits.<sup>67</sup> For example, a Maryland judge found that a losing candidate’s challenge to the winning candidate’s qualifications was precluded by laches because the petitioner knew his opponent had failed to file the required campaign finance documents—and thus should have been disqualified—before the election, but waited until three days after the election to sue for her disqualification.<sup>68</sup> An Illinois judge held that laches prevented a post-election challenge to a candidate who was otherwise qualified for office except for improper nomination papers, an error that occurred several months earlier.<sup>69</sup> In another example, in a case from Hawaii, a court found that laches also barred a post-election lawsuit seeking to overturn the election results because ballot measure choices were changed from “yes” and “no” to “for” and “against” because they could have been challenged and corrected before the election.<sup>70</sup>

### 3. Appeals

Defendants may raise a laches bar for the first time during an appeal. Laches operates differently from challenges to the timeliness of an appeal because even timely appeals can be barred by laches.<sup>71</sup>

### 4. Interplay with Statutes of Limitations

Because laches considers prejudice as well as delay, its operation sometimes shortens the time in which a suit is considered timely, regardless of whether the limitations period has run. In addition, courts sometimes substitute laches for absent or inapplicable limitations periods.<sup>72</sup>

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67. *Id.* at 776 (noting the trial court dismissed the plaintiff’s initial lawsuit for laches and denying the petition because the petitioner had “short-circuited” the appeals process by bringing a writ petition rather than an appeal).

68. *Ross*, 876 A.2d at 694.

69. *Thurston v. State Bd. of Elections*, 392 N.E.2d 1349 (Ill. 1979).

70. *Thirty Voters of Cnty. of Kauai v. Doi*, 599 P.2d 286, 288 (Haw. 1979) (per curiam) (discussing ballot measure voting choices changed from “yes” and “no” to “for” and “against”.); *Lewis v. Cayetano*, 823 P.2d 738 (Haw. 1992) (noting that when it became apparent that election officials were not going to correct the ballot irregularities the plaintiff was obligated to file a pre-election lawsuit).

71. *Ellis v. Swensen*, 16 P.3d 1233, 1239 (Utah 2000) (applying laches where appeal was filed the thirty-day appeals limitations period ended on a Sunday and appeal was filed the following Monday on the grounds that the full appeals period was not guaranteed for election cases).

72. *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Commw. Ct. 2004) (en banc) (holding that equity operates to void a ballot measure election when a legal requirement was ignored or disregarded even though the state election code limited election challenges to elective offices and omitted ballot measure challenges, and while equity did not carry forward the election code’s tight statute of limitations period, laches did apply).

## IV. CONCLUSION

As in nearly all areas of the law, the timely commencement of a civil case can determine the outcome of a case even before it has been heard. Under both the statute of limitations and laches doctrines, the plaintiff's delay may result in the court's refusal to hear the case or grant relief due to notions of fair dealing, legal integrity, and the efficient and effective execution of the law—impulses that are often heightened in deadline-driven, politically-charged election cases.



## CHAPTER 11

# Extraordinary and Equitable Relief

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## CHAPTER 11: EXTRAORDINARY AND EQUITABLE RELIEF

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## I. INTRODUCTION

Requests for extraordinary writs (mandamus, prohibition, and quo warranto), equitable relief (various types of injunctions), or declaratory judgments<sup>1</sup> are not uncommon in election-related litigation. When issued, writs of mandamus<sup>2</sup> compel officials to perform their legally required duties, writs of prohibition constrain and overturn the unauthorized exercise of judicial or quasi-judicial authority, quo warranto ousts usurpers from office, injunctions either compel or prohibit action, and declaratory judgments announce the rights, duties, and obligations of the parties.

Extraordinary writs, which originated in common law, are now frequently either authorized or limited by state statutes.<sup>3</sup> Before receiving an extraordinary writ, requestors must usually demonstrate that no adequate, alternative form of relief is available and that they acted with utmost diligence lest they become vulnerable

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1. Declaratory judgments are procedural devices and are not a form of relief. They are included in this chapter because plaintiffs sometimes erroneously request declaratory judgments rather than writs of mandamus or instead of filing an election contest.
  2. In practice, the “writ of” portion is frequently omitted when referring to the extraordinary writs. In addition, some states have statutory replacements for writs of mandamus, thus references to writs of mandamus or mandamus in this manual are intended to include the statutory equivalents, to the extent applicable.
  3. See GA. CODE ANN. § 9-4-3; V.R.A.P. Rule 21.

to laches.<sup>4</sup> Extraordinary writs may offer plaintiffs an opportunity to challenge election officials' decisions in the absence of an administrative or judicial appeals process. Equitable relief too is generally available when no adequate remedy at law exists.

This chapter discusses the use of extraordinary and equitable relief in election-related lawsuits.

## II. EXTRAORDINARY WRITS

### A. Writs of Mandamus

Mandamus is a discretionary writ that usually issues to compel a government official or government agency—such as election officials or the board of elections or its equivalents—to perform a legally required, ministerial public duty.<sup>5</sup> Mandamus does not establish legal rights or duties; it only enforces the performance of preexisting public duties.<sup>6</sup> For example, mandamus can compel a member of the state legislature to open and publish election returns<sup>7</sup> and it can compel an election official to register a voter or grant ballot access to a candidate or ballot measure.<sup>8</sup>

All states permit writs of mandamus<sup>9</sup> or a statutory equivalent, although some states permit only the state supreme court to issue the writ<sup>10</sup> while other states

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4. State *ex rel.* Newell v. Tuscarawas County Bd. of Elections, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam).
  5. Although less common, mandamus can also be used to compel an inferior court to act. See *In re Wilbourn*, 590 So.2d 1381, 1386 (Miss. 1991) (ordering the lower court to dissolve a temporary restraining order that was preventing the election board for certifying a winner and, thus, holding up any opportunity for an election contest).
  6. CHESTER JAMES ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS 292 (1987); State *ex rel.* Willke v. Taft, 107 Ohio St. 3d 1 (2005) (noting courts cannot create the legal duties subject to mandamus action; they must be pre-existing).
  7. ANTIEAU, *supra* note 6, at 312; State v. Elder, 31 Neb 169 (1891).
  8. *Id.* at 313. Mandamus is unavailable where the official acted within his authorized discretion. exercised was not faulty. See State *ex rel.* Vickers v. Summit County Council, 97 Ohio St. 3d 204 (2002) (per curiam) (noting mandamus would not have been available even absent laches because the municipal council had no clear legal duty to submit every charter amendment proposal to the voters).
  9. ANTIEAU, *supra* note 6, at 291; see, e.g., Russell v. Smokerise Bath & Racquet Club, Inc., 256 S.E.2d 457, 460 (Ga. 1979); (GA. CODE ANN. § 9-6-1 (West)).
  10. N.M. Const. art. VI, § 3; Del. Sup. Ct. R. 43.

permit their lower courts to do so.<sup>11</sup> To qualify for a writ of mandamus, the plaintiff<sup>12</sup> must demonstrate the following:

- a clear legal right for the denied or withheld act at the time the suit was instituted,<sup>13</sup>
- the defendant’s clear legal duty<sup>14</sup> to act as requested, coupled with failure to do so, and
- mandamus is the only available adequate remedy.<sup>15</sup>

The majority view holds that a plaintiff’s eligibility for mandamus relief is not conditioned on her first demanding that the defendant act because the legally-imposed duty operates as a continuing demand on the defendant’s conduct.<sup>16</sup> The minority view requires plaintiffs to demand that the defendant act—and the defendant must usually refuse to act, either by his words or conduct—before seeking mandamus relief.<sup>17</sup> The defendant’s anticipated refusal substitutes for actual refusal only when it is clear that the plaintiff’s demand would have been vain or useless.<sup>18</sup>

Virtually all legally required election duties have been subjected to a writ of mandamus at one time or another.

Virtually all legally required election duties have been subjected to a writ of mandamus at one time or another. Courts have issued writs of mandamus to compel government bodies or officials<sup>19</sup> to:

11. NEV. REV. STAT. ANN. § 34.160; N.D. CENT. CODE § 32-34-01.
12. Local practice rules might require petitions for mandamus be brought in state’s name in relation to the plaintiff. ANTIEAU, *supra* note 6, at 292; State *ex rel.* Krieger v. Bd. of Supervisors, 105 NW 2d 721 (Neb. 1960). Citizens and taxpayers may have standing to request mandamus to compel elections to be called as required and for performance of ministerial election-related duties. ANTIEAU, *supra* note 6, at 403. Citizens who signed petitions have standing to seek mandamus to compel the acceptance of the petition. *Id.* at 320-22.
13. *Id.* at 296. Mandamus does not enforce uncertain, abstract, doubtful, or prospective claims. Mandamus is only available to compel future duties when clear that the defendant does not intend to perform it or when the future duty is continues from a current duty he is not performing.
14. The defendant’s legal duty can arise from statutory or common law and must be something the defendant is capable of performing.
15. Hazzouri v. W. Pittston Borough, 416 F. Supp. 3d 405, 418 (M.D. Pa. 2019); GE v. W. Feliciano Par. Hosp. Serv. Dist. No. 1, No. 16-449-JWD-RLB, 2016 U.S. Dist. LEXIS 164214, at \*15 (M.D. La. Nov. 29, 2016).
16. ANTIEAU, *supra* note 6, at 297; People *ex rel.* Adams v. McKibben, 35 N.E.2d 321 (Ill. 1941).
17. *Id.* at 298.
18. *Id.* at 297.
19. Necessary parties to mandamus actions are those government bodies or individuals with a clear, legal duty to perform the requested action.

- hold legally required public elections, including recall or initiative elections,<sup>20</sup>
- accept legally conforming ballot measures or nominating petitions,<sup>21</sup>
- add wrongfully omitted candidates' names to the ballot,<sup>22</sup>
- accept filing fees necessary to secure ballot access,<sup>23</sup>
- restore wrongfully deleted names to a petition,<sup>24</sup>
- conduct elections in conformity with local law,<sup>25</sup>
- recognize qualified voters' right to vote when wrongfully-denied,<sup>26</sup>
- compel the provision of wrongfully-denied absentee ballots,<sup>27</sup>
- disqualify void election returns,<sup>28</sup>
- canvass the vote,<sup>29</sup> and
- announce the election results and issue the election certificates.<sup>30</sup>

Mandamus will not:

- compel performance of discretionary activities unless in its absence the discretion would be exercised in a shocking, discriminatory, or unjust manner,<sup>31</sup>
- compel strict compliance with the law in disregard of its plain intent and spirit,<sup>32</sup> nor

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20. *ANTIEAU*, *supra* note 6, at 320 (citing *Miller v. State ex rel. Meyers*, 53 S.W. 2d 838 (Tex. Civ. App. 1932); *Howard v. Clark*, 589 S.W. 2d 748 (Tex. Civ. App. 1979); *Struhm v. Berkeley*, 229 Cal. App. 2d 278 (1964); *Blue v. Stockton*, 355 P. 2d 395 (Alaska 1960)).
21. *ANTIEAU*, *supra* note 6, at 321 (citing *Coney v. Topeka*, 149 P. 689 (Kan. 1915); *State ex rel. Ehring v. Bliss*, 97 N.E.2d 671 (Ohio 1951)).
22. *ANTIEAU*, *supra* note 6, at 321 (citing *Lubin v. Panish*, 415 U.S. 709 (1974) (to be placed on ballot where filing fees demanded were unconstitutional); *Reynolds v. Conti*, 270 N.E. 2d 505 (Ill. Ct. App. 1971); *Soutar v. St. Clair Cnty. Election Comm'n*, 54 N.W. 2d 425 (Mich. 1952); *State ex rel. Smart v. McKinley*, 412 N.E.2d 393 (Ohio 1980)).
23. *ANTIEAU*, *supra* note 6, at 321 (citing *Davis ex rel. Taylor v. Crawford*, 95 Fla. 438 (1928)).
24. *Id.* (citing *State v. Land*, 110 S.E. 180 (W. Va. 1921)).
25. *Id.* (citing *Knoll v. Davidson*, 525 P. 2d 1273 (Cal. 1974)).
26. *Id.* (citing *Young v. Gness*, 496 P.2d 445 (Cal. 1972) (unconstitutional residence requirement)).
27. *Id.* (citing *Hudson v. Nehell*, 206 N.Y.S.2d 908 (1960)).
28. *Id.* (citing *McNally v. Bd. of Canvassers*, 25 N.W.2d 613 (Mich. 1947)).
29. *Id.* (citing *Roemer v. City Canvassers*, 51 N.W. 267 (Mich. 1892)).
30. *Id.* at 320-22 (citing numerous cases).
31. *Walsh v. Boyle*, 166 N.Y.S. 681, 685 (N.Y. App. Div. 1917) (finding ballot order placement was left to officials' discretion in absence of showing of discrimination that "shock[s] the conscience" or violates "all rights, decency and fair play").
32. *ANTIEAU*, *supra* note 6, at 302; *see Elmer v. Commissioner of Insurance*, 23 N.E.2d 95, 98 (Mass. 1939).



- issue when the controversy is moot.<sup>33</sup>

Courts may not issue mandamus that is actually a request for declaratory or injunctive relief in disguise.<sup>34</sup> Mandamus compels action, it does not prohibit it.<sup>35</sup> Mandamus does not issue if an adequate alternative remedy exists,<sup>36</sup> if such a remedy once existed but was lost because of the plaintiff's unexcused delay,<sup>37</sup> or there is no clear legal right to the requested relief.<sup>38</sup> Therefore, its availability may be limited or foreclosed when state statutes provide administrative review or expedited appeals from official actions.<sup>39</sup> To bar mandamus, the alternative remedy must be equally and fully sufficient and offer the speedy, adequate and specific remedy mandamus would provide.<sup>40</sup> Thus, a speedy and adequate injunction can bar mandamus,<sup>41</sup> but a mandatory injunction that fails to offer a complete remedy usually cannot.<sup>42</sup> Declaratory judgments are rarely adequate

33. *Id.* at 304.

34. *State ex rel. Mackey v. Blackwell*, 834 N.E.2d 346 (Ohio 2005) (per curiam) (holding the mandamus claim fails for want of jurisdiction at both appeals and state supreme court levels because, based on the relator's request that the court "prevent" and "prohibit[]" certain actions and declare that other actions violated a state statute, the realtors were actually seeking prohibitory injunctions and a declaratory judgment) and *State ex rel. Essig v. Blackwell*, 817 N.E.2d 5 (Ohio 2004).

35. See *Mackey*, 834 N.E.2d at 349 (per curiam) (noting the court must examine the petition to see if it seeks to compel or prohibit official action) (citation omitted).

36. See *Mackey*, 834 N.E.2d at 350 (finding mandamus not a substitute for a statutory election contest); *Ex parte Beattie*, 124 So. 273, 275 (Fla. 1929) (rejecting the requested mandamus action because it was actually an election contest).

37. See *Anderson v. Ill. State Bd. of Elections*, 589 N.E.2d 907, 909 (Ill. App. Ct. 1992) (finding mandamus is appropriately denied when "proper and timely use" of statutory election remedies would have avoided resort to mandamus) (citation omitted); *State ex rel. Byrd v. Bd. of Elections*, 417 N.E.2d 1375, 1379 (Ohio 1981) (upholding the denial of a writ of mandamus when the candidate failed to seek a recount or file an election contest within the statutorily allotted time frame, and instead waited six weeks to request a writ of mandamus); *Harding v. State Election Bd.* (Okla. 1946) (holding that filing a writ of mandamus 10 days after a protest to his candidacy was sustained given the proximity of impending election).

38. See *State ex rel. Citizens for Responsible Green Gov't v. City of Green*, 118 N.E.3d 236, 241 (Ohio 2018) (denying writ of mandamus because "[g]iven the proximity of the November election, the committee lacks an adequate remedy in the ordinary course of the law."); *State ex rel. Willke v. Taft*, 836 N.E.2d 536, 540 (Ohio 2005) (dismissing a mandamus action against the Governor because there was no enforceable legal duty owed by the Governor to the Plaintiffs); *State ex rel. Frank v. Becker*, 9 S.W.2d 153, 154 (Mo. 1928) (en banc) (denying writ of mandamus to compel the secretary of state to certify to county clerks that Plaintiff is the nominee after the primary election because to grant the writ would be to command the secretary of state to do something contrary to law).

39. *In re Willbourn*, 590 So.2d 1381, 1384-85 (Miss. 1991). See also *Gracey v. Grosse Pointe Farms Clerk*, 452 N.W.2d 471 (Mich. Ct. App. 1989) (holding, where administrative processes exist, mandamus may be limited to an order for the administrative remedies to proceed or to accelerate the process).

40. ANTIEAU, *supra* note 6, at 298; see *State ex rel. Bethke v. Bain*, 240 P.2d 658, 963 (Or. 1952); *Cislo v. City of Shleton*, 405 A.2d 84, 91 (Conn. 1978).

41. *Id.* at 299.

42. *Id.* at 300.

alternatives.<sup>43</sup> Adequate administrative remedies also bar mandamus,<sup>44</sup> but obviously futile, incomplete, or historically arbitrarily-applied administrative remedies do not.<sup>45</sup> In at least one case, the availability of a federal civil rights lawsuit under § 1983 barred mandamus.<sup>46</sup>

Even though requests for mandamus are actions at law, their availability is nonetheless subject to the equitable doctrines of unclean hands and laches.<sup>47</sup> Moreover, mandamus cannot be used to compel actions that are unlawful, nugatory, fruitless, or contravene public policy.<sup>48</sup> A writ of mandamus is also generally considered inappropriate if its issuance would cause confusion, embarrassment, disorder, or unnecessary hardship to the defendant public agency,<sup>49</sup> or would not promote substantial justice.<sup>50</sup>

Although mandamus is a discretionary writ, courts may not arbitrarily or capriciously refuse to issue one.<sup>51</sup> Nonetheless, a court's decision to grant or deny a writ of mandamus can be appealed only for abuse of discretion.<sup>52</sup> Courts can issue writs of mandamus in either an alternative or preemptory form.<sup>53</sup> Alternative writs of mandamus order the recipient to take action or demonstrate why mandamus is inapplicable while preemptory writs are final and absolute.<sup>54</sup>

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43. *Id.*

44. *Id.*

45. *Id.*

46. *See State ex rel. Mackey v. Blackwell*, 834 N.E.2d 346 (Ohio 2005) (per curiam) (noting the adequacy of §1983 for federal civil rights violations, but not for state claims, because it can provide declaratory, injunctive, and monetary relief).

47. When mandamus relief is not completely barred because of the election's proximity, the nearness may nonetheless alter the relief. *See Zaremberg v. Super. Ct.*, 8 Cal. Rptr. 3d 723, 730 (Ct. App. 2004) (issuing mandamus to a lower court to set aside its orders prohibiting a ballot measure from appearing on the ballot, but due to the nearness to the election, the ballot measure had to be placed on the ballot at a later election as there was insufficient time to add it to the originally contemplated election).

48. *South Carolina v. United States*, 243 F. Supp. 3d 673, 681 (D.S.C. 2017).

49. *ANTI-EAU*, *supra* note 6, at 300-301, 303; *see U.S. ex rel. Greathouse v. Dern*, 289 U.S. 352, 353 (1933).

50. *Anderson v. Ill. State Bd. of Elections*, 589 N.E.2d 907, 909 (Ill. App. Ct. 1992).

51. *Levin v. Second Judicial Dist. Court*, 450 P.3d 911 (Nev. 2019).

52. *See, e.g., Berry v. Garrett*, 890 N.W.2d 882, 885 (Mich. Ct. App. 2016) (reversing lower court issue of writ of mandamus); *Nykoriak v. Napoleon*, 954 N.W.2d 824 (Mich. 2021) (affirming lower court issue of writ of mandamus).

53. *Dep't of Revenue v. Carpet Warehouse, Inc.*, 676 P.2d 299, 300 (Or. 1984); *Sturgess v. Guerrant*, 583 S.W.2d 258, 260 (Mo. Ct. App. 1979).

54. *Hattaway v. McMillian*, 859 F. Supp. 560, 565 (N.D. Fla. 1994) (alternative writ of mandamus); *Kenosha Prof'l Firefighters, Local 414, IAFF, AFL-CIO v. City of Kenosha*, 766 N.W.2d 577, 586 (Wis. 2009).

In practice, courts commonly issue the alternative writ and reserve the preemptory form for instances when the alternative proves unavailing.

## B. Writs of Prohibition

Courts issue writs of prohibition when a judicial or quasi-judicial body has acted in a manner that exceeds its jurisdiction.<sup>55</sup> Writs of prohibition target judicial acts involving fraud, corruption, abuse of discretion, or actions that clearly disregard applicable statutory provisions.<sup>56</sup> Elections boards can be seen as acting quasi-judicially when they:

- hold hearings to determine candidate qualifications,<sup>57</sup>
- Compute and canvas ballot returns,<sup>58</sup>
- Conduct recounts,<sup>59</sup> or
- remove candidates from the ballot.<sup>60</sup>

Courts issue writs of prohibition when a judicial or quasi-judicial body has acted in a manner that exceeds its jurisdiction.

Under the common law, every court of general jurisdiction could issue writs of prohibition. Today, state statutes may specify which courts may issue it.<sup>61</sup>

Because prohibition stops only excessive judicial or quasi-judicial authority, it is unavailable to stop officials from performing their statutorily mandated ministerial duties. Thus, a court can issue a writ of prohibition when a lower court exceeds its jurisdiction by ordering a recount not required by statute,<sup>62</sup> but cannot

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55. State *ex rel.* Travers v. McBride, 607 S.W.2d 851, 854 (Mo. Ct. App. 1980) (applicability of prohibition to lower courts); ANTIEAU, *supra* note 6, at 479 (applicability of prohibition to administrative bodies). Prohibition is generally unavailable when public officials act non-judicially. *Id.* at 498.

56. Arkansas Game & Fish Comm'n v. Mills, 265 S.W.3d 760, 762 (Ark. 2007).

57. See Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff, 101 Ohio St. 3d 256 (2004).

58. Donald J. Trump for President, Inc. v. Phila. County Bd. of Elections, 2020 Pa. Commw. Unpub. LEXIS 512, \*19-\*20 (Pa. Cmmw. Ct. 2020); *In re McCracken Appeal*, 88 A.2d 787, 788 (Pa. 1952).

59. White v. Laird, 96 A. 318 (Md. 1915) (power of elections board to conduct recount involves exercise of discretion and is quasi-judicial).

60. ANTIEAU, *supra* note 6, at 498; see *Mansur v. Morris*, 196 S.W.2d 287 (Mo. 1946).

61. Okla. Const. art. VII, § 4; WIS. STAT. ANN. § 783.08; Ill. Const. art. VI, § 4.

62. State *ex rel.* Travers v. McBride, 607 S.W.2d 851, 854 (Mo. Ct. App. 1980).

issue it to prevent the Secretary of State from receiving, tabulating and certifying election returns and results as constitutionally mandated.<sup>63</sup>

Before a court issues a writ of prohibition, the petitioner must commonly demonstrate the following:

- the targeted inferior judicial or quasi-judicial tribunal exercised unauthorized power,<sup>64</sup>
- the petitioner would be injured if the writ is denied,<sup>65</sup> and
- no adequate alternate remedy exists.<sup>66</sup>

Petitioners may also be required to exhaust all available administrative remedies before seeking prohibition.<sup>67</sup> Although petitioners are commonly required to first object to the court or body exceeding its jurisdiction before seeking a writ of prohibition, this requirement is frequently waived in interests of society or justice.<sup>68</sup> In addition, the petitioner must act in good faith and with clean hands.<sup>69</sup>

Writs of prohibition are available both before and after the election, although untimely requests may be barred by laches.<sup>70</sup> Before the election, writs of prohibition have been used to stop inferior courts from impermissibly counting the names on a recall petition and to prevent election boards from placing legally ineligible candidates' names on the ballot.<sup>71</sup> After the election, prohibition has restrained election boards from allowing others to view the ballots, and halted election contest proceedings when the lower court lacked jurisdiction or the contest was untimely filed.<sup>72</sup> If an otherwise mooted issue is of public importance,

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63. *In re Wilbourn*, 590 So.2d 1381, 1385 (Miss. 1991) (citing *Barnes v. Ladner*, 131 So.2d 458 (Miss. 1961)).

64. *State ex rel. Abernathy v. Lucas Cty. Bd. of Elections* 125 N.E.3d 832, 835 (Ohio 2019).

65. *State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam); see ANTINEAU, *supra* note 6, at 502. The hardship may need to be extraordinary and amount to a great and irreparable injury if the writ is denied.

66. *Newell*, 757 N.E.2d at 1138.

67. ANTINEAU, *supra* note 6, at 501 (failure to exhaust administrative remedies can lead to the request's dismissal as premature).

68. *Id.* at 500 (noting that the writ commonly issues despite the petitioner's failure to object below when the question relates to public offices).

69. *Id.* at 501. Petitioners may also need to demonstrate their status as persons "beneficially interested" in the defendant tribunal remaining within its jurisdiction. *Id.* at 536.

70. For more on laches in the context of election litigation, see Chapter 10: Statutes of Limitations and Laches.

71. *Id.* at 499. As long as the targeted election has not yet been held, prohibition can also prevent the ballot measures or candidates' names from being placed on the ballot even if a protest hearing has been completed. See *State ex rel. Hill Communities, Inc. v. Clermont County Bd. of Elections*, 746 N.E.2d 1115, 1118 (Ohio 2001) (per curiam).

72. ANTINEAU, *supra* note 6, at 499.

a court may issue a writ of prohibition to provide future guidance to election officers.<sup>73</sup>

Courts usually deny requests for writs of prohibition when an adequate legal remedy or another extraordinary writ is available.<sup>74</sup> Before an alternate remedy can displace prohibition it usually must be equally prompt, convenient, and effective.<sup>75</sup> Courts also deny requests for a writ of prohibition when issuing it would be useless or against public policy;<sup>76</sup> when the requestor's interest is unclear, too remote, or inconsequential; or if the requestor has no legal right that is directly affected by the act the writ would target.<sup>77</sup>

### C. Quo Warranto

Quo warranto actions are common law actions, now frequently codified in statute, that challenge the winning office holder's right to the elective office because of her purported failure to meet the necessary qualifications.<sup>78</sup> Quo warranto actions differ from—and serve different purposes than—election contests.<sup>79</sup> Election contests vindicate personal rights and are brought by or on behalf of unsuccessful candidates<sup>80</sup> who claim they are the true winner or that the true winner is unascertainable.<sup>81</sup> Quo warranto, on the other hand, protects the public from an unqualified office holder

Quo warranto actions are common law actions, now frequently codified in statute, that challenge the winning office holder's right to the elective office because of her purported failure to meet the necessary qualifications.

73. *Id.* at 501.

74. ANTIÉAU, *supra* note 6, at 499; *Simpson v. Police Ct.*, 117 P. 553 (Cal. 1911).

75. *See State ex rel. Knisely v. Jones*, 274 Mo. 374, 379, 202 S.W. 1117, 1118 (1918).

76. ANTIÉAU, *supra* note 6, at 501; *see Marvel Rare Metals Co. v. General Electric*, 56 2d 832 (6th Cir. 1932).

77. ANTIÉAU, *supra* note 6, at 536; *see Coughlin v. Seattle School Dist. #1*, 621 P.2d 183, 186 (Wash. App. 1980).

78. *White v. Miller*, 219 S.E.2d 123, 124 (Ga. 1975). When state contest statutes do not permit election contests based on the candidate's lack of qualifications, or when laches would prevent this type of lawsuit because the qualification problems were known or discoverable before the election, quo warranto may nonetheless be available to protect the public from an unqualified or ineligible office holder. A state may also recognize quo warranto challenges to incorporation elections. *See Donaghey v. Att'y Gen.*, 584 P.2d 557, 558 n.1 (Ariz. 1978) (en banc).

79. *Miller*, 219 S.E.2d at 124.

80. *Id.*

81. *See supra* Chapter 9: Election Contests.

and is brought by or on behalf of the public.<sup>82</sup> Because it is meant to protect the public, statutory authority that grants a legislative body exclusive authority to determine election contests for its seats does not preclude citizens from filing quo warranto actions.<sup>83</sup> Quo warranto actions may only be used to oust those elected to office.<sup>84</sup>

Quo warranto may be the exclusive statutory means of challenging the office holder's entitlement to office.<sup>85</sup> Because a quo warranto action seeks to oust the usurper from office, it is only brought after the purported winner takes office. Losing an election is insufficient by itself to sustain a quo warranto action. Either the losing candidate must plead and prove his own rightful title to the office,<sup>86</sup> or he must be able to bring the quo warranto action in his capacity as an interested citizen and taxpayer.<sup>87</sup> Successful quo warranto actions oust the office holder and leave the office either vacant<sup>88</sup> or vested in the person in whose name the suit was brought.<sup>89</sup>

As an extraordinary writ, quo warranto actions require the unavailability of an adequate alternative remedy.<sup>90</sup> In some instances, quo warranto actions have been possible when state statutes did not support an election contest under the circumstances that tainted the election. For example, a plaintiff was permitted to contest the failure of election officials to properly report correct vote totals through a quo warranto action because there was no statutory right of election contest in this situation for municipal elections.<sup>91</sup> Another court permitted a quo

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82. *Miller*, 219 S.E.2d at 124. Although a losing candidate or a voter may be able to bring a quo warranto action, they are frequently brought by the state attorney general in relation to the individual who claims a right to the office, or in the state's name. *Id.* at 124. If the attorney general fails to bring a quo warranto action when a private citizen brings him undisputed facts that demonstrate as a matter of law that an office is being usurped, the private citizen can seek a writ of mandamus to compel the attorney general to pursue the claim. *See Donaghey*, 584 P.2d at 558.

83. *See Donaghey*, 584 P.2d 557.

84. *See State ex rel. Branch v. Pitts*, 110 N.E.3d 87 (Ohio Ct. App. 2018).

85. *Reid v. Dalton*, 100 P.3d 349, 353-54 (Wa. Ct. App. 2004).

86. *Id.* at 354.

87. *Miller*, 219 S.E.2d at 124-25; *Noble v. Meagher*, 686 S.W.2d 458, 462 (Ky. 1985) (Stephens, C.J., dissenting); *but see Nelson v. Sneed*, 83 S.W. 786 (Tenn. 1904) (contestant cannot also claim citizen quo warranto rights because different legal rights are at stake).

88. *Carleton v. Civ. Serv. Comm'n*, 522 A.2d 825 (1987 Conn. App.).

89. *Nicolopoulos v. City of Lawndale*, 111 Cal. Rptr. 2d 420 (Ct. App. 2001).

90. *Id.* at 422.

91. *Dunlap v. State ex rel. Durrett*, 622 So. 2d 1305, 1306-07 (Ala. 1993).

warranto action to precede after plaintiffs missed the five-day deadline for filing election contests because the two mechanisms do not serve the same function.<sup>92</sup>

### III. EQUITABLE RELIEF

Courts issue mandatory injunctions to require the subject to act and prohibitory injunctions to prohibit the subject from acting.<sup>93</sup> In either case, the injunction may be temporary or permanent.<sup>94</sup> Temporary injunctions and restraining orders last a short time—a few hours to a few days—before they expire or must be renewed and could be issued in an *ex parte* proceeding.<sup>95</sup> Permanent injunctions last longer than temporary injunctions but require full due process before they issue.<sup>96</sup>

Plaintiffs seeking an injunction must demonstrate the likelihood they will succeed on the merits of the underlying case, plus the likelihood that they will experience irreparable harm if the injunction is not granted.<sup>97</sup> Courts review requests for injunctions by balancing the hardships the parties would experience if the injunction is granted or denied.<sup>98</sup> In election cases, the courts may also consider the hardship voters would experience if the injunction is granted or denied.<sup>99</sup> Sometimes courts also consider whether issuing the injunction will advance public interests.<sup>100</sup>

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92. *White v. Miller*, 219 S.E.2d 123, 124-25 (1975).

93. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009).

94. *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1124 (E.D. Cal. 2010), supplemented (June 1, 2010).

95. *See Newsom v. Superior Ct. of Sutter Cty.*, 51 Cal. App. 5th 1093, 265 Cal. Rptr. 3d 582 (Cal. App. 3d 2020) (reversing the superior court's grant of an *ex parte* temporary restraining order against the enforcement of an executive order regarding vote by mail because there was no evidence of irreparable harm or immediate danger and proper notice was not given to the Governor); *Plocek v. Welhausen*, 144 S.W.2d 631, 632-33 (Tex. Civ. App. 1940) (affirming the refusal to grant a temporary injunction *ex parte* because the time before the election was so short that the temporary injunction would actually be a permanent injunction and notice needed to be given to opposing parties).

96. *Fla. State Soc'y of Homeopathic Physicians v. Fla. Dep't of Prof'l Regulation*, 487 So. 2d 374, 376 (Fla. Dist. Ct. App. 1986).

97. *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

98. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per curiam); *In re Wilbourn*, 590 So. 2d 1381, 1384 (Miss. 1991) (identifying the ever-ticking twenty-day statute of limitations for an election contest as a problem if the certification of the election's results were enjoined without a winner being announced).

99. *Sw. Voter Registration Educ. Project*, 344 F.3d at 919 (noting voters' election preparations would be wasted if the election was enjoined).

100. *Id.* at 918-19 (finding that interfering with an impending election to be extraordinary but interfering with an election in progress because absentee ballots had already been mailed to be unprecedented, thus refusing to issue an injunction to stop the state from using previously decertified voting machines in a gubernatorial recall election).

Courts generally refuse to issue injunctions that would prevent election officials from performing their statutorily required duties because doing so would violate the doctrine of non-judicial interference.<sup>101</sup> Courts may also refuse to enjoin an ongoing election.<sup>102</sup> The Purcell Principle—a doctrine discouraging court ordered changes to election law or procedure on the eve of an election—is one rationale for denying equitable relief in the election law context.<sup>103</sup>

When a court’s decision to issue or deny an injunction is appealed, the reviewing court conducts a “limited and deferential”<sup>104</sup> *de novo* review to determine if the lower court’s actions constituted an abuse of discretion.<sup>105</sup>

## IV. DECLARATORY JUDGMENTS

Declaratory judgments are not extraordinary writs. Rather, they are procedural devices<sup>106</sup> that declare the validity or existence of statutory rights, legal status or legal relations between the parties, which the court has determined through statutory construction.<sup>107</sup>

The use of declaratory judgments is limited to existing and actual controversies.<sup>108</sup> They may be denied when—despite their captioning—they are an attempt to circumvent other restrictions, such as when a declaratory judgment lawsuit is an attempt to circumvent expired election contest statutes of limitations.<sup>109</sup> Courts may exercise their discretion to deny or defer a declaratory judgment request, especially when issuing it would violate the court’s policy of not intervening in the

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101. *In re Wilbourn*, 590 So. 2d at 1385.

102. *Sw. Voter Registration Educ. Project*, 344 F.3d at 919 (noting that enjoining the election would be tantamount to telling voters who have already voted that their vote does not count and they must vote again, but noting that fewer qualms existed in postponing an initiative election that was operating under an already accelerated schedule).

103. *See, e.g.*, *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (staying the district court’s extension of the state absentee ballot receipt deadline); *Paher v. Cegavske*, No. 320CV00243MMDWGC, 2020 WL 2748301, at \*6 (D. Nev. May 27, 2020) (denying request for preliminary injunction to enjoin the all-mail June primary election days before it was scheduled to occur); *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) (denying request preliminary injunction to extend absentee voting after voting period already began).

104. *Id.* at 918.

105. Courts sometimes exceed their jurisdiction when they grant injunctions, such as when a court issued an injunction to move election contest proceedings from the statutorily designated tribunal to itself. *In re Wilbourn*, 590 So. 2d at 1385 (citing *Ex parte Wimberly*, 57 Miss. 437 (1879)).

106. *DeHoff v. Att’y Gen.*, 564 S.W.2d 361, 363 (Tenn. 1978).

107. *Reid v. Dalton*, 100 P.3d 349, 353 (Wa. Ct. App. 2004).

108. *Landwersiek v. Dunivan*, 147 S.W.3d 141, 149 n.9 (Mo. Ct. App. 2004).

109. *Clark v. City of Trenton*, 591 S.W.2d 257, 259 (Mo. Ct. App. 1979).



exercise of legislators' or election officials' discretion.<sup>110</sup> Finally, although statutes of limitations do not exist for declaratory judgment requests, applicable statutes of limitations continue to operate on the underlying substantive claims.<sup>111</sup>

## V. CONCLUSION

This chapter has presented the wide array of relief options available in election-related lawsuits: extraordinary relief, such as writs of mandamus, compel officials to perform legally required duties; writs of prohibition constrain and overturn the unauthorized exercise of judicial or quasi-judicial authority; quo warranto ousts usurpers from office leaving the office vacant or replaced by the petitioner; equitable relief, such as injunctions, can be used to compel or prohibit certain actions; and declaratory judgments which announce the rights, duties, and obligations of the parties. As noted above, these relief options, which were originally part of the common law, are now frequently authorized or limited and regulated in state election codes.

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110. *In re Wilbourn*, 590 So. 2d 1381 (counting votes, canvassing returns, and declaring the result are functions given to the legislature and not the courts, meaning that judicial resolution of a disputed election is inappropriate until the results are certified and a contest action is filed).

111. *DeHoff*, 564 S.W.2d at 363.



## CHAPTER 12

# Special Considerations

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## CHAPTER 12: SPECIAL CONSIDERATIONS

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## I. INTRODUCTION

Election law cases are frequently faced with considerations not present in other types of civil litigation. The following are among the unique challenges that may require special judicial consideration:

- Pre-Argument Remedies
- The Purcell Principle
- Redistricting / Reapportionment Plans & Looming Elections
- Independent State Legislature Doctrine
- Immunity for Election Officials
- Preclearance Mechanisms

## II. PRE-ARGUMENT REMEDIES

Although pre-election challenges are strongly favored over post-election contests, the shortened time frame in which they can be brought may deprive a court of the ability to offer a meaningful remedy to a prevailing plaintiff. In these circumstances, the plaintiff is successful in name only.

In an acknowledgment of this potential outcome, when a challenger appears to have a likelihood of prevailing, the court may opt to issue a pre-argument injunction that preserves a meaningful remedy should a challenger ultimately

prevail. For example, in *Republican Party of Pennsylvania v. Boockvar*, the Supreme Court ordered Pennsylvania county boards of election to segregate absentee ballots received after the legally prescribed deadline as it was unable to reach the merits of the case before the election.<sup>1</sup> In another example, as the Supreme Court prepared to hear *Williams v. Rhodes*,<sup>2</sup> the Chief Justice took the unusual step of issuing a pre-argument injunction that required the challenger's name to be added to a set of ballots to ensure a meaningful remedy was available should the challenger prevail.<sup>3</sup>

### III. THE PURCELL PRINCIPLE

When litigants wait to challenge election regulations until right before an election, despite the opportunity for an earlier challenge, laches may apply.<sup>4</sup>

The closer an election looms, the more likely a federal court order will cause voter confusion and administrative error.<sup>5</sup> When cases come before federal courts seeking a change to election rules shortly before an election is held, the Supreme Court has imposed a presumption against granting the requested relief if doing so would cause voter confusion or make it difficult for election officials to administer the election. This theory is sometimes referred to as the “*Purcell* principle.”<sup>6</sup> The Supreme Court first identified this idea in its *per curiam* opinion in *Purcell v. Gonzalez*.<sup>7</sup> The case—which was filed four months before the primary election and six months before the general election—dealt with an Arizona ballot initiative which required voters to present proof of citizenship when registering to vote and

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1. *Republican Party of Pennsylvania v. Boockvar*, 208 L. Ed. 2d 293 (Nov. 6, 2020); *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1, 2 (2020).
  2. *Williams v. Rhodes*, 393 U.S. 23 (1968).
  3. *Ely v. Klahr*, 403 U.S. 108, 121 n.5 (1971) (Douglas, J., concurring) (noting that this just-in-case remedy, combined with an expedited oral argument schedule, were the only reasons the appellant's later victory was not hollow as without this action no time remained after the decision and before the election for any corrective action to occur).
  4. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (staying a motion for preliminary injunction because the plaintiff had no reasonable explanation for filing his action so close to the election).
  5. *See Purcell*, 549 U.S. at 4-5; *Thomas v. Bryant*, 919 F.3d 298, 315 (5th Cir. 2019); *Common Cause v. Rucho*, 284 F. Supp. 3d 780, 791 (M.D.N.C. 2018).
  6. *See Richard L. Hasen, Reining in the Purcell Principle*, 43 FLA. ST. U.L. REV. 427 (identifying the terming the “*Purcell* principle” while analyzing the seemingly disparate outcomes of four election law cases heard by the Supreme Court).
  7. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

to present identification when voting on election day.<sup>8</sup> The lower court denied plaintiffs request for preliminary injunction to prevent Arizona from enforcing it,<sup>9</sup> which the appellate court overturned without explanation a month before the election.<sup>10</sup> The Supreme Court reversed the Court of Appeals' decision, based not on the merits but because the election was a little more than two weeks away.<sup>11</sup> The Court stressed its concern that federal court action so near an impending election would “result in voter confusion and consequent incentive to remain away from the polls.”<sup>12</sup> The Court has continued to apply this principle in subsequent cases.<sup>13</sup>

Because of its focus on preventing voter and official confusion about election rules close to an election, the *Purcell* principle is not “an ironclad rule.”<sup>14</sup> Instead, federal courts have interpreted it as a presumption against judicial interference with election regulations that may be overcome even when an election is imminent.<sup>15</sup> Some factors courts have used to determine if judicial interference is appropriate include:

- if a court’s remedy will cause voter confusion;<sup>16</sup>
- if the failure of a court to intercede will lead to significant disenfranchisement;<sup>17</sup>

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8. *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2006 WL 8431038, at \*6 (D. Ariz. Oct. 12, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007). *See also* *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006), *aff'd sub nom. Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).
  9. *Gonzalez v. State of Arizona*, No. CV 06-1268-PHX, 2006 WL 3627297 at \*9-\*10 (D. Ariz. Sept. 11, 2006), *aff'd sub nom. Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).
  10. *Purcell*, 549 U.S. at 5-6.
  11. *Id.* at 4-5.
  12. *Id.*
  13. *See* Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U.L. REV. 427 (citing to following cases: *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014); *Frank v. Walker*, 135 S. Ct. 7 (2014); and *Veasey v. Perry*, 135 S. Ct. 9 (2014)). *See also* *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).
  14. Nicholas Stephanopoulos, *Freeing Purcell from the Shadows*, TAKE CARE (Sept. 27, 2020), <https://takecareblog.com/blog/freeing-purcell-from-the-shadows>.
  15. *Id.*
  16. *See* *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020), appeal dismissed sub nom. *People First of Alabama v. Sec'y of State for Alabama*, No. 20-13695-GG, 2020 WL 7038817 (11th Cir. Nov. 13, 2020), and appeal dismissed sub nom.; *Rangel-Lopez v. Cox*, 344 F. Supp. 3d 1285, 1290-91 (D. Kan. 2018).
  17. *See* *Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2020 WL 5665475, at \*2 (W.D. Wis. Sept. 23, 2020).

- if plaintiffs have diligently pursued their claim;<sup>18</sup> and
- election proximity.<sup>19</sup>

When federal courts weigh if the remedy will cause voter confusion, they generally make an assessment based on the type of policy being challenged and the implications of their choices.<sup>20</sup> For example, a U.S. District Court in Alabama held that the *Purcell* principle did not prevent it from enjoining enforcement of several state election laws in light of the COVID-19 pandemic where the suit was timely and the ruling would not create voter confusion.<sup>21</sup> The court found that the election laws—requiring notary or two witnesses sign absentee ballot affidavits, requiring absentee voters to submit a copy of their photo identification with absentee ballot application, and imposing a de facto curbside voting ban—as they stood *created* voter confusion due to pandemic conditions.<sup>22</sup> The court’s decision to enjoin enforcement of some of the challenged laws, the court found, did not require more action from voters, but rather relieved some voters of providing additional information or voting in person during a pandemic.<sup>23</sup>

Courts almost never make decisions that upset policies greatly affecting the election process—such as changing or adding a polling location—shortly before an election because of a high likelihood of that decision creating significant voter and election official confusion.<sup>24</sup> However, courts have found that policy changes close to elections that only affect administrators—such as changes to signature match requirements—fall outside of *Purcell’s* ambit.<sup>25</sup> Courts are also not

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18. See *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (*Purcell* principle concerns are “especially true when a plaintiff has unreasonably delayed bringing his claim.”)

19. *Purcell*, 549 U.S. at 4-5 (2006) (“Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

20. *Id.*

21. *People First of Alabama*, 491 F. Supp. 3d at 1140.

22. *Id.* at 1128.

23. *Id.* at 1142.

24. See *Rangel-Lopez v. Cox*, 344 F. Supp. 3d 1285, 1290-91 (D. Kan. 2018) (holding that adding an additional polling location days before an election would cause voter confusion and violate the *Purcell* principle).

25. See, e.g., *Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1055 (D.N.D. 2020) (“The concerns that troubled the Supreme Court in *Purcell* are not present in this instance. A voter filling out an absentee ballot will be entirely unaffected by an order enjoining the signature-matching requirement—a requirement that applies only after a ballot is submitted. In other words, there is no potential for voter confusion or dissuasion from voting because the process for submitting an absentee ballot will remain unchanged.”).

typically concerned if resolving legal violations would merely result in more work for election administrators.<sup>26</sup>

In addition to considering if court interference will cause voter disenfranchisement, courts also consider if inaction could lead to voter disenfranchisement.<sup>27</sup> Judges must balance the harm of potentially creating voter confusion if they do interfere against the disenfranchisement that may occur if they do not.<sup>28</sup> For example, while determining if whether or not to issue an injunction barring a consent decree to extend the deadline for counting absentee ballots beyond Election Day, the Eighth Circuit determined that inaction would lead to more disenfranchisement. In issuing the injunction, the court believed it was preventing “a post-election scenario where mail-in votes, received after the statutory deadline, are either intermingled with ballots received on time or invalidated without prior warning.”<sup>29</sup>

In addition to considering if court interference will cause voter disenfranchisement, courts also consider if inaction could lead to voter disenfranchisement.

While the *Purcell* principle concerns federal court rulings, traces of the doctrine can be found in state court holdings as well.<sup>30</sup>

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26. See *People First of Alabama v. Sec'y of State for Alabama*, 815 F. App'x 505 (11th Cir. 2020) (concurrency) (stating that the possible need to provide more training to election workers is not barred by the *Purcell* principle).
  27. See *Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2020 WL 5665475, at \*2 (W.D. Wis. Sept. 23, 2020) (“*Purcell* would not inhibit my granting immediate relief if qualified student voters would actually be disenfranchised, but plaintiffs haven't made that showing.”).
  28. *Carson v. Simon*, 978 F.3d 1051, 1061 (8th Cir. 2020).
  29. *Id.* at 1062.
  30. See, e.g., *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1 (Iowa 2020) (concurrency); *All. for Retired Americans v. Sec'y of State*, 2020 ME 123, 240 A.3d 45 (Maine 2020); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204 (Iowa 2020); *Liddy v. Lamone*, 398 Md. 233, 250, 919 A.2d 1276 (2007); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich. 1, 740 N.W.2d 444 (2007).

## IV. REDISTRICTING / REAPPORTIONMENT PLANS & LOOMING ELECTIONS

Although redistricting is covered more fully in another chapter, special consideration is included here because of unique timing questions in redistricting cases. Legal challenges that arise in redistricting cases often run up against hard federal and state statutory deadlines for when candidates must file and elections must be held. State courts may hear election challenges relating to delayed or obsolete state or local redistricting schemes. If a redistricting plan is determined unconstitutional and the state legislature cannot create a constitutional plan before the election, courts are often asked to decide among the following courses of action:

- proceed with the election under the invalid districting scheme,<sup>31</sup>
- postpone the election until the redistricting is complete,<sup>32</sup> or
- impose a court-created redistricting plan and then proceed with the election.<sup>33</sup>

The U.S. Supreme Court has upheld a federal district court's decision to allow an election to proceed under an existing apportionment plan that became unconstitutional by the operation of time.<sup>34</sup> A significant factor in the outcome was the Court's assumption that a constitutional plan would be in place before the next election.<sup>35</sup>

When evaluating a constitutional challenge to an apportionment plan, courts consider the following factors:

- whether the legislative body has sufficient time to draw a new plan before the next election,
- whether an election will be delayed while the new plan is being designed or implemented,
- whether an interim at-large election is feasible,

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31. See *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

32. See *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019).

33. *Id.*

34. *Ely v. Klahr*, 403 U.S. 108, 112 (1971) (finding no error in court's decision to allow the election to proceed under an existing court-ordered plan that population shifts had rendered obsolete when the legislature's proposed plan was unconstitutional and the only other option was to postpone the election until a new court-ordered plan could be devised).

35. *Id.* at 113.



- how many legislative seats are involved in the upcoming election, and
- the reason the plan is unconstitutional.<sup>36</sup>

After considering those criteria, courts generally evaluate options under a “lesser evils” approach.<sup>37</sup> The court may also reserve the right to substitute its own reapportionment plan if the legislative body fails to make progress on a constitutional plan by a court-imposed deadline.<sup>38</sup> For example, in 2018 the Pennsylvania Supreme Court overturned the state’s congressional map,<sup>39</sup> giving the legislature eighteen days to create a map that complies with the state constitution and giving the governor five days to approve it.<sup>40</sup> When the legislature failed to pass a new map, the court issued its own.<sup>41</sup> Similarly, a Texas district court had to issue an interim district map before the 2012 midterm elections as the legislature drawn redistricting map awaited preclearance.<sup>42</sup> There, the court acted because it appeared unlikely the preclearance process would be complete before the midterm elections and using the previously drawn map would contravene the constitutional requirement of one-person, one-vote due to a significant increase in the state’s population.<sup>43</sup>

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36. *Id.* at 112.

37. *Id.* at 113.

38. *Id.*

39. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

40. *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083, 1083-86 (Pa. 2018).

41. *Id.*

42. As a result, the district court received proposals and held hearings before issuing an interim districting plan. *Perez v. Perry*, 835 F. Supp. 2d 209, 211-13 (W.D. Tex. 2011). At the time, Texas was a covered jurisdiction subject to § 5 of the Voting Rights Act which required it to see federal preclearance of its electoral map before it could be used in the upcoming midterm election. *Perez*, 835 F. Supp. 2d at 211. In 2013, the U.S. Supreme Court invalidated the coverage formula in *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).

43. *Perry v. Perez*, 565 U.S. 388, 390-91 (2012).

## V. INDEPENDENT STATE LEGISLATURE THEORY

Article II, Section I of the U.S. Constitution explicitly grants state legislatures independent authority in how they administer federal elections.<sup>44</sup> Litigants have advanced the theory that courts and state executives cannot infringe upon legislative power in this area because of the direct constitutional grant of authority to the state legislature exclusively.<sup>45</sup> This theory is known as the Independent State Legislature Theory (ISLT).

Scholars diverge on whether this theory is supported by historical practice but agree that its recent notoriety is a result of a series of U.S. Supreme Court cases emanating from litigation surrounding the 2000 presidential election.<sup>46</sup> In *Bush I*, the Supreme Court gave a brief outline of the doctrine but left open the question of “*how much* independence an Article II legislature has from its constitution.”<sup>47</sup>

In *Bush II*, although the Court did not decide the case on the basis of Article II, three justices alluded to the ISLT in concurrence.<sup>48</sup> The concurrence expressed the belief that Article II grants state legislatures the power to choose the manner in which they appoint presidential electors and state courts must therefore be “deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.”<sup>49</sup> The concurrence concluded that the Florida Supreme Court misinterpreted state election law and interfered with the state legislature’s Article II authority. The concurrence argued that overruling Florida courts’ interpretation of state law preserved the “constitutionally prescribed role of [the] state legislature.”<sup>50</sup> Following this reasoning, the concurrence maintained

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44. U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [to elect the President and Vice President].”). Article I of the Constitution also deals with state authority over election administration. U.S. CONST. art. I, §4, cl. 1 (“[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof.”). For a more detailed explanation of the difference between these two doctrines, see Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GEORGIA L. REV. 1 (2020).

45. See Morley *supra* note 44; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. STATE L. REV. 2 (2001).

46. See Morley *supra* note 44 and Smith *supra* note 45.

47. Smith *supra* note 45 at 734 (emphasis in original).

48. *Id.* at 736.

49. *Bush v. Gore*, 531 U.S. 98, 114 (2000).

50. *Id.* at 115.

Electoral boards or election officials who are defendants may have immunity from damage awards for alleged constitutional violations.

that the remedy issued by the Florida Supreme Court—to recount thousands of ballots within a four-day period—was not appropriate given the “safe harbor” deadline.<sup>51</sup>

In 2003, a majority of the U.S. Supreme Court denied certiorari in *Colorado General Assembly v. Salazar*, a case involving the state supreme court’s invalidation of a legislatively drawn congressional district map.<sup>52</sup> The three dissenting justices believed the court should have heard the case and held that the court here treated itself as part of the “Legislature” under the Elections Clause, an action that the dissenters argued is impermissible.<sup>53</sup>

In the 2020 election cycle, courts wrestled with the ISLT. One example involved a Pennsylvania case in which the Republican Party sought to overturn the state supreme court’s decision allowing absentee ballots to be counted when received three days after Election Day.<sup>54</sup> Plaintiffs argued that only the legislature, not a state court, had the authority under Articles I and II to set absentee ballot deadlines in presidential elections.<sup>55</sup> The Supreme Court rejected plaintiffs’ claim in a 4-4 decision, issuing no opinion.<sup>56</sup> In 2022, the Supreme Court granted certiorari in *Moore v. Harper* which could have significant implications for the balance of power between state legislatures and other actors in relation to federal elections.<sup>57</sup>

51. *Id.* at 121.

52. Morley *supra* note 44 at 86.

53. *Id.* at 87.

54. Scarnati v. Boockvar, 2020 U.S. LEXIS 5182 (2020); Republican Party v. Boockvar, 208 L. Ed. 2d 225 (2020); Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020); Pa. Democratic Party v. Boockvar, 2020 Pa. LEXIS 4685 (Pa. 2020).

55. Scarnati v. Boockvar, 2020 U.S. LEXIS 5182 (2020); Republican Party v. Boockvar, 208 L. Ed. 2d 225 (2020).

56. *Id.*

57. Moore v. Harper, 142 S. Ct. 1089 (2022).

## VI. IMMUNITY FOR ELECTION OFFICIALS

Electoral boards or election officials who are defendants may have immunity from damage awards for alleged constitutional violations. For example, courts have found that state boards of elections acting in their official capacity enjoy Eleventh Amendment sovereign immunity.<sup>58</sup> Absolute immunity may protect members of local boards of elections operating under a statutory grant of authority and exercising quasi-judicial powers in trial-like settings, such as when they consider and rule on nominating petitions.<sup>59</sup> Absolute immunity's applicability depends on the nature of the official's responsibilities, not rank or job title.<sup>60</sup> The availability of absolute immunity insulates board members' decision making from harassment and intimidation and ensures board members are not influenced by a fear of litigation or personal financial liability.<sup>61</sup> An official who asserts a right to absolute immunity must prove the challenged conduct qualifies for protection.<sup>62</sup>

Some courts have held that § 2 of the Voting Rights Act “effects a valid abrogation of state sovereign immunity.”<sup>63</sup> In 1999, the Sixth Circuit held that Congress (1) intended to abrogate the States' sovereign immunity under the Voting Rights Act by explicitly prohibiting states and political subdivisions from discriminating against voters on the basis of race, and (2) that Congress has the power to abrogate sovereign immunity by passing legislation under the Fifteenth Amendment.<sup>64</sup> Since this decision, some courts permit plaintiffs to sue state election officials under the VRA.<sup>65</sup>

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58. *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 521 (7th Cir. 2001).

59. *Id.* at 521 (granting absolute immunity to individual members of the state elections board who denied the gubernatorial candidacy nominating petition of a Libertarian Party member because of an insufficient number of qualifying signatures).

60. *Id.*

61. *Id.* at 522.

62. *Id.*

63. *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1278 (N.D. Ga. 2019); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017); *Mixon v. Ohio*, 193 F.3d 389, 398–99 (6th Cir. 1999); *Ga. State Conference of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017).

64. *Mixon v. State of Ohio*, 193 F.3d 389, 398 (6th Cir. 1999).

65. *See, e.g., OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1278 (N.D. Ga. 2019).

Election officials can be criminally penalized for interfering with federal elections.<sup>66</sup> State statutes impose penalties on election officials for a variety of infractions, such as failing to perform their duties, drinking alcohol on the job, interfering with voters or the voting process, or breaking election laws.<sup>67</sup> Following the 2020 election, several states passed laws penalizing election officials for acts such as committing technical infractions,<sup>68</sup> leaving ballot boxes unsupervised or accessible outside of early voting periods,<sup>69</sup> and intentionally or knowingly miscounting votes.<sup>70</sup>

## VII. PRECLEARANCE MECHANISMS

Section 5 of the Voting Rights Act (VRA) requires legislatures in covered jurisdictions to seek preclearance before implementing any change to a state’s elections practices or procedures.<sup>71</sup> There are two means by which a jurisdiction is covered—Section 4(b) which contains a formula to determine covered jurisdictions<sup>72</sup> and Section 3(c) which allows federal courts to “bail-in” jurisdictions found to have violated the Fourteenth or Fifteenth Amendment.<sup>73</sup> *Shelby County v. Holder* effectively removed the preclearance requirement when

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66. 52 U.S.C.A. § 20511; *Federal Prosecution of Election Offenses*, DEPT. OF JUSTICE 1, 24 (Richard C. Pilger ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download> (“The following activities provide a basis for federal prosecution under the statutes referenced in each category: ... Malfeasance by election officials acting “under color of law” by performing such acts as diluting valid ballots with invalid ones (ballot-box stuffing), rendering false tabulations of votes, or preventing valid voter registrations or votes from being given effect in any election, federal or non-federal (18 U.S.C. §§ 241, 242), as well as in elections in which federal candidates are on the ballot (52 U.S.C. §§ 10307(c), 10307(e), 20511(2)).”). *See also* 52 U.S.C.A. § 20701; *Federal Prosecution of Election Offenses*, DEPT. OF JUSTICE 1, 77 (Richard C. Pilger ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download> (“The retention requirements of Section 20701 are aimed specifically at election administrators. In a parochial sense, these laws place criminally sanctionable duties on election officials.”).

67. *See, e.g.*, ALA. CODE § 11-46-132; CAL. ELEC. CODE § 18562-3 (West); DEL. CODE ANN. tit. 15, § 5139 (West); IND. CODE ANN. § 3-14-4-1–10 (West); IND. CODE ANN. § 3-14-3-3 (West); KY. REV. STAT. ANN. § 117.995 (West); KY. REV. STAT. ANN. § 119.225 (West); KY. REV. STAT. ANN. § 119.145 (West); 25 PA. STAT. ANN. § 3525 (West); 25 PA. STAT. ANN. § 3548 (West); N.Y. ELEC. LAW § 17-106 (McKinney); N.Y. ELEC. LAW § 17-106 (McKinney); OHIO REV. CODE ANN. § 3599.16(a) (West); OHIO REV. CODE ANN. § 3599.32 (West); OHIO REV. CODE ANN. § 3599.19(A)(13)-(14), (B) (West) TENN. CODE ANN. § 2-19-113 (West); TENN. CODE ANN. § 2-19-114 (West).

68. 2021 Iowa S.F. 413, 98th G.A.; *see also* Iowa Code Ann. § 721.2 (West 2021).

69. S.B. 90, 123rd Reg. Sess. (Fla. 2021).

70. H.B. 574, 87th Leg., Reg. Sess. (Tex. 2021).

71. 570 U.S. 529 (2013).

72. 52 U.S.C.S. § 10303.

73. 52 U.S.C.S. § 10302.

it held the Section 4(b) coverage formula unconstitutional in 2013.<sup>74</sup> Unless and until Congress elects to create a new Section 4(b) coverage formula based on “current conditions,” only jurisdictions bailed in by a court under Section 3 must preclear voting changes.<sup>75</sup> Very few courts have used the bail in process.<sup>76</sup>

Despite the largely dormant federal VRA preclearance process, individual states have considered state-level preclearance procedures. In 2021, for example, Virginia enacted the Voting Rights Act of Virginia.<sup>77</sup> In a process similar to the federal Voting Rights Act construct, the statute requires certain Virginia localities to request pre-approval from the state attorney general for certain changes to the voting process.<sup>78</sup>

## VIII. CONCLUSION

Because of the unique nature of election disputes and the external constraints often not present in other types of litigation, special considerations such as those suggested in this chapter may apply.

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74. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

75. *See Shelby Cty.*, 570 U.S. at 673.

76. *See* Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 8, 1992 (June 2010).

77. Governor Northam Approves Voting Rights Act of Virginia, *VIRGINIA.GOV* (Mar. 31, 2021), <https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-894132-en.html>.

78. *Id.*

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