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From: Coan, Michael (SEB)
To: AO Records
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EXTERNAL SENDER

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Subject: Fwd: CREW

EXTERNAL EMAIL: Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Dear Mr. Chairman:

I hope you are well.

I wanted to send you the attached document put out by the "crew" you solicited to come speak before you at the August 6th meeting. I still am befuddled as to why an attorney (Mr. Sus) who does not live in Georgia was invited by you to come defend your position against the rule changes.

The other night I watched MSNBC, Rachel Maddow, take up this issue with Noah Bookbinder from CREW. Inviting these people in has now targeted Georgia citizens as you can see beginning on Page 34. If there is additional focus on Georgia, it's not because of the patriotic citizens. It's because of this - inviting radical, left organizations to interfere in Georgia. It's very disturbing that you helped focus the spotlight FOR NO GOOD REASON, on honest, VOLUNTEER Board of Elections Members.

Please consider this when inviting future groups.

Lastly, please have a change of heart and have an in-person meeting next week. The GSP is

aptly capable of handling any issues. Afterall, they do protect the Governor.

Very respectfully,

Salleigh Grubbs



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Election certification under threat:

A legal roadmap to protect the
2024 election including from
35 officials who have refused
to certify results



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Special thanks to Freddy Wong and Adam Markhoff.

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I. Introduction and recommendations

The 2020 election was marred by unprecedented efforts to destabilize our democracy through lies and criminal misconduct. These efforts culminated in a violent insurrection on the U.S. Capitol to stop Congress from lawfully certifying the presidential election results on January 6, 2021. The attack failed, but threats to the election certification process have only escalated, now with an increasing focus on county-level certification. Since 2020, more than 30 rogue county officials across the country have voted to deny or delay certifying election results in violation of law, often citing false claims of voter fraud or irregularities. Among those officials are avowed 2020 election deniers, individuals who acted as fake presidential electors for Donald Trump and a criminally convicted participant in the January 6th insurrection who was later removed from office in a lawsuit led by CREW.¹

The states have shut down these dangerous efforts to date—including in Arizona and New Mexico where state authorities secured emergency court orders, called writs of

¹ See Morgan Lee, Nicholas Riccardi, & Mark Sherman, *Supreme Court rejects appeal by former New Mexico county commissioner banned for Jan. 6 insurrection*, Associated Press (Mar. 18, 2024), <https://apnews.com/article/supreme-court-insurrection-capitol-attack-new-mexico-cc69572ec4a4404c69947d7d91b3960a>; *Judge removes Griffin from office for engaging in the January 6 insurrection*, CREW (Sept. 6, 2022), <https://www.citizensforethics.org/news/press-releases/judge-removes-couy-griffin-from-office-for-engaging-in-the-january-6-insurrection/>.

mandamus, compelling county officials to follow the law.² But the threat of disruption looms large in this year's elections. If county officials successfully obstruct certification, it could have a cascading effect on state and federal certification deadlines. It could also lead to mass disenfranchisement of qualified voters.

County certification is the culmination of the process by which votes are counted and reported to higher authorities.³ State laws make clear that certification is non-discretionary.⁴ It is not an opportunity for county officials to politically grandstand, lodge protest votes against election practices they dislike or investigate suspected voter fraud. State laws provide robust mechanisms outside of the certification process—including recounts, audits, evidentiary hearings before state election boards and election contests in court—to investigate suspected fraud and errors. These are the legally-designated avenues for resolving the rare cases where genuine problems arise in an election, not the certification process.⁵ For statewide races and races across multiple counties, county certification marks the end of one phase of a multi-step election process, and it must occur by a hard deadline to ensure later state and federal certification deadlines are met. If county officials try to obstruct this process, state and federal laws provide mechanisms to compel certification by statutory deadlines and to punish misconduct.

That election certification is a “ministerial,” non-discretionary function has been a settled principle of American election law since the turn of the twentieth century, when state courts across the country shut down partisan attempts by county officials to refuse to count lawful votes.⁶ But some officials emboldened by former President Trump's 2020 election denial movement now seek to weaponize this routine government process, undermining the foundations of our election infrastructure. Their reasons for denying or delaying certification have often been brazenly lawless.⁷ For instance:

- Couy Griffin, the former county official in New Mexico who a state court removed from office for engaging in the January 6th insurrection, stated: “My

² See *infra* Parts II(A)(2) and II(E)(2).

³ See Lauren Miller, *How State and Local Election Certification Works*, *State Court Report* (Mar. 4, 2024), <https://statecourtreport.org/our-work/analysis-opinion/how-state-and-local-election-certification-works>.

⁴ See generally Lauren Miller & Will Wilder, *Certification and Non-Discretion: A Guide to Protecting the 2024 Election*, 35 *Stan. L. & Pol'y Rev.* 1 (2024).

⁵ See Protect Democracy, *Election Certification is Not Optional*, at 17-18 (Mar. 2024), https://protectdemocracy.org/wp-content/uploads/2024/03/PD_County-Cert-WP_v03.1.pdf.

⁶ See George W. McCrary, *A Treatise on the American Law of Elections*, at 200, § 264 & n.1 (4th ed. 1897); Miller & Wilder, *supra*, at 26-31 (discussing cases).

⁷ As used in this report, “refusal to certify” means voting either to delay or deny certifying election results.

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.”⁸

- Jerry Forestieri and Timothy DeHaan, two former county officials in North Carolina who the state election board removed from office, said they were voting against certification to protest a federal court ruling from several years earlier that they claimed was “illegal” and “pervert[ed] our election practices.” DeHaan admitted “[w]e feel the election was held according to the law that we have, but that the law is not right.”⁹
- Ron Gould and Hildy Angius, two current county officials in Arizona, said their votes to delay certification were purely a “political statement” to protest election practices in a different county.¹⁰

County officials in other states, such as Georgia and Pennsylvania, have offered a veneer of legal justification for refusing to certify.¹¹ Others have withheld certification based on arbitrary and shifting demands for non-essential election records.¹² No matter these officials’ motives or the sincerity of their concerns, the law gives them no “discretion” not to certify. Rather, as the Georgia Supreme Court explained more than a century ago, “[t]he duties of [election] canvassers are purely ministerial; they perform the mathematical act of tabulating the votes of the different precincts as the [election] returns come to them.”¹³

This report identifies 35 county officials who previously refused to certify elections in apparent violation of state and federal law, and who may be in a position to do so again in this year’s general election.¹⁴ It focuses on the eight states where county officials have unlawfully refused to certify elections since 2020: Arizona, Colorado, Georgia, Nevada, New Mexico, North Carolina, Pennsylvania and Michigan. The report also outlines legal remedies available to state and federal authorities, as well as voters, to protect certification at the county level. These remedies include emergency court orders to

8 Susan Montoya Bryan & Morgan Lee, *Screams, threats as New Mexico counties certify vote*, Associated Press (June 17, 2022), <https://apnews.com/article/2022-midterm-elections-new-mexico-government-and-politics-donald-trump-fa26178d77b421ff7317d1a6ae83e0c4>.

9 Doug Bock Clark, *Some Election Officials Refused to Certify Results. Few Were Held Accountable*, ProPublica (Mar. 9, 2023), <https://www.propublica.org/article/election-officials-refused-certify-results-few-held-accountable>.

10 Bob Christie, *2nd Arizona county delays certifying election, for now*, Associated Press (Nov. 21, 2022), <https://apnews.com/article/2022-midterm-elections-arizona-phoenix-83aa473b9c0549c87d1c2125ddcfb655>.

11 See *infra* Parts II(C)(2) and II(G)(2).

12 See Justin Glawe, *Trump Allies Sue to Allow Election Officials to Refuse to Certify Results*, Rolling Stone (June 4, 2024), <https://www.rollingstone.com/politics/politics-features/trump-think-tank-lawsuit-election-officials-refuse-certify-results-1235032235/>.

13 *Davis v. Warde*, 118 S.E. 378, 391 (Ga. 1923).

14 Unless indicated otherwise, all references to “elections” include both primary and general elections. This report does not contain any non-public, personally identifiable information concerning election officials in any state.

compel compliance with the law, criminal charges to punish and deter misconduct and legal procedures to remove obstructionist officials from their county positions.

In recent years, conspiracy theories about elections and the certification process have contributed to an increase in violence, threats, harassment, doxxing and other forms of intimidation toward election workers. While we strongly advocate using appropriate legal mechanisms to hold accountable any county election official who defies the law, violence and intimidation have no place in our democracy, regardless of any misconduct by government officials.

Based on our review of the states' responses to certification abuses since the 2020 election, we recommend the following **preventative** and **remedial measures**:

- State election boards, secretaries of state, attorneys general and local prosecutors should explicitly advise county officials of their non-discretionary certification duties and the penalties for non-compliance before any election, as Michigan authorities did earlier this year.¹⁵
- States authorities should bring expedited mandamus litigation to swiftly resolve certification disputes in the state's highest court, as New Mexico and Nevada authorities have.¹⁶
- States should utilize mechanisms, where available, for state election officials to step in to certify elections in place of obstructionist county officials.¹⁷
- States should utilize mechanisms, where available, for state election boards or courts to remove county officials who willfully disregard their legal duties, as North Carolina, New Mexico and Nevada have in place.¹⁸
- If county officials willfully violate the law, state authorities should pursue appropriate civil and criminal remedies. If state authorities fail to act, then federal authorities should pursue appropriate civil and criminal remedies to protect federal voting rights.¹⁹

¹⁵ See *infra* Part II(H)(2).

¹⁶ See *infra* Parts II(D)(2) and II(E)(2).

¹⁷ See *infra* Parts II(B)(3)(a), II(F)(3)(a) and II(H)(3)(a).

¹⁸ See *infra* Parts II(D)(3)(c)(4), II(E)(2) and II(F)(3)(c)(4).

¹⁹ This report does not exhaustively detail all potential legal remedies to protect county-level certification; it discusses only the most viable remedies as of the date of the report's publication. Nor does this report evaluate the state law remedies that may be available if county officials certify an election for the wrong candidate. The report also focuses on individuals who remain in positions of power or who may be so appointed for the 2024 general election, not those who have been removed or resigned from office.

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

Arizona



II. STATE-BY-STATE ANALYSIS

A. ARIZONA

1. Election certification framework at the county level

In Arizona, each county’s “board of supervisors” is the governing body responsible for election certification.²⁰ In a general election, the board must “meet and canvass the election” six to twenty days after it occurs.²¹ In a primary election, the board of supervisors must canvass and deliver to the secretary of state the returns within thirteen days after the election.²² Each board of supervisors has three to five elected members, depending on the county’s population.²³ Although Arizona has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of the boards of supervisors.

Arizona law requires all canvasses to “be made in public by opening the returns, other than the ballots, and determining the vote of the county, by polling places, for each person voted for and the vote for and against each proposed constitutional amendment

²⁰ Ariz. Rev. Stat. §§ 16-403, 16-642(A).

²¹ A.R.S. § 16-642(A).

²² A.R.S. § 16-645(B).

²³ A.R.S. § 11-211.

and ... measure appearing upon the ballot.”²⁴ While in some cases the canvass can be postponed if “the returns from any polling place in the election district where the polls were opened and an election held are found to be missing,” county board of supervisors’ canvasses are specifically excluded from this postponement provision.²⁵ Arizona law allows parties to bring election contests in court after the statewide canvass to address allegations of fraud or election misconduct, but boards of supervisors have no legal authority to investigate the validity of such claims.²⁶

“When the result of the canvass is determined,” the county’s “official canvass ... shall be entered on the official record of the election district” and the board of supervisors “shall deliver a copy of the official canvass...to the secretary of state.”²⁷ Arizona law requires the official canvass to include, among other things, the number of ballots cast, the number of ballots rejected and the number of votes received by each candidate.²⁸ In a general election, the secretary of state shall canvass the return on the third Monday following a general election.²⁹ In a primary election, the secretary of state shall canvass the return and issue a letter declaring nomination no later than the third Thursday following the election.³⁰ Then, once the statewide canvass is complete, the secretary of state “must promptly issue a Certificate of Nomination or Certificate of Election to each legislative, statewide, and federal candidate who received the highest number of votes for each office at the election.”³¹

2. County officials who have refused to certify elections

COCHISE COUNTY, AZ

On November 18, 2022, Tom Crosby and Peggy Judd of the Cochise County Board of Supervisors voted to [delay](#) certification of the 2022 general election results, citing purported concerns about voting machines. The Cochise County Board of Supervisors

²⁴ A.R.S. § 16-643.

²⁵ A.R.S. § 16-642(C).

²⁶ See, e.g., A.R.S. §§ 16-671 to 16-678 (Article 13 - Contest of Elections) (no mention of board of supervisors having an investigative role).

²⁷ A.R.S. § 16-646(A), (C).

²⁸ A.R.S. § 16-646(A)(1)-(7).

²⁹ A.R.S. § 16-648(A).

³⁰ A.R.S. § 16-645(B).

³¹ Arizona Secretary of State, Election Procedures Manual (2023), https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf [hereinafter Arizona EPM]; A.R.S. § 16-645(B); A.R.S. § 16-650.

then met on November 28, 2022, and again [voted](#) to postpone certification by the same 2-1 vote. The [Arizona Secretary of State](#) and [an advocacy group](#) filed mandamus lawsuits against the board to compel certification. The cases were [consolidated](#) and on December 1, 2022, three days after the statutory deadline to certify the election, the court [ordered](#) the board to complete the canvass and provide it to the Secretary of State that day. Judd and the third member of the board then voted to certify the election, but Crosby was [absent](#) and did not vote to certify. On November 27, 2023, a state grand jury returned an [indictment](#) charging Judd and Crosby with the felony offenses of interference with an election officer and conspiracy.

Tom Crosby

Current position: [Cochise County Board of Supervisors, District 1 County Supervisor, Vice-Chairman.](#)

Refusal to certify: [General Election, Cochise County, 2022: Crosby voted with Peggy Judd to delay certification of the election results beyond the statutory certification deadline.](#)

Stated reasons for refusal to certify: On November 18, 2022, Crosby moved to table the vote on certification over purported concerns about the county's voting machines, until "such evidence about lawful certification by an accredited laboratory is presented and confirmed by persons with expertise in that field" (2:15:28-2:15:51). At the meeting, State Elections Director Kori Lorick explained that all voting equipment in the county was in compliance with the law. Lorick "personally provided documentation to the supervisors showing the machines were certified." At the meeting on November 28, 2022, when the board again voted to postpone certification, Crosby added that the "meeting should have provided the opportunity for 'subject matter experts' on voting machines and representatives of the secretary of state to discuss the issue." Crosby's claims about voting machines had already been [debunked](#) by federal elections officials and the Arizona Supreme Court.

Peggy Judd

Current position: Cochise County Board of Supervisors, District 3 County Supervisor.

Refusal to certify: General Election, Cochise County, 2022: Judd voted to delay certification of the election results beyond the statutory certification deadline.

Stated reasons for refusal to certify: Judd voted for Crosby's motion to table the vote on certification because of purported concerns about the state's voting machines, but later claimed that her true intent was to protest election administration in Maricopa County. She justified her pretextual voting machine objections by claiming, "It's the only thing we have to stand on." There is no credible evidence of widespread fraud or irregularities in the 2022 general election in Maricopa County.

MOHAVE COUNTY, AZ

After the 2020 general election, Ron Gould and Hildy Angius of the Mohave County Board of Supervisors voted to delay certifying the election results, amid pressure from the Arizona Republican Party. Similarly, after the 2022 general election, Gould, Angius and another supervisor, Travis Lingenfelter, voted to delay certifying the election results as a political protest against election practices in another county. The three ultimately joined the other board members to certify the election, but Gould and Angius claimed they did so "under duress."

Ron Gould

Current position: Mohave County Board of Supervisors, District 5 County Supervisor

Refusal to certify: General Election, Mohave County, 2020: Mohave County was one of the counties in which officials initially voted to delay certifying the election results, although they ultimately certified by the statutory deadline.

General Election, Mohave County, 2022: Gould and two other board

members initially voted against certifying the election results. Gould ultimately voted to certify the election and claimed he was doing so “under duress.”

Stated reasons for refusal to certify: 2020 General Election: Gould stated, “There are lawsuits all over the place on everything, and that’s part of the reason why I’m in no big hurry to canvass the election.” None of these lawsuits impacted the outcome of the 2020 election in Arizona.

2022 General Election: Gould admitted his vote was a “political” protest based on his view of election practices in Maricopa County: “It is purely a political statement. But it’s the only way that we can make that statement.” Gould later stated, “Originally, we postponed it from last Monday’s meeting as a political statement to let the Maricopa County Board of Supervisors know that we were displeased with the poor handling of their election.” There is no credible evidence of widespread fraud or irregularities in the 2022 general election in Maricopa County.

Additional information: In 2024, Gould filed a lawsuit to challenge Arizona’s prohibition of hand-counting ballots. The lawsuit alleged that a letter Arizona Attorney General Kris Mayes sent to the board, which informed them that conducting a hand count would violate Arizona law, amounted to “intimidation and threat, and abuse of her office.”

Hildy Angius

Current position: Mohave County Board of Supervisors, District 2 County Supervisor

Refusal to certify: General Election, Mohave County, 2020: Angius seconded Gould’s motion to delay certification, but ultimately certified by the statutory deadline.

General Election, Mohave County, 2022: Angius, along with Ron Gould and Travis Lingenfelter, initially voted to delay certifying the election results. Angius ultimately voted to certify the election “under duress.”

Stated reasons for refusal to certify: Angius said her vote was in protest of election practices in Maricopa County: “This is 2020 redux. If we don’t certify today, we’re just making a statement of solidarity.” In a November

22, 2022, [Facebook](#) comment, Angius wrote that her vote “was a political message.”



Hildy Angius, Mohave County Supervisor District 2

Robert Hunt it is solid in Mohave County. Our vote was a political message. We could not have said it more clearly. But nobody seemed to bother to actually listen to what was said instead raising it to mass hysteria .

November 22, 2022

In another comment on the same post, Angius wrote, “Maricopa County has made a mockery of our elections and by doing so has diluted our votes here in Mohave County.” She also made the baseless claim that “this election was rigged.” There is [no credible evidence](#) of widespread fraud or irregularities in the 2022 general election in Maricopa County.



Author

Hildy Angius, Mohave County Supervisor District 2

Thank you for your opinion. Maricopa County has made a mockery of our elections and by doing so has diluted our votes here in Mohave County. If you had listened to our meeting instead of jumping to conclusions you would have heard that we intend on certifying on November 28th which is well within the law. The fact that everyone’s hair caught on fire at the mere mention in delaying certification confirms my belief that this election was rigged.

Travis Lingenfelter

Current position: [Mohave County Board of Supervisors, District 1 County Supervisor](#)

Refusal to certify: General Election, Mohave County, 2022: Along with Angius and Gould, Lingenfelter initially [voted to delay](#) certifying the election results. He ultimately [voted](#) to certify the election.

Stated reasons for refusal to certify: Justifying his vote to delay certification, Lingenfelter [explained](#), “A significant percentage of Arizona’s voters seem to have misgivings about the state of Arizona’s election process...I’ve received emails from Georgia, Michigan and

telephone calls from all over the country. If they're watching us, the question is: When was the last time you changed someone's mind by guilting them, shaming them, or just telling them to sit down and shut up? I would guess the answer to that question would be 'never'. We must tackle the issue of election integrity by embracing the pillars of good governance." According to public reporting, he also stated that his vote to delay approval of the canvass was "a political statement to Maricopa County officials and the Arizona legislature" and was necessary "for better performance in future election years." There is no credible evidence of widespread fraud or irregularities in Arizona elections.

3. Legal remedies under Arizona law

A) WHAT IF A BOARD OF SUPERVISORS REFUSES TO CERTIFY?

(1) Mandamus

Mandamus, an emergency form of court order compelling government officials to comply with the law, is the proper remedy to compel county certification in Arizona. A court may issue a writ of mandamus upon "the verified complaint of the party beneficially interested, 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 office."³² Mandamus is a form of "special action" governed by separate rules of procedure,³³ and may be brought in the Superior Court, Court of Appeals, or the Arizona Supreme Court,³⁴ though the state supreme court's original jurisdiction in such cases is "highly discretionary."³⁵

Mandamus is available in Arizona when: (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

³² A.R.S. § 12-2021.

³³ Ariz. R. P. Spec. Act. 1, 3(a).

³⁴ Ariz. R. P. Spec. Act. 4(a).

³⁵ *Forty-Seventh Legislature v. Napolitano*, 143 P.3d 1023, 1026 (Ariz. 2006) (en banc).

acted arbitrarily and unjustly and in the abuse of discretion”; and (2) there is “no other ‘plain, speedy and adequate remedy at law.’”³⁶

A board of supervisors’ refusal to certify would meet both conditions for mandamus relief. First, certification by the county board of supervisors is a ministerial, non-discretionary duty. The statute repeatedly uses the word “shall” in describing the board’s duties.³⁷ And in Arizona, “[t]he use of the word “shall” indicates a mandatory intent by the legislature.”³⁸ Moreover, the Arizona Election Procedures Manual, which includes statutorily-required guidance by the Arizona Secretary of State,³⁹ states that the board has a “non-discretionary duty to canvass” and “has no authority to change vote totals, reject the election results, or delay certifying the results without express statutory authority or a court order.”⁴⁰ Because the Election Procedures Manual “has the force of law,”⁴¹ it is enforceable through a mandamus action.

Second, there is no other adequate remedy under Arizona law to timely compel certification. The election code authorizes election contests, but only “after completion of the canvass of the election and declaration of the result thereof by the secretary of state.”⁴²

The Arizona Attorney General, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus as “part[ies] beneficially interested,” a term courts have construed “liberally to promote the ends of justice.”⁴³ The Arizona attorney general has additional authority to bring mandamus actions

36 *Rhodes v. Clark*, 373 P.2d 348, 350 (Ariz. 1962).

37 See, e.g., A.R.S. § 16-642(A) (“The governing body holding an election *shall* meet and canvass the election...”) (emphasis added); A.R.S. § 16-645(A) (for nominations to be a party candidate, after the governing body “has completed its canvass of precinct returns, the person having the largest number of votes [...] *shall* be declared the nominee of the party for that office and *shall* be given a certificate of nomination for that office by the board or governing body”); A.R.S. § 16-646(A) (“When the result of the canvass is determined, a statement, known and designated as the official canvass, *shall* be entered on the official record of the election district.”) (emphasis added).

38 *Ins. Co. of N. Am. v. Superior Ct. In & For Cnty. of Santa Cruz*, 800 P.2d 585, 588 (Ariz. 1990); see also *HCZConst, Inc. v. First Franklin Fin. Corp.*, 18 P.3d 155, 158 (Ariz. Ct. App. 2001) (“The ordinary meaning of ‘shall’ in a statute is to impose a mandatory provision.”) (citations omitted).

39 See A.R.S. § 16-452(A) (the Secretary “shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots”); A.R.S. § 16-452(B) (“The rules shall be prescribed in an official instructions and procedures manual to be issued not later than December 31 of each odd-numbered year immediately preceding the general election”).

40 Arizona EPM at 248.

41 *Arizona Pub. Integrity All. v. Fontes*, 475 P.3d 303, 308 (Ariz. 2020).

42 A.R.S. § 16-673.

43 *Arizona Pub. Integrity All.*, 475 P.3d at 307.

under the Arizona Rules of Procedure for Special Actions,⁴⁴ and the Arizona election code.⁴⁵

The 2022 mandamus litigation in Cochise County, discussed above, is instructive. There, the Arizona secretary of state and Arizona voters filed mandamus actions after the County Board of Supervisors delayed certification.⁴⁶ A court granted the writ, and ordered the board to certify the election that day.⁴⁷ Two of the three board members, including one who had previously voted to delay certification, voted to certify on December 1, 2022, after the statutory deadline.

(2) Arizonans' constitutional right to vote

A county board's refusal to certify may also violate the Arizona Constitution's free and equal elections clause, which provides: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."⁴⁸ "Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted."⁴⁹ This right may be violated if, for example, county officials indefinitely delay certification and the lawful votes from that county are not counted, thereby disenfranchising that county's voters. An aggrieved voter could bring an action for injunctive relief under the Arizona Constitution.⁵⁰ The need to protect Arizonans' fundamental right to vote would also strongly reinforce any request for mandamus relief.

44 See Ariz. R. P. Spec. Act. 2(a)(1) ("Any person who previously could institute an application for a writ of mandamus ... may institute proceedings for a special action."); *State v. Board of Sup'rs of Yavapai County*, 127 P. 727, 728 (Ariz. 1912) (example of Arizona Attorney General bringing mandamus action prior to enactment of the special action procedures).

45 A.R.S. § 16-1021 (authorizing the Arizona Attorney General to enforce provisions of Title 16 "through civil and criminal actions").

46 Verified Complaint for Special Action Relief, *Hobbs v. Crosby*, No. CV202200553, 2022 WL 17406170 (Ariz. Super. Ct. Dec. 1, 2022), <https://www.documentcloud.org/documents/23320751-hobbs-v-crosby-nov-28-2022-verified-complaint-for-special-action-relief>; Verified Special Action Complaint, *Arizona Alliance of Retired Americans v. Crosby*, No. CV202200552 (Ariz. Super. Ct.) <https://www.democracymocket.com/wp-content/uploads/2022/11/2022.11.28-Verified-Special-Action-Complaint.pdf>.

47 Minute Entry: Order Re: Special Action, *Arizona Alliance of Retired Americans v. Crosby*, No. CV202200552 (Ariz. Super. Ct. Dec. 1, 2022), <https://statesuniteddemocracy.org/wp-content/uploads/2023/02/2022-12-01-ME-Re-Special-Action-Hearing.pdf>.

48 Ariz. Const. art. 2, § 21.

49 *Chavez v. Brewer*, 214 P.3d 397, 408 (Ariz. Ct. App. 2009).

50 See *id.* (permitting such a claim).

B) WHAT IF A BOARD OF SUPERVISORS DEFIES A COURT ORDER TO CERTIFY?

(1) Court appointments to carry out order

Like other states,⁵¹ Arizona has a state equivalent of Federal Rule of Civil Procedure 70, which empowers courts to appoint someone in place of an official who defies a court order.⁵² The Arizona rule provides that when a judgment requires a party to “perform any...specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party’s expense—by another person appointed by the court.”⁵³ “When done, the act has the same effect as if done by the party.”⁵⁴ “The court also may hold the disobedient party in contempt.”⁵⁵

As election law scholar Derek Muller has explained, enforcement of certification requirements through state equivalents of Federal Rule of Civil Procedure 70 “allows courts to efficiently resolve election disputes without inviting grandstanding.”⁵⁶

(2) Civil contempt

A county official who defies a court order could also be held in civil contempt. In Arizona, “civil contempt is the disobedience of a court order directing an act for the benefit or advantage of the opposing party to the litigation.”⁵⁷ The court can impose civil contempt sanctions “to coerce the person to do or to refrain from doing some act.”⁵⁸ Sanctions may include fines and imprisonment.⁵⁹

⁵¹ See *infra* Parts II(B)(3)(b)(1), II(C)(3)(b)(1), II(D)(3)(b)(1) and II(E)(3)(b)(1).

⁵² See Fed. R. Civ. Pro. 70(a).

⁵³ See Ariz. R. Civ. P. 70(a).

⁵⁴ Ariz. R. Civ. P. 70(a).

⁵⁵ Ariz. R. Civ. P. 70(e).

⁵⁶ See Derek Muller, *Election Subversion and the Writ of Mandamus*, 65 Wm. & Mary L. Rev. 327, 377 (2023) (contrasting enforcement through Rule 70 equivalents and contempt orders).

⁵⁷ *Ong Hing v. Thurston*, 416 P.2d 416, 422 (Ariz. 1966).

⁵⁸ *Stoddard v. Donahoe*, 228 P.3d 144, 149 (Ariz. Ct. App. 2010) (citing *Korman v. Strick*, 652 P.2d 544, 547 (Ariz. 1982)).

⁵⁹ See *Korman v. Strick*, 652 P.2d 544 (Ariz. 1982); *Lanfor V. MHC Cont'l, LLC*, No. C2016-5807, 2018 Ariz. Super. LEXIS 147, *38-40 (Ariz. Super Ct., 2018).

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

Arizona is the only state that has brought criminal charges against county officials identified in this report who have refused to certify elections.⁶⁰ Those charges allege Cochise County Supervisors Peggy Judd and Tom Crosby “conspired to delay the canvass of votes cast in Cochise County in the November 2022 General Election.”⁶¹ The Cochise County case could serve as a model for pursuing criminal accountability against county officials who willfully abuse or delay certification.

(1) Criminal provisions of the election code

A county official who willfully subverts the certification process could be prosecuted under various provisions of the Arizona election code.

Judd and Crosby have been charged with interference with an election officer, a class 5 felony. Under A.R.S. § 16-1004(A) “[a] person who at any election knowingly interferes in any manner with an officer of such election in the discharge of the officer’s duty, or who induces an officer of an election or officer whose duty it is to ascertain, announce or declare the result of such election, to violate or refuse to comply with the officer’s duty or any law regulating the election” is guilty of a felony, subject to a presumptive one-and-a-half year prison sentence.⁶² Refusal to certify an election not only interferes with the other board of supervisors’ ability to canvass the county results, it also interferes with the secretary of state’s duty to complete the canvass of the election.

Under A.R.S. § 16-1009, “[a] public officer upon whom a duty is imposed by this title, who knowingly fails or refuses to perform that duty in the manner prescribed by law, is guilty of a class 3 misdemeanor,” subject to a maximum of thirty days imprisonment absent enhancement.⁶³ Similarly, under A.R.S. § 16-1010, “[a] person charged with performance of any duty under any law relating to elections who knowingly refuses to perform such duty, or who, in his official capacity, knowingly acts in violation of any provision of such law, is guilty of a class 6 felony,” subject to a presumptive one year prison sentence.⁶⁴ Given the clear duty to certify elections as discussed above, these statutes could apply to county officials who “knowingly” refuse to certify. Under A.R.S. § 16-452(C), “[a] person who violates any rule adopted pursuant to this section

60 See Press Release, Attorney General Mayes Announces Grand Jury Indictment, Ariz. Att’y Gen. Kris Mayes (Nov. 29, 2023), <https://www.azag.gov/press-release/attorney-general-mayes-announces-grand-jury-indictment>.

61 *Id.*

62 A.R.S. § 13-702(D).

63 A.R.S. § 13-707(A).

64 A.R.S. § 13-702(D).

[related to the Election Procedures Manual] is guilty of a class 2 misdemeanor,” subject to a maximum of four months’ imprisonment absent enhancement.⁶⁵ An official who violates the “non-discretionary duty to canvass” described in the manual (discussed above) could be charged under this provision.⁶⁶

(2) Conspiracy

A county official who agrees with others to illegally disrupt or delay certification may be charged with conspiracy. “A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense.”⁶⁷ “The elements of conspiracy are (1) an intent to promote or aid the commission of an offense, (2) an agreement with one or more persons that one of them or another person will engage in conduct constituting the offense and (3) an overt act committed in furtherance of the offense.”⁶⁸ “[C]onspiracy is an offense of the same class as the most serious offense which is the object of or result of the conspiracy.”⁶⁹

(3) Criminal contempt

A county official who defies a court order to certify may be held in criminal contempt of court. Under A.R.S. § 12-861, “[a] person who wilfully disobeys a lawful writ, process, order or judgment of a superior court by doing an act or thing therein or thereby forbidden, if the act or thing done also constitutes a criminal offense, shall be proceeded against for contempt.” Unlike civil contempt, which is intended to compel compliance with an order, “criminal contempt is characterized by imposition of an unconditional sentence for punishment or deterrence.”⁷⁰ “[A] person cannot be punished for criminal contempt by imprisonment for longer than six months, or by a fine greater than \$300, unless he has been found guilty by a jury or has waived the right to trial by jury.”⁷¹

65 A.R.S. § 13-707(A).

66 Arizona EPM at 248.

67 A.R.S. § 13-1003(A).

68 *State v. Newman*, 688 P.2d 180, 185 (Ariz. 1984).

69 A.R.S. § 13-1003(D).

70 *State v. Cohen*, 489 P.2d 283, 287 (Ariz. 1971).

71 Ariz. R. Crim. P. 35.4(a).

FORWARD

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

Colorado



STATE-BY-STATE ANALYSIS

B. COLORADO

1. Election certification framework at the county level

In Colorado, each “county canvass board” is responsible for certifying elections.⁷² Boards consist of three or five people, with registered electors of the county appointed by chairpersons of the two major political parties (with an equal number of one or two representatives from each party), along with the county clerk.⁷³ Political party appointees can be appointed as late as fifteen days before the election.⁷⁴ Although Colorado has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of the county canvass boards.

Each county canvass board “shall,” within 22 days of any election, “(a) Reconcile the ballots cast in an election to confirm that the number of ballots counted in that election does not exceed the number of ballots cast in that election; (b) Reconcile the ballots cast in each precinct in the county to confirm that the number of ballots cast does not exceed the number of registered electors in the precinct; and (c) Certify

⁷² Colo. Rev. Stat. § 1-10-101.5.

⁷³ C.R.S. § 1-10-101(1)(a); 8 Colo. Code Regs. § 1505-1:10.2 (2023).

⁷⁴ C.R.S. § 1-10-101(1)(a).

[by majority] the abstract of votes cast in any election and transmit the certification to the secretary of state.”⁷⁵ The abstract of votes is the count of “the number of votes counted for and against each candidate,” prepared by election judges.⁷⁶ County canvassing boards do not have the legal authority “to investigate questions concerning irregularities, frauds, and illegal votes in the ballot box”; rather, “any such complaints are properly raised in an election contest case” filed in court.⁷⁷

In the event of any clerical errors, “the county clerk and recorder, after consultation with the election judges, shall make any correction required by the facts of the case.”⁷⁸ If a majority of a board is unable to certify the abstract of votes within that 22-day period for any reason, it nevertheless “shall transmit the non-certified abstract of votes to the secretary of state along with a written report detailing the reason for non-certification.”⁷⁹ Even if the canvass board finds that the method of making or certifying returns does not conform to the law, the returns “shall nevertheless be canvassed if they are sufficiently explicit in showing how many votes were cast for each candidate.”⁸⁰

The secretary of state, in turn, “certif[ies] the official statewide election results for all candidates” after “receiving, compiling, and totaling the final abstracts of votes cast for all elections from the counties,”⁸¹ and “[i]n the event that an accurate and verifiable determination of the count cannot be made and therefore the secretary of state is unable to certify the election of any candidate,” must “issue a report indicating the nature of the irregularity rather than issue a certification.”⁸²

75 C.R.S. §§ 1-10-101.5, 1-10-102(1).

76 C.R.S. § 1-13.5-615.

77 *Goff v. Kimbrel*, 849 P.2d 914, 917 (Colo. App. 1993); see C.R.S. § 1-11-201; C.R.S. § 1-11-213.

78 C.R.S. § 1-10-104(2).

79 C.R.S. § 1-10-101.5(1)(c); see also C.R.S. § 1-10-103(1) (“Immediately after the official abstract of votes cast has been certified and no later than the twenty-second day ... the county clerk and recorder shall transmit to the secretary of state the portion of the abstract of votes cast that contains the statewide abstract of votes cast.”)

80 C.R.S. § 1-10-104(1) (emphasis added).

81 C.R.S. § 1-10-105(1).

82 C.R.S. § 1-10-105(4).

2. County officials who have refused to certify elections⁸³

The major political parties in Colorado have not, as of the time of this publication, appointed members to county canvass boards. But parties often re-appoint the same individuals in successive elections, and thus may re-appoint the individuals listed below for the 2024 election.

The bipartisan Colorado County Clerks Association has commendably been a vocal opponent of election disinformation and county-level election subversion.⁸⁴

BOULDER COUNTY, CO

Theresa Watson

Position: Previously a member of the Boulder County Canvass Board. If re-appointed by the Boulder County Republican Party, Watson would again serve as a county canvass board member for the Boulder County Canvass Board.

Refusal to certify: Coordinated Election, Boulder County, 2023: Watson voted against certifying the results of the November 7, 2023, Coordinated Election, but was unsuccessful in preventing certification.

Presidential Primary Election, Boulder County, 2024: Watson voted against certifying the results of the presidential primary, but was unsuccessful in preventing certification.

Stated reasons for refusal to certify: 2023 General Election: Watson cited “vulnerabilities in the Boulder County Elections, drop boxes and

⁸³ In addition to the counties listed below, reporting indicates that an unidentified Larimer County board member voted against certifying election results in the fall of 2023. *See* Nick Coltrain, *Colorado officials warn of new frontier in election denial as more Republicans refuse to certify vote totals*, The Denver Post (Apr. 8, 2024), <https://www.denverpost.com/2024/04/08/colorado-election-denial-county-canvass-boards-election-officials-protests-trump/>. The name of that board member is not publicly available.

⁸⁴ *See, e.g.,* Statement of Colorado County Clerks Association (Dec. 8, 2023), <https://coloradonewslines.com/wp-content/uploads/2023/12/CCCA-Exec-Board-Statement-on-Elections-12.8.23.pdf>.

the signature verification process” and “a lack of proficient training for signature verification judges who are responsible for ‘ensuring that only those individuals eligible to vote have their vote counted.’”

2024 Primary Election: Watson cited “her concern that 80% of voters use our secure 24-hour drop boxes and she feels the surveillance on them is not adequate.” Watson also objected to the use of mail-in ballots since they have to go through a signature verification process. A Boulder County press release states that Watson’s objections are “completely outside the scope of the duty of the Canvass Board. Her decision not to sign does not impact the certification.” And despite Watson’s objections, Colorado has a long history of successful and secure mail-in voting.

Additional information: In 2021, the Colorado Times Recorder reported that Watson participated in an online chat room with members of the U.S. Election Integrity Plan, a “QAnon-linked election fraud conspiracy group” that “coordinated a caravan of protestors from Denver to Washington D.C. for the January 6th protest at the U.S. Capitol, providing routes, racial maps of the city, and a forum where attendees discussed tactics and weapons to bring to the event.” Watson “referenced videos about how to use a ‘tactical pen,’ which is a heavy metal pen intended not to be used as a writing instrument but as a weapon for stabbing an opponent.” Watson wrote, “A tactical pen is a good equalizer to carry in a crowd...Jason Hanson, former CIA agent has a good quality one—I’d avoid Amazon and Walmart versions—and he has many videos about how to use and getting away quick. Plus things you thought you’d never need to know.”

Boulder County Republicans also declined to certify the 2020 and 2022 elections while Watson was serving as Chair.

In 2023, the Colorado Republican party issued a press release urging county canvass boards to vote against certifying elections.

EL PASO COUNTY, CO

Candice Stutzriem

Position: Previously a member of the El Paso County Canvass Board. If re-

appointed by the El Paso County Republican Party, Stutzriem would again serve as a county canvass board member for the El Paso County Canvass Board.

Refusal to certify: Coordinated Election, El Paso County, 2023: Stutzriem elected not to certify the election results but was unsuccessful in preventing certification.

Presidential Primary Election, El Paso County, 2024: Stutzriem voted against certifying the election results but was unsuccessful in preventing certification.

Stated reasons for refusal to certify: 2023 Coordinated Election: Stutzriem released a “Minority Report” that included numerous unsubstantiated claims and conspiracy theories, including that fraudulent ballots could be “created in the wild” and “stuffed into obscure drop boxes”; that the Secretary of State did not sufficiently “prevent non-citizens from appearing on the voter rolls nor to prevent them from voting”; and that the widely-debunked film 2000 Mules—which was recently pulled from distribution—demonstrated “what can and does happen at voter drop boxes.”

2024 Presidential Primary Election: Stutzriem reportedly “said her decision not to certify the March presidential primary was ‘based entirely on the actions’ of [Secretary of State] Griswold and the Secretary’s statements about Trump in the recent 14th Amendment lawsuit by voters seeking to bar him from the ballot.” In reality, Secretary Griswold was a defendant in that lawsuit, which was filed against her by Republican and unaffiliated voters.

JEFFERSON COUNTY, CO

Nancy Pallozzi

Position: Previously a member of the Jefferson County Canvass Board. If re-appointed by the Jefferson County Republican Party, Pallozzi would serve as a member for the Jefferson County Canvass Board. Pallozzi serves

as the Chair of Jefferson County GOP.

Refusal to certify: Coordinated Election, Jefferson County, 2023: Pallozzi voted against certifying the election results but was unsuccessful in preventing certification.

Presidential Primary Election, Jefferson County, 2024: Pallozzi voted against certifying the election results but was unsuccessful in preventing certification.

Stated reasons for refusal to certify: 2023 General Election: Pallozzi outlined her objections in a “Minority Report,” dated November 28, 2023, that cited, among other things: a mismatch in “duplication” regarding “overvotes” and “undervotes,” under-scrutinized signature verification such that she witnessed mismatched signatures that did not get flagged, undeliverable ballots without proper chain of custody including 20,000 unattended ballots left in open, the rejection of her requests that wires of tabulators be exposed for voter confidence and for a bipartisan audit and the lack of thoroughness of a random audit.

2024 Presidential Primary Election: Pallozzi reportedly refused to certify because she “didn’t see the chain of custody for undeliverable ballots, which she wrote was her ‘sole reason’ for not signing off.”

Additional information: In July 2022, Pallozzi reportedly participated in a call with Republican activists to discuss ways to block certification of primaries.

3. Legal remedies under Colorado law

A) WHAT IF THE CANVASS BOARD REFUSES TO CERTIFY?

(1) Certification by secretary of state

The secretary of state can certify election results in place of a board of canvassers that refuses to do so. As noted above, “[w]hen unable to certify the abstract of votes by the majority of the board for any reason, the canvass board shall transmit the non-

certified abstract of votes to the secretary of state along with a written report detailing the reason for non-certification.”⁸⁵ If the secretary of state “determines that the non-certified abstract of votes, along with the written report, other information and facts of the case provided by the county, or information revealed upon investigation by the secretary of state is clear and convincing in showing how many votes were cast for each candidate, ballot question, or ballot issue, the secretary of state shall certify the results for the county and proceed to certifying state results under section 1-10-105.”⁸⁶ However, for this to happen, the canvass board must still transmit the non-certified abstract of votes and a written report. If they refuse to do that or otherwise obstruct the secretary’s role under C.R.S. § 1-10-104(3), legal action may be necessary.

(2) Mandamus

Mandamus is a proper remedy in Colorado to compel a canvass board to comply with its mandatory certification and reporting duties. Colorado Rule of Civil Procedure 106(a) (2) permits a person to petition a district court for mandamus relief or its equivalent to “compel a ... governmental body ... to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station.”⁸⁷ Plaintiffs seeking mandamus relief must show that (1) they “have ‘a clear right’ to the relief sought; (2) the party sued [has] ‘a clear duty’ to perform the act requested; and (3) there can be no other remedy available.”⁸⁸ Mandamus actions may be filed in a district court,⁸⁹ or directly in the Colorado Supreme Court.⁹⁰ In the supreme court, such relief “is extraordinary in nature and is a matter wholly within the discretion of the supreme court.”⁹¹

A county canvass board’s refusal to certify would likely meet the conditions for mandamus relief. Refusal to certify an election could nullify votes cast, and voters and the state can likely

demonstrate clear rights to have votes counted.⁹² And Colorado courts have made clear that “mandamus is proper when a canvassing board refuse[s] to perform its duty to certify an election” because “[c]anvassing returns of ballots already counted by election officials is a ministerial duty of a canvassing board.”⁹³ However, a court may find that C.R.S. § 1-1-113, discussed below, creates an adequate alternative remedy, so it may be advisable to pursue both claims together.

85 C.R.S. § 1-10-101.5(1)(c).

86 C.R.S. § 1-10-104(3).

87 *Owens v. Carlson*, 511 P.3d 637, 642 (Colo. 2022).

88 *Id.*

89 Colo. R. Civ. P. 106(a).

90 Colo. R. App. P. 21(a)(1), (2).

91 Colo. R. App. P. 21(a)(1).

92 See *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.”) (cleaned up).

93 *Goff v. Kimbrel*, 849 P.2d 914, 916-17 (Colo. Ct. App. 1993) (citing *People ex rel. Griffith v. Bundy*, 109 P.2d 261 (Colo. 1941), and *Leary v. Jones*, 116 P. 130, 134 (Colo. 1911)).

The Colorado attorney general, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus relief.⁹⁴

(3) Statutory remedy for “neglect of duty and wrongful acts” in elections

C.R.S. § 1-1-113 establishes procedures for challenging any “neglect of duty” or “wrongful act[]” relating to elections. Under that statute, “when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under [the Election Code] has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code.”⁹⁵ There appears to be no precedent for applying C.R.S. § 1-1-113 to a canvass board’s refusal to certify an election, but given the clear duties outlined in C.R.S. § 1-10-101.5, refusal to certify or to transmit the requisite records to the secretary of state is likely “a breach or neglect of duty or other wrongful act.”

(4) Coloradans’ constitutional right to vote

A county board’s refusal to certify may also violate the Colorado Constitution’s free and open elections clause, which provides: “All elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”⁹⁶ “Concomitant with the right to cast a vote is the right to have that vote counted without undue interference with the exercise of that right.”⁹⁷ This right may be violated if, for example, county officials indefinitely delay certification and the lawful votes from that county are not counted, thereby disenfranchising that county’s voters. In addition to being a basis for affirmative relief, the need to protect Coloradans’ fundamental right to vote would strongly reinforce any request for mandamus relief.

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

94 See, e.g., *State ex rel. Norton v. Bd. of County Com’rs of Mesa County*, 897 P.2d 788, 789 (Colo. 1995) (Governor); *City of Aurora v. 1405 Hotel, LLC*, 371 P.3d 794, 803 (Colo. Ct. App. 2016) (private party).

95 C.R.S. § 1-1-113(1).

96 Colo. Const. art. II, § 5.

97 *Meyer v. Lamm*, 846 P.2d 862, 872 (Colo. 1993); see also *Gessler v. Doty*, 272 P.3d 1131, 1133 (Colo. Ct. App. 2012) (“The Colorado Constitution expressly recognizes the right of citizens to vote and to have their votes counted.”).

(1) Court appointments to carry out order

Like other states,⁹⁸ Colorado has an analogue to Federal Rule of Civil Procedure 70 that empowers courts to appoint someone in place of an official who defies a court order to certify and to hold the disobedient party in contempt.⁹⁹

(2) Civil contempt

A county official who defies a court order to certify may be held in civil contempt for “disobedience or resistance...to or interference with any lawful writ, process, or order of the court.”¹⁰⁰ Civil contempt triggers remedial sanctions “to force compliance with a lawful order or to compel performance of an act within the person’s power or present ability to perform.”¹⁰¹ Upon “motion supported by affidavit,” if the person is found in contempt, “[t]he court shall enter an order in writing or on the record describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged.”¹⁰² “If the court finds that the contemnor has the present ability to purge the contempt, it may impose fines or imprisonment until the contemnor performs the necessary acts.”¹⁰³

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code and criminal laws related to official duties

A county official who refuses to certify election results or to transmit the non-certified abstract of votes to the secretary of state could be prosecuted under various provisions of the Colorado election code and criminal code.

Under C.R.S. § 1-13-114, “[a]ny person who willfully interferes or willfully refuses to comply with the rules, orders, or acceptable use policy for the statewide voter registration system of the secretary of state or the secretary of state’s designated agent in the carrying out of the powers and duties prescribed in section 1-1-107 commits a

98 See *supra* Part II(A)(3)(b)(1); *infra* Parts II(C)(3)(b)(1), II(D)(3)(b)(1) and II(E)(3)(b)(1).

99 See Colo. R. Civ. P. 70.

100 C.R.C.P. 107(a)(1).

101 C.R.C.P. 107(a)(5).

102 C.R.C.P. 107(c), (d)(2).

103 *People ex rel. PUC of Colo. v. Entrup*, 143 P.3d 1120, 1125 (Colo. Ct. App. 2006) (citing *In re Estate of Elliott*, 993 P.2d 474, 479 (Colo. 2000)).

class 1 misdemeanor,” subject to 6—18 months’ imprisonment, a \$500—\$5,000 fine, or both.¹⁰⁴

Similarly under C.R.S. § 1-13-107, “[a]ny public officer, election official, or other person upon whom any duty is imposed by this code who violates, neglects, or fails to perform such duty or is guilty of corrupt conduct in the discharge of the same” shall be charged with a class 2 misdemeanor,¹⁰⁵ subject to 3—12 months’ imprisonment, a \$250—\$1,000 fine, or both.¹⁰⁶

Finally, under C.R.S. § 18-8-404(1), “A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly: (a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or (b) Refrains from performing a duty imposed upon him by law; or (c) Violates any statute or lawfully adopted rule or regulation relating to his office.” This is a class 1 misdemeanor,¹⁰⁷ subject to 6—18 months’ imprisonment, a \$500—\$5,000 fine, or both.¹⁰⁸

(2) Conspiracy

A county official who agrees with others to illegally disrupt or delay certification may be charged with conspiracy. “A person commits conspiracy to commit a crime if, with the intent to promote or facilitate its commission, he agrees with another person or persons that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime, or he agrees to aid the other person or persons in the planning or commission of a crime or of an attempt to commit such crime.”¹⁰⁹ Conspiracy has three elements: “(1) a real agreement, combination, or confederation with a common design; (2) between two or more persons; (3) to accomplish an unlawful purpose which amounts to a crime.”¹¹⁰ “If a person conspires to commit a misdemeanor which is defined by any statute other than one contained in this title and for which conspiracy no penalty is specifically provided, the person commits a class 2 misdemeanor.”¹¹¹

(3) Criminal contempt

County officials who defy court orders to certify election results may also be held in criminal contempt. Criminal contempt triggers punitive sanctions “for conduct that

¹⁰⁴ C.R.S. § 18-1.3-501(1)(a).

¹⁰⁵ See C.R.S. § 1-13-111.

¹⁰⁶ C.R.S. § 18-1.3-501(1)(a).

¹⁰⁷ C.R.S. § 18-8-404(2).

¹⁰⁸ C.R.S. § 18-1.3-501(1)(a).

¹⁰⁹ C.R.S. § 18-2-201(1).

¹¹⁰ *People v. Davis*, 296 P.3d 219, 225 (Colo. Ct. App. 2012).

¹¹¹ C.R.S. § 18-2-201(5).

is found to be offensive to the authority and dignity of the court.”¹¹² “The court may impose a fine or imprisonment or both if the court expressly finds that the person’s conduct was offensive to the authority and dignity of the court.”¹¹³

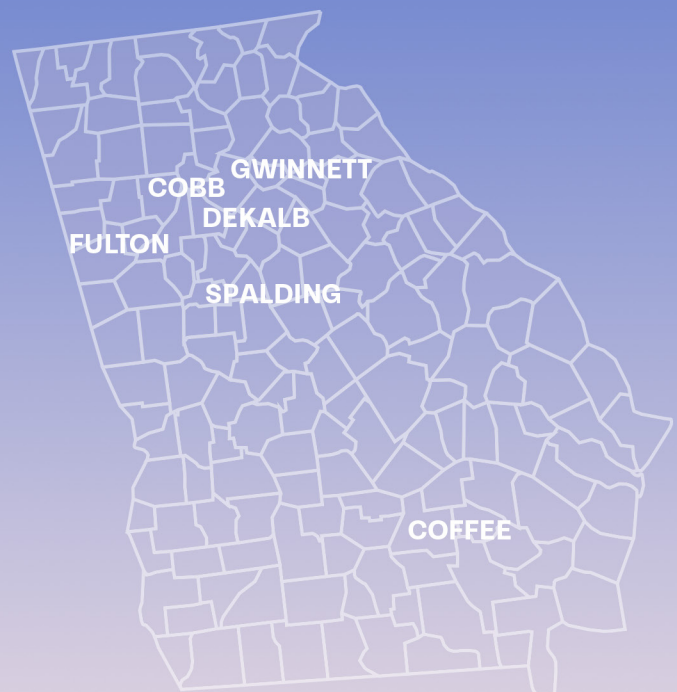
¹¹² C.R.C.P. 107(a)(4).

¹¹³ C.R.C.P. 107(d)(1).

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

Georgia



STATE-BY-STATE ANALYSIS

C. GEORGIA

1. Election certification framework at the county level

In Georgia, each county's "election superintendent" is responsible for certifying elections.¹¹⁴ In most counties, state law establishes county boards of elections and registration that consist of no fewer than three members to act as their election superintendent.¹¹⁵ In counties with no board, the election superintendent is either the probate judge or a board of the probate judge and two electors from each of the major political parties.¹¹⁶ Although Georgia has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of county elections superintendents.

Elections superintendents "shall...receive from poll officers the returns of all primaries and elections," "canvass and compute the same," "tabulate the figures for the entire county," "sign, announce, and attest the same," conduct a mandatory pre-certification

¹¹⁴ O.C.G.A. § 21-2-70(9).

¹¹⁵ O.C.G.A. § 21-2-40.

¹¹⁶ O.C.G.A. §§ 21-2-70(15)(A), 21-2-74.1, 21-2-74(a).

audit process and certify the results of the election.¹¹⁷ The certification deadline is mandatory and fixed by statute: the “returns shall be certified by the superintendent not later than 5:00 P.M. on the Monday following the date on which such election was held and such returns shall be immediately transmitted to the Secretary of State.”¹¹⁸ Within that time frame, the superintendent may order a pre-certification recount or recanvass in precincts in the county where there appears to be a “discrepancy” or “error, although not apparent on the face of the returns.”¹¹⁹ These processes are governed by a detailed set of rules established by statute and regulation.¹²⁰ The secretary of state ultimately “shall certify” the votes cast “[n]ot later than 5:00 P.M. on the seventeenth day following the date on which such election was conducted.”¹²¹

Election superintendents have no authority to withhold certification based on suspected fraud or errors in returns; such issues are instead resolved in the courts. State law mandates that “the superintendent shall compute and certify the votes justly, regardless of any fraudulent or erroneous returns presented to him or her, and shall report the facts to the appropriate district attorney for action.”¹²² If “the results of an election contest change the returns so certified, a corrected return shall be certified and filed by the superintendent which makes such corrections as the court orders.”¹²³ The statute conforms with longstanding Georgia case law recognizing that election “superintendents [are] not selected for their knowledge of the law” and lack authority to render legal judgments on election returns.¹²⁴

2. County officials who have refused to certify elections

COBB COUNTY, GA

117 O.C.G.A. §§ 21-2-70(9), 21-2-493, 21-2-498; *see also* O.C.G.A. § 21-2-497(b) (“Each county and municipal superintendent 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.”).

118 O.C.G.A. § 21-2-493(k).

119 O.C.G.A. § 21-2-495(a), (b).

120 *See* Ga. Comp. R. & Regs. 183-1-12.01-.20.

121 O.C.G.A. § 21-2-499(b).

122 O.C.G.A. § 21-2-493(i); *see also* O.C.G.A. § 21-2-522(1), (3), (4) (authorizing election contests based on alleged misconduct, fraud, irregularities, illegal votes and counting errors); *Bacon v. Black*, 133 S.E. 251, 253 (Ga. 1926) (“The determination of the judicial question affecting the result in such county elections is confined to the remedy of contest as provided by law.”).

123 O.C.G.A. § 21-2-493(l).

124 *Tanner v. Deen*, 33 S.E. 832, 835-36 (Ga. 1899).

Debbie Fisher

Current position: Cobb County Board of Elections and Registration, Assistant Secretary

Refusal to certify: General Municipal Elections, Cobb County 2023: Fischer voted against certifying the election results but was unsuccessful in preventing certification by a 4 to 1 vote.

Stated reasons for refusal to certify: Fischer provided numerous reasons for refusing to certify, none of which were legitimate grounds for withholding certification under Georgia law. Specifically:

Fisher reportedly “expressed concern with a six-vote discrepancy between reported votes in the Georgia Registered Voter Information System, or GARViS, and ePulse, a state election management program designed to provide real-time monitoring, as well as the county’s election system” and “encouraged the board to ‘do our own internal testing to find out if these reports are syncing with our (election management) system.’” According to the Cobb County interim director of elections, “the issue was resolved when the six votes were manually transferred to the GARViS total.”

In board meetings, Fisher cited “inconsistencies in reporting with the SOS; Garvis and Epulse issues” and claimed that she only received part of a requested report regarding a claimed six-vote discrepancy.

Fisher later claimed that she opposed certification “because she didn’t understand why voter check-in data for some early voters appeared twice on reports generated by the secretary of state’s office. State election officials said they quickly resolved the programming issue between check-in systems and registration computers.”

Additional information: Fisher was reportedly responsible for the Cobb County Republican Party posting fake sample ballots to its website in February 2024 that eliminated several candidates for the Republican presidential primary. Fisher later wrote in a now-deleted Facebook post, “Republican Primary Ballot will have all of the original candidates on the ballot, however there are only 2 Candidates remaining that are considered legitimate votes, Nikki Haley and Donald Trump. Any other selection will be considered a blank vote and not be counted.” This statement is incorrect: votes for candidates who have dropped out of the race are still “counted.”

DEKALB COUNTY, GA

Nancy Jester

Current position: DeKalb County Board of Registration and Elections, Board Member

Refusal to certify: DeKalb County, General Municipal Election 2023: Jester and another member of the DeKalb Board of Registration and Elections voted against certifying the election results but were unsuccessful in preventing certification by a 3 to 2 vote.

Stated reasons for refusal to certify: Jester claimed that she lacked confidence in the voting machine testing process and referenced the 2022 DeKalb County Commission election where ballots in 40 precincts had to be recounted due to computer programming issues. The board postponed the certification vote so they could hand count ballots. It was reported that “Jester’s perspective was that the failure to ensure public participation in the second round of Logic & Accuracy tests performed on machines that needed to be repaired after they had been deployed, represented a fundamental procedural failure that affected the quality of the results.” In response to criticism of her vote, Jester said, “No one should shame me for voting my conscience” and that her “‘no’ vote means I can’t guarantee to the public that there isn’t something bad happening when you open up a machine in the middle of an election...The election didn’t meet a standard of quality that I think it needs to meet. They need to fix it now, because if they don’t, it’s going to cause a lot of problems next year.”

Anthony Lewis

Current position: DeKalb County Board of Registration and Elections, Board Member

Refusal to certify: DeKalb County, Primary Election 2022: Lewis voted

against certifying the election results but was unsuccessful in preventing certification by a 4 to 1 vote.

DeKalb County, General Municipal Election 2023: Lewis refused to certify the election results but was unsuccessful in preventing certification by a 3 to 2 vote.

Stated reasons for refusal to certify: The minutes of a meeting of the DeKalb County Board following the 2023 General Municipal Election indicate that Lewis said: “One reason there is a Board and a panel of five (5) people is to achieve some level of balance and make sure that everyone in the county is represented.” According to the minutes, Lewis claimed that “expecting that everyone in the county will think along the same lines is incorrect.” He also “stated that every member of the Board, including himself, works to do the best they can for the County” and “that he believes residents of the County have the right to act within their government and to speak to their officials when they feel that something is wrong.”

FULTON COUNTY, GA

Julie Adams

Current position: Fulton County Board of Registration and Elections, Republican Member

Refusal to certify: Presidential Preference Primary, Fulton County March 2024: Adams and Michael Heekin voted against certifying the primary results but were unsuccessful in preventing certification by a 3 to 2 vote.

Primary Election, Fulton County May 2024: Adams abstained from certifying the primary.

Stated reasons for refusal to certify: 2024 Presidential Preference Primary: Adams and another county official, Michael Heekin, reportedly refused to certify in part because they demanded to see “administrative and operational documents, particularly those showing the chain of custody of elections materials between the polls and the counting room.” Adams claimed, “It was very concerning and insulting that a

board member cannot request documents, and further that my vote is not needed...This is a presidential election year, and like never before in our history, Fulton County will be scrutinized intensely by the press, our citizens, our state, our country and our candidates. We need to give them the very best in providing legal, transparent and accurate elections.”

2024 Primary Election: On May 22, 2024, the day after the primary, Adams filed a lawsuit against the Fulton County election board and the county’s election director “in an effort to get access to more election information.” Adams is represented in the case by American First Policy Institute. The suit alleges Adams is “unable to fulfill her oath of office” without access to “essential election materials and processes.” The suit also seeks a judicial ruling that Adams’ duties as a board member are “discretionary” rather than “ministerial.”

Additional information: Adams has served as the director of the Tea Party Patriots, “a pro-Trump group that helped organize the ‘Stop the Steal’ rally that preceded the attack on the Capitol on Jan. 6” according to reporting, and she is the regional coordinator for southeastern states for the Election Integrity Network.

Michael Heekin

Current position: Fulton County Board of Registration and Elections, Vice Chair

Refusal to certify: Presidential Preference Primary, Fulton County March 2024: Heekin and Julie Adams voted against certifying the primary results but were unsuccessful in preventing certification by a 3 to 2 vote.

Stated reasons for refusal to certify: During a meeting of the Fulton County Board of Registration and Elections, Heekin “expressed his biggest concern is [c]hain of [c]ustody.” He said “this is the weak link of Elections.” Heekin and Adams reportedly “had been requesting administrative and operational documents, particularly those showing the chain of custody of elections materials between the polls and the counting room. Fulton County’s administrators said the documents aren’t formally available for review until the end of the week, which is days after the certification vote.” According to reporting, there were no “obvious irregularities” in this

election.

Additional information: Heekin expressed doubts about the November 7, 2023 municipal elections but voted to certify after a second ballot count was conducted. He said there were challenges with the “administration, tallying and certification” of the election due to Georgia Registered Voters Information System (GARViS) software and called on Georgia’s Secretary of State to fix the system before the March 12, 2024 presidential preference primary.

In March 2024, Heekin proposed a rule change to the Georgia State Elections Board that would allow county officials to conduct a “reasonable inquiry” before certifying elections. In May 2024, the board voted to initiate rulemaking on Heekin’s proposed amendment. CREW and a coalition of other pro-democracy organizations have urged the board to reject the proposed amendment because it is contrary to settled Georgia law and would invite abuse of the certification process. On August 6, the board voted 3-2 to adopt the rule.

GWINNETT COUNTY, GA

David Hancock

Current position: Gwinnett County Board of Registration and Elections, Member

Refusal to certify: Presidential Primary Election, Gwinnett County 2024: Hancock was the sole member to vote against certifying the results of the primary but was unsuccessful in preventing certification.

Stated reasons for refusal to certify: During the board’s March 18, 2024 meeting, Hancock stated, “There were things that were wrong with the election...that went against the law.” Hancock cited at least two purported cases of ballots not in the custody of two poll workers; precincts purportedly without fully trained poll workers; memory cards that were purportedly left unsecured; purported “chain of custody issues

with at least two precincts.”

Additional information: On May 23, 2024, Hancock posted on Facebook a link to a [report](#) “outlining the mandatory duty of county officials to certify election results.” Hancock was critical of the report and suggested the need for guidelines on certification.



David Hancock

May 23 · 🌐

...

This is the opposition to validating the process before certifying the election that your county Board of Election members in Georgia are currently facing:



PROTECTDEMOCRACY.ORG

New Guidance on Preventing Election Certification Interference

The report outlines the mandatory duty of county officials to certify election results.



David Hancock

Jamie Barcus Reinhold At this moment there are NO guidelines on what is required to certify an election in georgia. And when I was not able to inspect some records before certifying the presidential primary I voted NOT to certify - and received a legal threat from the Democrat party of Georgia. But some of us are working to change that. Stand by...

Alice O’Lenick

Current position: Gwinnett County Board of Registration and Elections, Member

Refusal to certify: 2020 General Election, Gwinnett County: After first voting to certify the election results with the unanimous Gwinnett County Board of Registration, O’Lenick voted against certifying the results of the recount but was unsuccessful in preventing certification by a 4 to 1 vote.

Stated reasons for refusal to certify: O’Lenick claimed that she “couldn’t say” if the vote was an accurate representation of the votes in Gwinnett County. According to reporting, “she didn’t know if she could trust ballot drop boxes that the state allowed counties to use so it was easier for people to vote” and “didn’t know whether everyone who voted in Gwinnett should have been able to cast a ballot.” On allegations questioning the validity of thousands of voters, she stated “We haven’t investigated. We need to investigate...It makes me question whether we’re doing things properly to have a just and fair and unquestionable election.” There is no evidence that thousands of people illegally voted in Gwinnett County.

Additional information: O’Lenick has supported changing voting laws in Georgia to make it easier for Republicans to win elections, claiming at a Republican party meeting, “They don’t have to change all of them, but they’ve got to change the major parts of them so that we at least have a shot at winning.”

SPALDING COUNTY, GA

Roy McClain

Current position: Spalding County Board of Elections and Voter Registration, Secretary

Refusal to certify: Spalding County, General Municipal Election 2023: McClain voted against certifying the election results but was

unsuccessful in preventing certification by a 2 to 1 vote.

Stated reasons for refusal to certify: McClain walked out of the county board meeting in protest and needed to be convinced to return so the vote could continue. At that meeting, McClain suggested that County Attorney Stephanie Windham should ask a judge for more time prior to certifying, to find if there are discrepancies between hand count and machine count, because the holiday gave them less time. Windham stated that if there were contests which were close in count, she would be more comfortable to go before the judge to ask for more time. However, this was not the case.

Additional information: In a debate over counting machine printed ballots prior to certifying the results of an election, McClain voted in July 2023 to mandate hand-counts of elections prior to certification. He has had long-standing objections to voting machines. He was also reportedly involved in an unsuccessful plan to illegally access election system data.

3. Legal remedies under Georgia law

A) WHAT IF AN ELECTIONS SUPERINTENDENT REFUSES TO CERTIFY?

(1) Mandamus

Mandamus is the proper remedy to compel county certification in Georgia. Mandamus is available when “(1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief.”¹²⁵ “[W]here the applicable law vests the official or agency with discretion with regard to whether action is required in a particular circumstance, mandamus will not lie, because there is no clear legal right to the performance of such an act.”¹²⁶ Mandamus actions can be

¹²⁵ *Bibb Cnty. v. Monroe Cnty.*, 755 S.E.2d 760, 766 (Ga. 2014); see also O.C.G.A. § 9-6-20 (“[W]hen, 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.”).

¹²⁶ *Bibb Cnty.*, 755 S.E.2d at 767.

brought in the Superior Court, Court of Appeals or Supreme Court.¹²⁷ However, Georgia appellate courts have narrowly construed their original jurisdiction in mandamus actions as “merely enabling, not mandatory,”¹²⁸ and stated that “the need to resort to the appellate courts for such relief by petition filed in the appellate courts will be extremely rare.”¹²⁹

An election superintendent’s refusal to certify would meet both conditions for mandamus relief. First, Georgia law does not appear to provide any “other adequate legal remedy” to compel certification. Second, Georgia law makes clear that the superintendents’ certification duty is non-discretionary. As a matter of statutory construction, the legislature’s repeated use of the word “shall” means that a superintendent’s certification by the statutory deadline is mandatory.¹³⁰ And a long line of Georgia Supreme Court precedent holds that acts akin to election certification are non-discretionary or “ministerial” duties compellable by mandamus.¹³¹ A Georgia attorney general opinion likewise recognizes that the election code’s “use of the word ‘shall’...with respect to the duties imposed upon a...superintendent of elections... indicates the imposition by the General Assembly...of a mandatory duty to perform certain enumerated functions” and that “an action for mandamus...may lie to require performance...of [these] duties.”¹³²

The Georgia State Election Board, attorney general, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus relief.¹³³ Because election certification involves a “public right” and “the object” of the

127 Ga. Const. art. VI, § 1, Par. IV.

128 *Clark v. Hunstein*, 733 S.E.2d 259, 260 (Ga. 2012).

129 *Byrd v. Robinson*, 825 S.E.2d 424, 425 (Ga. Ct. App. 2019) (quoting *Brown v. Johnson*, 306 S.E.2d 655 (Ga. 1983)).

130 See *Hall Cnty. Bd. of Tax Assessors v. Westrec Properties, Inc.*, 809 S.E.2d 780, 786 (Ga. 2018) (“The word ‘shall’ is generally construed as a word of command. The import of the language is mandatory.”); *Mead v. Sheffield*, 601 S.E.2d 99, 100 (Ga. 2004) (applying principle in construing the Election Code).

131 See, e.g., *Tanner v. Deen*, 33 S.E. 832, 835-36 (Ga. 1899) (issuing writ of mandamus requiring superintendents to consolidate election returns because their duties were “regulated by statute, and not left to the discretion of the party performing” them); *Thompson v. Talmadge*, 41 S.E.2d 883, 893 (Ga. 1947) (recognizing the “general, if not indeed the universal, rule of law applicable to election canvassers” that “they are given no discretionary power except to determine if the returns are in proper form and executed by the proper officials and to pronounce the mathematical result, unless additional authority is expressed”); *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.”); *Davis v. Warde*, 118 S.E. 378, 391 (Ga. 1923) (“The duties of canvassers are purely ministerial; they perform the mathematical act of tabulating the votes of the different precincts as the returns come to them.”); *Brockett v. Maxwell*, 38 S.E.2d 176, 179 (Ga. Ct. App. 1946) (“ascertaining and declaring the result of the election” is “ministerial”).

132 1978 Ga. Att’y Gen. Op. 246 (No. U78-44) (Oct. 27, 1978).

133 See O.C.G.A. § 21-2-32 (authorizing State Election Board to seek mandamus); *Barrow v. Raffensperger*, 842 S.E.2d 884, 891 (Ga. 2020) (holding that plaintiff had a “right as a Georgia voter to pursue a mandamus claim to enforce the Secretary’s duty to conduct an election that is legally required” and did “not need to establish any special injury to bring that claim as a voter”).

mandamus would be “to procure the enforcement of a public duty” and “no legal or special interest need be shown.”¹³⁴

(2) Georgians’ constitutional right to vote

A county board’s refusal to certify may also violate the Georgia Constitution’s right to vote clause, which provides: “Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people.”¹³⁵ Under this provision, “a qualified elector is guaranteed the fundamental right to vote provided he or she uses one of the procedures put forth by the legislature, assuming those procedures do not offend the constitution.”¹³⁶ The fundamental right to vote and to have one’s vote counted may be violated if, for example, county officials indefinitely delay certification and the lawful votes from that county are not counted, thereby disenfranchising that county’s voters. An aggrieved voter could bring an action for declaratory relief under the Georgia Constitution.¹³⁷ The need to protect Georgians’ fundamental right to vote would also strongly reinforce any request for mandamus relief.

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

(1) Court appointments to carry out order

Like other states,¹³⁸ Georgia has an analogue to Federal Rule of Civil Procedure 70 that empowers courts to appoint someone in place of an official who defies a court order to certify and to hold the disobedient party in contempt.¹³⁹

¹³⁴ O.C.G.A. § 9-6-24; *accord Atlanta Title & Tr. Co. v. Tidwell*, 160 S.E. 620, 620 (Ga. 1931).

¹³⁵ Ga. Const. art. II, § I, ¶ II.

¹³⁶ *Democratic Party of Georgia, Inc. v. Perdue*, 707 S.E.2d 67, 73 (Ga. 2011).

¹³⁷ *See Gardei v. Conway*, 868 S.E.2d 775, 780 (Ga. 2022) (“[A]lthough Georgia does not have a statutory cause of action like 42 U.S.C. § 1983 under which a person can assert claims under the Georgia Constitution, declaratory judgment actions for claims asserting the violation of individual rights are authorized under our State’s Constitution.”).

¹³⁸ *See supra* Parts II(A)(3)(b)(1) and II(B)(3)(b)(1); *infra* Parts II(D)(3)(b)(1) and II(E)(3)(b)(1).

¹³⁹ O.C.G.A. § 9-11-70.

(2) Civil contempt

A county official who defies a court order to certify could also be held in civil contempt for “[d]isobedience or resistance...to any lawful writ, process, order, rule, decree, or command of the courts.”¹⁴⁰ The purpose of “civil contempt” is to impose “conditional punishment as a means of coercing future compliance with a prior court order.”¹⁴¹ A civil contempt finding for disobeying an injunction can result in fines “purgeable by abiding by the injunction” and imprisonment.¹⁴²

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code

A county official who willfully subverts the certification process could face prosecution under various provisions of the Georgia election code.

Under O.C.G.A. § 21-2-597, “Any person who intentionally interferes with, hinders, or delays or attempts to interfere with, hinder, or delay any other person in the performance of any act or duty authorized or imposed by this chapter shall be guilty of a misdemeanor,” which is punishable up to 12 months and a fine up to \$1,000.¹⁴³ This statute is comparable to the Arizona statute prohibiting “interference with an election officer,” which the state used to charge officials in Cochise County.¹⁴⁴

Under O.C.G.A. § 21-2-596, “Any public officer or any officer of a political party or body on whom a duty is laid by this chapter who willfully neglects or refuses to perform his or her duty shall be guilty of a misdemeanor,” which is punishable by imprisonment of up to 12 months and a fine of up to \$1,000.¹⁴⁵ The Georgia Supreme Court has stated that this provision applies “in any instance where [the Election Code] is willfully abrogated by the responsible public officers.”¹⁴⁶

Under O.C.G.A. § 21-2-603, “A person commits the offense of conspiracy to commit election fraud when he or she conspires or agrees with another to commit a violation of” the criminal provisions of the election code. “The crime shall be complete when

¹⁴⁰ O.C.G.A. § 15-1-4(a)(3).

¹⁴¹ *Collins v. State*, 871 S.E.2d 676, 678 (Ga. Ct. App. 2022).

¹⁴² *Stardust, 3007, LLC v. City of Brookhaven*, 824 S.E.2d 595, 603 (Ga. Ct. App. 2019); *Alred v. Celanese Corp. of America*, 54 S.E. 2d 240, 249 (Ga. 1949).

¹⁴³ O.C.G.A. § 17-10-3.

¹⁴⁴ See *supra* Part II(A)(3)(c)(1).

¹⁴⁵ O.C.G.A. § 17-10-3.

¹⁴⁶ *Malone v. Tison*, 282 S.E.2d 84, 88 (Ga. 1981).

the conspiracy or agreement is effected and an overt act in furtherance thereof has been committed, regardless of whether the violation of this chapter is consummated,” subject to imprisonment of up to 12 months and a fine of up to \$1,000.¹⁴⁷

(2) Conspiracy

A county official who agrees with others to illegally obstruct or delay certification may be charged with conspiracy. “A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy.”¹⁴⁸ “To prove conspiracy, two elements must be shown: an agreement and an act in furtherance of it. The State need not prove an express agreement between the co-conspirators, only that two or more persons tacitly came to a mutual understanding to accomplish or to pursue a criminal objective.”¹⁴⁹ “A person convicted of the offense of criminal conspiracy to commit a felony shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he could have been sentenced if he had been convicted of the crime conspired to have been committed, by one-half the maximum fine to which he could have been subjected if he had been convicted of such crime, or both. A person convicted of the offense of criminal conspiracy to commit a misdemeanor shall be punished as for a misdemeanor.”¹⁵⁰

(3) Criminal contempt

A county official who defies a court order may also be held in criminal contempt. “The purpose in punishment for criminal contempt is to preserve the power and vindicate the dignity of the court and to punish for disobedience of the court’s orders.”¹⁵¹ “Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.”¹⁵²

¹⁴⁷ O.C.G.A. § 17-10-3.

¹⁴⁸ O.C.G.A. § 16-4-8.

¹⁴⁹ *Melesa v. State*, 724 S.E.2d 30, 32 (Ga. 2012).

¹⁵⁰ O.C.G.A. § 16-4-8.

¹⁵¹ *Collins v. State*, 871 S.E.2d 676, 678 (Ga. Ct. App. 2022).

¹⁵² *In re Syvertson*, 891 S.E.2d 424, 425 (Ga. Ct. App. 2023).

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

Nevada



STATE-BY-STATE ANALYSIS

D. NEVADA

1. Election certification framework at the county level

In Nevada, each county's board of county commissioners and county clerk are responsible for election certification.¹⁵³ Each board consists of three, five or seven elected commissioners depending on the county's population.¹⁵⁴ Although Nevada has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of the county boards.

Each board is required by law to "meet and canvas the returns" "[a]s soon as the returns from all the precincts and districts in any county have been received" and complete the canvass "on or before the 10th day following the election."¹⁵⁵ Each board "shall...note separately any clerical errors discovered" and "[t]ake account of the changes resulting from the discovery, so that the result declared represents the true vote cast."¹⁵⁶ For both

¹⁵³ See Nev. Rev. Stat. § 293.387(1), (3); Nevada County Commissioner Handbook 16 (2023), <https://www.nvnaco.org/wp-content/uploads/NACO-2023-Commissioner-Handbook-Final.pdf>.

¹⁵⁴ N.R.S. §§ 244.011, 244.014, 244.016.

¹⁵⁵ N.R.S. § 293.387(1).

¹⁵⁶ N.R.S. § 293.387(2).

statewide and local elections, the county clerk then “shall...enter upon the records of the board an abstract of the result, which must contain the number of votes cast for each candidate.”¹⁵⁷ After making the abstract, the board “shall cause the county clerk to certify the abstract” and to make a copy of the abstract and a mechanized report of the same.¹⁵⁸ The copy and mechanized report must be submitted to the Secretary of State on or before the 10th day following the election.¹⁵⁹

In elections for statewide and federal office, “[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.”¹⁶⁰ Unlike in other states where the Secretary of State ultimately certifies the election, in Nevada “[t]he Governor shall issue certificates of election to and commission the persons having the highest number of votes and shall issue proclamations declaring the election of those persons.”¹⁶¹

County boards have no authority to withhold certification based on suspected fraud or errors. Rather, Nevada law sets out detailed procedures for recounts and election contests.¹⁶² An election contest, not the certification process, is the legally-designated forum for resolving allegations that “[i]llegal or improper votes were cast and counted” or that “there was a malfunction of any voting device or electronic tabulator, counting device or computer in a manner sufficient to raise reasonable doubt as to the outcome of the election.”¹⁶³

2. County officials who have refused to certify elections

ESMERALDA COUNTY, NV

After the 2022 primary election, an Esmeralda County resident made a number of unfounded [complaints](#) to the Esmeralda County Board of Commissioners concerning issues related to voting in the county. The board voted to delay certification based on these claims to hand count the 317 ballots in the county. When the numbers ultimately matched up, the commissioners [certified](#) the results.

¹⁵⁷ N.R.S. § 293.387(3).

¹⁵⁸ N.R.S. § 293.387(3).

¹⁵⁹ N.R.S. § 293.387(3).

¹⁶⁰ N.R.S. § 293.395(2).

¹⁶¹ N.R.S. § 293.395(3).

¹⁶² See N.R.S. §§ 293.400-435.

¹⁶³ N.R.S. §§ 293.410(c)(1), (f).

De Winsor

Current position: Esmeralda Board of County Commissioners, County Commissioner, District 2

Refusal to certify: Esmeralda County, Primary Election, 2022: Winsor and another County Commissioner who is no longer in office, Timothy Hipp, successfully delayed certification.

Stated reasons for refusal to certify: Winsor's refusal to certify was apparently in response to constituent complaints. Justifying his refusal, he stated, "This is where we proved we do it right." Prior to the election, the three Esmeralda County commissioners had "voted...to join commissioners in neighboring Nye County calling for elections to be conducted using paper ballots—and without Dominion machines." Similar conspiracy theories about Dominion Voting Systems have repeatedly been debunked.

ELKO COUNTY, NV

Rex Steninger

Current position: Elko County Board of Commissioners, County Commissioner

Refusal to certify: Primary Election, Elko County, Recount 2022: Steninger voted against certifying the primary results but was unsuccessful in preventing certification.

Stated reasons for refusal to certify: According to meeting minutes, "Steninger voted nay in protest of the State regulation that mandated the way the recount was performed."

Additional information: Steninger wrote in an October 2021 email obtained through a public records request: "I am convinced the last election was stolen and have been involved in every way I can think of to reveal the steal and fix the system."

WASHOE COUNTY, NV

In Washoe County, two commissioners, Jeanne Herman and Michael Clark, have repeatedly voted against certifying election results, as described below. In recounts of two elections during the June 2024 primary, a third member of the board, Clara Andriola, joined Herman and Clark, thus blocking certification of those election results by a 3-2 vote. The following day, the Nevada Attorney General, on behalf of the Nevada Secretary of State, filed a mandamus suit in the Nevada Supreme Court to compel the board to certify the election results. On July 16, 2024, Andriola and Clark reversed their positions and voted to certify the recounts under threat of removal and criminal prosecution; Herman was the lone holdout.

Jeanne Herman

Current position: Washoe County Board of Commissioners, Vice Chair and County Commissioner, District 5

Refusal to certify: General Election, Washoe County, 2020: Herman was the sole commissioner to vote against certifying the election results but was unsuccessful in preventing certification. Primary Election, Washoe County 2022: Herman was the sole commissioner to vote against certifying the primary results but was unsuccessful in preventing certification.

General Election, Washoe County, 2022: Herman was the sole commissioner to vote against certifying the election results but was unsuccessful in preventing certification.

Primary Election, Washoe County, 2024: Herman and Michael Clark voted against certifying the election results but were unsuccessful in preventing certification.

Primary Election Recount, Washoe County, 2024: Herman and two other commissioners voted against certifying the recounts of the election results in one race for a commission seat and one race for a local school board seat, successfully outvoting the other two members of the commission. The board ultimately voted to certify the recounts under threat of removal and criminal prosecution. Herman was the lone holdout.

Stated reasons for refusal to certify: Primary Election, Washoe County, 2024: During the 2024 primary election dispute, Herman gave various

reasons for her refusal to certify. She claimed multiple members of her family did not receive ballots. Furthermore, reading from a constituent's letter, she said, "I believe there were so many anomalies with just the balloting—much less the observing and the counting—that this election should be completely thrown out and let's start all over." The letter cited alleged errors on ballots and instructions that were not uniform across all the ballots. There is no credible evidence of widespread fraud or irregularities in Nevada elections.

Primary Election Recount, Washoe County, 2024: Explaining her decision to vote against certifying the recount in the 2024 election, even after she was threatened with removal and prosecution, Herman said, "There are hills to climb on and there are hills to die on and this might be one of those...My constituents come to me with reports of fraud. We've had people come here and report over and over and over the hardships (they face) to go to the election and have their vote count. I always felt it was my duty to protect the voters' rights by not certifying a bad election canvas."

Michael Clark

Current position: Washoe County Board of County Commissioners, County Commissioner, District 2

Refusal to certify: Presidential Preference Primary, Washoe County, 2024: Clark was the sole commissioner to vote against certifying the primary results but was unsuccessful in preventing certification.

Primary Election, Washoe County, 2024: Clark and Jeanne Herman voted against certifying the election results but were unsuccessful in preventing certification.

Primary Election Recount, Washoe County, 2024: Clark and two other commissioners voted against certifying the recounts of the election results in one race for a commission seat and one race for a local school board seat, successfully outvoting the other two members of the commission. Clark ultimately reversed his position and voted to certify under threat of removal and criminal prosecution.

Stated reasons for refusal to certify: Clark gave various reasons for his refusal to certify the 2024 primary election. He claimed he did not receive

a ballot for himself, but did receive multiple ballots with someone else's name on them and that he has been receiving their ballots for years, despite reporting it to the registrar. He also claimed that there were people who were certified to run for office whose names did not get on the ballot. He claimed he received an incorrect sample ballot, and that sample ballots omitted a race and listed Democratic candidates in a Republican race.

Clara Andriola

Current position: Washoe County Board of County Commissioners, County Commissioner, District 4

Refusal to certify: Primary Election Recount, Washoe County, 2024: Andriola and two other commissioners voted against certifying the recounts of the election results in one race for a commission seat and one race for a local school board seat, successfully outvoting the other two members of the commission. Andriola ultimately reversed her position and voted to certify under threat of removal and criminal prosecution.

Stated reason for refusal to certify: Justifying her vote against certification, Andriola claimed, "There's a lot of information that has been shared that in my opinion warrants further investigation" and referenced public comments raising concerns about the election and "hiccups" by the elections department. She also said "I'm basing my vote on the fact that (Assistant District Attorney Edwards) used the word 'conscience'" referring to his plea that members of the board vote their conscience and said "we have, not just today, but an ongoing concern (about elections). There has to be trust."

3. Legal remedies under Nevada law

A) WHAT IF A BOARD OF COUNTY COMMISSIONERS REFUSES TO CERTIFY?

(1) Mandamus

Mandamus is the proper remedy to compel county certification in Nevada. “A writ of mandamus is available to compel the performance of an act which the law... [requires] as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion.”¹⁶⁴ Mandamus requires (1) an “unmistakable duty to act” or “a manifest abuse of discretion in disregarding such a duty,”¹⁶⁵ and (2) “no ‘plain, speedy and adequate remedy in the ordinary course of law.’”¹⁶⁶ A writ of mandamus “may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court.”¹⁶⁷

A board of county commissioner’s refusal to certify would satisfy both conditions for mandamus relief. First, Nevada law imposes “unmistakable” certification duties on county officials compellable by mandamus. As outlined above, the statutes repeatedly use the word “shall” in describing officials canvassing and certification duties. Under Nevada law, “[s]hall’ impose[] a duty to act” unless “otherwise expressly provided in a particular statute or required by the context,”¹⁶⁸ and the Nevada Supreme Court has “explained that, when used in a statute, the word ‘shall’ imposes a duty on a party to act and prohibits judicial discretion and, consequently, mandates the result set forth by the statute.”¹⁶⁹ Second, Nevada law does not appear to provide any adequate alternative remedy to compel certification.

The Attorney General, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus relief.¹⁷⁰

¹⁶⁴ *Canarelli v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 506 P.3d 334, 336 (Nev. 2022) (quoting *Cote H. v. Eighth Jud. Dist. Court*, 175 P.3d 906, 907-08 (Nev. 2008)) (alterations in original).

¹⁶⁵ *Kerkorian v. Sisolak*, 462 P.3d 256 (Nev. 2020) (unpublished disposition).

¹⁶⁶ *Canarelli*, 506 P.3d at 336-37 (quoting Nev. Rev. Stat. § 34.170).

¹⁶⁷ N.R.S. § 34.160.

¹⁶⁸ N.R.S. § 0.025(1)(d).

¹⁶⁹ *Goudge v. State*, 287 P.3d 301, 304 (Nev. 2012); see also *Kabew v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 545 P.3d 1137, 1140 (Nev. 2024) (“[W]e generally construe ‘shall’ as mandatory.”).

¹⁷⁰ See N.R.S. § 228.170; *State ex rel. List v. Douglas Cnty.*, 524 P.2d 1271, 1273-74 (Nev. 1974) (attorney general can seek mandamus “on behalf of the people of the State of Nevada” where “[t]he interest

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

(1) Court appointments to carry out order

Like other states,¹⁷¹ Nevada has an analogue to Federal Rule of Civil Procedure 70 that empowers courts to appoint someone in place of an official who defies a court order to certify and to hold the disobedient party in contempt.¹⁷²

(2) Civil statutory penalties for defying writs of mandamus

Nevada law imposes specific penalties on state and county officers who defies a writ of mandamus: “When a peremptory mandate has been issued and directed to any...board or person” and that person “has, without just excuse, refused or neglected to obey the same, the court may, after notice and hearing, adjudge the party guilty of contempt and upon motion impose a fine not exceeding \$1,000.”¹⁷³ The penalty’s purpose is to “induce the fined party to comply with the writ.”¹⁷⁴

If disobedience persists, “the court may order the party to be imprisoned for a period not exceeding 3 months and may make any orders necessary and proper for the complete enforcement of the writ.”¹⁷⁵ Fines on a government officer “may be retained from the salary of...[the] officer. Such...officer for such willful disobedience shall also be deemed guilty of a misdemeanor in office.”¹⁷⁶ These sanctions are “held in abeyance until and unless the \$1,000 fine does not induce the fined party to comply with the writ.”¹⁷⁷

(3) Civil contempt

A county official who defies a court order to certify might also be held in civil contempt. Nevada “[c]ourts have inherent power to enforce their decrees through civil

of the state is manifest”); *ACLU of Nev. v. County of Nye*, 519 P.3d 36, 36 n.3 (Nev. 2022) (unpublished disposition) (rejecting the argument that ACLU may not seek mandamus enforcing election law).

¹⁷¹ See *supra* Parts II(A)(3)(b)(1), II(B)(3)(b)(1) and II(C)(3)(b)(1); *infra* Part II(E)(3)(b)(1).

¹⁷² See Nev. R. Civ. P. 70.

¹⁷³ N.R.S. § 34.290(1).

¹⁷⁴ *Barrows v. Seventh Jud. Dist. Ct. In & For Cnty. of White Pine*, 913 P.2d 1296, 1298 (Nev. 1996).

¹⁷⁵ N.R.S. § 34.290(2).

¹⁷⁶ N.R.S. § 34.290(3).

¹⁷⁷ *Barrows*, 913 P.2d at 1298.

contempt proceedings.”¹⁷⁸ Under N.R.S. § 22.010(3), disobedience to any lawful court order is contempt. “A civil contempt order ‘must be conditional or indeterminate—that is, it must end if the contemnor complies.’”¹⁷⁹ The court may impose conditional monetary penalties, or, “when the contempt consists in the omission to perform an act which is yet in the power of the person to perform, the person may be imprisoned until the person performs it.”¹⁸⁰

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code

Under N.R.S. § 293.800(2), “[a] public officer or other person, 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, except where another penalty is provided, is guilty of a category E felony,” which is subject to a “minimum term of not less than 1 year and a maximum term of not more than 4 years.”¹⁸¹ And “[i]f the person is a public officer, his or her office is forfeited upon conviction of any offense provided for in subsection 2.”¹⁸² This statute may apply to county officials who willfully obstruct or delay certification, particularly if they hinder other election officials from fulfilling their duties under Nevada law.

(2) Conspiracy

A county official who agrees with others to illegally disrupt or delay certification may be charged with conspiracy. Conspiracy is defined as “an agreement between two or more persons for an unlawful purpose.”¹⁸³ The “unlawful agreement is the essence of the crime of conspiracy” and the “conspiracy is committed upon reaching the unlawful agreement.”¹⁸⁴ Also, it is not “necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination.”¹⁸⁵ The penalty can range

¹⁷⁸ In re Determination of Relative Rts. of Claimants & Appropriators of Waters of Humboldt River Stream Sys. & Tributaries, 59 P.3d 1226, 1231 (Nev. 2002).

¹⁷⁹ Id.

¹⁸⁰ N.R.S. § 22.110.

¹⁸¹ N.R.S. § 193.130

¹⁸² N.R.S. § 293.800(3).

¹⁸³ Doyle v. State, 921 P.2d 901, 911 (Nev. 1996).

¹⁸⁴ Moore v. State, 27 P.3d 447, 450 (Nev. 2001).

¹⁸⁵ N.R.S. § 199.490.

from gross misdemeanors to class B felonies with a maximum sentence of 10 years imprisonment.¹⁸⁶

(3) Criminal contempt

A county official who defies a court order may also be found in criminal contempt. “[I]f a person is found guilty of contempt, a fine may be imposed on the person not exceeding \$500 or the person may be imprisoned not exceeding 25 days, or both.”¹⁸⁷ The court may also “require the person to pay to the party seeking to enforce the writ, order, rule or process the reasonable expenses, including, without limitation, attorney’s fees, incurred by the party as a result of the contempt.”¹⁸⁸

(4) Removal from office

Nevada law also provides a mechanism for removing from public office those “who refuse[] or neglect[] to perform any official act in the manner and form prescribed by law, or who is guilty of any malpractice or malfeasance in office.”¹⁸⁹ Any person may file in district court “a complaint in writing, duly verified by the oath of any complainant, alleging that any officer within the jurisdiction of the court...[h]as refused or neglected to perform the official duties pertaining to the officer’s office as prescribed by law” or “[h]as been guilty of any malpractice or malfeasance in office.”¹⁹⁰ The court then must hold a hearing “not more than 10 days or less than 5 days from the day when the complaint was presented,” where it must “hear the complaint and evidence offered by the party complained of.”¹⁹¹ “If, on the hearing, it appears that the charge or charges of the complaint are sustained, the court shall enter a decree that the party complained of shall be deprived of the party’s office.”¹⁹²

¹⁸⁶ N.R.S. § 199.480.

¹⁸⁷ N.R.S. § 22.100(2).

¹⁸⁸ N.R.S. § 22.100(3).

¹⁸⁹ N.R.S. § 283.440(1). Although this removal procedure does not apply to “[a] state officer removable from office only through impeachment pursuant to Article 7 of the Nevada Constitution,” N.R.S. § 283.440(1)(b), county officials are not covered by the impeachment clause. See *Robison v. First Judicial Dist. Ct. In and For Ormsby Cnty.*, 313 P.2d 436, 438-39 (Nev. 1957).

¹⁹⁰ N.R.S. § 283.440(2)(b), (c).

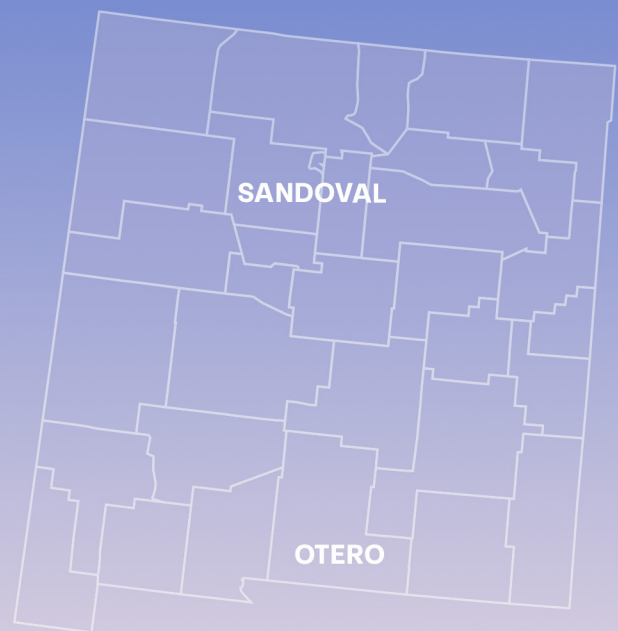
¹⁹¹ N.R.S. § 283.440(2).

¹⁹² N.R.S. § 283.440(2).

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

New Mexico



STATE-BY-STATE ANALYSIS

E. NEW MEXICO

1. Election certification framework at the county level

In New Mexico, each county's clerk and county canvassing board are primarily responsible for election certification.¹⁹³ Each county canvass board consists of the members of its board of county commissioners,¹⁹⁴ unless the board of county commissioners has designated the county board of registration to serve as the canvassing board.¹⁹⁵ Each county has three or five commissioners who are elected to serve four-year terms.¹⁹⁶ Although New Mexico has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of the county canvass boards.

Each county clerk is required to appoint an election board to count paper, absentee, provisional and previously uncounted write in ballots, provide a summary report of those tallies to the canvassing board, canvass the county's precincts, prepare a report

¹⁹³ See N.M. Stat. Ann. § 1-13-1.

¹⁹⁴ N.M.S.A. § 1-13-1(A).

¹⁹⁵ N.M.S.A. § 1-13-1(B).

¹⁹⁶ N.M.S.A. § 4-38-2, § 4-38-6.

of the canvass by “carefully examining the returns” to ascertain if they are properly certified and “whether any discrepancy, omission, or error appears” on their face and to present that report to the canvassing board for its “consideration and approval.”¹⁹⁷ The clerk must also provide a “cumulative report” to the Secretary of State “to be used in the event of a recount.”¹⁹⁸ The county canvassing board then “shall meet to approve the report of the canvass...and declare the results” between six and ten days for counties with less than 150,000 voters and between six and thirteen days for all other counties.¹⁹⁹ “Immediately after the meeting of the county canvassing board, the county clerk shall transmit a copy of the county canvass report, along with any hand tally sheets, to the secretary of state.”²⁰⁰ In elections for federal and statewide office, the secretary of state is required to make a report from the county election board and county canvassing boards transmitted by the county clerks and provide it to the state canvassing board, which is required to “meet...and proceed to approve the report of the canvass and declare the results” of the election on the third Tuesday after the election.²⁰¹

New Mexico law specifies detailed procedures—outside of the certification process—for resolving suspected error or fraud.²⁰² For example, if it appears that a “certificate has not been properly executed” or “there is a discrepancy within the election returns,” the county canvassing board “shall immediately issue a summons directed to the precinct board [election board], commanding them to forthwith appear and make the necessary corrections or supply omissions,”²⁰³ after which “the county canvassing board shall proceed with the canvass of all correct election returns.”²⁰⁴ New Mexico law also sets out detailed procedures for recounts and election contests,²⁰⁵ in which courts have broad authority to resolve alleged violations of “the provisions of the Election Code... that protect the secrecy and sanctity of the ballot.”²⁰⁶

2. County officials who have refused to certify elections

OTERO COUNTY, NM

¹⁹⁷ N.M.S.A. § 1-13-4.

¹⁹⁸ N.M.S.A. § 1-13-4(D).

¹⁹⁹ N.M.S.A. § 1-13-13(A).

²⁰⁰ N.M.S.A. § 1-13-1(D).

²⁰¹ N.M.S.A. § 1-13-16(A); N.M.S.A. § 1-13-15(A). *See also Cobb v. State Canvassing Board*, 140 P.3d 498 (N.M. 2006) (applying statutes to presidential elections).

²⁰² *See, e.g.*, N.M.S.A. § 1-13-5 to 1-13-11.

²⁰³ N.M.S.A. § 1-13-5(A).

²⁰⁴ N.M.S.A. § 1-13-5(C).

²⁰⁵ N.M.S.A. §§ 1-14-2 - 1-14-25.

²⁰⁶ N.M.S.A. § 1-14-13(A).

After the 2022 primary, the three-member Otero Board of County Commissioners [voted](#) unanimously against certifying the county's primary results based on unsubstantiated claims about Dominion Voting Systems. The New Mexico secretary of state [filed](#) a petition for writ of mandamus against the board to compel certification, which the New Mexico Supreme Court [granted](#) the following day. In response to that order and under threat of criminal charges, the board [voted](#) 2-1 to certify the election. The lone holdout was County Commissioner Couy Griffin, who [said](#) "My 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." A state court later [removed Griffin and barred him for life](#) from public office based on his participation in the January 6th insurrection in a lawsuit [led by CREW](#).

Gerald Matherly

Current position: [Otero Board of County Commissioners, County Commissioner, District 1, Chairman](#)

Refusal to certify: Primary Election, Otero County, 2022: Matherly, Griffin and the other commissioner, Vickie Marquardt, [voted unanimously against](#) certifying the primary election. After the secretary of state sued the board and threatened a criminal referral, [Matherly and Marquardt voted to certify](#).

Stated reasons for refusal to certify: Matherly did not provide specific reasons for his refusal to certify but reportedly had previously expressed [concerns](#) about state voting tabulators. When Matherly certified the results pursuant to a court order, he stated, "As of right now we have no proven black and white facts that anything was wrong." He added that it would have been unfair to the winning candidates, stating: "It would all be for naught and I can't do that for those people. Those people won the election fairly."

Vickie Marquardt

Current position: Otero Board of County Commissioners, County Commissioner, District 3

Refusal to certify: Primary Election, Otero County, 2022: Marquardt, Griffin and Matherly voted unanimously against certifying the primary election. After the secretary of state sued the board and threatened a criminal referral, Marquardt and Matherly voted to certify.

Stated reasons for refusal to certify: Expressing her reason for refusing to certify, Marquardt stated, “I have huge concerns with these voting machines...I just don’t think in my heart that they can’t be manipulated.”

Marquardt also said, “The New Mexico Supreme Court, the Democrat-controlled New Mexico Legislature and the Democrat-controlled secretary of state and the attorney general will not allow us to withhold approval pending an investigation into these issues. Instead, they are railroading this commission and rubber stamping approval under the threat of criminal charges in jail.”

Additional information: Discussing the 2022 general election, an election that Marquardt did vote to certify, she expressed concerns, according to reporting, that elections were being tampered with nationwide but said, “If we don’t certify we’ve been down this road before...and if that happens the governor gets to replace us...I feel like someone is coming after us no matter the way we go.” Also after the 2022 general election, she said, “Honestly, I don’t have a reason for not certifying Otero County elections. I think you guys do a good job in your office,” referring to the Otero County Clerk’s office, but said “the state had pretty much taken the rights of the commission and authority of the commission away. We’re basically like notaries.”

SANDOVAL COUNTY, NM

Jay Block

Current position: Sandoval Board of County Commissioners, County Commissioner, District 2

Refusal to certify: Municipal Election, Sandoval County, 2022: Commissioner Block voted against certifying the municipal election results for the Village of Jemez Springs but was unsuccessful in preventing certification by a 3 to 1 vote.

Primary Election, Sandoval County 2022: Commissioner Block voted against certifying the primary results but was unsuccessful in preventing certification by a 4 to 1 vote.

General Election, Sandoval County, 2022: Commissioner Block voted against certifying the election results but was unsuccessful in preventing certification by a 4 to 1 vote.

Stated reasons for refusal to certify: 2022 Municipal Election: The Jemez Springs clerk did not appear at the March 11 meeting to provide data to certify the canvass. When the clerk appeared at a later meeting, Block refused to certify the results, claiming in a Rumble interview that the clerk still had not complied with state law (3:25).

2022 Primary Election: At the June 2022 meeting where he voted against certifying the primary, Block asked the clerk's office a series of specific questions about the equipment/software used during the voting process (20:30-26:45) then read a statement (34:16-35:00) citing, among other things, the fact the committee had not reviewed "the cast vote record which is inarguably the most crucial document[.]" He later reiterated many of the same points during Facebook live and Rumble interviews. There is no credible evidence of widespread fraud or irregularities in New Mexico elections.

2022 General Election: After questioning Sandoval County Clerk and Deputy (29:00) during the Board's meeting immediately prior to the certification vote, Block said, "I don't know how I can vote if I don't have the data in front of me. I'm voting no because I was not provided the data the other commissioners were" (53:00).

3. Legal remedies under New Mexico law

A) WHAT IF THE COUNTY CANVASS BOARD REFUSES TO CERTIFY?

(1) Mandamus

Mandamus is the proper remedy to compel county certification in New Mexico. State law provides an explicit mandamus remedy to compel county certification: N.M.S.A. § 1-13-12 provides that a “district court, upon petition of any voter, may issue a writ of mandamus to the county canvassing board to compel it to approve the report of the county canvass and certify the election returns.”²⁰⁷ The statute is consistent with longstanding New Mexico case law recognizing that it is “quite well settled that [clerks and canvassing boards] act only ministerially, and not judicially,” and that “the power of the court to compel ministerial officers to act is without doubt.”²⁰⁸ Mandamus may be sought in the District Court or Supreme Court.²⁰⁹ The attorney general, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus relief.²¹⁰

The 2022 Otero County case, discussed above, is an instructive precedent. Although N.M.S.A. § 1-13-12 only authorizes “voters” to petition a “district court” for a writ of mandamus to compel county certification, the New Mexico Supreme Court exercised its original jurisdiction to grant the secretary of state’s petition.²¹¹ By seeking mandamus directly in the state supreme court, the secretary was able to efficiently resolve the certification dispute within tight election timeframes.

²⁰⁷ N.M.S.A. § 1-13-12.

²⁰⁸ *Territory ex rel. Lewis v. Bd. Cnty. Comm’rs of Bernalillo Cnty.*, 16 P. 855, 862 (N.M. 1888); *see also New Energy Econ., Inc. v. Martinez*, 247 P.3d 286, 290 (N.M. 2011) (discussing mandamus elements); N.M.S.A. § 44-2-5; N.M.S.A. § 1-1-3 (“As used in the Election Code [Chapter 1 NMSA 1978], ‘shall’ is mandatory.”).

²⁰⁹ *See* N.M.S.A. § 1-13-12 (district court); N.M. Const. art. VI § 3 (supreme court); *State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 980 P.2d 55, 60 (N.M. 1999) (supreme court will exercise original jurisdiction “when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.”).

²¹⁰ *State ex rel. King v. Lyons*, 248 P.3d 878, 881 (N.M. 2011) (state Attorney General); *State ex rel. League of Women Voters v. Advisory Comm. to the N.M. Compilation Comm’n*, 401 P.3d 734, 738 (N.M. 2017) (private voters).

²¹¹ *See* N.M. Const. art. VI § 3; *see also* N.M. R. App. P. 12-504.

(2) New Mexicans' constitutional right to vote

A county board's refusal to certify may also violate the New Mexico Constitution's free and open clause, which provides: "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."²¹² Under this clause, "every qualified voter may freely exercise the right to vote without restraint or coercion of any kind and that his or her vote, when cast, shall have the same influence as that of any other voter."²¹³ The fundamental right to vote may be violated if, for example, county officials indefinitely delay certification and the lawful votes from that county are not counted, thereby disenfranchising that county's voters. In addition to being a basis for affirmative relief, the need to protect New Mexicans' fundamental right to vote would strongly reinforce any request for mandamus relief.

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

(1) Court appointments to carry out order

Like other states,²¹⁴ New Mexico has an analogue to Federal Rule of Civil Procedure 70 that empowers courts to appoint someone in place of an official who defies a court order to certify and to hold the disobedient party in contempt.²¹⁵

(2) Civil contempt

New Mexico courts can impose civil contempt sanctions to compel compliance with court orders. "Civil contempts are remedial and may use fines, imprisonment, or other sanctions as coercive measures to compel the contemnor to comply in the future with an order of the court. Because the purpose of those civil contempt sanctions is to compel compliance with the court's orders and not to punish, the continuing contempt sanctions end when the contemnor complies."²¹⁶

²¹² N.M. Const. art. II, § 8.

²¹³ *Grisham v. Van Soelen*, 539 P.3d 272, 282 (N.M. 2023); *see also* *Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001) ("[N]o election can be free and equal ... if any substantial number of persons entitled to vote are denied the right to do so").

²¹⁴ *See supra* Parts II(A)(3)(b)(1), II(B)(3)(b)(1), II(C)(3)(b)(1) and II(D)(3)(b)(1).

²¹⁵ N.M. R. Civ. P. Dist. Ct. 1-070.

²¹⁶ *Concha v. Sanchez*, 258 P.3d 1060, 1066 (N.M. 2011); *see also* *State ex rel. Bliss v. Greenwood*, 315 P.2d 223, 225 (N.M. 1957) ("Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil").

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code

Under N.M.S.A. § 1-20-23, “any state or county officer or...any deputy or assistant thereto” who “willful[y] violat[es]...the Election Code” or who “willful[ly] fail[s] or refus[es]...to perform any act or duty required of him by the Election Code...is guilty of a fourth degree felony” with a basic sentence of 18 months’ imprisonment,²¹⁷ and “in addition, [such] violation is sufficient cause for removal from office in a proceeding instituted for that purpose as provided by law.”²¹⁸ This statute could apply to a county official who willfully refuses or delays certification. In 2022, the New Mexico Secretary of State began “preparing a criminal referral to the New Mexico Attorney General related to” the Otero County Board of Canvassers’ “willful violations of the Election Code” and “willful failure or refusal to perform their duties under the Election Code”²¹⁹ by refusing to certify the election, though charges were not ultimately filed.

(2) Conspiracy

A county official who agrees with others to illegally disrupt or delay certification may be charged with conspiracy. A “[c]onspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.”²²⁰ “Whoever commits conspiracy shall be punished as follows:...if the highest crime conspired to be committed is...a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony,”²²¹ with a basic sentence of 18 months’ imprisonment.²²² “The gist of conspiracy under the statute is an agreement between two or more persons to commit a felony.”²²³ “In order to be convicted of conspiracy, the defendant must have the requisite intent to agree and the intent to commit the offense that is the object of the conspiracy.”²²⁴

²¹⁷ N.M.S.A. § 31-18-15(A).

²¹⁸ N.M.S.A. § 1-20-23.

²¹⁹ Press Release from N.M. Sec’y of State, *Secretary of State Files Lawsuit Against Otero County Commission for Illegal Actions to Disenfranchise 2022 Primary Election Voters and Harm Primary Candidates* (June 14, 2022), <https://www.sos.nm.gov/2022/06/14/secretary-of-state-files-lawsuit-against-otero-county-commission-for-illegal-actions-to-disenfranchise-2022-primary-election-voters-and-harm-primary-candidates/>.

²²⁰ N.M.S.A. § 30-28-2(A).

²²¹ N.M.S.A. § 30-28-2(B)(3).

²²² N.M.S.A. § 31-18-15(A).

²²³ *State v. Gallegos*, 254 P.3d 655, 660 (N.M. 2011) (quoting *State v. Deaton*, 390 P.2d 966, 967 (N.M. 1964)).

²²⁴ *Id.* (quoting *State v. Varela*, 993 P.2d 1280, 1291 (N.M. 1999)).

(3) Criminal Contempt

A county official who defies a court order may also be held in criminal contempt. “Criminal contempt proceedings are instituted to punish completed acts of disobedience that have threatened the authority and dignity of the court and are appropriate even after the contemnor is no longer acting contemptuously.”²²⁵ Sanctions may include “fines” and “imprisonment.”²²⁶

(4) Removal from office

New Mexico law provides a mechanism for the state to institute legal proceedings to remove county officials for, among other things, (1) “failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office; (2) “gross incompetency or gross negligence in discharging the duties of the office,” or (3) “any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office.”²²⁷ It is a quasi-criminal proceeding that requires a grand jury accusation, expedited timelines and a trial by jury.²²⁸

A county official who willfully obstructs or delays certification would be subject to removal proceedings under this provision. In the 2022 Otero County certification dispute, state authorities’ threats to remove the recalcitrant county commissioners apparently motivated two of them to change their votes.²²⁹

(5) Statutory fines for defying writs of mandamus

As in Nevada,²³⁰ New Mexico law imposes specific penalties on public officers who defy writs of mandamus: “Whenever a peremptory mandamus is directed to a public officer, body or board, commanding the performance of any public duty specially enjoined by law, if it appears to the court that such officer or any member of such body or board, without just excuse, refuses or neglects to perform the duty so enjoined, the court

²²⁵ *Concha v. Sanchez*, 258 P.3d 1060, 1066 (N.M. 2011).

²²⁶ *See id.*

²²⁷ N.M.S.A. § 10-4-2; *see also* N.M.S.A. § 10-4-1 (removal mechanism applies to “[a]ny officer of a political subdivision of the state elected by the people”); *State v. Santillanes*, 654 P.2d 542, 542 (N.M. 1982) (removal proceeding against county commissioner).

²²⁸ *See generally* N.M.S.A. §§ 10-4-3–10-4-29.

²²⁹ Annie Gown, *New Mexico county certifies election results, bowing to court order*, Wash. Post (June 17, 2022), <https://www.washingtonpost.com/politics/2022/06/17/new-mexico-county-weighs-defying-order-certify-election-results/> (quoting one commissioner as stating, “I don’t think it’s worth us getting removed from our seats”).

²³⁰ *See supra* Part II(D)(3)(b)(1).

may impose a fine not exceeding two hundred and fifty dollars (\$250) upon every such officer or member of such body or board.”²³¹

Although the maximum fine is only \$250, the statute does not displace the courts’ inherent contempt power to “punish for disobedience of the writ, or to compel obedience to the writ by imprisonment until compliance.”²³²

²³¹ N.M.S.A. § 44-2-13.

²³² *Delgado v. Chavez*, 140 U.S. 586, 589 (1891).

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

North Carolina



STATE-BY-STATE ANALYSIS

F. NORTH CAROLINA

1. Election certification framework at the county level

In North Carolina, each county's board of elections is responsible for canvassing election returns and reporting the results to the State Board of Elections.²³³ Prior to 2023, state law specified that each board of elections consisted of five members: four appointed by the State Board of Elections and one chair appointed by the governor.²³⁴ A new law, currently enjoined by a state court,²³⁵ would create four-member county boards, one each appointed for a two-year term by the president pro tempore of the Senate, the speaker of the House of Representatives, the minority leader of the Senate

²³³ See N.C. Gen. Stat. §§ 163-182.4(a), 163-182.5, 163-182.6.

²³⁴ N.C.G.S. § 163-30 (2019).

²³⁵ *Cooper v. Berger*, No. 23CV029308-910 (N.C. Super. Ct. Mar. 11, 2024), <https://www.carolinajournal.com/wp-content/uploads/2024/03/cooper-berger-electionsboard-23CV029308-910.pdf>.

and the minority leader of the House of Representatives and none of whom may hold another office, be a candidate or be a close family member of a candidate.²³⁶

In elections for federal and statewide office, the county boards shall “receive the returns of primaries and elections, canvass the returns, make abstracts thereof, [and] transmit such abstracts to the proper authorities.”²³⁷ “‘Abstract’ means a document signed by the members of the board of elections showing the votes for each candidate and ballot proposal on the official ballot in the election.”²³⁸ Each county board “shall meet at 11:00 A.M. on the tenth day after every election to complete the canvass of votes cast and to authenticate the count in every ballot item in the county by determining that the votes have been counted and tabulated correctly,”²³⁹ and, “[a]s soon as the county canvass has been completed...shall prepare abstracts of all the ballot items in a form prescribed by the State Board.”²⁴⁰ The state board of election shall then similarly “authenticate the count in every ballot item,”²⁴¹ and finally “[i]ssue certificates of nomination and election.”²⁴²

County boards of elections have no legal authority to investigate allegations of fraud absent an election protest, or to delay certification absent approval by the State Board of Elections.²⁴³ North Carolina law allows voters and candidates to file election protests with the county board alleging fraud or error and requires the board to hold a hearing on the protest,²⁴⁴ but a “protest concern[ing] an irregularity other than the counting or tabulating of votes...shall not delay the canvass.”²⁴⁵ “If a protest was filed before the canvass and concerns the counting and tabulating of votes, the county board shall resolve the protest before the canvass is completed” and “may recess the canvass meeting, but shall not delay the completion of the canvass for more than three days unless approved by the State Board of Elections” and “shall not delay the canvass of ballot items unaffected by the protest.”²⁴⁶ The county board shall make a written decision on each protest with findings of fact and conclusions of law,²⁴⁷ which “may be appealed to the State Board of Elections,”²⁴⁸ and then to the Superior Court of Wake County in cases of federal positions,²⁴⁹ but appeals of protest dismissals “shall not delay the canvass.”²⁵⁰

²³⁶ N.C.G.S. § 163-30.

²³⁷ N.C.G.S. § 163-33(9).

²³⁸ N.C.G.S. § 163-182(1).

²³⁹ N.C.G.S. § 163-182.5(b).

²⁴⁰ N.C.G.S. § 163-182.6(a).

²⁴¹ N.C.G.S. § 163-182.5(c).

²⁴² N.C.G.S. § 163-182.4(b)(1), (c)(3).

²⁴³ N.C.G.S. § 163-182.10.

²⁴⁴ See N.C.G.S. §§ 163-182.9, 163-182.10.

²⁴⁵ N.C.G.S. § 163-182.10(a)(3) (emphasis added).

²⁴⁶ N.C.G.S. § 163-182.10(a)(2).

²⁴⁷ N.C.G.S. § 163-182.10(d).

²⁴⁸ N.C.G.S. § 163-182.11(a).

²⁴⁹ N.C.G.S. § 163-182.14.

²⁵⁰ N.C.G.S. § 163-182.10(a)(2).

The State Board of Elections “may initiate and consider complaints on its own motion, may intervene and take jurisdiction over protests pending before a county board, and may take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election,”²⁵¹ and has the 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.”²⁵²

2. County officials who have refused to certify elections

MECKLENBURG COUNTY, NC

Elizabeth McDowell

Current position: Mecklenburg County Board of Elections, Board Member, Secretary

Refusal to certify: general election, Mecklenburg County, 2020. McDowell and Mary Potter Summa voted against certifying the election results but were unsuccessful in preventing certification by a 3 to 2 vote.

Stated reasons for refusal to certify: McDowell did not state a reason for her refusal to certify.

²⁵¹ N.C.G.S. § 163-182.12.

²⁵² N.C.G.S. § 163-22(c).

Mary Potter Summa

Current position: Mecklenburg County Board of Elections, Member

Refusal to certify: general election, Mecklenburg County, 2020: Summa and Elizabeth McDowell voted against certifying the election results but were unsuccessful in preventing certification by a 3 to 2 vote.

Stated reasons for refusal to certify: Summa questioned the legality of state election board rules that were upheld by the North Carolina Supreme Court. Referring to State Board of Elections Director Karen Brinson, Summa stated, “I do not feel that she had the emergency powers at all, emergency powers are triggered when there’s a disruption in the election. There was no disruption in this election.” She also disagreed with directives allowing the board to track ballots that did not have a postmark because she believed “[t]he state directives said we could ballot track, that’s not in the statute” and resulted in ballots that were counted in contravention of the law.

Additional information: Summa wrote an op-ed in 2021 justifying her vote against certification, accusing Democrats of taking advantage of the COVID-19 pandemic to “r[u]n roughshod over state election laws” and blaming bureaucrats for trying to nullify election laws.

SURRY COUNTY, NC

Jerry Forestieri and Timothy DeHaan

After the 2022 election, two members of the Surry County Board of Elections, Jerry Forestieri and Timothy DeHaan, refused to certify the election results. They wrote in a letter that they were protesting a federal court ruling they claimed was “illegal” and “pervert[ed] our election practices.” The letter also stated, “with regard for the sacred blood shed of both my Redeemer and His servants, past Patriots who made the ultimate sacrifice, to secure God granted inalienable rights defended by men of true character, I cannot, I must not call these election results credible and bow to the perversion of truth.” DeHaan admitted at the

certification meeting, “[w]e feel the election was held according to the law that we have, but that the law is not right.” While DeHaan eventually voted to certify, Forestieri remained a holdout as the board voted to certify by a 4 to 1 vote. The State Board of Elections later removed both men from their county positions because, as the state board chair explained, “[t]hose who administer elections must follow the law as it is written, not how they want it to be.”

Although the officials involved in the Surry County certification refusal are no longer in office, we include the episode in this report because it is an illustrative example of effective state enforcement action.

3. Legal remedies under North Carolina law

A) WHAT IF A COUNTY BOARD REFUSES TO CERTIFY?

(1) Intervention by the state board of elections

The State Board of Elections has expansive supervisory authority over county boards that it could use to remedy any abuses in canvassing and certification. For instance, the state board “shall require all reports from the county boards of elections and election officers as provided by law, or as are deemed necessary by the State Board, and shall compel observance of the requirements of the election laws by county boards of elections and other election officers.”²⁵³ The State Board further “shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a county board of elections to comply with any part of the election laws imposing duties upon a county board of elections.”²⁵⁴ The state board “may intervene and take jurisdiction over protests pending before a county board” and it is broadly authorized to “take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result

²⁵³ N.C.G.S. § 163-22(c).

²⁵⁴ N.C.G.S. § 163-22(c).

of an election.”²⁵⁵ If a county board fails to timely provide its canvass to the state board, “the State Board is authorized to secure the originals or copies” of the missing abstracts “from the appropriate clerks of superior court or county boards of elections, at the expense of the counties.”²⁵⁶

(2) Mandamus

Mandamus is a proper remedy in North Carolina to compel county boards and their members to comply with their mandatory canvassing and certification duties. Mandamus is appropriate when “(1) the party seeking relief has a clear legal right to the act requested; (2) the respondent has a legal duty to perform the act requested; (3) performance of the act at issue is ministerial in nature and does not involve the exercise of discretion; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no alternative, legally adequate remedy is available.”²⁵⁷ A mandamus action would likely need to be filed in Superior Court, as it is unclear whether North Carolina appellate courts have original jurisdiction over mandamus actions against non-judicial officers.²⁵⁸

A county official’s refusal to canvass and certify election results would meet these conditions. As outlined above, North Carolina law repeatedly uses the word “shall” in describing the county boards’ canvassing and certification duties. And “[i]t is well established that the word shall is generally imperative or mandatory when used in [North Carolina] statutes.”²⁵⁹ Thus, the “plain language” of these statutes imposes duties on county boards that are “ministerial in nature, involving no discretion.”²⁶⁰ Nor does there appear to be any adequate alternative remedy to timely compel compliance.²⁶¹

The attorney general, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus relief.²⁶²

(3) North Carolinians’ constitutional right to vote

²⁵⁵ N.C.G.S. § 163-182.12.

²⁵⁶ N.C.G.S. § 163-182.5(c).

²⁵⁷ *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 777 S.E.2d 733, 736 (N.C. 2015) (cleaned up).

²⁵⁸ *See Pue v. Hood*, 22 S.E.2d 896, 898 (N.C. 1942) (“[T]he issuance of a writ of mandamus is an exercise of original and not appellate jurisdiction.”); N.C. Const. art. IV, § 12 (Supreme Court and Court of Appeals have appellate jurisdiction and supervisory power over lower courts, and Superior Court has general original jurisdiction); N.C.G.S. § 7A-32 (Supreme Court and Court of Appeals may issue writ of mandamus only in aid of jurisdiction or supervisory power over lower courts).

²⁵⁹ *Morningstar*, 777 S.E.2d at 737 (cleaned up).

²⁶⁰ *Id.*

²⁶¹ *See Graham Cnty. Bd. of Elections v. Graham Cnty. Bd. of Comm’rs*, 712 S.E.2d 372, 379-80 (N.C. Ct. App. 2011).

²⁶² *See, e.g., Morningstar*, 777 S.E.2d at 734-35 (private party); *Bickett v. State Tax Comm’n*, 99 S.E. 415, 421 (N.C. 1919) (Governor).

A county board's refusal to certify may also violate the North Carolina Constitution's free election clause, which provides: "All elections shall be free."²⁶³ "[A] voter is deprived of a 'free' election if (1) a law prevents a voter from voting according to one's judgment or (2) the votes are not accurately counted."²⁶⁴ This clause may be violated if, for example, county officials indefinitely delay certification and the lawful votes from that county are not counted, thereby disenfranchising that county's voters. An aggrieved voter could bring an action for declaratory and injunctive relief under the North Carolina Constitution.²⁶⁵ The need to protect North Carolinians' fundamental right to vote would also strongly reinforce any request for mandamus relief.

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

(1) Court appointments to carry out order

Like other states,²⁶⁶ North Carolina has an analogue to Federal Rule of Civil Procedure 70 that empowers courts to appoint someone in place of an official who defies a court order to certify and to hold the disobedient party in contempt.²⁶⁷

(2) Civil contempt

A county official who defies a court order may also be held in civil contempt. "Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties."²⁶⁸ "A person who is found in civil contempt may be imprisoned as long as the civil contempt continues" and [t]he period of imprisonment for a person found in civil contempt shall not exceed 90 days for the same act of disobedience or refusal to comply with an order of the court."²⁶⁹ Furthermore, "[a] person who has not purged himself or herself of the contempt within the period of imprisonment imposed by the court under this subsection may be recommitted for one or more successive periods of imprisonment, each not to exceed 90 days," for a total of

²⁶³ N.C. Const. art. I, § 10.

²⁶⁴ *Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023).

²⁶⁵ See *Holmes v. Moore*, 840 S.E.2d 244 (N.C. App. Ct. 2020) (granting injunctive relief).

²⁶⁶ See *supra* Parts II(A)(3)(b)(1), II(B)(3)(b)(1), II(C)(3)(b)(1) and II(D)(3)(b)(1).

²⁶⁷ N.C.G.S. § 1A-1, Rule 70.

²⁶⁸ *Cnty. of Durham by and through Durham DSS v. Burnette*, 821 S.E.2d 840, 851 (N.C. Ct. App. 2018) (quoting *Mauney v. Mauney*, 150 S.E.2d 391, 393 (N.C. 1966)).

²⁶⁹ N.C.G.S. § 5A-21(b), (b2).

up to 12 months.²⁷⁰ A person found in civil contempt “is not subject to the imposition of a fine.”²⁷¹

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code and criminal laws related to official duties

A county official who willfully subverts canvassing and certification could face prosecution under various provisions of the North Carolina election code and criminal code.

Under N.C.G.S. § 163-274, it is a Class 2 misdemeanor for “any person to fail,...as a member of any board of elections, to prepare the books, ballots, and return blanks which it is the person’s duty under the law to prepare, or to distribute the same as required by law, or to perform any other duty imposed upon that person within the time and in the manner required by law” and “any chair of a county board of elections or other returning officer to fail or neglect, willfully or of malice, to perform any duty, act, matter or thing required or directed in the time, manner and form in which said duty, matter or thing is required to be performed in relation to any primary, general or special election and the returns thereof,” which carries sentences of up to 60 days depending on prior offenses and subject to other enhancements.²⁷²

Under N.C.G.S. § 163-275(3), it is a Class I felony for “any person who is an election officer, a member of an election board or other officer charged with any duty with respect to any primary or election, knowingly to make any false or fraudulent entry on any election book or any false or fraudulent returns, or knowingly to make or cause to be made any false statement on any ballot, or to do any fraudulent act or knowingly and fraudulently omit to do any act or make any report legally required of that person,” which ranges from 3-12 months’ imprisonment depending on prior offenses and subject to other enhancements.²⁷³

Under N.C.G.S. § 14-230(a), if any government official “shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1 misdemeanor,” which carries sentences of up to 120 days depending on prior offenses and subject to other

²⁷⁰ N.C.G.S. § 5A-21(b2).

²⁷¹ N.C.G.S. § 5A-21(d).

²⁷² N.C.G.S. § 163-274(1), (11); N.C.G.S. § 15A-1340.23(c).

²⁷³ N.C.G.S. § 163-275(3); N.C.G.S. § 15A-1340.17(c).

enhancements.²⁷⁴ If it is found “that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense.”²⁷⁵

(2) Conspiracy

A county official who agrees with others to illegally disrupt or delay certification may be charged with conspiracy. “A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.”²⁷⁶ “No express agreement need be proved; proof of circumstances which point to a mutual implied understanding to commit the unlawful act is sufficient to prove a conspiracy.”²⁷⁷ A “conspiracy to commit a Class I felony is a Class 1 misdemeanor,”²⁷⁸ which carries sentences of up to 120 days depending on prior offenses and subject to other enhancements,²⁷⁹ and a conspiracy to commit a Class 2 misdemeanor is a Class 3 misdemeanor,²⁸⁰ which carries sentences of up to 20 days depending on prior offenses and subject to other enhancements.²⁸¹

(3) Criminal contempt

A county official who defies a court order may also be held in criminal contempt. Criminal contempt involves punitive sanctions for conduct including “[w]illful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution.”²⁸² “A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars (\$500.00), or any combination of the three.”²⁸³

(4) Removal from office

²⁷⁴ N.C.G.S. § 15A-1340.23(c).

²⁷⁵ N.C.G.S. § 14-230(a).

²⁷⁶ *State v. Lyons*, 836 S.E.2d 917, 921 (N.C. Ct. App. 2019) (quoting *State v. Bindyke*, 220 S.E.2d 521, 526 (N.C. 1975).

²⁷⁷ *State v. Howell*, 611 S.E.2d 200, 205 (N.C. Ct. App. 2005).

²⁷⁸ N.C.G.S. § 14-2.4(a).

²⁷⁹ N.C.G.S. § 15A-1340.23(c).

²⁸⁰ N.C.G.S. § 14-2.4(b).

²⁸¹ N.C.G.S. § 15A-1340.23(c).

²⁸² N.C.G.S. § 5A-11(a)(3).

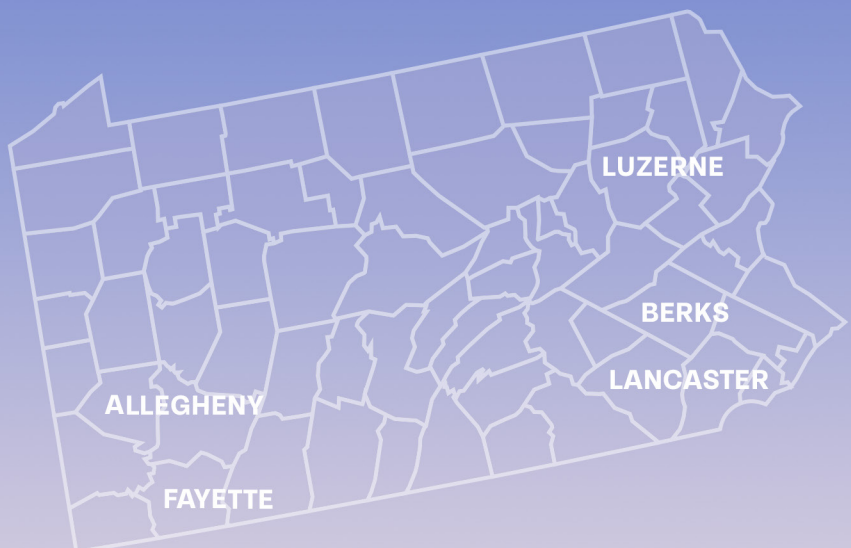
²⁸³ N.C.G.S. § 5A-12(a).

The State Board of Elections has the statutory “power to remove from office any member of a county board of elections for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause.”²⁸⁴ In March 2023, the state board exercised this power by removing two members of the Surry County Board of Elections, Tim DeHaan and Jerry Forestieri, for [refusing to certify elections](#), following a [voter complaint](#).

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

Pennsylvania



STATE-BY-STATE ANALYSIS

G. PENNSYLVANIA

1. Election certification framework at the county level

In Pennsylvania, each county's election board is responsible for election certification.²⁸⁵ All county election boards have a member of both of the major parties; they consist of county commissioners for a non-home-rule county and "members of the county board which performs legislative functions" or other membership established by the county charter in a home-rule county.²⁸⁶ Although Pennsylvania has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of the county election boards.

Each county election board is required by law to receive "the returns from each district" and, for offices that by law require a nomination petition, provide those returns by phone, fax or electronically to the Secretary of the Commonwealth by 3:00 A.M. the morning after the election.²⁸⁷

²⁸⁵ 25 Pa. Stat. § 3152(b); 25 P.S. § 3154(b).

²⁸⁶ 25 P.S. § 2641(b).

²⁸⁷ 25 P.S. § 3152(b).

At 9:00 A.M. on the third day following the election, each board must “publicly commence the computation and canvassing of the returns...from day to day until completed”²⁸⁸ and, when complete, “tabulate the figures for the entire county and sign, announce and attest the same.”²⁸⁹ Pennsylvania law provides specific parameters for the tabulation that include 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.²⁹⁰ The county board then “shall submit the unofficial returns to the Secretary of the Commonwealth by five o’clock P. M. on the Tuesday following the election.”²⁹¹

With two exceptions, each county board is required by law to “certify the returns so computed” within five days after the computation is complete or, if a petition for a recount has been filed during that window, upon completion of the recount or recanvass.²⁹² Those exceptions are if the court of common pleas has directed any returns to be revised or a recount has uncovered errors, then the “returns shall be revised, corrected and certified accordingly.”²⁹³ But in no instance can the certification be delayed beyond the third Monday after the election.²⁹⁴

County officials have no legal authority to withhold certification based on suspected or alleged error or fraud. Rather, “[i]f any error or fraud is discovered, the county board shall compute and certify the votes justly regardless of any fraudulent or erroneous returns presented to it, and shall report the facts to the district attorney of the proper county for action.”²⁹⁵ The law sets out detailed procedures for allegations of error or fraud to be resolved in the courts through voter petitions and election contests.²⁹⁶

2. County officials who have refused to certify elections

ALLEGHENY COUNTY, PA

²⁸⁸ 25 P.S. § 3154(a).

²⁸⁹ 25 P.S. § 3154(a).

²⁹⁰ 25 P.S. § 3154(b)-(d).

²⁹¹ 25 P.S. § 3154(f).

²⁹² 25 P.S. § 3154(f).

²⁹³ 25 P.S. § 3154(f); *see also* 25 P.S. § 3154(e) (providing processes for recounts and recanvasses).

²⁹⁴ 25 P.S. § 2642(k).

²⁹⁵ 25 P.S. § 3154(d)(3).

²⁹⁶ *See* 25 P.S. §§ 3157(a), 3261–63, 3352, 3456.

Samuel DeMarco

Current position: Allegheny County Council, At Large Council Representative; Allegheny County Elections Board, Member

Refusal to certify: General Election, Allegheny County, 2020: DeMarco voted against certifying the election results on November 23, 2020 but was unsuccessful in preventing certification by a 2 to 1 vote. DeMarco voted against certifying amended results on November 25 but was again unsuccessful by a 2 to 1 vote.

Stated reasons for refusal to certify: DeMarco stated the vote against the certification was a “protest vote,” over issues such as “poll watchers not being permitted in satellite voting offices and disallowing ballot challenges based solely on signatures.” DeMarco cited state-level decisions about the handling of mail-in ballots, but admitted that the county itself runs elections securely.

Additional information: DeMarco was a fake elector in Pennsylvania in 2020. DeMarco also filed a lawsuit in March 2024 against Allegheny County Executive for installing drop boxes without approval from the Election Board. He stated, “[t]his isn’t about whether you like drop boxes, or not like drop boxes. This is about someone taking a unilateral action in an arbitrary decision.”

2022 CERTIFICATION DISPUTES IN BERKS, FAYETTE AND LANCASTER COUNTIES

In May 2022, the county commissions of Berks, Fayette and Lancaster counties each refused to certify election results. Each cited a lack of clear guidance under Pennsylvania law regarding the counting of undated mail-in ballots, even though multiple courts had ruled that such ballots should be counted. According to the Department of State’s petition against the three counties, after the courts ruled that these ballots must be counted, the Pennsylvania Department of State emailed all of the county election boards in the state, requesting that they send a final certification that included the undated mail-in votes. 64 of the 67 counties eventually complied. But in late June the boards of Berks, Fayette and Lancaster counties informed the Department of State that they would not transmit election results that included the undated mail-in ballots. The Secretary of the Commonwealth sued the three counties for refusing to comply with their non-discretionary duties. The Pennsylvania Commonwealth Court

ordered the three counties to include the ballots in question in their certified results. The counties ultimately complied in August 2022, well after the statutory certification deadline.

BERKS COUNTY, PA

Christian Leinbach

Current position: Berks County Board of Commissioners, Chairman

Refusal to certify: Primary Election, Berks County, 2022: After initially voting to certify an election result that excluded ballots that, despite being timely received, missed a handwritten date, Leinbach refused to recertify a result that complies with the law and includes all legal votes. Eventually, a court ordered compliance and the county board complied.

Stated reasons for refusal to certify: Leinbach cited a purported lack of clarity on how to count undated mail-in ballots. In response to being told by Pennsylvania's Deputy Secretary for Elections and Commissions that court rulings made clear undated ballots must be counted Leinbach wrote in an email, "[p]lease help me understand where the clear court guidance is regarding certification on undated ballots. I do not see it...I believe the rulings are anything but clear. At best the issue is not settled. I look forward to your response." Leinbach testified to the same in court.

Michael Rivera

Current position: Berks County Board of Commission, Vice-Chair

Refusal to certify: Primary Election, Berks County, 2022: After initially voting to certify an election result that excluded ballots that, despite being timely received, missed a handwritten date, Rivera refused to

recertify a result that complies with the law and includes all legal votes. Eventually, a court ordered compliance and the county board complied.

Stated reasons for refusal to certify: Rivera insisted the decision to not include undated ballots in the count was in accordance with state law, “feels the County has already complied with the recent court order” and “sees no need to recertify” the results that include all legal votes.

FAYETTE COUNTY, PA

Scott Dunn

Current position: Fayette County Commission, County Commissioner, Chairman

Refusal to certify: Primary Election, Fayette County, 2022: According to the Joint Stipulation in the litigation around the certification in Fayette County, the board certified an election result that excluded ballots which, although timely received, did not include a handwritten date. Dunn and the Fayette County board then refused to recertify a result that complied with the law and included all legal votes. Eventually, a court ordered compliance and the county board complied.

Stated reasons for refusal to certify: The Fayette County Board of Elections refused to certify the May 2022 Primary results due to its objection to the inclusion of undated ballots in the returns, despite the fact that federal and state courts previously determined that those ballots should still be counted and that the county should submit both total returns with undated ballots and total returns without them.

In court, Dunn testified regarding his refusal to certify, “[a]t that point that was where I felt this is uncomfortable, this is not the proper procedure that should be applied. And I let—you know, I said I don’t feel comfortable complying with this if that’s the word, and that’s where it started...As a Commissioner I put my hand on my daddy’s bible, put my hand in the air and I swore to defend the Constitution of the state of

Pennsylvania and the laws of the state of Pennsylvania, and that's what I'm doing."

In a July 2022 interview, Dunn stated, "The bottom line is, we're just tired of everything changing...You change how you count. It's not just this election. It's every election. It's after the fact."

Additional information: After the court ordered that undated ballots be counted, Dunn stated, "[t]oday, we are complying with a court order that, in my belief, is in direct violation of the law recently deemed constitutional...This was, and is, to me, about the law and poorly written voting codes in the commonwealth that led to uncertainty, ambiguity and allow for interpretation of the law."

LANCASTER COUNTY, PA

Ray D'Agostino

Current position: Lancaster County Commission, County Commissioner, Vice-Chairman

Refusal to certify: Primary Election, Lancaster County, 2022: D'Agostino voted to convene the count and canvass of the election. According to the Joint Stipulation in the litigation around the certification in Lancaster County, the board certified an election result that excluded ballots which, although timely received, did not include a handwritten date. The Lancaster County Commission then refused to recertify a result that complied with the law and included all legal votes. Eventually, a court ordered compliance, and the county commission complied.

Stated reasons for refusal to certify: In court, D'Agostino testified that "he sees value in the handwritten dates because they 'go to the validity and the authenticity of the ballot received' and can raise red flags that prompt further investigation."

Joshua Parsons

Current position: Lancaster County Commission, County Commissioner, Chairman

Refusal to certify: Primary Election, Lancaster County, 2022: Parsons initially voted to canvass the election. According to the Joint Stipulation in the litigation around the certification in Lancaster County, the board certified an election result that excluded ballots which, although timely received, did not include a handwritten date. The Lancaster County Commission then refused to recertify a result that complied with the law and included all legal votes. Eventually, a court ordered compliance and the county commission complied.

Stated reasons for refusal to certify: Parsons said “his understanding is that the current statutory law states electors shall fill out, sign and date the declaration on the printed envelope.”

LUZERNE COUNTY, PA

In Luzerne County, the 2022 general election was not certified at the initial certification meeting where the vote was 2-2, with one abstention. Although some county officials cited paper shortage issues, a 2023 report by the Luzerne County District Attorney found the issues were a result of a complicated series of events involving retrieval of paper ballots and there was no intentional effort to disenfranchise voters. Following the failure to certify, a congressional candidate requested a writ of mandamus requiring the board to certify. The case ultimately became moot when, at the second special meeting held two days later, the board certified the election by a 3-2 vote, with Alyssa Fusaro and another official who is no longer in office voting no again.

Alyssa Fusaro

Current position: Luzerne County, Board of Elections and Registration, Vice-Chair

Refusal to certify: General Election, Luzerne County, 2022: Fusaro and another member of the board voted against certification at the Board's

first meeting resulting in a 2 to 2 deadlock with one abstention that prevented certification of the election results. At a subsequent special meeting, Fusaro and another member again voted against certification of the election results but were unsuccessful in preventing certification by a vote of 3 to 2.

Stated reasons for refusal to certify: At the first certification meeting, Fusaro stated, “[v]oters were turned away at the polls and unable to vote, we had machines jamming, we had [an] open investigation into why we ran out of paper; polls running out of paper and photocopying ballots. How do we know that additional photocopies were not made and cast? Complete lack of privacy of voters as the screens that we purchased...were never used...We had judges’ bags that were not properly stocked with the necessary items...to do their job, i.e. voter lists...I personally witnessed office staff not being sworn in until halfway through the adjudication process and being able to unpack the black precinct bags and handle provisional ballots, a process which they were also unsupervised on. Finally, the numbers; the numbers that were originally given to us were atrocious. No explanation, a difference of massive amounts...” She also requested a state investigation.

At the second meeting, Fusaro reiterated issues of running out of paper, machines jamming, lack of privacy, photocopied ballots and judges’ bags not being stocked with the necessary items. She also raised concerns about voters turned away because they were not listed in the paper poll books. She claimed she had “major reservations about whether this was a free and fair election.”

Daniel Schramm

Current position: Luzerne County Board of Elections and Registration, Secretary

Refusal to certify: General Election, Luzerne County, 2022. Schramm abstained from the initial vote to certify the election results, which resulted in a 2 to 2 vote and certification being denied. At a subsequent special meeting, Schramm voted with the majority to certify the election

by a vote of 3 to 2. At a second vote two days later, Schramm voted yes and the election was certified.

Stated reasons for refusal to certify: At the first meeting in which Schramm abstained, he stated, “[m]y feeling is I needed a little more information. So, I really didn’t want to say, ‘Oh, yeah, we’re done with it now.’ I want more information, so I can make a short decision on that it’s right to certify it or to not certify it.”

NORTHAMPTON COUNTY, PA

Scott Hough

Current position: Northampton County Election Division, Vice Chair

Refusal to certify: Municipal Elections, Northampton County, 2023. Hough voted against certifying the election results, but was unsuccessful in preventing certification by a vote of 4 to 1.

Stated reasons for refusal to certify: Hough said, “I just could not, with a common sense good conscience, sign off on something I was unsure of,” and that he still had many questions about the election process. During a meeting, Hough also argued that he had no way of knowing how many people were turned away and said, “I can’t sign something I don’t agree with.”

Additional information: Speaking of a county Election Integrity Committee created after the 2023 election, Hough said, “[f]or the last two years, no one has come to our meetings. We sat there the other day and got hammered for three hours and told by the solicitor we had to vote yes to certify the election.”

3. Legal remedies under Pennsylvania law

A) WHAT IF THE COUNTY ELECTION BOARD REFUSES TO CERTIFY?

(1) Mandamus

Mandamus is a proper remedy to compel county certification in Pennsylvania. Courts will issue a writ of mandamus “to compel official performance of a ministerial act or mandatory duty.”²⁹⁷ A Pennsylvania court may issue a writ of mandamus only where (1) the petitioners have a clear legal right, (2) the responding public official has a corresponding duty and (3) no other adequate and appropriate remedy at law exists.²⁹⁸ “[O]nly the Commonwealth Court is imbued with the authority to issue writs of mandamus or prohibition to other government units.”²⁹⁹ In emergency cases, the Pennsylvania Supreme Court could invoke its discretionary King’s Bench authority,³⁰⁰ or its extraordinary jurisdiction.³⁰¹

A county board’s refusal to comply with their canvassing and certification duties would meet each condition for mandamus relief. First, the Pennsylvania Supreme Court has held that voters have a “clear legal right to elected representation” under the Pennsylvania Constitution.³⁰² And Pennsylvania law gives the candidate who wins the

²⁹⁷ *Chanceford Aviation Properties, L.L.P. v. Chanceford Twp. Bd. Of Supervisors*, 923 A.2d 1099, 1107 (Pa. 2007).

²⁹⁸ *Id.* at 1108.

²⁹⁹ *McCray v. Pa. Dept. of Corr.*, 872 A.2d 1127, 1130 & n.13 (Pa. 2005).

³⁰⁰ *See Com. v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (noting court’s authority “to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law”); *Fagan v. Smith*, 41 A.3d 816, 818 (Pa. 2012) (per curiam) (assuming King’s Bench jurisdiction over electors’ petition for mandamus and ordering the Speaker of the Pennsylvania House of Representatives to issue writs of election for special elections to fill vacancies in enumerated legislative districts).

³⁰¹ 42 Pa. Cons. Stat. § 726 (“Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.”).

³⁰² *Fagan*, 41 A.3d at 818 (citing Pa. Const. art. I, § 5); *see also In re Barlip*, 428 A.2d 1058, 1060 (Pa. Commw. Ct. 1981) (voters have “a substantial interest in obtaining compliance with the election laws”).

most votes a clear legal right to hold office.³⁰³ Second, Pennsylvania law repeatedly uses the word “shall” in imposing those duties. And Pennsylvania courts have held that “[t]he word ‘shall’ carries an imperative or mandatory meaning.”³⁰⁴ Pennsylvania case law also makes clear that county officials’ duties are non-discretionary or “ministerial.”³⁰⁵ Nor is there any adequate alternative remedy to timely compel certification.³⁰⁶

The Pennsylvania Attorney General, other state officials and private litigants (including ordinary voters) have standing to seek mandamus relief.³⁰⁷

(2) Pennsylvanians’ constitutional right to vote

A county board’s refusal to certify an election may also violate the Pennsylvania Constitution’s free and equal elections clause, which provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”³⁰⁸ Courts have construed this clause as follows:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, and when no constitutional right of the qualified elector is subverted or denied him.³⁰⁹

“[T]he Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth

303 See 25 P.S. § 3167 (“Except 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, up to the number required by law to be elected thereto”).

304 *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004).

305 See, e.g., *In re Mun. Reapportionment of Twp. of Haverford*, 873 A.2d 821, 833 n.17 (Pa. Commw. Ct. 2005) (“The duties of a board of elections under the Election Code are ministerial and allow for no exercise of discretion.”); *Shroyer v. Thomas*, 81 A.2d 435, 437 (Pa. 1951) (“The duties of the County Board of Elections are purely ministerial. They are prescribed by the Election Code. They are given no discretion.”).

306 Pennsylvania law does provide an alternative remedy—an appeal process in court—for any person aggrieved by a county board’s computation or canvassing of returns, as well as any recount or recanvass. See 25 P.S. § 3157(a). But this appeal process does not apply to certifications. See *Chapman v. Berks Cnty. Bd. Of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *7 (Pa. Commw. Ct. Aug. 19, 2022) (unpublished).

307 See, e.g., *Com. ex rel. Woodside v. Borough of Bridgeport, Montgomery Cnty.*, 106 A.2d 615 (Pa. 1954) (State Attorney General); *Fagan v. Smith*, 41 A.3d 816 (Pa. 2012) (per curiam) (voters).

308 Pa. Const. art. I, § 5.

309 *Shankey v. Staisey*, 257 A.2d 897, 899 (Pa. 1969).

an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.”³¹⁰

A county official’s obstruction or delay of certification could violate Pennsylvanians’ constitutional right to have their votes “honestly counted.”³¹¹ An aggrieved voter could bring an action for declaratory and injunctive relief.³¹² The need to protect this fundamental right would also strongly reinforce any request for mandamus relief.

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

(1) Civil contempt

A county official who defies a court order may be held in civil contempt. The purpose of civil contempt is “to prospectively coerce the contemnor into compliance with the court’s directive.”³¹³ “[T]he complaining party must prove: (1) That the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) That the act constituting the contemnor’s violation was volitional; and (3) That the contemnor acted with wrongful intent.”³¹⁴ Sanctions can include conditional imprisonment or fines.³¹⁵

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code

A county official who willfully subverts certification could face prosecution under various provisions of the Pennsylvania election code.

³¹⁰ *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018).

³¹¹ *Shankey*, 257 A.2d at 899.

³¹² See 42 Pa. C.S. § 7532 (empowering Pennsylvania courts “to declare rights, status, and other legal relations whether or not further relief is or could be claimed”); see also *Nat’l Election Def. Coal. v. Boockvar*, 266 A.3d 76 (Pa. Commw. Ct. 2021).

³¹³ *In re C.W.*, 960 A.2d 458, 466 (Pa. Super. Ct. 2008).

³¹⁴ See *Cnty. of Fulton v. Sec’y of Commonwealth*, 292 A.3d 974, 1004 (Pa. 2023) (holding county in contempt for violating order by allowing third party to inspect voting equipment).

³¹⁵ See *id.* at 1030.

Under 25 P.S. § 3548, any election official, including a “member of a county board of elections,” “on whom a duty is laid by this act who shall wilfully neglect or refuse to perform his duty, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand (\$1,000) dollars, or to undergo an imprisonment of not more than two (2) years, or both, in the discretion of the court.” This statute could apply to a county official who willfully refuses to perform their non-discretionary certification duties.

Under 25 P.S. § 3549, “[a]ny person who intentionally interferes with, hinders or delays or attempts to interfere with, hinder or delay any other person in the performance of any act or duty authorized or imposed by this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred (\$500) dollars, or to undergo an imprisonment of not more than one (1) year, or both, in the discretion of the court.” This statute is comparable to the Arizona statute prohibiting “interference with an election officer,” which the state used to charge officials in Cochise County.³¹⁶

Under 25 P.S. § 3525, “any person who shall make a false return of the votes cast at any primary or election[,],...who shall...certify as correct a return of votes cast upon any voting machine which he knows to be fraudulently registered thereon,...or who shall conspire with others to commit any of the offenses herein mentioned, or in any manner to prevent a free and fair primary or election, shall be guilty of a felony of the third degree, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding fifteen thousand (\$15,000) dollars, or to undergo an imprisonment of not more than seven (7) years, or both, in the discretion of the court.”

Pennsylvania law imposes a supplemental penalty on any person convicted of a “willful violation” of the election code’s criminal provisions: in addition to any penalty of fines or imprisonment, such person “shall...be deprived of the right of suffrage absolutely for a term of four years from the date of his conviction years from the date of his conviction.”³¹⁷

2) Obstructing administration of law

A county official who willfully subverts certification may also be charged with obstructing administration of law. Under 18 Pa.C.S. § 5101, “A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by...breach of official duty, or any other unlawful act.” This crime has two elements: “1) an intent to obstruct the administration of law; and 2) an act of affirmative interference with governmental functions.”³¹⁸

³¹⁶ See *supra* Part II(A)(2).

³¹⁷ 25 P.S. § 3552; see *Com. v. Petrillo*, 386 A.2d 590 (Pa. Super. Ct. 1978).

³¹⁸ *Commonwealth v. Palchanes*, 224 A.3d 58, 60 (Pa. Super. Ct. 2019).

(3) Conspiracy

A county official who agrees with others to illegally disrupt or delay certification may be charged with conspiracy. “A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he: (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.”³¹⁹ However, “[n]o person may be convicted of conspiracy to commit a crime unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.”³²⁰

(4) Criminal Contempt

A court may punish a county official who defies a court order with criminal contempt. In Pennsylvania, “[t]he court’s power to impose summary punishment for acts of indirect criminal contempt is a right inherent in courts and is incidental to the grant of judicial power under Article 5 of [the Pennsylvania] Constitution.”³²¹ State law provides for punishment of fines not to exceed \$100 or imprisonment not to exceed 15 days.³²²

(5) Removal from office

A county official who subverts certification might also be removed from office. The Pennsylvania Constitution states:

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed civil officers, other than judges of the courts of record, may be removed at the pleasure of the power by which they shall have been appointed. All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.³²³

³¹⁹ 18 Pa. C.S. § 903(a).

³²⁰ 18 Pa. C.S. § 903(e).

³²¹ *Commonwealth v. Bartic*, 303 A.3d 124, 132 (Pa. Super Ct. 2023) (citing *Commonwealth v. McMullen*, 961 A.2d 842, 849 (Pa. 2008)).

³²² 42 Pa. C.S. § 4136(b).

³²³ Pa. Const. art. VI, § 7.

These are the exclusive methods to remove public officers in Pennsylvania.³²⁴

Under this provision, the method for removing county election board members will vary depending on whether they are elected or appointed (which, as discussed above, varies by county in Pennsylvania). If board members are appointed, they may be removed by the governing body that oversees them, such as the county council. If the board is made up of elected county commissioners, they can only be removed by impeachment.

AMERICAN³²⁴ *Martin v. Donegal Twp.*, 293 A.3d 765, 778 (Pa. Commw. Ct. 2023).

**ELECTION CERTIFICATION UNDER
THREAT: A LEGAL ROADMAP TO PROTECT
THE 2024 ELECTION INCLUDING FROM 35
OFFICIALS WHO HAVE REFUSED TO
CERTIFY RESULTS**

STATE-BY-STATE ANALYSIS:

Michigan



STATE-BY-STATE ANALYSIS

H. MICHIGAN

Unlike the states discussed above, none of the county officials in Michigan who previously voted against certifying elections remain in office. Nonetheless, this report includes Michigan because of the history of attempted county-level certification abuse in the state, as well as the state's successful efforts in thwarting such abuse.

1. Election certification framework at the county level

In Michigan, each county's "board of county canvassers" is responsible for canvassing election returns and reporting the results to the board of state canvassers.³²⁵ Each board consists of four members serving staggered four-year terms, with the county committee of each of the two major political parties appointing a registered elector to serve on the board every two years to ensure an even party split.³²⁶ Although Michigan has robust procedures to investigate and resolve allegations of voter fraud, that is not the responsibility of the boards of county canvassers.

³²⁵ M.C.L. §§ 168.24a(1), 168.825.

³²⁶ M.C.L. §§ 168.24a(1), 168.24c.

State law requires boards of county canvassers to “proceed without delay” after an election “to canvass the returns of votes cast...according to precinct returns, early voting returns” and absentee returns and to “conclude the canvass at the earliest possible time and in every case no later than the fourteenth day after the election.”³²⁷ During its canvass, each county board must correct “obvious mathematical errors in the tallies and returns”³²⁸ and may, in the event of incomplete or incorrect returns, adjourn from day to day until all returns are complete and correct.³²⁹ Once complete, the clerk of each board must “forthwith, and in no case later than 24 hours after the completion of the canvass” provide the Secretary of State with “a certified copy of each of the statements [certifying the election results] prepared by the board...together with a certificate of authenticity signed by himself and the chairman of the board of canvassers.”³³⁰ If a county board fails to complete and certify its canvass within fourteen days of the election, it must “immediately deliver to the secretary of the board of state canvassers all records and other information pertaining to the election”³³¹ and, in presidential elections where the first and second place candidates are shown by unofficial returns to differ by less than 25,000 votes, the secretary of state may direct the boards of county canvassers to complete the canvass earlier.³³²

In elections for statewide and federal office, “the board of state canvassers is the only body or entity in this state authorized to certify the *results*...and to determine which person is elected in such election,”³³³ and the board of county canvassers’ duty is to “prepare a statement in detail of the number of votes cast for each office, the names of the persons for whom such votes were given, and the number of votes given to each person, as shown by the returns of the boards of inspectors of election of the various voting precincts of the county.”³³⁴ The state board is also required to immediately take up any elections for which a county board has failed to certify the vote counts to “make the necessary determinations and certify the results not later than the twentieth day after the election.”³³⁵

County boards of canvassers have no legal authority to independently investigate suspected fraud; such issues are instead resolved through the board of state canvassers and the attorney general. A 2022 amendment to the Michigan Constitution provides that “[i]t 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

327 M.C.L. § 168.822(1).

328 M.C.L. § 168.823(3).

329 M.C.L. § 168.823(1).

330 M.C.L. § 168.828.

331 M.C.L. § 168.822(2).

332 M.C.L. § 168.842(2).

333 M.C.L.S. Const. Art. II, § 7(3).

334 M.C.L. § 168.824; M.C.L. § 168.828.

335 M.C.L. § 168.822(2).

boards in the county and any corrected returns.”³³⁶ Even when a petition for recount has been filed by a candidate alleging “fraud or mistake in the canvass of the votes,”³³⁷ the adjudication would not be within the boards of county canvasser’s authority. For presidential elections, the board of state canvassers “shall canvass the returns and determine the result”³³⁸ and is therefore responsible for ruling on such petitions for recount.³³⁹

2. Prior election certification refusals

WAYNE COUNTY, MI, 2020

The first significant certification dispute in recent times happened in Wayne County, when County Board of Canvassers Monica Palmer and William Hartmann initially [refused to](#) certify the 2020 general election results over baseless claims of voter fraud. After two hours, the two ultimately voted to certify. Two days after certifying, Palmer and Hartmann publicly [expressed](#) interest in rescinding their votes but could not do so. When the State Board of Canvassers later met to certify the results, then-member Norm Shinkle [abstained](#) from certifying the results, but was outvoted and the election was certified.

In response to the Wayne County incident, Michigan voters [amended their constitution](#) in 2022 to make clear that county officials have a “ministerial, clerical, nondiscretionary duty...to certify election results based solely on...statements of returns from the precincts and absent voter counting boards in the county and any corrected returns.”

DELTA COUNTY, MI, 2024

In April 2024, two members of the Delta County Board of Canvassers, Bonnie Hakkola and LeeAnn Oman, [refused](#) to certify the results of a [special recall election](#) for County Administrator because they did not believe the results were statistically accurate and wanted a recount. Prior to the final vote, the Michigan Director of Elections and Secretary of the Board of State Canvassers sent a [letter](#) explaining the duties and

³³⁶ M.C.L.S. Const. Art. II, § 7(3); M.C.L. § 168.822(3).

³³⁷ M.C.L. § 168.879(1)(b).

³³⁸ M.C.L. § 168.841.

³³⁹ M.C.L. §§ 168.879(1)(a), 882(3). Michigan also recently enacted [S.B. 603](#), a comprehensive reform of recounts. While it is unclear whether the law will go in effect before the next election, it provides that a recount is “limited to determining the number of votes cast on ballots” and “not an investigation or an audit of the conduct of an election.”

responsibilities of the canvassers, as well as the consequences for non-compliance. On May 20, 2024 the Commissioners certified the vote unanimously. Hakkola voted to certify the election despite her two page statement stating that she felt ‘coerced’ to certify. On June 18, 2024, both Hakkola and Oman submitted [letters of resignation](#).

3. Legal remedies under Michigan law

A) WHAT IF A BOARD OF COUNTY CANVASSERS REFUSES TO CERTIFY?

(1) Certification by the board of state canvassers

The Board of State Canvassers can certify election results if a county board of canvassers refuses to do so. “The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.”³⁴⁰ “[I]f the board of county canvassers fails to certify the results of any election for any officer or proposition 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 not later than the twentieth day after the election.”³⁴¹ Because certification by the Board of State Canvassers requires a board of county canvassers to transmit the records, mandamus relief may be necessary if the county board refuses to do so.

(1) Mandamus

Mandamus is a proper remedy to compel county certification in Michigan. Mandamus “will only be issued where (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.”³⁴² A mandamus action can be brought in a circuit

³⁴⁰ M.C.L.S. Const. Art. II, § 7(3).

³⁴¹ M.C.L. § 168.822(2).

³⁴² *Citizens Protecting Michigan's Const. v. Sec'y of State*, 761 N.W. 2d 210, 216-17 (Mich. Ct. App. 2008).

court where venue is proper, the Court of Appeals,³⁴³ or the Court of Claims,³⁴⁴ a court of statewide limited jurisdiction that hears cases against state agencies and officers.³⁴⁵ The Michigan Supreme Court would have original jurisdiction, though it only exercises it in emergency circumstances.³⁴⁶

A county board's refusal to certify would meet each condition for mandamus relief. As the Michigan Secretary of State's office recently explained in a letter to a county board of canvassers, "under both the Michigan Constitution and Michigan Election law, county canvassers have a clear and nondiscretionary duty to certify election results based solely on election returns. The Constitution and Michigan Election Law do not authorize boards of county canvassers to refuse to certify election results based on claims made by third parties of alleged election irregularities, or a general desire to conduct election investigations."³⁴⁷ Michigan case law likewise makes clear that it is "a ministerial duty of the board of State canvassers to canvass the returns and issue a certificate of election"³⁴⁸ and that the courts have "jurisdiction to compel a board of canvassers to canvass the votes for the office of representative in Congress, and report the result to the secretary of State."³⁴⁹ Nor does there appear to be any adequate alternative relief, thus making mandamus "the appropriate remedy."

The Michigan Attorney General, other state officials and private litigants (including ordinary voters) would have standing to seek mandamus relief.³⁵⁰

(2) Michiganders' constitutional right to vote

A county board's refusal to certify an election may also violate the Michigan Constitution's right to vote clause, which provides in part:

Every citizen of the United States who is an elector qualified to vote in Michigan shall have the...fundamental right to vote, including but not

³⁴³ M.C.L. § 600.4401

³⁴⁴ Mich. Ct. R. 3.305.

³⁴⁵ See M.C.L. § 600.6401 et seq.

³⁴⁶ See e.g., *Leitman v. State Bar Grievance Bd.*, 198 N.W.2d 313 (Mich. 1972) ("[T]here is no reason why an aggrieved petitioner may not file in this Court an application for an original writ of mandamus, pursuant to Const. 1963, art. 6, s 4.").

³⁴⁷ Letter from Mich. Sec'y of State Director of Elections to Delta County Board of Canvassers, at 1 (May 16, 2024), <https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2024/May/Delta-County-Canvassers-Letter-05-16-2024.pdf>.

³⁴⁸ *McLeod v. Kelly*, 7 N.W.2d 240, 243 (Mich. 1942) (citing *Dingeman v. Bd. of State Canvassers*, 164 N.W. 492, 492 (Mich. 1917)).

³⁴⁹ *Id.* at 242 (citing *Belknap v. County Canvassers of Ionia*, 54 N.W. 376 (Mich. 1893)).

³⁵⁰ See *Citizens for Higgins Lake Legal Levels v. Roscommon Cnty. Bd. of Comm'rs*, 988 N.W.2d 841 (Mich Ct. App. 2022) (private litigants); *Wayne County v. State Treasurer*, 306 N.W.2d 468 (Mich Ct. App. 1981) (county government); *Attorney General v. Bruce*, 182 N.W. 155 (Mich. 1921) (state attorney general).

limited to the right, once registered, to vote a secret ballot in all elections. No person shall: (1) enact or use any law, rule, regulation, qualification, prerequisite, standard, practice, or procedure; (2) engage in any harassing, threatening, or intimidating conduct; or (3) use any means whatsoever, any of which has the intent or effect of denying, abridging, interfering with, or unreasonably burdening the fundamental right to vote.³⁵¹

The fundamental right to vote may be violated if, for example, county officials indefinitely delay certification and the lawful votes from that county are not counted, thereby disenfranchising that county's voters. "Any Michigan citizen or citizens shall have standing to bring an action for declaratory, injunctive, and/or monetary relief to enforce the rights created by" this provision.³⁵²

B) WHAT IF COUNTY OFFICIALS DEFY A COURT ORDER TO CERTIFY?

(1) Civil contempt

A county official who defies a court order to certify may be held in civil contempt for "disobeying any lawful order, decree, or process of the court."³⁵³ "Civil contempt proceedings seek compliance through the imposition of sanctions of indefinite duration, terminable upon the contemnor's compliance or inability to comply."³⁵⁴ Civil contempt triggers remedial sanctions "instituted to preserve and enforce the rights of private parties to suits and to compel obedience of orders and decrees made to enforce those rights and administer the remedies to which the court has found the parties are entitled."³⁵⁵ Remedial sanctions can include fines, imprisonment, or both.³⁵⁶

C) POTENTIAL CRIMINAL PENALTIES AND OTHER CONSEQUENCES FOR REFUSING TO CERTIFY

(1) Criminal provisions of the election code and criminal laws related to official duties

³⁵¹ Mich. Const. Art. II, §4(1)(a).

³⁵² Mich. Const. Art. II, §4(1).

³⁵³ M.C.L. § 600.1701(g).

³⁵⁴ *DeGeorge v. Warheit*, 741 N.W.2d 384, 388 (Mich. Ct. App. 2007).

³⁵⁵ *See In re Contempt of United Stationers Supply Co.*, 608 N.W.2d 105, 107 (Mich. Ct. App. 2000).

³⁵⁶ M.C.L. § 600.1715.

Under M.C.L. § 168.931(1)(g), a county official who “willfully fail to perform a duty imposed upon that individual by this act or disobey a lawful instruction or order of the secretary of state as chief state election officer” commits a misdemeanor under the Michigan Election Law,³⁵⁷ subject to “a fine of not exceeding \$500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both.”³⁵⁸ A county official who willfully fails to perform their certification duties as required by the Michigan Election Law could be charged under this statute. The case for “willfulness” would be especially strong with respect to the county canvassers whom the Michigan Secretary of State explicitly advised of their certification duties and the penalties for non-compliance earlier this year, if those same officials refuse to certify election results.

Under M.C.L. § 750.478a(1), “A person shall not attempt to intimidate, hinder, or obstruct a public officer or public employee or a peace officer in the discharge of his or her official duties by a use of unauthorized process.” This is “a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$1,000.00, or both” for first offenders and “a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both” for repeat offenders. This statute is comparable to the Arizona statute prohibiting “interference with an election officer,” which the state used to charge officials in Cochise County.³⁵⁹

Under M.C.L. § 201.3(5), the office of the county canvasser would be declared vacant upon “conviction of any infamous crime, or of any offense involving a violation of his oath of office.” M.C.L. § 168.24b dictates that the county canvassers shall take and subscribe to the constitutional oath of office to “support the Constitution of the United States and the constitution of this state” and “faithfully discharge the duties of [their office.]”³⁶⁰ Convictions for crimes relating to violations of official duties would likely violate this oath and thus provide a basis for removal from office.

(2) Conspiracy

A county official who agrees with others to illegally obstruct or delay certification may be charged with conspiracy. “Criminal conspiracy is a mutual understanding or agreement between two or more persons, expressed or implied, to do or accomplish some criminal or unlawful act...All the requisite elements of the crime of conspiracy are met when the parties enter into the mutual agreement, and no overt acts necessarily must be established.”³⁶¹ “If commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court

³⁵⁷ M.C.L. § 168.931(2).

³⁵⁸ M.C.L. § 168.934.

³⁵⁹ *See supra* Part II(A)(2).

³⁶⁰ M.C.L.S. Const. Art. XI, § 1.

³⁶¹ *People v. Hamp*, 312 N.W.2d 175, 180 (Mich. Ct. App. 1981).

an additional penalty of a fine of \$10,000.00 may be imposed...If commission of the offense prohibited by law is punishable by imprisonment for less than 1 year..., the person convicted under this section shall be imprisoned for not more than 1 year nor fined more than \$1,000.00, or both such fine and imprisonment.”³⁶²

(3) Criminal contempt

A county official who defies a court order may be held in criminal contempt. Criminal contempt involves punitive sanctions to “punish past disobedient conduct by imposing an unconditional and definite sentence.”³⁶³ “Punishment for contempt may be a fine of not more than \$7,500.00, or imprisonment which, except in those cases where the commitment is for the omission to perform an act or duty which is still within the power of the person to perform shall not exceed 93 days, or both, in the discretion of the court.”³⁶⁴

³⁶² M.C.L. § 750.157a.

³⁶³ *DeGeorge v. Warheit*, 741 N.W.2d 384, 388 (Mich. Ct. App. 2007).

³⁶⁴ M.C.L. § 600.1715(1).

III. Federal legal remedies

Because the states administer elections, they are the first lines of defense against county-level certification subversion. But the federal government also has a vital role in enforcing relevant federal statutes and constitutional provisions protecting the right to vote. Thus, if a state is unable or unwilling to take action against rogue county officials who threaten to disenfranchise voters in violation of federal law, the U.S. Department of Justice (DOJ) should intervene. This section discusses some of the federal criminal and civil remedies available to protect against certification abuse at the county level.

A. Sections 11(a) and 12(c) of the Voting Rights Act

Section 11(a) of the Voting Rights Act (VRA) (codified at 52 U.S.C. § 10307(a)) is the federal statute most clearly implicated by a county official's willful refusal to certify election results. It provides: "No person acting under color of law shall...willfully fail or refuse to tabulate, count, and report" a "vote" of any "person...qualified to vote."³⁶⁵ Violators of section 11(a) face criminal penalties of up to 5 years imprisonment and fines of up to \$5,000.³⁶⁶ The VRA also authorizes emergency injunctive relief to halt

³⁶⁵ 52 U.S.C. § 10307(a).
³⁶⁶ 52 U.S.C. § 10308(a).

or prevent violations of section 11(a) “[w]henver any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by” the statute.³⁶⁷

Although there is little precedent for section 11(a) enforcement, voting rights experts agree that “[a]ny refusal to certify an election based on meritless innuendo would likely violate” the statute,³⁶⁸ since certification is how votes are formally “report[ed]” to higher authorities.³⁶⁹ This reading is reinforced by one of section 11(a)’s few enforcement precedents. In that case, Sheriff Jim Clark of Selma, Alabama—the Jim Crow sheriff who gained infamy after ordering the “Bloody Sunday” attack on John Lewis and fellow marchers on the Edmund Pettus Bridge in 1965—tried to steal the Democratic primary in 1966 from an opponent backed by Selma’s recently enfranchised Black population.³⁷⁰ Clark persuaded county officials to toss out ballot boxes after they had been counted based on clerical “failures to comply with technical procedures of Alabama law.”³⁷¹ But a federal court swiftly enjoined this effort under the newly-enacted VRA and ordered the election to be properly certified, reasoning that a “bare allegation” of “irregularities” cannot justify disregarding otherwise-valid votes.³⁷² After all the votes were counted, Sheriff Clark lost the election and never again held office.³⁷³

Section 11(a) only prohibits “willful” refusals to certify, which would exclude any good faith dispute over certification. Although “willful” is a “word of many meanings” that is “often...influenced by its context,” courts have “describe[d] a ‘willful’ actor as one who violates ‘a known legal duty.’”³⁷⁴ If county officials disregard clear judicial precedent or warnings from state authorities about their legal duties to certify, defy court orders to certify or refuse to certify based on reasons that show a lack of good faith, there is a strong argument that they are “willfully fail[ing] or refus[ing] to...report” lawful votes in violation of section 11(a).

Like other VRA provisions, private plaintiffs can enforce section 11(a) against state officials through civil lawsuits under 42 U.S.C. § 1983.³⁷⁵ In such a suit, private litigants

³⁶⁷ 52 U.S.C. § 10308(d).

³⁶⁸ Samuel Bagenstos & Justin Levitt, Refusing to certify legitimate votes is a felony, Detroit Free Press (Nov. 23, 2020), <https://www.freep.com/story/opinion/contributors/2020/11/23/michigan-canvassers-who-could-face-felony-charges/6388235002/>.

³⁶⁹ Jacek Pruski & Helen White, Election Denying Officials Who Refuse to Certify Election Results Could Face Prosecution, Just Security (Nov. 7, 2022), <https://www.justsecurity.org/83975/election-denying-officials-who-refuse-to-certify-election-results-could-face-prosecution/>.

³⁷⁰ Bagenstos & Levitt, *supra*.

³⁷¹ *Id.*

³⁷² *United States v. Executive Committee of Democratic Party of Dallas County, Ala.*, 254 F. Supp. 537, 539 (S.D. Ala. 1966).

³⁷³ Bagenstos & Levitt, *supra*.

³⁷⁴ *Ratzlaf v. United States*, 510 U.S. 135, 141-42 (1994) (cleaned up) (citing cases).

³⁷⁵ See *Gray v. Main*, 291 F. Supp. 998, 999 (M.D. Ala. 1966) (“42 U.S.C. § 1983 seems clearly to permit individuals such as plaintiffs to bring an action alleging violations of § 1973i,” the predecessor version of section 11(a)); see also *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 476 (S.D.N.Y. 2020) (“[B]oth the government and private parties may sue to enforce Section 11(b).”) (citing cases).

could seek a court order requiring certification (as in the Sheriff Clark case) or directing a county board to transmit election results to relevant state authorities. In contrast to other VRA provisions, section 11(a)'s plain text does not require any "showing of specific intent or racial animus."³⁷⁶

Section 12(c) of the VRA (codified at 52 U.S.C. § 10308(c)) makes it a crime to conspire with others to violate other provisions of the VRA, including section 11(a). The penalties are imprisonment of up to five years and a fine of up to \$5,000.³⁷⁷ This provision could apply if county officials conspire to willfully refuse certification in violation of section 11(a).

B. 18 U.S.C. § 241 (conspiracy against rights) and 18 U.S.C. § 242 (deprivation of rights under color of law)

County officials' refusal to certify could also violate what federal prosecutors have called the "two primary statutes that criminalize the actions of governmental officials who abuse their authority to deprive their fellow citizens of their constitutional rights: conspiracy against rights, 18 U.S.C. § 241, and deprivation of rights under color of law, 18 U.S.C. § 242."³⁷⁸

Under 18 U.S.C. § 241, it is a felony to "conspire to injure, oppress, threaten, or intimidate" an individual "in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," including the right to vote and to have one's vote counted.³⁷⁹ The penalties are fines and imprisonment of up to 10 years.³⁸⁰ "To obtain a conviction for conspiracy to violate civil rights under § 241, the government must prove that the defendant knowingly agreed with another person to injure a third party in the exercise of a right guaranteed under the Constitution," and that there was specific intent to commit the deprivation."³⁸¹ Unlike most conspiracy statutes, section 241 does not require proof of an overt act.³⁸² Section 241 could apply to county officials who conspire with others to refuse to certify lawful votes with the

³⁷⁶ League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Interest Legal Found., 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018).

³⁷⁷ 52 U.S.C. § 10308(c).

³⁷⁸ Samantha Trepel, Prosecuting Color-of-Law Civil Rights Violations: A Legal Overview, 70 U.S. Dep't of Justice J. of Fed. L. & Prac., No. 2, March 2022, at 21, <https://www.justice.gov/usao/page/file/1492851/dl>.

³⁷⁹ See *United States v. Classic*, 313 U.S. 299, 322 (1941) (explaining that the phrase "any right or privilege secured ... by the Constitution" as used in predecessor of section 241 "extends to the right of the voter to have his vote counted in both the general election and in the primary election"); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted.") (cleaned up).

³⁸⁰ 18 U.S.C. § 241.

³⁸¹ *United States v. Robinson*, 813 F.3d 251, 256 (6th Cir. 2016) (cleaned up) (quoting *United States v. Lanham*, 617 F.3d 873, 885 (6th Cir. 2010)).

³⁸² *United States v. Conatser*, 514 F.3d 508, 519 n.4 (6th Cir. 2008) (citing cases).

specific intent to deprive individuals of their federal rights to have their votes counted. Indeed, the DOJ’s guide for prosecuting federal election offenses explicitly states that section 241 embraces conspiracies to “fail to count votes” and to “prevent the official count of ballots in primary elections.”³⁸³

Under 18 U.S.C. § 242, it is a misdemeanor for any person acting under color of law to “willfully” deprive a person “of any rights, or immunities secured or protected by the Constitution or laws of the United States,” including the right to vote and to have one’s vote counted.³⁸⁴ Willfulness under section 242 “requires proof of a ‘specific intent to deprive a person of a federal right’ but this does not require proof that the defendant was ‘thinking in constitutional terms.’”³⁸⁵ Section 242 could apply to county officials who refuse to certify lawful votes with the specific intent to deprive individuals of their federal rights to have their votes counted.

C. Other federal provisions

County officials’ refusal to certify election results could also implicate various other federal constitutional and statutory provisions, including the First, Fourteenth and Fifteenth Amendments and section 101(a) of the Civil Rights Act of 1964, which bars states from denying the right to vote based on an error or omission that is not “material” to the voter’s qualifications.³⁸⁶ The applicability of these provisions will depend on the facts of a particular case. Aggrieved voters and other private litigants could bring actions under 42 U.S.C. § 1983 to vindicate their federal rights.

383 U.S. Dep’t of Justice, Federal Prosecution of Election Offenses, at 34-35 (8th ed. Dec. 2017), <https://www.justice.gov/criminal/file/1029066/dl> (citing cases).

384 See *Classic*, 313 U.S. at 315; see also *Trepel*, supra, at 32 (“The same rights that serve as a basis for a section 242 prosecution may form the basis of a civil rights conspiracy charge under section 241.”).

385 *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (quoting *Screws v. United States*, 325 U.S. 91, 111 (1945)).

386 See *Pruski & White*, supra.

IV. Appendix: sample court filings, complaints and letters

This appendix compiles sample complaints, court filings, letters and other instructive materials from prior county-level certification disputes.

Arizona:

Verified Complaint for Special Action Relief, Hobbs v. Crosby, Case No. S0200CV202200552 (Ariz. Sup. Ct., filed Nov. 28, 2022) (Secretary of

State seeking mandamus)

Verified Special Action Complaint, Arizona Alliance of Retired Americans, Inc. v. Crosby, S0200CV202200552 (Ariz. Sup. Ct., filed Nov. 28, 2022) (voters seeking mandamus)

Indictment, Arizona v. Judd, Case No. 93-SG-56 (Ariz. Sup. Ct., filed Nov. 29, 2023), (indictment of county officials)

Michigan:

Letter from Mich. Sec’y of State Director of Elections to Delta County Board of Canvassers (May 16, 2024) (warning county officials of their non-discretionary certification duties and penalties for non-compliance)

New Mexico:

Petition for Writ of Mandamus, Toulouse Oliver v. Otero County Commission, No. S-1-SC-39426 (N.M., filed June 14, 2022) (Secretary of State seeking mandamus)

Nevada:

Petition for Writ of Mandamus, Aguilar v. Washoe County Board of County Commissioners, No. 88965 (N.V., filed July 10, 2024) (Secretary of State seeking mandamus)

North Carolina:

Voter Complaint Against Surry County Board of Elections Members (Nov. 28, 2022)

Pennsylvania:

Petition for Review, Chapman v. Berks Cnty. Bd. of Elections, No. 355MD2022 (Pa. Cmwlth. Ct., filed July 11, 2022) (Secretary of the Commonwealth seeking mandamus, injunctive and declaratory relief)

Complaint, Cartwright v. Luzerne Cnty. Bd. of Elections, No. 202210782 (Pa. Ct. of Common Pleas, filed Nov. 29, 2022) (congressional candidate seeking mandamus, injunctive and declaratory relief)

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