

# CERTIFICATION AND NON-DISCRETION: A GUIDE TO PROTECTING THE 2024 ELECTION

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*In the wake of the January 6, 2021 attack on the U.S. Capitol, lawmakers and advocates focused significant attention towards reforming the Electoral Count Act—an 1887 law that governs the counting of Electoral College votes in Congress. After almost two years, Congress passed reforms to the Act that will make it more difficult for partisan actors to manipulate the outcome of future presidential elections. While this achievement is no doubt critical to prevent another insurrection, partisan attacks on election outcomes remain most likely to occur at the state and local level where the bulk of election administration takes place, long before Congress meets to ratify the Electoral College results. The 2022 election cycle previewed one such attack with alarming frequency: Rogue officials in several states refused to certify election results or attempted to otherwise interfere with certification—the statutory process by which election officials attest to the accuracy and completeness of election results.*

*While efforts to impede certification are not new, never before have they been deployed on such a large and coordinated scale. For this reason, little academic attention has been paid to the mechanics of state certification frameworks.<sup>1</sup> This Article fills that gap to demonstrate why, and how, state certification frameworks can combat the ongoing threats against them. It begins by providing a detailed overview of how election certification works and how recent attacks on the process have targeted and disrupted certification using false claims of widespread election fraud. It then delves into the rich but often overlooked history of certification as a non-discretionary duty to demonstrate that those attacks flouted hundreds of years*

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1. Florida serves as a notable exception; the state's certification process was the topic of substantial discourse following the 2000 presidential election. *See, e.g.,* Robert W. Lee, *The Florida Election Canvassing System*, 26 NOVA L. REV. 851, 852 (2002). The field has seen an increase in scholarship, upon which this Article aims to expand, following the 2022 midterm elections. *See* Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WILLIAM & MARY L. REV. 327 (2023); Jason Marisam, *Election Obstruction*, 71 UCLA L. REV. DISC. 2, 3 (2023).

*of well-established American legal history; recognizing that discretion created opportunities for crises and election fraud, early courts and legislatures purposefully shaped certification into a mandatory, non-discretionary duty. The Article concludes with a roadmap for election officials, candidates, and advocates to resolve future attacks on the certification process in eight key battleground states likely to play significant roles in the 2024 election cycle.*

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## INTRODUCTION

In the wake of the January 6, 2021 attack on the U.S. Capitol, lawmakers and advocates focused significant attention towards reforming the Electoral Count Act—an 1887 law that governs the counting of Electoral College votes in Congress.<sup>2</sup> After almost two years, Congress succeeded in passing reforms to the Act that will make it more difficult for partisan actors to manipulate the outcome of future presidential elections.<sup>3</sup> While this achievement is no doubt critical to prevent another insurrection,<sup>4</sup> partisan attacks on election outcomes remain most likely to occur at the state and local level where the bulk of election administration takes place, long before Congress meets to ratify the Electoral College results. The 2022 election cycle previewed one such attack with alarming frequency: rogue officials in several states refused to certify election results or attempted to otherwise interfere with certification—the statutory process by which election officials attest to the accuracy and completeness of election results.

The events of Cochise County, Arizona, are illustrative. In the days after the 2022 general election, the county’s board of supervisors voted 2-1 against certifying the county’s election returns.<sup>5</sup> The dispute split along party lines; the board’s Republican members refused to certify the results over the lone Democratic member’s objection.<sup>6</sup>

The refusing members cited concerns rooted in election denialism—the false idea that the 2020 election was stolen and that widespread fraud continues to pervade our election system. First, they questioned whether the county’s voting machines were properly certified, despite repeated reassurance from both state and federal election officials that the machines had been tested and certified for accuracy.<sup>7</sup> Later on, one of the Republican supervisors conceded that their refusal to certify served as a protest against the election in nearby Maricopa County,

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2. 3 U.S.C. § 15.

3. Among other things, the bipartisan reform legislation, referred to as the Electoral Count Reform Act (ECRA) clarified that the vice president plays a purely ceremonial role in presiding over the joint meeting of Congress on January 6 and has no power to alter the electoral vote count; raises the threshold for how many House and Senate members are required to object to a state’s slate of electors to 20 percent of the members in each chamber (it previously stood at just one member of the House and one senator); and ensures an accelerated judicial remedy in the event that there is a dispute over whether a state’s slate of electors is legitimate. S. 4573, 117th Cong. § 109 (2022).

4. The ECRA also created a requirement that each state certify its electors to Congress 36 days after Election Day. *Id.* For a discussion of how the ECRA’s success depends in part on states updating their election laws to comply with this new deadline, see Kate Hamilton, *State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond*, 133 YALE L.J.F. 249, 257-59 (2023).

5. Hansi Lo Wang, *Counties in Arizona, Pennsylvania Fail to Certify Election Results by Legal Deadlines*, NPR (Nov. 28, 2022, 10:31 PM ET), <https://perma.cc/CF7Z-BAXN>.

6. *Id.*

7. Charles Homans, *G.O.P.-Controlled County in Arizona Holds Up Election Results*, N.Y. TIMES (Nov. 28, 2022), <https://perma.cc/3XAT-JQEL>.

where a ballot printing error ignited a firestorm of false allegations that the glitch exposed evidence of systemic vote counting fraud.<sup>8</sup> In the supervisor's own words, their allegations about Cochise County's voting machines were "the only thing we have to stand on."<sup>9</sup>

The refusal to certify threatened to disenfranchise every voter in Cochise County. Arizona law required state officials to begin gathering and reviewing county returns no later than December 8, leaving them with no choice but to complete the process without the county's 47,000 votes if the board did not certify in time.<sup>10</sup> Fortunately, then-Secretary of State Katie Hobbs obtained a court order on December 1 that ordered the board to certify the results without delay, holding that under state law the board held a "non-discretionary" duty to do so.<sup>11</sup> The court explained that Arizona's election certification statute provided no framework for the supervisors to refuse to certify based on their concerns about voting machines or Maricopa County.<sup>12</sup> In short, the officials had "exceeded [their] lawful authority in delaying" the process.<sup>13</sup> Just ninety minutes after Judge McGinley's order, the Board of Supervisors convened and certified the results.<sup>14</sup>

Cochise County was not an isolated incident. Throughout the 2022 election cycle, local officials in jurisdictions such as Otero County, New Mexico; Esmeralda County, Nevada; Berks, Fayette, Lancaster, and Luzerne Counties, Pennsylvania; and Mohave County, Arizona all refused (or threatened to refuse) to certify election results based on claims rooted in election denialism.<sup>15</sup> This trend comes on the heels of the 2020 presidential election, during which two local officials in Wayne County (Detroit), Michigan infamously invoked false claims of voter fraud to refuse to certify the 2020 presidential election.<sup>16</sup> President Trump publicly endorsed their decision, tweeting: "Wow! Michigan just refused

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8. *Id.*; Yvonne Wingett Sanchez & Isaac Stanley-Becker, *Maricopa County Says Printer Glitches Didn't Prevent Anyone from Voting*, WASH. POST (Nov. 27, 2022, 7:17 PM EST), <https://perma.cc/JSY9-R5X2>.

9. See Homans, *supra* note 7.

10. See Wang, *supra* note 5.

11. Fredreka Schouten, *Rural Arizona County Certifies Midterm Election Results After Judge's Order*, CNN (Dec. 1, 2022), <https://perma.cc/Q9K8-EKQ7>; see also Hansi Lo Wang, *Arizona's Cochise County Finally Certifies Its Election Results after a Court Order*, NPR (Dec. 2, 2022, 9:39 AM ET), <https://perma.cc/J272-VNJA>.

12. See Wang, *supra* note 5.

13. *Id.*

14. Jonathan J. Cooper, *Rural Arizona County Certifies Election after Judge's Order*, PBS (Dec. 2, 2022, 9:57 AM EST), <https://perma.cc/45KT-S2TQ>. Supervisors Ann English (D) and Peggy Judd (R) met to certify the results. The board's other Republican member, Tom Crosby, skipped the meeting. *Id.* On January 27, 2023, the court entered final judgment against the board. Final Judgment Under Rule 54(b), *Ariz. All. of Ret. Ams. v. Crosby*, No. CV202200552, CV202200553 (Consolidated) (Ariz. Super. Ct. R. App. P. Civ. 17 Jan. 27, 2023).

15. See *infra* Part II. For an overview of various theories as to why election denial has manifested in efforts to thwart certification, see Marisam, *supra* note 1 at 10-12.

16. Kathleen Gray et al., *Michigan Republicans Backtrack After Refusing to Certify Election Results*, N.Y. TIMES (Nov. 17, 2020), <https://perma.cc/Q44K-DZTQ>.

to certify the election results! Having courage is a beautiful thing. The USA stands proud!”<sup>17</sup>

Fortunately, courts and state officials intervened in these instances to compel certification.<sup>18</sup> But by invoking false claims of large-scale fraud, each refusal to certify threatens to validate the broader election denier movement and sow further doubt in the election administration process. Indeed, few who refused to certify have faced real consequences for their actions,<sup>19</sup> and election deniers show no sign of slowing down ahead of the next election cycle.<sup>20</sup> They may even be on the ballot.<sup>21</sup>

Certification crises are not, in fact, new. For as long as our country has held elections, rogue local officials have attempted to manipulate or interfere with election certification to benefit their preferred candidates. But never before have these attacks been deployed on such a large and coordinated scale. And for this reason, little academic attention has been paid to the mechanics of state certification frameworks (with the notable exception of Florida’s certification process after the 2000 presidential election). This Article fills that gap to demonstrate why, and how, state certification frameworks can combat the ongoing threats against them.

Part I begins by providing a detailed overview of state certification frameworks and the role that they play within the modern election administration system. Part II details how rogue officials targeted and disrupted these frameworks in the 2020 and 2022 election cycles using false claims of widespread fraud. Part III explores the often overlooked history of election certification and certification disputes to demonstrate just how little merit those attacks held; recognizing that

17. Donald J. Trump (@realDonaldTrump), X (Nov. 17, 2020, 9:11 PM), <https://twitter.com/realDonaldTrump/status/1328883405837258753>; see also Kyle Cheney & Zach Montellaro, *In Abrupt Reversal, Michigan’s Largest County Certifies Election Results*, POLITICO (Nov. 17, 2020, 8:28 PM EST), <https://perma.cc/8W4U-K69V>.

18. See *infra* Part II.

19. Doug Bock Clark, *Some Election Officials Refused to Certify Results. Few Were Held Accountable.*, PROPUBLICA (Mar. 9, 2023, 5:00 AM EST), <https://perma.cc/H9SY-S8BR>. Notably, two members of the Surry County Board of Elections in North Carolina have been removed from their posts after protesting certification during the 2022 general election. Their protest did not ultimately affect the certification vote, as the board’s three additional members voted unanimously to certify. Doug Bock Clark, *Two Republicans Kicked Off County Election Board in North Carolina for Failing to Certify Results*, PROPUBLICA (Mar. 31, 2023, 10:20 AM EDT), <https://perma.cc/7GK2-42NY>. And in November 2023, a state grand jury voted to indict the two Cochise County supervisors who voted against certifying the 2022 election. Jane C. Timm, *Arizona Election Deniers Indicted and Charged with Holding Up Midterm Results*, NBC NEWS (Nov. 29, 2023, 11:39 AM PST), <https://perma.cc/7WUQ-SHPK>. As of this writing, no other election officials have faced criminal charges for attempting to interfere with certification processes.

20. Election deniers now exercise control over local election offices in several key jurisdictions, and 2024 will likely see another slate of election-denying candidates on the ballot for such positions. See Lauren Miller & Wendy Weiser, *The Election Deniers’ Playbook for 2024*, BRENNAN CTR. FOR JUST. (May 3, 2023), <https://perma.cc/75JP-EDL8>.

21. See, e.g., *Replacing the Refs: 2023 Statewide Races & 2024 Presidential Candidates*, STATES UNITED DEMOCRACY CENTER, <https://perma.cc/G2Z3-DPNN> (archived Jan. 12, 2023).

discretionary certification created risks for disputes and fraud, early courts and legislatures purposefully shaped election certification into a mandatory, non-discretionary duty with well-established protections against those who aim to manipulate the results. Part IV offers a roadmap for election officials, candidates, and advocates to resolve future attacks by detailing the election certification processes and enforcement mechanisms in eight battleground states likely to play significant roles in the 2024 election cycle.

## I. ELECTION CERTIFICATION AND ITS ROLE IN THE ELECTION ADMINISTRATION SYSTEM

Election certification is just one part of America's complex, decentralized, and multi-step election administration system. Even when they are resolved, attacks on the certification process can sow disorder and create significant logistical challenges by disrupting the delicate balance and timeline of the election administration cycle.<sup>22</sup> Part I situates certification within the broader election administration system before explaining the mechanics of the certification process itself.

### A. Decentralization and State and Local Election Official Responsibilities

In many ways, the American election system's defining feature is its decentralization, meaning that most activity and decision-making occurs at the local level.<sup>23</sup> This decentralization creates a great deal of variation in election administration practices between states, and even between counties and cities within states.<sup>24</sup> While the specifics vary, states tend to divide responsibility before and on Election Day in similar ways.

Every state has a chief election official who exercises ultimate authority over election administration at the state level.<sup>25</sup> Under the most common arrangement, an elected secretary of state serves as the chief election official.<sup>26</sup> But in some states, the governor or legislature appoints the official, and in others a board or

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22. *See infra* Part II.

23. *Election Administration at State and Local Levels*, NAT'L CONF. OF STATE LEGISLATURES, <https://perma.cc/2FY7-R6AX> (archived Jan. 12, 2024).

24. *Id.*

25. *Id.* A chief election official has long been a structure of state constitutional arrangements. The National Voter Registration Act mandates that "Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this chapter." 52 U.S.C. § 20509. In most states, this NVRA-designated official also oversees most other aspects of election administration in the state, although some states divide this power between the chief election official and a board or commission.

26. *See, e.g.*, IOWA CODE ANN. § 47.1 (Westlaw through legislation effective July 14, 2023 from 2023 Regular Sess. and 2023 First Extraordinary Sess.) ("The secretary of state is designated as the state commissioner of elections and shall supervise the activities of the county commissioners of elections.").

commission oversees elections.<sup>27</sup> The chief official's statutory and constitutional duties typically include ensuring that local election officials follow the law,<sup>28</sup> administering the state voter registration database,<sup>29</sup> promulgating regulations and issuing best practices for local election officials,<sup>30</sup> and testing and certifying voting equipment.<sup>31</sup> In every state, chief election officials carry out these duties within the parameters of strict statutory and constitutional guidelines.<sup>32</sup>

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27. *See, e.g.*, TEX. CONST. Art. 4, § 21 (“There shall be a Secretary of State, who shall be appointed by the Governor . . . .”); WIS. STAT. ANN. § 5.05(1) (West, Westlaw through 2023 Act 39) (“The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns . . . .”).

28. *See, e.g.*, COLO. REV. STAT. ANN. § 1-1-301 (West, Westlaw through 2023 First Extraordinary Sess. of the 74th General Assembly) (“The secretary of state shall establish and operate or provide by contract a certification program for local election officials on the conduct of elections.”); MICH. COMP. LAWS ANN. § 168.31(1) (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.) (“The secretary of state shall . . . [a]dvise and direct local election officials as to the proper methods of conducting elections” and “investigate, or cause to be investigated by local authorities, the administration of election laws.”); WASH. REV. CODE ANN. § 29A.04.570 (West, Westlaw through 2023 Regular and First Special Sess.) (“The election review staff of the office of the secretary of state shall . . . evaluate the policies and procedures established for conducting the primary or election in the county and the practices of those conducting it.”).

29. *See, e.g.*, ALA. CODE § 17-4-30 (Westlaw through 2023 First Special, Regular, and Second Special Sess.) (“[T]he board of registrars, or the Secretary of State . . . shall use change-of-address information supplied by the United States Postal Service through the National Change of Address database and by at least one other voter registration database, including, but not limited to, the Electronic Registration Information Center or NVRA designated agency, to identify registered voters whose addresses may have changed.”); GA. CODE ANN. § 21-2-50 (West, Westlaw through 2023 Regular Sess.) (“The Secretary of State shall . . . maintain the official list of registered voters for this state and the list of inactive voters required by this chapter.”); WASH. REV. CODE ANN. § 29A.04.611 (West, Westlaw through 2023 Regular and First Special Sess.) (“[T]he secretary of state shall make rules governing . . . the maintenance of voter registration records.”).

30. *See, e.g.*, ALA. CODE § 17-1-3 (Westlaw through 2023 First Special, Regular, and Second Special Sess.) (“The Secretary of State is granted rule making authority for the implementation of Chapter 2 under the Alabama Administrative Procedure Act.”); MICH. COMP. LAWS ANN. § 168.31(1) (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.) (“The secretary of state shall . . . issue instructions and promulgate rules pursuant to the administrative procedures act . . . for the conduct of elections and registrations in accordance with the laws of this state.”); WASH. REV. CODE ANN. § 29A.04.611 (West, Westlaw through 2023 Regular and First Special Sess.) (“The secretary of state as chief election officer shall make reasonable rules in accordance with chapter 34.05 RCW not inconsistent with the federal and state election laws to effectuate any provision of this title.”).

31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-442 (Westlaw through 2023 First Regular Sess.) (Arizona statute establishing that the Secretary of State shall “appoint a committee” to make recommendations and “make final adoption” of the election equipment eligible to be used in the state); MO. ANN. STAT. § 115.225 (Vernon’s, Westlaw through 2023 First Regular Sess.) (“Before use by election authorities in this state, the secretary of state shall approve the marking devices and the automatic tabulating equipment used in electronic voting systems.”); N.H. REV. STAT. ANN. § 652:27 (Westlaw through 2023 Regular Sess.) (“No city or town may use an electronic poll book system that has not been approved by the secretary of state.”).

32. *See, e.g.*, 25 PA. STAT. AND CONS. STAT. § 3548 (Purdon’s, Westlaw through 2023 Regular Sess. Act 66) (Pennsylvania statute providing that “[a]ny Secretary of the Commonwealth . . . on whom a duty is laid by [state election law] who shall willfully neglect or refuse

While chief election officials maintain ultimate authority over elections at the state level, actual administration occurs at the local level. Most states run elections through counties, but in a few states, cities or towns oversee election administration.<sup>33</sup> In some states, a single individual such as a county clerk manages the process; other states utilize a local election commission or a combination of multiple officials.<sup>34</sup> Across all of these variations, local election officials' duties generally include selecting polling places,<sup>35</sup> procuring paper ballots and other supplies,<sup>36</sup> recruiting and training poll workers,<sup>37</sup> and counting votes.<sup>38</sup> Like state chief election officials, local election officials carry out these responsibilities subject to a range of restrictions and guidelines that include state statutes, state constitutional provisions, and federal voting rights law.<sup>39</sup>

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to perform his duty, shall be guilty of a misdemeanor.”).

33. These exceptions exist mostly in New England and the Midwest. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 23.

34. *See, e.g.*, OR. REV. STAT. ANN. § 246.200(1) (West, Westlaw through 2023 Regular Sess.) (“Except as otherwise provided by law, the county clerk is the only elections officer who may conduct an election in this state.”); MD. CODE ANN., ELEC. LAW § 2-202(b)(1) (West, Westlaw through 2023 Regular Sess.) (“Each local board . . . shall: oversee the conduct of all elections held in its county . . .”); Ariz. Sec’y of State’s Off., 2023 Arizona Elections Procedures Manual (July 2023), <https://perma.cc/XJZ6-A3FZ> (generally describing division of election administration between the county board of supervisors, designated elections directors, and the county recorder).

35. *See, e.g.*, MO. ANN. STAT. § 115.115 (Vernon’s, Westlaw through 2023 First Regular Sess.) (Missouri statute establishing that within each county, “the election authority shall designate a polling place for each precinct within which any voter is entitled to vote at the election”); 17 R.I. GEN. LAWS § 17-11-1 (West, Westlaw through 2023 Regular Sess. Ch. 398) (Rhode Island statute establishing that city boards “shall determine voting districts” and ensure that “not more than three thousand (3,000) total eligible registered voters shall be served by the same polling place”).

36. *See, e.g.*, GA. CODE ANN. § 21-2-70(5) (West, Westlaw through 2023 Regular Sess.) (Georgia statute requiring local superintendents to “purchase . . . preserve, store, and maintain election equipment of all kinds” including “ballots and all other supplies for primaries and elections”); N.C. GEN. STAT. ANN. § 163-33(7) (West, Westlaw through S.L. 2023-133 of 2023 Regular Sess.) (North Carolina statute requiring county boards of election to “provide for the purchase, preservation, and maintenance” of “pollbooks, maps, flags, cards of instruction, and other forms, papers, and equipment used in registration, nominations, and elections”).

37. *See, e.g.*, 17 R.I. GEN. LAWS § 17-11-11 (West, Westlaw through 2023 Regular Sess. Ch. 398) (Rhode Island statute establishing that “the local board in each city shall appoint for each polling place within the city where an election is to be held a warden and clerk, not from the same political party”); FLA. STAT. ANN. § 102.012 (West, Westlaw through 2023 Special B and C Sessions and First Regular Sess.) (Florida statute explaining that “[t]he supervisor of elections of each county . . . shall appoint an election board comprised of poll workers who serve as clerks or inspectors for each precinct in the county”).

38. *See, e.g.*, OR. REV. STAT. ANN. § 246.200(1) (West, Westlaw through 2023 Regular Sess.) (Oregon statute providing that the county clerk’s duties include “receiving and processing votes”); GA. CODE ANN. § 21-2-70(9) (West, Westlaw through 2023 Regular Sess.) (Georgia statute requiring local superintendents “[t]o receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to such authorities as may be prescribed by law”).

39. *See, e.g.*, COLO. REV. STAT. ANN. §§ 1-13.5-1601, 1-13-723(1) (West, Westlaw through 2023 First Extraordinary Sess. of the 74th General Assembly) (“Every officer upon whom any duty is imposed by any election law who violates the officer’s duty or who neglects



Finally, many voters most directly experience election administration through the poll workers who manage polling places during early voting and on Election Day.<sup>40</sup> Poll workers typically serve as temporary employees or paid volunteers and handle the nuts and bolts of running a polling place, such as setting up equipment, checking in voters, distributing ballots, and assisting voters with casting their ballots.<sup>41</sup> States subject poll workers to a variety of rules and constraints to ensure the integrity of the electoral process, including eligibility requirements, mandatory training, and oaths of office.<sup>42</sup>

## B. Unofficial Election Night Reporting

As soon as the polls close on Election Day, election officials and poll workers at the precinct level begin the process of tabulating, or aggregating, the results.<sup>43</sup> This process involves combining all electronically-read votes—either readouts of ballots that have been scanned, or votes cast directly into an electronic voting machine—into a subtotal.<sup>44</sup> This subtotal includes all in-person and

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or omits to perform the same upon conviction shall be punished.”); MINN. STAT. ANN. § 204C.41 (Westlaw through 2023 Regular Sess.) (detailing criminal penalties for “[a]n election officer or other individual required by law to safely keep and produce ballots on election day or to perform any other act, who intentionally fails or refuses to perform the act required, or who is required by law to abstain from any act, and intentionally does the act”); NEV. CONST. art. II, § 1A (listing the rights of voters and thereby imposing restrictions upon local election officials, i.e. “[t]o vote without being intimidated, threatened, or coerced” and “[t]o equal access of the elections system without discrimination”); *Section 2 of the Voting Rights Act*, U.S. Dep’t of Just. Civ. Rts. Div. (Apr. 5, 2023), <https://perma.cc/UC44-Y3A4> (explaining that Section 2 of the Voting Rights Act “continues to prohibit state and local officials from adopting or maintaining voting laws or procedures that purposefully discriminate on the basis of race, color, or membership in a language minority group”) (emphasis added).

40. See, e.g., Thad E. Hall, J. Quin Monson & Kelly D. Patterson, *The Human Dimension of Elections*, 62 POL. RSCH. Q. 507, 508-522 (2009), <https://perma.cc/B72S-YQLM> (finding that when voting in person, voters’ perception of poll workers can serve as a significant predictor of voter confidence).

41. *Election Poll Workers*, NAT’L CONF. OF STATE LEGISLATURES, <https://perma.cc/ZLM9-JT8B> (archived Jan. 12, 2023).

42. For a state-by-state overview of eleven battleground states, see *Poll Worker Rules and Constraints*, BRENNAN CTR. FOR JUST. (2022), <https://perma.cc/W635-5S9T>. Although media reports tracked efforts to recruit and train election deniers as poll workers throughout the 2022 election cycle, those efforts proved largely unsuccessful. Heidi Przybyla, *RNC Links Up with ‘Stop the Steal’ Advocates to Train Poll Workers*, POLITICO (Aug. 2, 2022, 4:30 AM EDT), <https://perma.cc/DQS6-WQ69> (describing recruitment threat); Oralandar Brand-Williams, *Despite Fears, Michigan Election Passes Without Intimidation or Interference*, BRIDGE MICH. (Nov. 9, 2022), <https://perma.cc/793C-RPWJ> (explaining that despite “signs that far-right activists were mobilizing as poll workers and election challengers, officials were relieved to see that those threats didn’t materialize”).

43. See Stephen Pettigrew & Charles Stewart, *Protecting the Perilous Path of Election Returns: From the Precinct to the News*, 16 OHIO STATE TECH. L.J. 587 (2020), for a more in-depth discussion of the legal protections that govern the tabulation process.

44. See, e.g., MICH. COMP. LAWS ANN. § 168.801 (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.) (“Immediately on closing the polls, the board of inspectors of election in each precinct shall proceed to canvass the vote. Such canvass shall commence by a comparison of the poll lists and a correction of any mistakes that may be found therein until

mail ballots cast before, on, and after Election Day (when counting eligible mail ballots arriving after Election Day).<sup>45</sup>

As tabulating unfolds, every state operates some form of an election night reporting system that totals and publishes unofficial results.<sup>46</sup> While these election night results are helpful in keeping the public updated, they are always, as their name implies, unofficial. Discrepancies between the unofficial election night results and the final results are not uncommon for several reasons, including the addition of eligible post-Election Day mail ballots and provisional ballots (ballots cast when election officials need more time to determine a voter's eligibility).<sup>47</sup> The tabulated results are considered final only when officials have reviewed and verified them through the canvass and certification process.

### C. Official Canvassing and Certification

Certification is a multi-step process governed by detailed statutes—statutes that leave officials with no discretion to refuse to certify results or otherwise deviate from the statutory process.

The first step in certification, referred to as the “canvass,” takes place some set amount of time (usually a week or two) after Election Day<sup>48</sup> and produces final election results by verifying the electronically tabulated results and incorporating all ballots that were not, or could not be, included in the electronic count.<sup>49</sup> For example, election officials will determine whether to count provi-

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they shall be found or made to agree. Such canvass shall be public and the doors to the polling places and at least 1 door in the building housing the polling places and giving ready access to them shall not be locked during such canvass.”).

45. Pettigrew, *supra* note 43, at 603; *see also* Quinn Scanlan, *How Battleground States Process Mail Ballots – and Why it May Mean Delayed Results*, ABC NEWS (Oct. 30, 2020, 5:09 AM), <https://perma.cc/VF24-VEV3> (generally describing the processes by which battleground states tabulated mail ballots in 2020).

46. *See* U.S. Election Assistance Comm’n, *Checklist for Securing Election Night Results Reporting*, <https://perma.cc/AA5E-67EF>.

47. The size of this discrepancy varies between states depending on how they complete the rest of the canvassing process, *e.g.*, differences in when and how states tally mail and provisional ballots and how many people vote by mail or use provisional ballots in the first place. *See generally* John Curiel, Charles Stewart III & Jack Williams, *The Blue Shift in the 2020 Election*, MIT ELECTION DATA & SCIENCE LAB (2021), <https://perma.cc/3SPL-Q3NT> (discussing the impact of several factors, including preprocessing restrictions, on variability in the pattern of election-result reporting across the country); Edward B. Foley & Charles Stewart III, “Explaining the Blue Shift in Election Canvassing,” 1 J. POL. INSTS. & POL. ECON. 239 (2020) (discussing the impact of corrections and late returns, provisional ballots, and mail ballots on post-Election Day shifts in results).

48. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-642(A) (Westlaw through 2023 First Regular Sess.) (“The governing body holding an election shall meet and canvass the election not less than six days nor more than twenty days following the election.”).

49. *See, e.g.*, Derek Tisler, Elizabeth Howard & Edgardo Cortés, *The Roadmap to the Official Count in the 2022 Election*, BRENNAN CTR. FOR JUST. (last updated Oct. 31, 2022), <https://perma.cc/8YAG-GLNA>.

sional ballots, resolve ballot marking errors, and adjudicate voter intent if unclear.<sup>50</sup> The process often overlaps with other post-election processes, such as mandatory audits and recounts.<sup>51</sup>

When local officials finish the canvass, they must then “certify,” or confirm the completeness and accuracy of the results within their jurisdiction via signature by a date set by statute.<sup>52</sup> For local races, the process ends there. After certification, local officials will generally present the winning candidate with some form of certificate formally declaring them the winner and entitling them to take office.<sup>53</sup>

For statewide races or races across multiple counties, the process continues. After certification, local officials must deliver the certified results from their jurisdiction to the officials responsible for the statewide canvass. At the state level, a designated group of state officials will then complete their own canvass to aggregate the certified results from each local jurisdiction and formally certify the winner of each race, again by a specific date set by statute.<sup>54</sup> In some states, a state board of elections serves as this certifying body.<sup>55</sup> In other states, the Secretary of State and Governor take on the role.<sup>56</sup> Once the statewide certification takes place, the state certifying body will, like local officials, present the winning

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50. See, e.g., ARIZ. REV. STAT. ANN. § 16-646 (Westlaw through 2023 First Regular Sess.) (describing the content of the official canvassed results in Arizona); see also Pettigrew, *supra* note 43, at 602 (“The canvassing process is designed to build on the election-night results, by checking that those results were correctly collected and recorded. In addition, disputes are resolved over provisional ballots and outstanding absentee ballots during the canvassing . . . the canvass is the process that produces the official results that are ultimately certified and result in the winner taking office. Canvassing occurs under a less hectic timeline than election-night reporting, although in some cases, it may nonetheless finish up by Friday of election week.”).

51. See generally U.S. ELECTION ASSISTANCE COMM’N, *Election Audits Across the United States* (Oct. 6, 2021), <https://perma.cc/C6C6-LFNY> (providing a comprehensive overview of post-election audit practices across the United States).

52. See, e.g., WIS. STAT. ANN. § 7.60(4) (West, Westlaw through 2023 Act 39) (“The board of canvassers shall make separate duplicate statements showing the numbers of votes cast for” federal, state, and local offices, and “[e]ach statement . . . shall be certified as correct and attested to by each canvasser’s signature.”); MI. CONST. art. II, § 7(7) (“For purposes of this section “to certify” means to make a signed, written statement.”).

53. *Id.* § 7.60(6) (“Immediately after expiration of the time allowed to file a petition for a recount the county clerk shall issue a certificate of election to each person who is elected to any county office.”).

54. See, e.g., ARIZ. REV. STAT. ANN. § 16-648(A) (Westlaw through 2023 First Regular Sess.) (“On the fourth Monday following a general election, the secretary of state, in the presence of the governor and the attorney general, shall canvass all offices for which the nominees filed nominating petitions and papers with the secretary of state . . .”).

55. See, e.g., N.C. GEN. STAT. ANN. § 163-182.5 (West, Westlaw through S.L. 2023-133 of 2023 Regular Sess.) (North Carolina statute requiring that the State Board of Elections canvass and certify the results).

56. See, e.g., ARIZ. REV. STAT. ANN. § 16-648 (Westlaw through 2023 First Regular Sess.) (Arizona statute mandating that the Secretary of State canvass the results “in the presence of the governor and the attorney general”).

candidate with a certificate declaring them the winner and entitling them to assume their new position.<sup>57</sup>

Throughout this multi-step process, state certification frameworks provide officials with no discretion to refuse to certify the results, manipulate the results, or otherwise deviate from statutory and regulatory instructions. For example, local and state level certification must happen within a predetermined time frame, leaving officials with no room for delay.<sup>58</sup> When proceeding with canvassing and certification, officials are generally limited to examining the face of the ballots and returns (e.g., resolving errors in how a voter marked a ballot).<sup>59</sup> In other words, they have a mandatory duty to certify the correct results without an investigation into the election itself;<sup>60</sup> all questions about suspected fraud or misconduct are typically left to a state-designated process or tribunal that hears election disputes.<sup>61</sup> Courts refer to this mandatory duty as a “ministerial” duty, defined as an obligation that “is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode an[d] occasion for its performance with such certainty that nothing remains for judgment or discretion.”<sup>62</sup>

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57. See, e.g., *id.* § 16-650 (Westlaw through 2023 First Regular Sess.) (“The secretary of state shall declare elected the person receiving the highest number of votes cast for each office . . . and shall, unless enjoined from so doing by an order of court, deliver to each such person, upon compliance with the provisions imposed by law upon candidates for office as conditions precedent to the issuance of the certificates, a certificate of election, signed by the secretary of state and authenticated with the great seal of the state.”). While some state frameworks contain separate certification provisions for statewide versus federal elections, see, e.g., *supra* note 262, most do not differentiate between statewide and federal races. See, e.g., Ariz. Rev. Stat. Ann. § 16-650 (Westlaw through 2023 First Regular Sess.).

58. See, e.g., KY. REV. STAT. ANN. §§ 117.355, 118.425 (Baldwin’s, Westlaw through 2023 Regular Sess.) (statute mandating specific time frames in Kentucky for county-level and state-level certification).

59. See *Byers v. Bailey*, 7 Iowa 390, 393 (1858) (county board of canvassers properly examined the face of the returns for one precinct to determine whether it read “fifty-three” or “forty-three” votes).

60. See, e.g., N.M. STAT. ANN. § 1-13-13 (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.) (New Mexico statute mandating that a “county canvassing board *shall* meet to approve the report of the canvass of the returns and declare the results no sooner than six days and no later than ten days from the date of the election” and “immediately upon approval of the report . . . *shall* issue a certificate of canvass of the results of the election”) (emphasis added).

61. See, e.g., *Lewis v. Comm’rs of Marshall Cnty.*, 16 Kan. 102, 108 (1876) (“Whenever it is suggested that illegal votes have been received, or that there were other fraudulent conduct and practices at the election,” a canvassing board is “apt to imagine that it is its duty to inquire into these alleged frauds, and decide upon the legality of the votes. But this is a mistake.”); see also *infra* Part III.C at 25-26.

62. *Meyers v. Schultz*, 690 N.W.2d 873, 877 n.6 (Wis. Ct. App. 2004) (quoting *Meyer v. Carman*, 73 N.W.2d 514, 515 (Wis. 1955)).

#### D. Enforcing Certification Statutes When Officials Fail to Carry Out Their Duties

In the event that election officials refuse to certify or delay certifying results, every state certification system includes an enforcement mechanism that generally falls into one of two categories: statutory remedies specific to the election certification context, or general mandamus remedies that apply to ministerial duties such as certifying an election. Additionally, states may also choose to impose criminal penalties on officials who refuse to properly certify results.

Some states with specific statutory remedies create a cause of action that a voter or candidate can bring in court against an official who refuses to certify the proper election results. In New Mexico, for example, any state trial court may “upon petition of any voter . . . issue a writ of mandamus to the county canvassing board to compel it to . . . certify the election results.”<sup>63</sup> Other states, such as Michigan, allow the state election board to take over certification at the local level in the event that a local official refuses to certify:

If the board of county canvassers fails to certify the results of any election . . . the board of county canvassers shall immediately deliver to the secretary of the board of state canvassers all records . . . [and] [t]he board of state canvassers shall meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records.<sup>64</sup>

In states without an explicit statutory enforcement mechanism, plaintiffs can petition for a writ of mandamus when officials refuse to certify the proper results.<sup>65</sup> Generally speaking, a writ of mandamus “compel[s] a lower court or a government officer to perform mandatory or purely ministerial duties correctly.”<sup>66</sup> In the election certification contest, a writ of mandamus would thus order a local official to certify the winner of an election pursuant to their state’s election certification framework.<sup>67</sup>

Most states require those seeking a writ of mandamus to prove two general elements: that the duty the plaintiff seeks to force a government official to perform is ministerial and not discretionary, and that no other adequate remedy exists.<sup>68</sup> Some states, through either statutes or common law precedent, also require the plaintiff to demonstrate that they have a specific right to the action sought.<sup>69</sup>

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63. N.M. STAT. ANN. § 1-13-12 (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.). The New Mexico Constitution also grants the New Mexico Supreme Court original jurisdiction over mandamus proceedings, meaning that a litigant could also file an action directly with the state supreme court. N.M. CONST. art. VI, § 3.

64. MICH. COMP. LAWS § 168.822(2) (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.). Importantly, as will be discussed below, Michigan law also provides an alternative mandamus remedy for voters and candidates in the event the state board refuses to act.

65. See *infra* Part IV.

66. *Mandamus*, BLACK’S LAW DICTIONARY (8th ed. 2004).

67. For more detail on the role of mandamus remedies in election disputes, see Muller, *supra* note 1.

68. See *id.* at 10-12.

69. See, e.g., *In re CIGNA Healthcare, Inc.*, 777 A.2d 884, 887 (N.H. 2001) (“This court

For centuries, courts have found candidates (and in many states, voters) who bring suit to enforce certification to meet these requirements.<sup>70</sup>

As with any dispute that implicates separate branches of government, states may confront a situation in which officials who refuse to certify an election subsequently choose to defy a court order directing them to certify. While modern elections have fortunately not seen this sort of defiance, Derek T. Muller's recent article, *Election Subversion and the Writ of Mandamus*,<sup>71</sup> sets forth several state statutory mechanisms that would compel performance in such an instance, including fines that stem from courts' contempt power;<sup>72</sup> provisions that allow rogue officials to be removed from office;<sup>73</sup> or provisions analogous to Federal Rule of Civil Procedure 70 that allow courts to appoint another person to carry out the court-ordered certification.<sup>74</sup>

## II. RECENT ATTACKS ON STATE CERTIFICATION SYSTEMS

Efforts to impede certification took on a variety of forms throughout the 2020 and 2022 election cycles, including explicit votes to refuse to certify results, votes to delay the process while local officials investigated unsupported allegations of fraud, and even refusals to include specific types of ballots in the certification process. Part II details each such instance in which rogue election officials attempted to thwart certification and garnered significant press coverage, with the goal of both illuminating the threat and demonstrating the resilience of state certification frameworks. Each attack provides useful insight into how those officials targeted and disrupted the state's certification framework, as well as how each state's enforcement mechanism responded to and ultimately resolved the certification crisis.

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will, in its discretion, issue a writ of mandamus only where the petitioner has an apparent right to the requested relief.”). *But see* GA. CODE ANN. § 9-6-24 (West, Westlaw through 2023 Regular Sess.) (“Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced.”).

70. *See infra* Part III.C.

71. Muller, *supra* note 1, at 17-20.

72. *See, e.g.*, N.M. STAT. ANN. § 44-2-13 (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.).

73. While not the result of defying a mandamus order, two members of the Surry County Board of Elections in North Carolina were removed by the State Board of Elections after (unsuccessfully) protesting certification during the 2022 general election. Press Release, N.C. State Board of Elections, State Board Removes 2 Surry County Board of Elections Members (Mar. 28, 2023). The Board did so under its statutory authority to remove any county board of elections member “for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause.” *Id.* (citing N.C. GEN. STAT. ANN. § 163-22(c) (West, Westlaw through S.L. 2023-133 of 2023 Regular Sess.)).

74. *See, e.g.*, Rule 1-070 NMRA; *see also* FED. R. CIV. P. 70.

### A. Wayne County, 2020 General Election

In the chaotic days after the November 2020 presidential election, Michigan saw the first election denier-driven instance in which officials refused to certify election results. The controversy began in Wayne County—the state’s largest county and home to Detroit.<sup>75</sup> After citizen protesters spent two weeks objecting to the “stolen” 2020 election and making false claims of widespread fraud outside the building where election workers processed absentee ballots, the Wayne County Board of Canvassers met to certify the county results on November 17, 2020.<sup>76</sup>

At this meeting, Monica Palmer and William Hartmann, the two Republican members of the four-member board, initially refused to cast their votes to certify the election. Palmer and Hartmann pointed to disinformation-fueled claims of a discrepancy in the number of mail ballots received.<sup>77</sup> Minutes after the deadlock vote, President Trump tweeted “Wow! Michigan just refused to certify the election results! Having courage is a beautiful thing. The USA stands proud!”<sup>78</sup> But less than two hours later, the two Republican members changed their votes once Democratic board member Jonathan Kinloch offered a resolution to ask the Secretary of State for an official audit of the Wayne County results.<sup>79</sup> The county officially certified the election, seemingly ending the controversy.<sup>80</sup>

But later that evening, President Trump called Palmer’s cell phone for a brief conversation, the exact details of which have never been revealed.<sup>81</sup> Two days later, Palmer and Hartmann publicly stated their desire to rescind their votes to certify and claimed that they had only certified in the first place because of public criticism and threats.<sup>82</sup> The Secretary of State’s office made clear that “no legal

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75. Mich. S. Fiscal Agency, *Michigan Population, by County: Selected Years 1990-2022* (2023), <https://perma.cc/BQZ8-7W7D>.

76. Gus Burns, *Protesters Continue Questioning Michigan Election Results in Detroit Demonstrations*, MLIVE (Nov. 6, 2020, 5:18 PM), <https://perma.cc/B3PM-WNXJ>. At one point during the protests, a false bomb threat forced the Wayne County Treasurer’s Office to close. Larry Spruill, *Wayne County Treasurer’s Office Closes Over Threat to Steal Ballots; Sheriff Weighs In*, CLICKONDETROIT (Nov. 7, 2020, 12:38 AM), <https://perma.cc/3HN9-YKY4>.

77. Beth LeBlanc, Francis X. Donnelly & Craig Mauger, *Wayne County Canvassers Certify after Initial Deadlock*, DETROIT NEWS (Nov. 17, 2020, 6:08 PM ET), <https://perma.cc/ZM82-QTCB>.

78. Donald J. Trump (@realDonaldTrump), X (Nov. 17, 2020, 9:11 PM), <https://perma.cc/5JUL-L5TE>.

79. Clara Hendrickson, *Donald Trump Called Monica Palmer after Wayne County Board of Canvassers Meeting*, DETROIT FREE PRESS (Nov. 19, 2020, 10:40 AM EST), <https://perma.cc/CQ5H-MDUF>.

80. Kyle Cheney & Zach Montellaro, *In Abrupt Reversal, Michigan’s Largest County Certifies Election Results*, POLITICO (Nov. 17, 2020, 8:28 PM EST), <https://perma.cc/XD8M-83Z9>.

81. See Clara Hendrickson, *Donald Trump Called Monica Palmer after Wayne County Board of Canvassers Meeting*, DETROIT FREE PRESS (Nov. 19, 2020, 10:40 AM EST), <https://perma.cc/Q9M5-6TAN>.

82. Kendall Karson, Katherine Faulders & Will Steakin, *Republican Canvassers Ask to*

mechanism for them to rescind their vote” existed and that the certification process now rested in the hands of the State Board of Canvassers.<sup>83</sup>

Controversy continued throughout the state level certification process. Before the State Board of Canvassers’ vote to certify, President Trump summoned the Republican leaders of the Michigan Legislature to the White House in an unsuccessful attempt to convince them to interfere with the process.<sup>84</sup>

When the State Board of Canvassers ultimately met to certify, for the first time in Michigan history their vote was not unanimous.<sup>85</sup> Republican board member Norm Shinkle abstained from the vote, citing unfounded claims of fraud that the Trump campaign had raised in its various lawsuits filed in the state in the weeks since Election Day.<sup>86</sup> Ahead of his abstention vote, Shinkle stated that he would “weigh both sides and make a decision” and that he viewed the board’s responsibilities as “not merely certifying the election but also getting to the bottom of any alleged improprieties.”<sup>87</sup>

Michigan’s certification ultimately proceeded on schedule, and neither the State Board of Canvassers nor the Secretary of State’s office ever had to take legal action to move the process along.<sup>88</sup> Had the Wayne County Board of Canvassers not voted to certify, the State Board of Canvassers could have exercised their statutory authority to step in and manage the Wayne County certification process themselves. And as will be discussed in Part IV.C, Shinkle’s view of the role of the State Board of Canvassers held no merit; the board’s duties are purely ministerial, and had a second board member joined Shinkle in abstaining, the Secretary of State could have brought a swift end to the matter by seeking mandamus remedies.

Nonetheless, Wayne County’s certification controversy foreshadowed future disputes. Michigan’s election certification framework leaves no room for county officials to look beyond the face of the returns when certifying the results.<sup>89</sup> By initially offering the resolution calling for an audit as a means to con-

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*‘Rescind’ Their Votes Certifying Michigan Election Results*, ABC NEWS (Nov. 19, 2020, 10:12 AM), <https://perma.cc/25AB-9WQU>.

83. *Id.*

84. Annie Grayer, Caroline Kelly & Maegan Vazquez, *Michigan Lawmakers Who Met with Trump Say They See Nothing to Change Election Outcome*, CNN (Nov. 21, 2020, 2:28 PM EST), <https://perma.cc/QG53-W2E9>.

85. Beth Reinhard, Alice Crites & Dalton Bennett, *Obscure Michigan Board Thrust in Fracas over Electoral Results*, WASH. POST (Nov. 21, 2020, 5:24 PM EST), <https://perma.cc/MP8K-ZEHN>.

86. *See id.* The Trump Campaign cited Shinkle’s wife as a witness in one of these suits. *See* Dave Farenthold, Beth Reinhard, Elise Viebeck & Emma Brown, *Trump’s Escalating Attacks Put Pressure on Vote Certification Process*, WASH. POST (Nov. 19, 2020, 8:14 PM EST), <https://perma.cc/BM29-2EQN>.

87. *See* Reinhard et al., *supra* note 85.

88. Alana Wise, *Michigan Certifies Joe Biden’s Election Victory*, NPR (Nov. 23, 2020, 1:30 PM ET), <https://perma.cc/V9HA-FE88>.

89. *See infra* Part IV.C. *See also infra* Part IV.C, at 33, for a discussion of how in re-



vince Palmer and Hartmann to switch their votes, Kinloch may have inadvertently complicated the process and fed the same conspiracy theories that would drive certification crises in 2022.<sup>90</sup>

#### B. Otero County, 2022 Primary Election

New Mexico saw the first major certification crisis of the 2022 midterm elections in Otero County, a rural county in the southwestern region of the state. Following the state's June 7 primary, the three-person Otero County Board of Commissioners voted to not certify the county's election results.<sup>91</sup> Rather than point to any specific problem with the election returns (which included approximately 7,300 votes), the board based its refusal on concerns about vote-counting machines provided by Dominion Voting Systems.<sup>92</sup>

The voting machine company first became a source of national controversy during the aftermath of the 2020 presidential election, when a team of lawyers working with President Trump held a news conference to claim, without evidence, that Dominion conspired with an election software firm, financier George Soros, and Venezuela to rig the election results.<sup>93</sup> No evidence has ever substantiated these allegations.<sup>94</sup> Courts have since rejected related allegations that Dominion crafted its technology to manipulate results, and Dominion won a staggering \$787.5 million settlement in its lawsuit against Fox News.<sup>95</sup> Nevertheless, false claims about the machines continue to drive local officials like Otero County Commissioner Vicky Marquardt, who explained: "I have huge concerns with these voting machines . . . I just don't think in my heart that they can't be

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sponse to the 2020 certification delay, Michigan's voters successfully amended their state constitution to further clarify that state and county officials have a non-discretionary duty to certify election results.

90. The Wayne County Board's resolution calling for an "audit" of the results was meaningless because Michigan already conducts risk-limiting audits after every election. Maureen Halliday, *Michigan Performs Risk-Limiting Election Audit*, WILX NEWS 10 (Jan. 21, 2021, 1:23 PM PST), <https://perma.cc/C5KD-FUUD>. Risk-limiting audits of the type regularly conducted in Michigan are considered the "gold standard" in post-election audit procedures. See Christopher DeLuzio, *A Smart and Effective Way to Safeguard Elections*, BRENNAN CTR. FOR JUST. (July 25, 2018), <https://perma.cc/3XNZ-ZQHH>.

91. Annie Gowen, *New Mexico County Certifies Election Results, Bowing to Court Order*, WASH. POST (June 17, 2022, 1:03 PM EDT), <https://perma.cc/L39D-VWN6>.

92. *Id.*

93. Alan Feuer, *Trump Campaign Knew Lawyers' Voting Machine Claims Were Baseless, Memo Shows*, N.Y. TIMES (Sept. 21, 2022), <https://perma.cc/9DLU-DKG9>; see also Jack Queen, *Timeline of Key Events Leading Up to Fox, Dominion Defamation Trial*, REUTERS (Apr. 18, 2023, 6:08 AM PDT), <https://perma.cc/RGX4-LEWT>.

94. CNN Facts First, *Does the Dominion Voting Systems Organization Have Ties to Venezuelan President Hugo Chavez, George Soros and the Clinton Foundation?*, CNN, <https://perma.cc/36ZC-E6BZ>.

95. David Bauder, Randall Chase & Geoff Mulvihill, *Fox, Dominion Reach \$787M Settlement over Election Claims*, AP NEWS (Apr. 18, 2023, 5:32 PM PST), <https://perma.cc/5858-ABH4>.

manipulated.”<sup>96</sup>

Although the board’s refusal to certify generated quite a bit of press coverage as a potential harbinger for the general election, the end result was swift.<sup>97</sup> After the board’s initial vote to not certify the results, Secretary of State Maggie Toulouse Oliver filed an emergency petition for a writ of mandamus with the New Mexico Supreme Court.<sup>98</sup> In her petition, Oliver explained that New Mexico law explicitly states that county canvassing boards “*shall* meet to approve the report of the canvass of the returns and declare the results.”<sup>99</sup> The board’s sole discretionary power is limited to summoning the precinct board (poll workers) to make corrections or supply omissions related to the returns themselves.<sup>100</sup> The law, in other words, was clear: Otero County’s commissioners held a mandatory, non-discretionary duty to either certify the results or summon the precinct board to resolve a specific problem.<sup>101</sup> By refusing to certify the results, yet identifying no issue for the precinct board, Oliver argued that the board had violated its statutory mandate.<sup>102</sup>

The New Mexico Supreme Court agreed. In an order issued just one day after Oliver’s petition, it directed the board to comply with its statutory duty to “‘meet to approve the report of the canvass of the returns and declare the results’ . . . no later than June 17, 2022.”<sup>103</sup> The board complied in a 2-1 vote, but not without a last word from the dissenting commissioner. The lone remaining objector, Commissioner Couy Griffin, explained that his “vote to remain a no isn’t based on any evidence, it’s not based on any facts, it’s only based on my gut feeling and my own intuition, and that’s all I need.”<sup>104</sup>

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96. Fredreka Schouten, *New Mexico Secretary of State Sues County Commission over Refusal to Certify Primary Results*, CNN (June 14, 2022, 11:25 PM EDT), <https://perma.cc/KSX4-4XDQ>.

97. See, e.g., Blake Hounshell & Nick Corasaniti, *A Hidden New Threat to U.S. Elections*, N.Y. TIMES (July 22, 2022), <https://perma.cc/7ETZ-AA8S>.

98. Emergency Verified Petition for Writ of Mandamus, N.M. Sec’y of State v. Otero Cnty. Comm’n, No. S-1-SC-39426 (N.M. June 14, 2022). The New Mexico Supreme Court holds original jurisdiction over petitions for writ of mandamus against state officers, boards, or commissions. N.M. CONST. art. VI, § 3.

99. Emergency Verified Petition for Writ of Mandamus, *supra* note 98 at 10 (emphasis added) (citing N.M. STAT. ANN. § 1-13-13(A) (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.)).

100. *Id.* at 10-11 (citing N.M. STAT. ANN. § 1-13-5(A) (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.)).

101. Even if the board did summon the precinct board, it still would have been required to proceed with the canvass of all correct returns by at least ten days after the election. *Id.* at 11 (citing N.M. STAT. ANN. §§ 1-13-5(C), -13 (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.)).

102. Emergency Verified Petition For Writ of Mandamus, *supra* note 98 at 11.

103. Order Granting Writ of Mandamus, N.M. Sec’y of State v. Otero Cnty. Comm’n, No. S-1-SC-39426 (N.M. June 15, 2022).

104. Gowen, *supra* note 91. Griffin made his remarks via telephone from Washington, where he had just been sentenced to 14 days in jail based on his involvement in the January 6th attack on the U.S. Capitol. *Id.*

### C. Esmeralda County, 2022 Primary Election

Just days after the certification dispute in Otero County, New Mexico, local officials in Esmeralda County, Nevada threatened to upend their primary certification process. With just 743 residents, Esmeralda clocks in as the state's least-populated county,<sup>105</sup> although it is not immune from election controversies; in 2002, candidates for a county commissioner position famously broke a deadlocked election by drawing a card.<sup>106</sup>

When Esmeralda County's commissioners met to publicly certify the primary results on June 23, 2022, one resident—Mary Jane Zakas—made a hodgepodge of complaints concerning the county's voting processes during public comment.<sup>107</sup> She protested, for example, that “hot dog tongs could have breached” ballot boxes that she claimed did not meet security standards.<sup>108</sup> Despite detailed assurances from county Clerk-Treasurer LaCinda Elgan that no wrongdoing occurred, two of the three commissioners opted to delay the vote in order to recount the county's ballots by hand.<sup>109</sup>

Press reports quickly drew comparisons between Esmeralda County and Otero County.<sup>110</sup> In fact, the relevant portion of Nevada's election code mirrors the same non-discretionary language that the New Mexico Supreme Court found persuasive: Under Nevada law, each county's board of commissioners “*shall* meet and canvass the returns.”<sup>111</sup> In other words, the commissioners had no discretion to refuse to certify the results.

Fortunately, Esmeralda County's commissioners reversed course without court intervention. The commissioners certified the results just hours before the state's midnight certification deadline on June 24, but not before they and several aids spent more than seven hours hand-counting each of the county's 317 ballots.<sup>112</sup> According to meeting minutes, “everything matched.”<sup>113</sup> The final statement on the ordeal came from Elgan, who lamented that “she was sorry the commissioners chose to do this” in the first place.<sup>114</sup>

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105. United States Census Bureau, *Quick Facts Esmeralda County, Nevada*, <https://perma.cc/99AU-5Q8L>.

106. Joe Cavaretta, ‘Draw!’ Settles an Election Tie in Nevada, L.A. TIMES (Nov. 24, 2022, 12:00 AM PT), <https://perma.cc/L74C-LFNY>.

107. Meeting Minutes, Esmeralda Cnty. Bd. Of Comm'rs Special Meeting (June 23, 2022), <https://perma.cc/3BQA-XYMB> [hereinafter Esmeralda Cnty. Minutes].

108. *Id.*

109. Ken Ritter, *Rural Nevada County Delays Approving Primary Vote Results*, AP NEWS (June 23, 2022, 8:48 PM EST), <https://perma.cc/5DBS-X5GX>.

110. *Id.*

111. NEV. REV. STAT. ANN. § 293.387 (West, Westlaw through 82nd Regular Sess. 2023) (emphasis added); N.M. STAT. ANN. § 1-13-5(A) (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.).

112. Ken Ritter, Gabe Stern & Scott Sonner, *Last Nevada County Approves Primary Results After Hand Count*, AP NEWS (June 25, 2022, 3:41 AM EST), <https://perma.cc/NL2B-KPKJ>.

113. Esmeralda Cnty. Minutes, *supra* note 107.

114. *Id.*

#### D. Mohave County, 2022 General Election

This Article has already explored how local election officials in Cochise County, Arizona refused to certify the county's election based on debunked conspiracy theories about ballot printing malfunctions in neighboring Maricopa County.<sup>115</sup> After obtaining a court order directing the county to certify, state officials successfully resolved the dispute and certified the statewide election results in full compliance with the statutory timeline.<sup>116</sup> But Cochise County was not alone in capitalizing on Maricopa County's printer problems to further ambiguous theories of fraud. Across the state, the Mohave County Board of Supervisors also voted to delay certification as a protest against the election in Maricopa County, acknowledging that it was "purely a political statement."<sup>117</sup> The board eventually voted to certify the results a week later, although two board members noted that they did so "under duress."<sup>118</sup> Mohave County's board made a similar decision to delay after the 2020 election as President Trump voiced concerns about his loss in Arizona, raising the potential for a similar disruption and further escalation in 2024.<sup>119</sup>

#### E. Berks, Fayette, and Lancaster Counties, 2022 Primary Election

Several Pennsylvania counties—Berks, Fayette, and Lancaster—sparked chaos when they refused to properly certify their primary election results by excluding certain valid ballots from their totals. On June 23, 26, and 27, respectively, the three counties informed the Pennsylvania Department of State that they would not include in their totals a specific type of ballot: mail-in ballots that were received before the state's 8:00 p.m. deadline on Election Day but were missing a date on the outside envelope.<sup>120</sup>

By the time the counties notified the Department, two courts had already decided whether Pennsylvania counties should count these ballots, commonly referred to as "undated mail-in ballots." Just days after the May primary, the Third Circuit issued its opinion in *Migliori v. Lehigh County Board of Elections*—a case stemming from a 2021 local judicial election.<sup>121</sup> Although the

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115. See *supra* Introduction. See also Jonathan J. Cooper, *Arizona Certifies 2022 Election Results Despite GOP Complaints*, PBS (Dec. 5, 2022, 3:23 PM EST), <https://perma.cc/2W8R-Z7TX>; Alice Clapman, *Arizona County's Refusal to Certify Vote Shows Why Election Denial is Still a Threat*, BRENNAN CTR. FOR JUST. (Dec. 2, 2022), <https://perma.cc/95QF-2GGJ>.

116. Clapman, *supra* note 115.

117. Bob Christie, *2nd Arizona County Delays Certifying Election, For Now*, AP NEWS (Nov. 21, 2022, 8:04 PM), <https://perma.cc/J9MV-ZBYY>.

118. Bill McMillen, *Supervisors Begrudgingly Certify County Election Results*, THE DAILY NEWS (Nov. 28, 2022), <https://perma.cc/MH94-TC82>.

119. *Arizona GOP Pressures Counties to Delay Certifying Vote*, AP NEWS (Nov. 18, 2020), <https://perma.cc/Q7WP-KDMN>.

120. Petition for Review at 7-8, *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 MD 2022 (Pa. Commw. Ct. Jul. 11, 2022), <https://perma.cc/M6GH-AE6H>.

121. 36 F.4th 153, 162-64 (3d Cir. 2022).

Pennsylvania Election Code requires voters to write a date on the outer envelope of their mail ballot,<sup>122</sup> the court held that refusing to count timely mail-in ballots because they omitted a date violated the Civil Rights Act’s Materiality Provision,<sup>123</sup> which protects votes from being discarded for mistakes “not material” to whether the voter is qualified to vote under Pennsylvania law.<sup>124</sup> In other words, “[i]gnoring ballots because the outer envelope was undated, even though the ballot was indisputably received before the deadline for voting serve[d] no purpose other than disenfranchising otherwise qualified voters.”<sup>125</sup>

Days later, U.S. Senate candidate David McCormick filed suit in state court to ensure that county boards of election included undated mail-in ballots in his close Senate primary race against Dr. Mehmet Oz.<sup>126</sup> The court agreed with McCormick. In a preliminary injunction order adopting much of the Third Circuit’s analysis in *Migliori*, it ordered county boards of elections to canvass the undated mail ballots.<sup>127</sup>

Despite these rulings, the Berks, Fayette, and Lancaster County Boards of Elections still refused to include the undated mail-in ballots in their returns.<sup>128</sup> On July 11, 2022, Pennsylvania Secretary of State Leigh Chapman and the Department of State filed suit in state court to request a writ of mandamus compelling the boards of election to certify the undated mail ballots based on the order in McCormick’s case, along with a declaratory judgment that boards of elections may not exclude undated mail ballots and an injunction prohibiting the three

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122. 25 PA. STAT. AND CONS. STAT. §§ 3146.6(a), 3150.16(a) (Purdon’s, Westlaw through 2023 Regular Sess. Act 66).

123. 36 F.4th at 162-64.

124. 52 U.S.C. § 10101(a)(2)(B).

125. 36 F.4th at 164. The U.S. Supreme Court denied a motion to stay the Third Circuit’s ruling on June 9, 2022. *Ritter v. Migliori*, 142 S. Ct. 1824 (2022). It later vacated the decision and remanded it with directions to dismiss the case as moot. 143 S. Ct. 297 (2022). The decision to dismiss the case as moot led to a subsequent lawsuit that is currently pending before the Third Circuit. *See infra* note 130.

126. Neil Vigdor, *McCormick Sues to Count Undated Mail-In Ballots, Trailing Oz in Pennsylvania Senate Race*, N.Y. TIMES (May 23, 2022), <https://perma.cc/HV44-XD5V>.

127. *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022). In the event that a different decision was reached at final judgment, the court ordered the county boards to provide two tallies to the state—one that included the votes from the undated mail ballots and one that did not. *Id.* at \*40. McCormick conceded soon after the preliminary injunction order, but the court rejected a request to vacate its original order. *See Order Granting Application to Discontinue, McCormick v. Chapman*, No. 286 MD 2022 (Pa. Commw. Ct. June 10, 2022), at 43, <https://perma.cc/VR9M-HKCH>.

128. The Secretary of State’s Office later realized that a fourth county, Butler County, also had failed to include undated mail ballots in its certified returns. Although Butler County sent a June 21, 2022, letter informing the state that it would not include undated mail ballots, the state mistakenly identified the county as not having any undated mail ballots. Because the Secretary of State had already certified races for districts that included Butler County by the time it realized its error, it did not take further action with respect to the county. *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*6 (Pa. Commw. Ct. Aug. 19, 2022).

counties from excluding undated mail ballots from their returns.<sup>129</sup>

In an opinion issued on August 19—over three months after the primary—the court agreed with the state.<sup>130</sup> Although it held that it could not grant a writ of mandamus based on the decision in *McCormick*, as the case involved only preliminary relief, the court found that both Pennsylvania law and the Materiality Provision, supported by the Third Circuit’s reasoning in *Migliori*, required the counties to include undated mail-in ballots and granted the state’s requested declaratory judgment and injunctive relief.<sup>131</sup> By August 25, 2022, the three counties had complied with the court’s order.<sup>132</sup>

#### F. Luzerne County, 2022 General Election

Following the general election, the Board of Elections in Luzerne County, Pennsylvania deadlocked over whether to certify its election results and missed the state’s November 28, 2022, certification deadline.<sup>133</sup> Two of the board’s Democrat members voted to certify, two Republican members voted “no,” and the board’s fifth member (a Democrat) abstained.<sup>134</sup> According to one local reporter, the abstaining member wanted to know “what happens if the vote is not certified.”<sup>135</sup>

The debate first arose after polling places in the county experienced paper shortages on Election Day, leading the two Republican board members to argue that the shortages amounted to a failed election process.<sup>136</sup> The situation came to a head in two contentious public meetings, at which attendees called the election

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129. Petition for Review, *supra* note 120; Emergency Application for Peremptory Judgment and Summary Relief, *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022 (Pa. Commw. Ct. Jul. 11, 2022), <https://perma.cc/X37R-YMR8>.

130. Undated mail-in ballots have continued to fuel controversy in several Pennsylvania cases. *See, e.g.*, *Pennsylvania State Conference of the NAACP v. Schmidt*, 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023) (ruling that Pennsylvania counties must count mail-in ballots with missing or incorrect dates on the outer envelope pursuant to the Civil Rights Act’s Materiality Provision), stayed pending appeal, No. 23-3166 (3d Cir. Dec 13, 2023), <https://perma.cc/G9LD-Q6W6>; *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022) (blocking counties from counting mail-in ballots with missing or incorrect dates one week before the general election). In any event, the Berks, Fayette, and Lancaster County boards had a clear duty to follow the relevant court orders instructing them to include the undated mail-in ballots in their vote totals, as will county boards in the future if the district court’s decision in *Schmidt* is upheld on appeal.

131. *Chapman v. Berks Cnty. Board of Elections*, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022).

132. Tom Lisi, *Lancaster County Board of Elections Complies with Order to Count Undated Mail-In Ballots*, LANCASTER ONLINE (Aug. 25, 2022), <https://perma.cc/X2LC-FELZ>.

133. Mark Scolforo, *Pa. County Deadlocks on Certifying Election Results, For Now*, NBC10 PHILA. (Nov. 29, 2022), <https://perma.cc/B2YL-3NFG>.

134. *Id.*

135. Chelsea Straub (@chelseastrub), X (Nov. 28, 2022, 11:28 AM), <https://perma.cc/PQT9-6MVU>.

136. Zach Schonfeld, *Pennsylvania’s Luzerne County Certifies Election After Being Sued*, THE HILL (Nov. 30, 2022 3:47 PM ET), <https://perma.cc/R4LK-69VG>.

“rife with disenfranchisement” and one individual shouted “liar” at one of the board members after they promised to certify Luzerne’s results.<sup>137</sup>

U.S. Representative and candidate for reelection Matt Cartwright (D-Pa.) filed suit shortly after the board missed the certification deadline, requesting a writ of mandamus requiring the board to certify the results.<sup>138</sup> Fortunately, however, the lawsuit was short-lived. The board voted to certify the results on November 30, 2022, after election officials contacted 125 election judges from the county’s 187 precincts—none of whom reported any voters turned away due to the paper shortages.<sup>139</sup>

### III. THE HISTORY OF ELECTION CERTIFICATION AS A NON-DISCRETIONARY ACT

Certification crises are not new. From the earliest and most rudimentary days of election certification in the United States, the law has contemplated and established protections against rogue local officials who aimed to manipulate or overturn election results. Part III explores this history to underscore the extent to which recent election denier attacks flouted hundreds of years of well-established American legal history.

The Section begins by tracing the development of election certification itself, demonstrating that colonial laws and their English predecessors anticipated and safeguarded against efforts to interfere with certification. It then traces the development of modern certification frameworks, demonstrating that states often designed their procedures in response to certification disputes, and with an eye towards preventing them in the future. Part III concludes with an overview of the consensus that formed as 19th century courts interpreted evolving certification statutes—namely, that allowing discretion in certification processes created opportunities for fraud, and thus officials held a mandatory, ministerial duty to canvass and certify election returns.

#### A. Certification’s Early Origins

The decentralized, locally run American election system we know today descended in large part from the decentralized English system it inherited. As far back as the fifth century, the Anglo-Saxons first divided their new territory into administratively manageable provinces called “shires.”<sup>140</sup> Drawing upon the government of their Germanic and Roman predecessors, the Anglo-Saxons designated one of their chief men, or “ealdorman,” to preside over each shire.<sup>141</sup>

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137. *Id.*; Scolforo, *supra* note 133.

138. Complaint, Cartwright v. Luzerne Cnty. Bd. of Elections, No. 202210782 (Pa. Ct. Com. Pl. Nov. 29, 2022).

139. Scolforo, *supra* note 133.

140. Edward Hasted, *General History: The Office of Sheriff*, in *THE HISTORY AND TOPOGRAPHICAL SURVEY OF THE COUNTY OF KENT: VOLUME 1* (Canterbury 1797), at 168-176, British History Online, <https://perma.cc/6MYQ-2GZX>.

141. *Id.*

Eventually, “shire reeves,”<sup>142</sup> i.e., “sheriffs,” took over the bulk of the ealdormen’s administrative duties.<sup>143</sup> After the Norman Conquest in the 11th century, ealdormen would become “counts” (from the Latin *comites*) and shires “counties” (from the Latin *comitatus*).<sup>144</sup>

By the early 17th century, the English system of election administration had begun to take on a familiar, county-based form.<sup>145</sup> Generally, when it came time for parliamentary elections the monarch would order writs of election to be issued to county sheriffs.<sup>146</sup> Once they received the writs, the sheriffs would then publish them by issuing “precepts” to local officials of each parliamentary borough within their jurisdiction.<sup>147</sup> The precept functioned as an order directing the borough to hold an election and send the sheriff a return in the form of an indenture—a formal document used to report the winning candidate.<sup>148</sup>

The indentures themselves served as an effective early method for securely reporting election results.<sup>149</sup> Scribes wrote mirroring copies of the election results on a single piece of parchment and then sliced the parchment in two, resulting in jagged vertical cuts.<sup>150</sup> The sheriff kept one copy and returned the other to the Crown, and if the results were ever disputed the parties could retrieve both pieces and fit them together.<sup>151</sup> If the indents along the edges did not line up, they knew one of the halves had been forged.<sup>152</sup>

Once the voters in each borough made their decision, the borough returned the indenture to the sheriff to verify, sign, and seal.<sup>153</sup> And after all boroughs within the county held their elections and returned their indentures to the sheriff, the sheriff compiled the returns and sent them, along with the writ, back to the central government at Westminster.<sup>154</sup>

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142. *Reeve*, MERRIAM-WEBSTER, <https://perma.cc/4VZ5-C9H9> (defining “reeve” as “a local administrative agent of an Anglo-Saxon king”).

143. Hasted, *supra* note 140.

144. *Id.*

145. For a comprehensive overview of parliamentary elections in the years 1604-1629, see *IV. Elections*, in *THE HISTORY OF PARLIAMENT: THE HOUSE OF COMMONS 1604-1629* (Andrew Thrush and John P. Ferris eds., 2010), <https://perma.cc/VK5M-NZR7>.

146. *Id.* The Chancery Department was charged with drafting the writ. *Id.*

147. *Id.* See also CORTLANDT F. BISHOP, *HISTORY OF ELECTIONS IN THE AMERICAN COLONIES* 111 (1893) (explaining that the colony of New York’s “method of publishing a writ [of election] by means of precepts addressed by the election officer to the local officials of his district, also prevailed in England”).

148. Thrush, *supra* note 145.

149. See Bishop, *supra* note 147, at 179-80 (summarizing the history of the indenture in England).

150. Vanessa Wilkie, *Securing Election Results in 1640*, *THE HUNTINGTON* (Jan. 13, 2021), <https://perma.cc/5KME-3M79>.

151. *Id.*

152. *Id.*

153. Thrush, *supra* note 145.

154. *Id.* For a discussion of the various voting methods used throughout English history, see, for example, Charles Gross, *The Early History of the Ballot in England*, Vol. 3, No. 3 *AM. HIST. REV.*, 456, 456-63 (Apr. 1898). See also Bishop, *supra* note 149, at 156-160.



When returning the writs, it was not uncommon for local sheriffs to attempt to abuse their powers to assist friends or family.<sup>155</sup> English law dating back to the 15th century prohibited such behavior,<sup>156</sup> although punishments varied across the centuries, ranging from penalties and fines to questioning before the House of Commons.<sup>157</sup>

Predictably, England's election administration practices filtered across the Atlantic to the American colonies.<sup>158</sup> Although some colonies hewed more closely to English practices than others, all continued to adhere to the decentralized system in administering elections.<sup>159</sup> A typical colonial election might begin, for example, with the governor of the colony ordering writs of election to be dispatched to county sheriffs.<sup>160</sup> The sheriff would then send out precepts to leading officials in the towns or divisions within their counties, commanding them to assemble all eligible voters for an election.<sup>161</sup> After local officials—often clerks or inspectors—collected and counted the votes, they would return them by indenture to the county sheriff, who would in turn keep one part of the indenture for his records and certify the other with a signature and seal, returning it along with the writ to the governor.<sup>162</sup>

Like the English system, colonial laws anticipated and built in safeguards against sheriffs who sought to partake in fraud or misconduct when recording and transmitting election results. In Virginia, for example, the sheriff was required to deliver under oath “unto the clerks of the same county court attested

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155. See Thrush, *supra* note 145.

156. *Id.* (“[I]n 1410 it was enacted that any sheriff guilty of electoral misconduct would be fined £100 and imprisoned for a year.”); see also Bishop, *supra* note 147, at 185-86 (noting the “English custom of allowing the justices of the assize to take inquest against a sheriff in order to test the truth of his return and permitting the latter to traverse an office found.”) (citing 11 Hen. IV, ch. I; 6 Hen. VI, ch. 4).

157. Thrush, *supra* note 145.

158. See, e.g., Bishop, *supra* note 147, at 183 (“It may be inferred that the provisions just enumerated in regard to the transmission of returns were derived from statutes in force at that time in the mother country. Doubtless many of the details not covered by the colonial statutes were regulated according to the English custom.”). In Maryland, for example, “the sheriffs were merely directed to hold the elections in such manner and forme as ye laws of England and this province doe[s] direct and provide.” *Id.* at 164 (internal citations omitted).

159. Bishop provides a survey of the colonies' respective election practices, broken down by trends within the Puritan, English, and proprietary colonies. *Id.* at 98-202.

160. *Id.* at 100-10. In some colonies the sheriff continued to serve as the presiding officer for all elections, while in others different officials, such as a “provost marshal” or even churchwardens, managed the process. *Id.* at 114-20.

161. *Id.* at 110-13.

162. *Id.* at 179-85. Other colonies, for example, opted to simply have local officials write the names of the winning candidates on the back of the writ. *Id.* at 180-81. Voting methods themselves varied widely across the colonies. The Puritan colonies, for example, operated proxy systems of voting by which rudimentary ballots were handed in at town “proxings” and delivered back to the colonial assembly. See *id.* at 127-40 for a comprehensive description of the various proxy processes. In other colonies, individuals cast their vote by a variety of different methods ranging from corn and beans to a poll by voice (*viva voce*) or show of hands. See *id.* at 140-75.

copies of the original poll of such election, without any embezzlement or alteration, to be recorded among the records of such county court.”<sup>163</sup>

## B. Moving Towards a Modern Statutory Framework

As the colonies became states and grew in population, they experimented with and fine-tuned increasingly formalized election administration practices, including their certification processes. In 1777, for example, North Carolina’s laws included no explicit instructions as to how the sheriff should certify or otherwise record the votes.<sup>164</sup> By 1789, the revised statute laid out a formal process by which the sheriff would “make out two correct Statements of the Number of Votes given to each Candidate in his County,” certify those statements, file one copy with the county clerk’s office, bring the other copy to a meeting of sheriffs at which they would review the returns, and then sign, seal, and give certificates of elections to the winning candidates.<sup>165</sup>

Often, states altered their procedures in response to certification disputes that arose in the rapidly changing election landscape, with an eye towards preventing similar disputes in the future. Edward B. Foley’s *Ballot Battles* details how in 1792, a dispute in New York’s gubernatorial election forced the state to reevaluate its canvass and certification processes.<sup>166</sup> At the time, New York law required the sheriff of each county to collect the returns and deliver them to the Secretary of State.<sup>167</sup> The Secretary would then hold the returns until a state legislative canvassing committee met to count the results.<sup>168</sup> Notably, state law gave the committee authority to resolve any questions concerning the counting according to a majority vote.<sup>169</sup> In Otsego County (home to Cooperstown), the outgoing sheriff had collected and delivered the returns on Election Day, even though his commission as sheriff had expired.<sup>170</sup> In response, the state canvassing committee voted along party lines to invalidate all of Otsego County’s ballots, narrowly swinging the election from John Jay, a Federalist, to George Clinton, a Democratic-Republican.<sup>171</sup>

For months, the committee’s decision dominated political conversation.<sup>172</sup>

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163. *Id.* at 186 (quoting 10 Geo. II, c. 2, § 8, 4 Henning, 475). Rhode Island, New York, and New Jersey aimed to prevent fraud by following the English practice of “requiring that copies of the poll . . . be delivered on demand to persons who were willing to pay a reasonable charge for the labor of writing them.”

164. JAMES IREDELL, LAWS OF THE STATE OF NORTH CAROLINA 319-21 (1791).

165. *Id.* at 661-62.

166. EDWARD B. FOLEY, *BALLOT BATTLES, THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 50-61 (2016).

167. *Id.* at 50.

168. *Id.*

169. *Id.*

170. *Id.* at 51.

171. *Id.*

172. *See id.* at 52-58 for a detailed analysis of the controversy and public response. As Foley points out, the Otsego County Sheriff, Federalist Richard Smith, was not blameless in

Fights between the two candidates' supporters broke out, and the Federalists came dangerously close to attempting to overturn the election through a special-purpose state constitutional convention.<sup>173</sup> Ultimately, the state avoided disaster when Jay, following the advice of Alexander Hamilton, abandoned his attempts to challenge the results and accepted the outcome.<sup>174</sup>

But rather than risk another debacle, the legislature changed its canvassing procedures to insulate its certification process from similar crises in the future. Under a new 1799 law, local inspectors of elections publicly canvassed their own returns and sent the Secretary of State certificates of their tallies, rather than the returns themselves.<sup>175</sup> Upon receiving the tallies from the Secretary, the state canvassing committee's role was limited to the ministerial duty of aggregating the local inspectors' totals; it no longer had authority to resolve any questions as to the count.<sup>176</sup> The sheriff saw his role entirely removed, as county clerks instead took on the duties of assembling local certificates and transmitting them to the Secretary of State.<sup>177</sup>

New York was not alone in shifting certification responsibilities away from the county sheriffs. Over the next two centuries, states would transfer certification duties to county canvassing boards or other county-level entities that would both canvass and certify local returns before sending them to state officials.<sup>178</sup>

Almost a century later, one of the many disputes within the contentious Hayes-Tilden election of 1876-77 would highlight another instance in which a state updated and clarified its election certification procedures with the specific goal of preventing disputes in mind.<sup>179</sup> At the time, Florida's election code required the state canvassing board to ratify all of the counties' vote tallies.<sup>180</sup> The

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this situation. Smith had resigned his position as sheriff to serve as supervisor of a town within Otsego County, and in that role he was responsible for packaging the town's returns. The constitution and laws of New York prohibited an individual from serving as both a town supervisor and county sheriff for separation of power purposes, i.e., so that the person responsible for collecting and delivering a county's returns to the Secretary of State (the sheriff) was not the same person who packaged a particular town's returns within the county and delivered them to the sheriff (the supervisor). Smith performed both roles in the election, creating, as Foley notes, a substantial conflict-of-interest. *Id.* at 55.

173. *Id.* at 57-58.

174. *Id.* at 58.

175. *Id.* at 58-59.

176. *Id.*

177. *Id.*

178. See e.g., Lee, *supra* note 1 at 855-58 (discussing early role of county judges in certifying Florida elections, dating back to its territorial days); N.J.L. 1930, c. 187, para. 67, p. 700; Pennsylvania Election Code, Act No. 320, art. III, 1937 Pa. Laws 1333; E.B. HARRINGTON & E.J. ROBERTS, THE REVISED STATUTES OF THE STATE OF MICHIGAN: PASSED AT THE ADJOURNED SESSION OF 1837, AND THE REGULAR SESSION OF 1838 Title II, Ch. 5, § 1 (1838).

179. For an overview of the several disputes that took place during the Hayes-Tilden election, see, for example, Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 554-55, 575-78 (2004); Foley, *supra* note 166, at 117-150.

180. Lee, *supra* note 1, at 859.

state canvassing board, however, did not just ratify the tallies, but instead evaluated the validity of the ballots themselves.<sup>181</sup> Ultimately, it rejected so many that it tipped both the presidential and gubernatorial races from the Democrats to the Republicans.<sup>182</sup> After a complicated court battle that made its way up to the Florida Supreme Court, the Republican-controlled court defied expectations when it ordered state officials to recount the ballots and award the governor's race to the Democratic candidate.<sup>183</sup> Republican Hayes, however, still won the state's presidential electoral votes thanks to a special Congressional commission created to resolve the election.<sup>184</sup>

After the dust had settled, Florida's state legislature followed New York's example and amended its election code to mitigate the state canvassing board's role.<sup>185</sup> The new law clarified, among other things, that the state canvassing board played a solely ministerial role in canvassing counties' results and had no discretion to evaluate the validity of the local tallies.<sup>186</sup> As an added safeguard, the revised law also explicitly limited the role of county canvassing boards by prohibiting them from reevaluating precinct officials' decisions as to whether ballots were properly cast.<sup>187</sup>

As the 19th century wore on and states continued to adapt their procedures, the basic statutory framework by which they canvassed and certified their election results evolved into a system resembling the modern processes used today. Although procedures varied by state, they generally followed a standard pattern:

After the polls closed, the local election officials tallied the votes . . . . The local officials then forwarded the results of their tally to the county canvassing officials, who added the various local tallies together when a race covered multiple polling precincts. The county returning board forwarded the results of their canvass to the state canvassing board. That board checked the county returns for proper form and added the county returns together when a race was statewide or covered multiple counties. When all the tallies were complete, the state canvassing board certified the outcome of each race. Based on that certification, the state's governor issued certificates of election to the candidates that the administrative canvass showed to have a plurality of the votes, or a majority when that was required.<sup>188</sup>

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*; Siegel, *supra* note 179, at 575-77; Foley, *supra* note 166 at 133-35. The Commission was comprised of five U.S. Senators, five U.S. Representatives, and two U.S. Supreme Court Justices and was charged with deciding which electoral votes should count in the four states (Oregon, South Carolina, Florida, and Louisiana) with disputed election results in the 1876 presidential election. Siegel, *supra* note 179, at 554.

185. 1881 Fla. Laws 481, Ch. 97, § 19.

186. *Id.* at 498, Ch. 97, § 40; *see also* Lee, *supra* note 3, at 861.

187. 1881 Fla. Laws 496, Ch. 97, § 36; Lee, *supra* note 3, at 861.

188. Siegel, *supra* note 179, at 569.

### C. State Court Decisions Solidified Certification as a Ministerial, Mandatory Duty

As certification statutes evolved, the state courts interpreting them began to form a consensus around the scope of officials' authority when exercising their statutorily prescribed duties: Discretion created opportunities for election fraud, and thus officials held a mandatory, ministerial duty to canvass and certify election returns.

In fact, it was not uncommon for courts to hear actions for mandamus remedies when local or state canvassing boards failed to perform or otherwise overstepped their election duties.<sup>189</sup> In some instances, those cases arose out of ballot-counting controversies that forced canvassing boards to grapple with difficult questions—should local officials certify the results, for example, when they tallied 1,163 ballots, but only 365 people had voted?<sup>190</sup> On other occasions, officials refused to count the returns for entire precincts based on procedural technicalities.<sup>191</sup>

But no matter the circumstances behind these officials' decisions, courts were consistent. Local election officials “were not selected for their knowledge of the law,” and thus they had no authority to make legal determinations as to the validity of election returns.<sup>192</sup> As the Supreme Court of Indiana explained in one 1872 ruling:

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189. See, e.g., *Lewis v. Comm'rs of Marshall Cnty.*, 16 Kan. 102, 108 (1876) (“[I]t is a common error for a canvassing board to overestimate its powers.”).

190. *Leary v. Jones*, 116 P. 130, 131 (Colo. 1911). The Colorado Supreme Court answered “yes” and held that any claim of “irregularities, frauds, and illegal votes in the ballot box . . . should have been left for the courts.” *Id.* at 133. See also *Foley*, *supra* note 166 at 25-26 (expounding on the unanticipated ballot-counting issues that the nation confronted in its early years).

191. See, e.g., *People ex rel. Fuller v. Hilliard*, 29 Ill. 413 (1862). In *Hilliard*, the local board of canvassers had thrown out returns for an entire precinct in which the officer charged with administering the oath of office to election judges and clerks failed to properly sign the oaths. *Id.* at 415. The Illinois Supreme Court held that the board held “no discretionary power” to reject returns that on their face complied with the law and had thus made a “grievous error.” *Id.* at 422-24.

192. *Tanner v. Deen*, 33 S.E. 832, 835 (Ga. 1899). In *Tanner*, the Democratic superintendents in Coffee County, Georgia refused to proceed with certification due to a dispute over whether to certify the returns of a single precinct: the McDonald precinct. *Id.* at 833; see also *Deen v. Tanner*, 32 S.E. 368, 368 (Ga. 1899). Their strategy was not subtle; without the McDonald precinct returns, the Democrats' candidates for representative and sheriff won by just a handful of votes. 33 S.E. at 833; 32 S.E. at 368; see also *New Court House for Coffee. One Will be Built at Once—Trouble Over the Election Returns*, THE MACON TELEGRAPH (Oct. 20, 1898), <https://perma.cc/6SPT-NXCT> (reporting the not-yet-final results and noting that “[t]he election consolidators for Coffee County failed to consolidate. The Democratic managers have made a consolidation signed by a majority of the election managers. The Populists refused to accept and have filed a mandamus, which will be heard by Judge Sweat at Waycross on next Saturday.”). After a lengthy legal battle, the Supreme Court of Georgia issued an order granting a writ of mandamus and requiring the superintendents to reassemble and certify the returns, including the returns from the McDonald precinct. 33 S.E. at 835-36.

The duty imposed is ministerial. It is not within [the canvassing board's] province to consider or determine any questions relative to the validity of the election held or of the votes received by the persons voted for. They are simply to cast up the votes given for each person, from the proper election documents, and to declare the person who, upon the *face* of those documents, appears to have received the highest number of the votes given, duly elected to the office voted for.<sup>193</sup>

In other words, so long as the returns appeared on their face to be “regular in form, and genuine,” courts did not permit canvassing boards to reject them on their own accord.<sup>194</sup> All other questions about suspected fraud or misconduct were to be heard by the tribunal designated by state statute to hear election contest disputes, or through *quo warranto* proceedings—a common law procedure for aggrieved parties to challenge a candidate’s right to assume office.<sup>195</sup>

Consistent with this principle, courts declined to award mandamus remedies on those occasions that canvassing boards properly exercised their discretion in examining the face of the returns. In one 1858 case, for example, the Supreme Court of Iowa determined that it could not weigh in on whether the returns for one precinct read “fifty-three” or “forty-three” votes.<sup>196</sup> County canvassers had properly exercised their discretion in interpreting the face of the returns to read “forty-three,” and thus the court could not compel otherwise.<sup>197</sup>

Courts made it abundantly clear, however, that this discretion was limited solely to the *face* of the returns. In all other cases, the risk that the certifying officers would seek to manipulate the results or otherwise abuse their power outweighed any thought that they could play a helpful role in investigating elections. In the prescient words of the Oklahoma Supreme Court:

To permit canvassing boards who are generally without training in the law . . . to look elsewhere than to the returns for a reason or excuse to refuse to canvass the same and adjudicate and determine questions that may be presented aliunde, often involving close legal questions, would afford temptation and great opportunity for the commission of fraud.<sup>198</sup>

Put even more succinctly by the Supreme Court of Colorado, “[a]ny other

193. *Kisler v. Cameron*, 39 Ind. 488, 490-91 (1872) (emphasis added) (citation omitted) (internal quotation marks omitted) (reacting to a board of canvassers that had failed to certify the results for a mayoral election).

194. *Lewis*, 16 Kan. at 106-07. In *Lewis*, the canvassing board had rejected the returns of one precinct based on alleged “unlawful and corrupt agreement and conspiracy” to manipulate the election outcome. *Id.* at 105. The Supreme Court of Kansas awarded a writ of mandamus against the board, explaining that “[q]uestions of illegal voting, and fraudulent practices, are to be passed upon by another tribunal.” *Id.*

195. See, e.g., *id.* at 108. For a discussion of the history of *quo warranto* proceedings and their adoption by American courts, see Siegel, *supra* note 179, at 570.

196. *State ex rel. Byers v. Bailey*, 7 Iowa 390, 404 (1858).

197. *Id.*

198. *Stearns v. State ex rel. Biggers*, 100 P. 909, 911 (Okla. 1909). The board of canvassers had made a partial canvass, refusing to count the votes from one ward on grounds of alleged fraud. *Id.*

rule would enable canvassing boards, through design or incompetency to temporarily, at least, defeat the will of the people and to compel persons who had received a majority of the legal votes to institute contest proceedings, entailing great expense and delay upon the person elected.”<sup>199</sup> By 1897, the ministerial, mandatory nature of certifying returns was so well-established that one leading treatise declared “[t]he doctrine that canvassing boards and return judges are ministerial officers possessing no discretionary or judicial power, is settled in nearly or quite all the states.”<sup>200</sup>

The reasoning of these 19th and early 20th century courts seems almost prophetic in light of the modern election-denier movement. Together they offer a reminder that while certification crises may feel “new” in today’s political climate, centuries of well-settled case law exists to resolve them. At the same time, this history also underscores a darker reality: Those who refused to certify elections in 2022 did so *in spite of* longstanding precedent. In this sense, history can both guide us in resolving future disputes and remind us that refusals to certify, even when promptly resolved, represent a direct challenge to absolute, longstanding norms that are fundamental to our electoral system.

#### IV. LITIGATING AND RESOLVING FUTURE ELECTION CERTIFICATION DISPUTES

Part IV offers a roadmap for how election officials, candidates, and advocates can navigate and resolve bad-faith attacks on the certification process in future elections. It describes the election certification framework in eight states likely to play a major role in the 2024 election: Arizona, Georgia, Michigan, New Hampshire, New Mexico, Nevada, Pennsylvania, and Wisconsin. Although these states vary in their political culture, demographics, and general approach to election administration, they share several important features that make them worthy of close attention: a recent history of close elections,<sup>201</sup> high levels of spending and engagement around political campaigns,<sup>202</sup> and active election denial activity.<sup>203</sup> Each state framework is broken down according to the key actors, their ministerial duties, and the applicable enforcement mechanisms in place.

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199. *Lehman v. Pettingell*, 89 P. 48, 49 (Colo. 1907) (holding that where there were irregularities in the local election judges’ certificates of their returns, but those irregularities did not make it impossible to ascertain who the voter had voted for, the county board of canvassers had no discretion to refuse to canvass the returns).

200. GEORGE W. MCRARY, *A TREATISE ON THE AMERICAN LAW OF ELECTIONS*, 153 § 229 (4th ed. 1897).

201. See, e.g., Chris Cillizza, *The 10 Closest States in the 2020 Presidential Election*, CNN (Nov. 9, 2020, 1:29 PM EST), <https://perma.cc/6HAE-ZW7Y> (listing Arizona, Georgia, Michigan, New Hampshire, New Mexico, Nevada, Pennsylvania, and Wisconsin).

202. See, e.g., Ian Vandewalker & Maya Kornberg, *Financing of Races for Offices that Oversee Elections: November 2022*, BRENNAN CTR. FOR JUST. (Nov. 1, 2022), <https://perma.cc/PRC3-QCWQ>; Ian Vandewalker, *Big Outside Spending on Election Denial Floods Local Elections in Battleground States*, BRENNAN CTR. FOR JUST. (Apr. 7, 2022), <https://perma.cc/L88S-FCR6>.

203. See Miller et al., *supra* note 22 (categorizing previous and ongoing election denier activity, including activity in each of the eight states profiled *infra* Part IV).

## A. Arizona

Official election certification in Arizona begins at the county level after the unofficial tally is complete.<sup>204</sup> State law provides that the “governing body holding an election shall meet and canvass the election not less than six days nor more than twenty days following the election.”<sup>205</sup> At the county level, the board of supervisors serves as this “governing body.”<sup>206</sup> If returns from any precinct are missing, the “canvass shall be postponed from day to day until all the returns are received or until six postponements have been had.”<sup>207</sup> When “the result of the canvass is determined” by the board of supervisors, the result is “entered on the official record of the election district” and “mailed immediately to the secretary of state who shall maintain and preserve it as a permanent public record.”<sup>208</sup>

The second step of the process takes place at the statewide level. According to the statutory framework, “[o]n the fourth Monday following a general election, the secretary of state, in the presence of the governor and the attorney general, shall canvass all offices.”<sup>209</sup> In the event that a county fails to report results by this date, “the canvass shall be postponed from day to day, not to exceed thirty days from the date of the election, until canvasses from all counties are received.”<sup>210</sup>

As with any election statute, the most critical component of Arizona’s election certification process is its enforcement mechanism. Arizona’s certification statute does not contain a specific certification enforcement provision, but instead uses mandatory language that triggers the state’s statutory mandamus remedy. Arizona allows any “party beneficially interested” to ask a state court “to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an

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204. In recent elections, Arizona has drawn criticism for releasing unofficial election night results at a relatively slow pace. See Meg Kinnard, *Why Arizona Election Results are Taking Days*, AP NEWS (Nov. 11, 2022, 11:12 PM EST), <https://perma.cc/AWK5-FT8W>. These delays stem from unique interplays between Arizona election law and voter behavior—an extremely large portion of Arizonans cast mail ballots, and many of these voters choose to drop their ballots off at polling places on Election Day. Ashley Lopez, *Why Vote Counting is Slower in Arizona*, NPR (Nov. 11, 2022, 2:19 PM ET), <https://perma.cc/6WU3-PK32>. These last-minute mail ballots must go through a labor-intensive signature verification process, which can lead to significant delays in unofficial results reporting. These delays facilitated rapid promulgation of conspiracy theories in places like Cochise County after the 2020 and 2022 general elections. See *supra* Part II. As discussed in Part I.B, however, Election Night reporting and election certification are two distinct legal processes, and it is the actual certification process that grants a candidate the right to take office. Separate and apart from any criticism of its unofficial reporting system, Arizona’s election certification statute follows the same two-step framework as other states and includes robust safeguards to prevent interference with the certification process.

205. ARIZ. REV. STAT. ANN. § 16-642(A) (Westlaw through 2023 First Regular Sess.).

206. *Id.* § 16-403.

207. *Id.* § 16-642(C).

208. *Id.* § 16-646.

209. *Id.* § 16-648(A).

210. *Id.* § 16-648(C).



office.”<sup>211</sup> Two conditions must be met under the mandamus statute: (1) “the act, performance of which is sought to be compelled, must be ‘a ministerial act which the law specially imposes as a duty resulting from an office,’ or if discretionary it must clearly appear ‘that the officer has acted arbitrarily and unjustly and in the abuse of discretion’”; and (2) “there must exist no other ‘plain, speedy and adequate remedy at law.’”<sup>212</sup>

A county or statewide official refusing to properly certify the results of an election would satisfy both conditions. First, the language of the certification statute plainly creates a ministerial, non-discretionary duty. Arizona courts, as well as state courts more generally, construe “shall” language as creating ministerial, non-discretionary duties.<sup>213</sup> The plain language of Arizona’s statute provides that a county board of supervisors “*shall* meet and canvass the election” during a specified time frame,<sup>214</sup> and the Secretary of State “*shall* canvass all offices” on the specified date.<sup>215</sup>

Further, the duty’s ministerial nature goes beyond merely certifying the results—the statute also creates a mandatory duty to certify the *correct* results. At the county level, the board of supervisors must open the precinct returns in public and “determin[e] the vote of the county, by polling places, for each person voted for.”<sup>216</sup> The board has no discretion to certify any results other than the actual tally of votes for each candidate from each voting location, and no discretion to reject votes for arbitrary reasons.<sup>217</sup> At the statewide level, the duties remain just as clear: “The secretary of state shall declare elected the person receiving the highest number of votes cast for each office.”<sup>218</sup>

An action to compel election certification also satisfies the second condition of Arizona’s mandamus remedy in that there is no other adequate remedy at law available. Although Arizona law establishes a comprehensive election contest remedy for challenging the outcome of an election,<sup>219</sup> parties may not sue under

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211. *Id.* § 12-2021.

212. *Rosenberg v. Ariz. Bd. of Regents*, 578 P.2d 168, 172 (Ariz. 1978) (emphasis omitted) (quoting *Rhodes v. Clark*, 373 P.2d 348, 350 (Ariz. 1962)).

213. *See, e.g., Walter v. Wilkinson*, 10 P.3d 1218, 1219 (Ariz. Ct. App. 2000) (explaining that use of the word “may” in a statute generally indicates permissive intent, while “shall” generally indicates a mandatory provision).

214. ARIZ. REV. STAT. ANN. § 16-642(A) (Westlaw through 2023 First Regular Sess.) (emphasis added).

215. *Id.* § 16-648(A) (emphasis added).

216. *Id.* § 16-643.

217. *Id.* § 16-644 (“No list, tally, certificates or endorsement returned from any precinct shall be set aside or rejected for want of form, or for not being strictly in accordance with the explicit provisions of this title, if they can be clearly understood, nor shall any declaration of result, commission or certificate be withheld or denied by reason of any defect or informality in making the returns of the election in any precinct, if the facts which the returns should disclose can be definitely ascertained.”).

218. *Id.* § 16-650.

219. Losing gubernatorial candidate Kari Lake took advantage of this remedy in 2022, when she filed an election contest in state court seeking to have Maricopa County’s certification rescinded based on the aforementioned ballot printing issues. Brian Rokus & Sonnet

this statute until “after completion of the canvass of the election and declaration of the result thereof.”<sup>220</sup> In other words, no other pre-certification legal mechanism exists to force a board of canvassers to carry out their duty.<sup>221</sup>

## B. Georgia

In Georgia, election certification falls under the purview of a superintendent of election at the county level and the Governor and Secretary of State at the state level.

At the county level, state law requires the county superintendent of election to “receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify the results thereof to such authorities as may be prescribed by law.”<sup>222</sup> Unlike in some other states, in Georgia the superintendent oversees both the unofficial tabulation and the ultimate certification of the results, as well as a mandated pre-certification audit process.<sup>223</sup> The superintendent’s office conducts all three processes according to a detailed set of rules established by statute and Secretary of State regulations and has no discretion to throw out particular votes or substitute their own judgment for the actual vote totals.<sup>224</sup> At the conclusion of these processes, the county superintendent certifies the results and “shall, upon certification, furnish to the Secretary of State in a manner determined by the Secretary of State a final copy of each ballot used for such election.”<sup>225</sup>

At the state level, “[u]pon receiving the certified returns of any election from the various superintendents, the Secretary of State shall immediately proceed to tabulate, compute, and canvass the votes cast for all candidates.”<sup>226</sup> Notably, state law creates a different process for presidential electors—the Secretary of State

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Swire, *Kari Lake Files Suit Challenging Certification of Arizona Election*, CNN (Dec. 9, 2022, 10:14 PM EST), <https://perma.cc/NQL8-4S64>. The ease and speed with which state courts dismissed all but one of her claims demonstrates that a clearly written election contest framework can serve as an important tool to strengthen confidence in the election results. Order, *Lake v. Hobbs*, No. CV-23-0046-PR (Ariz. Mar. 22, 2023).

220. ARIZ. REV. STAT. ANN. § 16-673(A) (Westlaw through 2023 First Regular Sess.).

221. The state court reviewing the Secretary of State’s mandamus petition in *Ariz. All. Of Ret. Ams. v. Crosby*, discussed *supra* note 16, recognized this in granting the petition in a minute order.

222. GA. CODE ANN. § 21-2-70(9) (West, Westlaw through 2023 Regular Sess.). Georgia law gives counties several options for how to structure their local election authorities, so the exact identity of the county superintendent varies. In some counties, the superintendent role is filled by an appointed Elections Supervisor; in other counties, it is the chair of an elected Board of Elections or a probate judge. *See id.* For more information, see Linda Ford, Off. of Sec’y of State Brian P. Kemp, “Local Board Structure and Elections Administration,” <https://perma.cc/9EGQ-VYYG>.

223. GA. CODE ANN. § 21-2-493 (West, Westlaw through 2023 Regular Sess.).

224. *See id.*; *see also id.* § 21-2-492 (2023) (officials are required to “perform their duties impartially and not to read, write, count, or certify any return or vote in a false or fraudulent manner”); *id.* § 21-2-498 (2023) (establishing detailed pre-certification audit process).

225. *Id.* § 21-2-497(b).

226. *Id.* § 21-2-499(a).

presents presidential election results to the Governor, who “shall enumerate and ascertain the number of votes for each person so voted and shall certify the slates of presidential electors receiving the highest number of votes.”<sup>227</sup>

The proper mechanism to enforce Georgia’s certification law depends on the nature of the certification issue. If a county superintendent or the Secretary of State refuses to certify the results, a writ of mandamus provides the appropriate mechanism for a candidate or aggrieved voter to seek relief.<sup>228</sup> Under Georgia law, courts award mandamus remedies to “compel a due performance” when a “defect of legal justice would ensue from a failure to perform or improper performance” of an official duty and no other specific legal remedy is available.<sup>229</sup> Indeed, the Georgia Supreme Court held that a writ of mandamus served as the proper remedy to compel certification as early as 1899.<sup>230</sup> It explained that even if local election officials disputed whether certain returns were defective:

A mandamus may issue, compelling the board to include such returns, notwithstanding that supposed defect; leaving it for the election tribunal, upon the report of the board to decide whether the defect is fatal. Though the command to include these [supposedly defective returns] might be considered to be a command to do a particular act—make the canvass—in a particular way, yet that is no objection to the mandamus, since here the manner of doing is of the essence of the deed and is regulated by statute, and not left to the discretion of the party performing.<sup>231</sup>

In the event that the Secretary of State attempts to certify fraudulent results, as opposed to refusing to certify altogether, such a crisis would likely fall under the “improper performance” language of Georgia’s mandamus statute<sup>232</sup> and similarly trigger the process for mandamus relief. At the county level, Georgia’s Election Code sets forth by statute the enforcement remedy for a county superintendent who submits fraudulent results. Specifically, if the Secretary of State

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227. *Id.* § 21-2-499(b).

228. Georgia’s mandamus remedy has a broad standing requirement—when a case involves a question “of public right and the object is to procure the enforcement of a public duty,” a plaintiff need only be “interested in having the laws executed and the duty in question enforced.” *Id.* § 9-6-24. An action to enforce proper certification of an election would satisfy this statutory definition. *See, e.g.,* Manning v. Upshaw, 49 S.E.2d 874, 876 (Ga. 1948) (finding that an action to compel local officials to hold an election via a writ of mandamus invoked a sufficient public right and public duty that an individual voter could bring suit).

229. GA. CODE ANN. § 9-6-20 (West, Westlaw through 2023 Regular Sess.).

230. *See* Tanner v. Deen, 33 S.E. 832, 833-36 (Ga. 1899).

231. *Id.* at 835 (quoting HORACE GAY WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, AND QUO WARRANTO: WITH FORMS. (2d ed. 1891)). For a more detailed description of the case, *see supra* note 192. *See also* Bacon v. Black, 133 S.E. 251, 253 (Ga. 1926) (“The duties of the managers or superintendents of election who are required by law to assemble at the courthouse and consolidate the vote of the county are purely ministerial.”).

232. GA. CODE ANN. § 9-6-20 (West, Westlaw through 2023 Regular Sess.) (“All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights.”).

identifies an “error . . . in the certified returns . . . the Secretary of State shall notify the county submitting the incorrect returns and direct the county to correct and recertify such returns.”<sup>233</sup>

### C. Michigan

In Michigan, precinct canvassing boards and county clerks manage the initial tabulation of unofficial returns. State law provides that election inspectors for each precinct “shall seal the . . . statement of returns . . . in an envelope addressed to the county clerk.”<sup>234</sup> The county clerk then tabulates and publishes unofficial election night returns for the county.<sup>235</sup>

After the unofficial returns are complete, county boards of canvassers oversee the first step of the formal certification process. First, the certification statute directs that the board of county canvassers “shall meet at the office of the county clerk no later than 9 a.m. on the Thursday after any election held in the county” and “shall then proceed without delay to canvass the returns of votes cast for all candidates for offices voted for and all questions voted on at the election, according to the precinct returns.”<sup>236</sup> The county board “must conclude the canvass at the earliest possible time and in every case no later than the fourteenth day after the election.”<sup>237</sup>

In performing the canvass, county boards have limited authority to examine discrepancies or mathematical errors. The statutory framework closely regulates this authority and makes clear that board members may not substitute their own judgment in place of the actual evidence of the returns. For example, if the county board finds that returns from any precinct are “missing, incomplete, or incorrect,” they may “summon the persons having the boxes containing the ballots cast at the election and the keys and seals of the boxes, or having the returns or the poll lists or tally sheets used and made at the elections” so they can inspect the actual ballots, but “shall not remove or mark the ballots” themselves.<sup>238</sup> The

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233. *Id.* § 21-2-499(a) The language of this statute is also plainly subject to the mandamus statute’s “failure to perform or improper performance” provision in the event the Secretary of State refuses to take action against a county official attempting to submit fraudulent returns. *Id.* § 9-6-20.

234. MICH. COMP. LAWS ANN. § 168.809(2) (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.).

235. *Id.* The statute also requires the clerk to make their office open to the public during the tabulation process. While transparency is an important goal in election administration, this requirement led to heated protests by election deniers and intense harassment of election workers at the clerk’s office in Detroit during the unofficial tabulation in 2020. *See Tresa Baldus et al., Chaos Erupts at TCF Center as Republican Vote Challengers Cry Foul in Detroit*, DET. FREE PRESS (Nov. 4, 2020, 3:17 PM ET), <https://perma.cc/T33A-6VC4>.

236. MICH. COMP. LAWS ANN. §§ 168.821(1), 168.822(1) (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.). The board of county canvassers is a four-member body consisting of two members appointed by each of the major political parties in the county. *Id.* § 168.24c.

237. *Id.* § 168.822(1).

238. *Id.* § 168.823(1)-(2).

relevant statute then limits the board's authority to "correct[ing] obvious mathematical errors" or re-counting the actual ballots directly.<sup>239</sup> After resolving any such issues, the "clerk of the board of county canvassers forthwith, and in no case later than 24 hours after the completion of the canvass . . . shall deliver in person or send to the secretary of state . . . a certified copy of each of the statements prepared by the board" along with a "certificate of authenticity" signed by the clerk and chairman of the board of canvassers.<sup>240</sup>

Once the county boards of canvassers complete their duties, the Secretary of State and the Board of State Canvassers oversee final certification at the state level.<sup>241</sup> State law explains that the Secretary of State "shall appoint the day of the meeting," which must occur "at the office of the secretary of state on or before the twentieth day after the election."<sup>242</sup> At this meeting, the state board "shall canvass the returns and determine the result of all elections" and "[u]pon making the determination . . . immediately prepare a certificate of determination and deliver the properly certified certificate . . . to the secretary of state."<sup>243</sup> As in other states, the relevant statute limits the board's authority to examining the actual certified vote tallies as delivered by the counties to the Secretary of State.<sup>244</sup>

Notably, Michigan voters amended their state constitution after the Wayne County certification delay in 2020 to expressly clarify that state and local officials have a non-discretionary, ministerial duty to certify elections. The amendment clarified:

It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns.<sup>245</sup>

The mechanism for enforcing Michigan's election certification law looks different depending on whether the dispute occurs at the county level or within the state board itself. If a county board of canvassers refuses to certify the results,<sup>246</sup> state law requires the State Board of Canvassers to step in and certify

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239. *Id.* § 168.823(3).

240. *Id.* § 168.828.

241. The Board of State Canvassers is a bipartisan body of four members selected by the Governor from slates submitted by the state's two major political parties. *Id.* § 168.22a(1).

242. *Id.* § 168.842(1).

243. *Id.* § 168.841(1).

244. *Id.* § 168.844. Michigan certification law does have one quirk: It requires the state board to send elections that end in exact ties to the legislature to pick the winner in a special joint session. *Id.* § 168.846. Nevertheless, the odds of a tie in a statewide race are statistically improbable given that the state has over eight million registered voters. *Voter Registration Statistics*, MICH. DEP'T OF STATE (2023), <https://perma.cc/YK7C-JZMZ>.

245. MICH. CONST. art. II, § 7, cl. 3.

246. At the county level, no political party can be represented by more than two members on the four-member precinct canvassing boards. MICH. COMP. LAWS ANN. § 168.24c(1) (Westlaw through P.A. 2023, No. 321, of the 2023 Regular Sess.). This two-to-two partisan split means that if a dispute occurs, the most likely scenario would involve the board members of one party refusing to vote to certify, creating a deadlock.

the county's results themselves.<sup>247</sup>

If the refusal to certify occurs within the state board, the Secretary of State or an aggrieved candidate may seek a writ of mandamus to force certification.<sup>248</sup> Such a crisis would satisfy the four requirements for mandamus under Michigan law: "(1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result."<sup>249</sup> In fact, in one case involving a contested election for circuit judge, the Michigan Supreme Court found that a dispute over certification issues satisfied all four requirements, and that in the absence of an ongoing recount, certification was a "a ministerial duty to be performed" by the defendant state board of canvassers.<sup>250</sup>

#### D. New Hampshire

Unlike most states, which administer elections primarily at the county level, New Hampshire administers elections at the town and city level, leading to an even higher level of decentralization.<sup>251</sup> Just like other states, however, New Hampshire uses a standard two-step election certification process.

At the first step, town or city clerks manage election certification at the local level. In towns, the clerk is an elected position; in cities, clerks are appointed by the city council.<sup>252</sup> In cities, appointed ward clerks handle many of the city clerk's election administration functions.<sup>253</sup>

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247. *Id.* § 168.822(2) ("If the board of county canvassers fails to certify the results of any election . . . by the fourteenth day after the election as provided, the board of county canvassers shall immediately deliver to the secretary of the board of state canvassers all records and other information pertaining to the election. The board of state canvassers shall meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records . . . . The cost of the canvass must be borne by the county involved."). The provision requiring the refusing board to bear costs may serve as an important deterrent against performative efforts to withhold certification.

248. *Citizens Protecting Michigan's Const. v. Sec'y of State*, 761 N.W. 2d 210, 216 (Mich. Ct. App. 2008) ("[M]andamus is the appropriate remedy for a party seeking to compel action by election officials"). Michigan courts have considered the Board of State Canvassers to be a state officer for mandamus purposes. *See Citizens for Prot. of Marriage v. Bd. of State Canvassers*, 688 N.W.2d 538, 541 (Mich. Ct. App. 2004). Although the Secretary of State rarely has petitioned for writs of mandamus throughout Michigan history, the Michigan Supreme Court has allowed a mandamus suit by the Secretary on at least one occasion. *See Sec'y of State v. Nat'l Salt Co.*, 86 N.W. 124 (Mich. 1901) (affirming decision to deny a writ of mandamus on the merits).

249. *Citizens Protecting Mich.'s Constitution*, 761 N.W.2d at 216-17.

250. *Dingeman v. Bd. of State Canvassers*, 164 N.W. 492, 492 (Mich. 1917), *aff'd*, *McLeod v. State Bd. of Canvassers*, 7 N.W.2d 240, 243 (Mich. 1942).

251. *See generally New Hampshire Election Procedure Manual: 2022-2023*, NEW HAMPSHIRE DEPARTMENT OF STATE, <https://perma.cc/Y6HG-A2CH> (providing a comprehensive overview of election administration in New Hampshire).

252. N.H. REV. STAT. ANN. §§ 41:16, 48:2 (Westlaw through 2023 Regular Sess.).

253. *See* NEW HAMPSHIRE DEPARTMENT OF STATE, *supra* note 251 at 128.

The certification process begins immediately after the polls close, “[a]fter the tabulation of votes has been completed and the result has been announced by the moderator” (the election officer in charge of the polls and voting) at each polling place.<sup>254</sup> New Hampshire’s certification laws provide that the clerk “shall prepare the election return in the presence of the other election officials”<sup>255</sup> by combining the total votes cast from each polling place moderator’s signed records of the number of votes for each candidate.<sup>256</sup> Next, the clerk “shall prepare the election return in duplicate on the forms supplied by the secretary of state and shall sign and shall certify such returns.”<sup>257</sup>

After local certification, the Secretary of State and Governor oversee the statewide certification process. Once the Secretary of State receives the returns from the town and city wards, the statutory framework instructs that the Secretary “shall examine, record and total such returns and shall declare elected to the office the same number of persons as the number of officers to which the district is entitled; provided that those persons declared officers-elect . . . received the highest number of votes cast for said office.”<sup>258</sup> After any statutory recount process is complete, state law directs the Governor to issue certificates of election to winning federal candidates and the Secretary of State to issue certificates of election to winning state candidates.<sup>259</sup>

New Hampshire’s statutory framework includes built-in civil enforcement schemes for clerks who refuse to certify their jurisdiction’s results or attempt to certify fraudulent results. If a town or city ward’s returns have “not been received by the secretary of state by 8:00 a.m. on the day after a state election, the secretary of state shall so notify the attorney general and the moderator, the selectmen [local governing body], and the clerk of the town or ward who shall forward such return forthwith.”<sup>260</sup> If “a town or ward clerk shall make an incorrect or incomplete election return, the moderator may require that clerk . . . to appear and amend the return according to the facts.”<sup>261</sup> And if that clerk refuses to appear and amend the return, or otherwise “intentionally neglects to make any return of votes required by law,” the statute imposes civil penalties.<sup>262</sup>

By making it clear that clerks have no authority to refuse to certify any results or certify incorrect results, and by giving both the Secretary of State and the local moderator enforcement options, New Hampshire’s election certification

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254. N.H. REV. STAT. ANN. § 659:71 (Westlaw through 2023 Regular Sess.). For a breakdown of New Hampshire’s various local election officers, see Lauren Miller, *New Hampshire Poll Workers: Rules and Constraints*, BRENNAN CTR. FOR JUST. (Oct. 13, 2023), <https://perma.cc/6ALN-8VWV>.

255. N.H. REV. STAT. ANN. § 659:71 (Westlaw through 2023 Regular Sess.).

256. *Id.* § 659:73.

257. *Id.* § 659:74.

258. *Id.* § 659:81.

259. *Id.* § 659:84.

260. *Id.* § 659:78.

261. *Id.* § 659:79.

262. *Id.* §§ 659:77(II), 659:79, 659:104.

statute ensures that clerks have no leeway to engage in bad-faith actions related to election certification. The state further supplements its civil enforcement mechanisms with a criminal penalty: If a clerk “shall knowingly make a false election return, he shall be guilty of a class B felony.”<sup>263</sup>

#### E. New Mexico

New Mexico’s certification process starts at the county level, where the county clerk presents the tallies by precinct to the county canvassing board.<sup>264</sup> Specifically, the state’s election certification statute provides that the clerk: (1) “shall . . . prepare the report of the canvass of the election returns by carefully examining the returns of each precinct to ascertain if they contain the properly executed certificates required by the Election Code and . . . whether any discrepancy, omission or error appears on the face of the election returns”; and (2) “present the report of the canvass to the county canvassing board for the board’s consideration and approval.”<sup>265</sup> Following this presentation, the county canvassing board “shall meet to approve the report of the canvass of the returns and declare the results no sooner than six days and no later than ten days from the date of the election.”<sup>266</sup>

While the statute’s language about resolving any “discrepancy” or “omission” may seem on its face to grant the county clerk and county canvassing board a considerable degree of discretion, other portions of the statute tightly control what qualifies as a discrepancy and how a discrepancy may be resolved. If, for example, it “appears that there is a discrepancy between the number of votes set forth in the certificate for any candidate and the number of electors voting as shown by the election returns” or “it appears that there is any omission, informality, ambiguity, error or uncertainty on the face of the returns,” the canvassing board must “immediately issue a summons directed to the precinct board” that supplied the returns.<sup>267</sup> If the discrepancy cannot be immediately resolved, the canvassing board must initiate a statutorily-mandated recheck of the voting machines and actual ballots.<sup>268</sup> The statute also requires the county to immediately notify the Secretary of State of any defective returns, and, if a machine recheck is necessary, the local state district court.<sup>269</sup> After reviewing the returns, the county board “shall issue a certificate of canvass of the results of the election”

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263. *Id.* § 659:80.

264. N.M. STAT. ANN. § 1-13-1(C) (West, Westlaw through July 1, 2023 of 2023 First Regular Sess.). In most counties, the county canvassing board is the Board of County Commissioners; however, counties also have discretion to alternatively designate the voter registration board as the county canvassing board. *Id.* at § 1-13-1(B).

265. *Id.* § 1-13-4(B)-(C).

266. *Id.* § 1-13-13(A).

267. *Id.* § 1-13-5(A).

268. *Id.* § 1-13-7.

269. *Id.* §§ 1-13-6, to -7.



and transmit the results to the Secretary of State, who issues certificates of election to county officers.<sup>270</sup>

For statewide candidates, the Secretary of State must then prepare a report for the State Canvassing Board.<sup>271</sup> According to the statute, the State Canvassing Board “shall meet in the state capitol on the third Tuesday after each statewide election and proceed to approve the report of the canvass and declare the results of the election.”<sup>272</sup>

If a local official attempts to derail the certification process by refusing to certify or by certifying fraudulent results, the certification statute allows any voter to go to court and immediately force certification through a specially tailored mandamus remedy. Specifically, upon “petition of any voter,” a state district court “may issue a writ of mandamus to the county canvassing board to compel it to . . . certify the election returns.”<sup>273</sup> The New Mexico Constitution also grants the New Mexico Supreme Court original jurisdiction over mandamus, affording litigants the alternative option to file a claim directly with the New Mexico Supreme Court.<sup>274</sup> While the statute grants this right to any voter, in practice the Secretary of State herself has sought a writ of mandamus to compel proper certification directly in the New Mexico Supreme Court.<sup>275</sup>

Although the exact language of the statute has changed over time, New Mexico courts have been consistent in finding these duties to be non-discretionary in nature. As early as 1888, the Supreme Court of the Territory of New Mexico declared it “quite well settled that [clerks and canvassing boards] act only ministerially, and not judicially,” explaining that “the power of the court to compel ministerial officers to act is without doubt.”<sup>276</sup> Beyond New Mexico, the court went on to note that the “doctrine that election and canvassing boards and return judges are ministerial officers, possessing no discretionary or judicial power, is settled in nearly or quite all the states.”<sup>277</sup>

#### F. Nevada

Beginning at the county level, Nevada’s certification process first requires each county’s board of commissioners to “meet and canvass the returns” from an election “[a]s soon as the returns from all the precincts and districts in any

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270. *Id.* § 1-13-13(B)-(C).

271. *Id.* § 1-13-16(A).

272. *Id.* § 1-13-15(A).

273. *Id.* § 1-13-12.

274. N.M. CONST. art. VI, § 3.

275. *See supra* Part II.B.

276. Territory *ex rel.* Lewis v. Bd. Cnty. Comm’rs of Bernalillo Cnty., 16 P. 855, 862 (N.M. 1888).

277. *Id.*; *see also* State *ex rel.* Scott v. Helmick, 294 P. 316, 321, 35 N.M. 219 para. 24 (N.M. 1930) (holding that a district court acted outside the bounds of its authority by ordering a non-statutory recount because election certification proceedings are purely ministerial duties).

county have been received.”<sup>278</sup> In doing so, the board must take steps to ensure “that the result declared represents the true vote cast.”<sup>279</sup> State law directs the county clerk to then take the result provided by the board and create “an abstract of the result, which must contain the number of votes cast for each candidate.”<sup>280</sup> Finally, the board “shall cause the county clerk to certify the abstract” and “transmit [the abstract] to the Secretary of State on or before the 10th day after the election.”<sup>281</sup>

The Secretary of State, Supreme Court, and Governor all participate in certification at the state level. After the Secretary of State receives the abstracts, “[o]n the fourth Tuesday of November after each general election, the justices of the Supreme Court, or a majority thereof, shall meet with the Secretary of State, and shall open and canvass the vote.”<sup>282</sup> At the conclusion of this official canvass, the Governor “shall issue certificates of election to and commission the persons having the highest number of votes.”<sup>283</sup>

Nevada law provides a clear statutory remedy to address any attempt to withhold certification of an election or certify a fraudulent result. The certification statute establishes that:

A certificate of election or commission must not be withheld from the person having the highest number of votes for the office because of any contest of election filed in the election or any defect or informality in the returns of any election, if it can be ascertained with reasonable certainty from the returns . . . who is entitled to the certificate or commission.<sup>284</sup>

The inclusion of “*from the person having the highest number of votes*” thus extends the statute’s reach to any county board of commissioners or statewide officer who attempts to certify a fraudulent result.

An election official involved in refusing to certify would also likely violate a criminal provision that Nevada applies to all “public officers” involved in elections.<sup>285</sup> In relevant part, the provision provides that any “public officer . . . upon whom any duty is imposed by this title, who willfully neglects his or her duty or willfully performs it in such a way as to hinder the objects and purposes of the election laws of this State . . . is guilty of a category E felony.”<sup>286</sup>

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278. NEV. REV. STAT. ANN. § 293.387(1) (West, Westlaw through 82nd Regular Sess. 2023).

279. *Id.* § 293.387(2)(b).

280. *Id.* § 293.387(3).

281. *Id.*

282. *Id.* § 293.395(2). This process applies only to “the number of presidential electors to which this State may be entitled, United States Senator, Representative in Congress, members of the Legislature, state officers who are elected statewide or by district, district judges, or district officers whose districts include area in more than one county.” *Id.* The County Clerk certifies most local offices directly. *See id.* § 293.393.

283. *Id.* § 293.395(3).

284. *Id.* § 293.397.

285. *Id.* § 293.800(2).

286. *Id.*

## G. Pennsylvania

Pennsylvania's election code delegates certification authority to county election boards, the Secretary of the Commonwealth, and the Governor. At the county level, state law requires the official canvass to occur "at nine o'clock A. M. on the third day following the primary or election."<sup>287</sup> The county board must follow a specific set of steps in tabulating the official results, including comparing the total number of votes cast against the total registrations, accounting for spoiled and extra printed ballots, and reconciling vote totals from all voting machines against the total number of votes cast in the county.<sup>288</sup> In the event of any "discrepancy in the returns," the county board must follow a specific set of steps that involves summoning the election officers of the district in question and conducting a recount.<sup>289</sup> After a five-day waiting period to allow candidates to file requests for recounts, "the county board shall certify the returns so computed in said county in the manner required by" the statutory framework and transmit the results to the Secretary of the Commonwealth.<sup>290</sup>

At the state level, Pennsylvania law provides that "[u]pon receiving the certified returns of any primary or election from the various county boards, the Secretary of the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates . . . and shall thereupon certify and file in his office the tabulation thereof."<sup>291</sup> The election code mandates that "[e]xcept as otherwise provided by law, the persons receiving the highest number of votes for any office at any election shall be declared elected to such office."<sup>292</sup> After certifying the results, the Secretary issues certificates of election directly to members of the state legislature.<sup>293</sup> For federal offices, the Secretary presents the returns to the Governor, who then issues the certificate of election.<sup>294</sup>

A writ of mandamus serves as the proper remedy for any misconduct related

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287. 25 PA. STAT. AND CONS. STAT. § 3154(a) (Purdon's, Westlaw through 2023 Regular Sess. Act 66).

288. *Id.* §§ 3154(b)-(d).

289. *Id.* § 3154(e).

290. *Id.* §§ 3154(f), 3158. Even in the event of a recount, certification must take place "no later than the third Monday following" the election. *Id.* § 2642(k).

291. *Id.* § 3159. In Pennsylvania, the Secretary of the Commonwealth is appointed by the Governor. *See* 71 PA. STAT. AND CONS. STAT. § 67.1(d)(1).

292. *Id.* § 3167. Pennsylvania case law suggests a strict interpretation of the statute. For example, even when a candidate dies days before the election, officials cannot certify the runner-up candidate as the winner; rather, the office becomes vacant until it can be filled as required by law. *See Derringe v. Donovan*, 162 A. 439, 476-77 (Pa. 1932) ("To hold that the votes cast for a contemporaneously or recently deceased winning candidate . . . shall be regarded as nullities, and that his opponent who was voted for by only a minority of the voters is in fact elected . . . is repugnant to the principle of majority rule. . . ."); *see also* Angelo Fichara & Graph Massara, *PA State Rep. Anthony DeLuca Elected Despite Being Dead: Why Was He On Ballot?* NBC 10 PHIL. (Nov. 10, 2022), <https://perma.cc/9Q6F-ZYLM>.

293. 25 PA. STAT. AND CONS. STAT. § 3164 (Purdon's, Westlaw through 2023 Regular Sess. Act 66).

294. *Id.* §§ 3163, 3166.

to election certification in Pennsylvania. State courts award the remedy “to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate or adequate remedy.”<sup>295</sup> The writ “may be used to compel performance of a ministerial duty, or to compel action in a matter involving judgment or discretion.”<sup>296</sup>

Precedent supports the fact that election certification meets all three elements required for a writ of mandamus. First, Pennsylvania courts have made clear that in the mandamus context, voters “have a clear legal right to elected representation” stemming from Article I, Section 5 of the Pennsylvania Constitution.<sup>297</sup> Pennsylvania’s election code also gives the candidate who wins the most votes a clear legal right to hold office, explicitly stating that “the persons receiving the highest number of votes for any office at any election *shall* be declared elected to such office.”<sup>298</sup>

Second, Pennsylvania’s election code consistently uses mandatory “shall” language when discussing certification, creating a “corresponding duty” for county boards and the Secretary of State to properly certify results. For example, the county board “shall . . . tabulate the figures for the entire county” and “shall” forward certified copies of the returns to the Secretary of State.<sup>299</sup> Likewise, the Secretary of State “shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates” and “shall thereupon certify and file in his office the tabulation thereof.”<sup>300</sup> In the election context, Pennsylvania courts have found that this sort of “shall” language creates clear legal duties subject to mandamus.<sup>301</sup> Finally, no other appropriate remedy exists in the event that a county board refuses to certify the results of an election; Pennsylvania’s recount and election contest provisions<sup>302</sup> do not address a situation in which a county board refuses to certify an election.

In addition to the remedies discussed above, Pennsylvania law makes it a

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295. *Jackson v. Vaughn*, 777 A.2d 436, 438 (Pa. 2001); *see also, e.g., Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012) (granting writ of mandamus ordering state house speaker to schedule special election); *Bd. of Revision of Taxes v. Phila.*, 4 A.3d 610, 627 (Pa. 2010) (explaining situation in which a request for a writ of mandamus was not appropriate due to availability of other remedies).

296. *Chanceford Aviation Properties, L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099, 1108 (Pa. 2007) (citing *Pa. Dental Ass’n v. Commonwealth Ins. Dep’t*, 516 A.2d 647, 652 (Pa. 1986)).

297. *Fagan*, 41 A.3d at 818 (citing PA. CONST. art. I, § 5).

298. 25 PA. STAT. AND CONS. STAT. § 3167 (Purdon’s, Westlaw through 2023 Regular Sess. Act 66) (emphasis added).

299. *Id.* §§ 3154(a), 3158.

300. *Id.* § 3159.

301. *Fagan*, 41 A.3d at 821-22.

302. *See, e.g.,* 25 PA. STAT. AND CONS. STAT. §§ 3261-3263 (Purdon’s, Westlaw through 2023 Regular Sess. Act 66); *id.* §§ 3312-3330.

felony offense to “make a false return of the votes cast at any primary or election.”<sup>303</sup> The penalty applies broadly to “any person” who makes the false return and any person “who shall conspire with others to commit any of the offenses herein mentioned,” meaning it would encompass misconduct by a member of a county board or any individual involved in the statewide certification process.<sup>304</sup>

#### H. Wisconsin

Wisconsin’s election certification process begins at the county level, where the first step of the official canvass must take place “[n]ot later than 9 a.m. on the Tuesday after each election” under state law.<sup>305</sup> A county board of canvassers consisting of the county clerk and two qualified electors from different political parties manages the process.<sup>306</sup> Under state law, the county board “shall open and publicly examine the returns” from each election district within their county and then “shall make separate duplicate statements showing” the total votes cast in the county for each office, the names of each person for whom votes were cast, the number of votes cast for each person, and the number of votes cast for and against any referendum question.<sup>307</sup> Immediately after the canvass, “the county clerk shall deliver or transmit to the [state] elections commission a certified copy of each statement of the county board of canvassers.”<sup>308</sup>

Wisconsin law creates a distinct set of remedies for county boards if a particular polling place fails to deliver the proper records ahead of the county canvass. If “returns have not been received from any election district or ward in the county, [the county board] shall dispatch a messenger and the person having them shall deliver the returns to the messenger.”<sup>309</sup> And if “any of the returns received are so informal or defective that the board cannot intelligently canvass them,” the law instructs that “they shall dispatch a messenger to deliver the returns back to the municipal board of canvassers with written specifications of the informalities or defects and command them to immediately complete the returns or remedy the defects in the manner required.”<sup>310</sup>

At the state level, the certification statute vests responsibility in the Wisconsin Elections Commission, a bipartisan commission that acts as the state’s chief

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303. *Id.* § 3525.

304. *Id.*

305. WIS. STAT. ANN. § 7.60(3) (West, Westlaw through 2023 Act 39). Unlike some other states, Wisconsin’s certification statute also sets statutory guidelines for unofficial election night reporting, mandating that “[o]n election night the county clerk shall keep the clerk’s office open to receive reports from the ward inspectors and shall post all returns . . . on an Internet site maintained by the county no later than 2 hours after receiving the returns.” *Id.* § 7.60(1).

306. *Id.* § 7.60(2).

307. *Id.* §§ 7.60(3)-(4).

308. *Id.* § 7.60(5).

309. *Id.* § 7.60(3).

310. *Id.*

election officer.<sup>311</sup> Upon “receipt of the certified statements from the county clerks, the commission shall record the election results by counties and file and carefully preserve the statements.”<sup>312</sup>

Remedies for malfeasance by county boards are built in throughout the statute. If “any county clerk fails or neglects to forward any statements, the commission may require the clerk to do so immediately” and can “dispatch a special messenger to obtain them” if not received eight days after a primary, or eleven days after any other election.<sup>313</sup> If “it appears that any material mistake has been made in the computation of votes,” or if “any county board of canvassers failed to canvass the votes or omitted votes from any ward or election district in the county,” then “the commission . . . may dispatch a messenger to the county clerk with written instructions to certify the facts concerning the mistake or the reason why the votes were not canvassed.”<sup>314</sup> Once any errors are resolved, the county clerk “shall immediately make a true and full answer, sign it, affix the county seal and deliver it to the messenger.”<sup>315</sup>

After the commission tabulates the statewide votes, and “[i]mmediately after the expiration of the time allowed to file a petition for recount, the commission shall make and transmit to each person declared elected a certificate of election under the seal of the commission.”<sup>316</sup> In the case of presidential elections, “the commission shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected, and the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services.”<sup>317</sup>

The Wisconsin Supreme Court has held that mandamus is the proper remedy for situations in which an election official declines to certify election results. As early as 1915, when granting a writ of mandamus to a candidate whose victory had not been certified, the Court held that the duty of county canvassing boards is “purely ministerial.”<sup>318</sup> The Court explained that the state’s certification framework was “directory” such that any “omission of duty” would result in “mandamus . . . to compel performance.”<sup>319</sup>

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311. Wisconsin Elections Comm’n, *About the WEC* (Nov. 18, 2023), <https://perma.cc/KAP9-UQJ4>; see also WIS. STAT. ANN. § 5.05 (West, Westlaw through 2023 Act 39).

312. WIS. STAT. ANN. § 7.70(1)(a) (West, Westlaw through 2023 Act 39).

313. *Id.* § 7.70(1)(b).

314. *Id.* § 7.70(3)(b).

315. *Id.*

316. *Id.* § 7.70(5)(a).

317. *Id.* § 7.70(5)(b).

318. *State ex rel. Husting v. State Bd. of Canvassers*, 150 N.W. 542, 547 (Wis. 1915).

319. *Id.* at 551-52. The structure of election administration in Wisconsin has undoubtedly changed since *State ex rel. Husting*, as the Wisconsin Elections Commission now serves as the certifying entity at the state level. See Wisconsin Elections Comm’n, *supra* note 311. Nevertheless, the underlying certification process has not changed, and thus the reasoning in *State ex rel. Husting* remains sound as it pertains to refusals to certify or fraudulent certifications.

Wisconsin's election code also ascribes criminal penalties to attempts to block certification or certify fraudulent results. Any "willful neglect or refusal by an election official to perform any of" their duties, as well as "intentionally" assisting or causing a false statement, certificate, or return of votes cast "in any election" is a Class I felony.<sup>320</sup>

## CONCLUSION

Those concerned by recent attacks on the certification process should find comfort in the track record of our existing certification system. For one, it was designed with the specific goal of preventing fraud and mitigating disputes in mind. And even in the face of an unprecedented election denier movement, state certification frameworks and their accompanying remedies have provided swift and effective relief time and time again.

But these attacks still cause harm. By basing their actions on false claims of widespread voter fraud, those who refuse to certify both validate and encourage the broader election denier movement while sowing disorder in the election administration process.<sup>321</sup> And election deniers show no sign of slowing down as the 2024 election cycle approaches. As recently as November 2023, a Republican canvass representative in La Plata County, Colorado refused to certify the county's election results.<sup>322</sup> The representative cited no evidence of fraud or any problems with the election, instead taking issue with the state's routine risk-limiting audit process.<sup>323</sup> The episode may foreshadow similar attempts in 2024; the representative's refusal came after the Colorado Republican Party circulated a letter advising county canvass boards to not certify the November 2023 election results.<sup>324</sup> The letter made allegations, without evidence, of a "rigged system,"

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320. WIS. STAT. ANN. §§ 12.13(2), 12.60 (West, Westlaw through 2023 Act 39).

321. A post-election analysis of social media posts and information conducted by the Brennan Center revealed that high-profile election deniers relied on four core, or "sticky" false narratives during the 2022 election cycle: conspiracy theories depicting voting machines as vehicles for widespread voter fraud, false claims that mail voting is insecure, baseless accusations of votes cast by noncitizens or with the names of dead people, and false claims of fraud in vote counting. Maya Kornberg, Mekela Panditharatne & Ruby Edlin, *3 Lessons on Misinformation in the Midterms Spread on Social Media*, BRENNAN CTR. FOR JUST. (Jan. 5, 2023), <https://perma.cc/6RSA-6DRC>. Spreaders of misinformation often latched onto breaking news events—including certification disputes—to spread these falsehoods elsewhere. *Id.* In other words, each refusal to certify was yet another instance for election deniers to spread false claims about elections.

322. Christian Burney, *La Plata County Republican Party Chair Shelli Shaw Refuses to Certify November Election Results*, THE DURANGO HERALD (Nov. 30, 2023), <https://perma.cc/9BZV-8E6X>.

323. *Id.*

324. Sara Wilson, *Colorado GOP Without Evidence Alleges 'Systemic Fraud' and Tells Canvass[s] Boards Not to Certify November Election*, Colorado Newsline (Nov. 22, 2023), <https://perma.cc/CZ45-37D4>.

echoing the same claims of election denial that circulated after the 2020 presidential election.<sup>325</sup>

For this reason, states may want to consider certain amendments to streamline and clarify their statutory frameworks in preparation for potential disputes in 2024 and future election cycles. To eliminate any room for error in judicial interpretation, state legislators may choose, for example, to add provisions that explicitly state that officials have a mandatory duty to certify the correct election results.<sup>326</sup> Or, if they do not have one already, states can create a statutory remedy specific to the election certification context rather than rely solely on mandamus remedies. Similarly, if they do not offer it already, states may opt to create a cause of action that a state official, candidate, or voter can bring in court against an official who refuses to certify the correct election results.<sup>327</sup> As election denial persists, any one of these small but significant steps may mean the difference between a smooth and disputed election.

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325. *Id.*

326. Alice Clapman, *How States Can Prevent Election Subversion in 2024 and Beyond*, BRENNAN CTR. FOR JUST., at 4 (Sept. 7, 2023), <https://perma.cc/TAM8-YCXK>; *see also, e.g.*, MI. CONST. art. II, § 7, cl.3.

327. Derek Tisler & Lawrence Norden, *Securing the 2024 Election*, BRENNAN CTR. FOR JUST. (Apr. 27, 2023), <https://perma.cc/4U2P-QGZ4>.