
State Implementation of the Electoral Count Reform Act and the Mitigation of Election-Subversion Risk in 2024 and Beyond

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ABSTRACT. The ECRA is a major step toward preventing future election subversion. But since states and localities administer elections, its success depends on state compliance. This Essay details how states should update their election codes ahead of the 2024 elections to guarantee that the new law lives up to its promise.

INTRODUCTION

The 2020 election and its aftermath were a shocking warning that election subversion poses a threat to the continued health of American democracy. Unlike voter suppression, which is aimed at limiting the ability to vote, election subversion is the manipulation of postelection processes to install candidates who did not win their offices under established election rules.¹ Traditionally, the possibility of election subversion seemed remote – even “absurd”² – as it had seldom occurred on even a small scale throughout the nation’s history.³ But former President Donald Trump’s effort to overturn the 2020 election results revealed pressure points and underdeveloped areas of state and federal law. These vulnerabilities nearly enabled partisans to interfere with counting and certifying election results, thereby potentially allowing losing candidates to claim elected office

1. See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 265 (2022).

2. *Id.*

3. *Id.*; see also EDWARD B. FOLEY, *BALLOT BATTLES 206-17* (2016) (determining that ballot-box stuffing in Texas likely delivered President Lyndon Johnson’s victory in his 1948 U.S. Senate race).

notwithstanding the actual votes cast and counted.⁴ Baseless legal challenges and fraud allegations, frivolous mass challenges to specific ballots, and threatening conduct toward election officials further empowered partisan interference and sowed distrust in the legitimacy of the election.⁵

Congress addressed some of these weaknesses by passing the Electoral Count Reform Act (ECRA) in late 2022—a rare act of bipartisanship in the elections context, and a major step toward preventing the type of subversion that was so dramatically on display following the 2020 presidential election.⁶ The legislation overhauled the archaic Electoral Count Act (ECA) of 1887, which had provided the primary legal framework for casting and counting Electoral College votes in presidential elections for more than a century.

The ECRA has been rightfully celebrated for the changes it makes to the process by which Congress counts electoral votes. But since presidential elections—like all federal elections—are administered by states and localities, any effort to combat election subversion must depend on state law. Despite their primacy in our electoral system, there is, as Miriam Seifter has pointed out, “not much scholarship assessing the role of states in protecting democracy.”⁷ Nonetheless, as Seifter explains, “state-level interventions provide an important and time-sensitive opportunity to reinforce democracy. Failing to seize the opportunity threatens to accelerate anti-democratic developments.”⁸

This Essay is the first to focus on one particular urgent state-level intervention: ensuring that state election law complies with the new ECRA.⁹ While many

4. See Barton Gellman, *Trump’s Next Coup Has Already Begun*, ATL. (Dec. 6, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843> [<https://perma.cc/BX2Y-9NRX>] (describing President Trump’s goal of persuading Republican state legislatures in states that Biden won to “seize control” of the certification process to appoint Trump electors instead); Nicholas Wu, *Jan. 6 Panel Ramps Up Investigation into Trump’s State-Level Pressure*, POLITICO (Jan. 10, 2022, 12:28 PM EST), <https://www.politico.com/news/2022/01/10/jan-6-committee-ramps-up-state-level-investigation-526752> [<https://perma.cc/5MLW-KAYS>] (same).

5. See Gellman, *supra* note 4.

6. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. P, tit. I, 136 Stat. 4459, 5233 (2022). For information on the legislation’s bipartisan support, see Amy B. Wang, *McConnell, Schumer Back Bill to Prevent Efforts to Subvert Presidential Election Results*, WASH. POST (Sept. 28, 2022, 8:31 AM EDT), <https://www.washingtonpost.com/politics/2022/09/27/mcconnell-schumer-electoral-reform> [<https://perma.cc/N7F5-XG82>].

7. Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069, 2081 (2022).

8. *Id.* at 2073.

9. For a sample of the information that has been published about state ECRA implementation, see Derek Muller, *State Legislatures Should Examine Their Codes After Passage of the Electoral Count Reform Act*, ELECTION L. BLOG (Dec. 28, 2022, 2:18 PM), <https://electionlawblog.org/?p=134071> [<https://perma.cc/GZ5D-D8DP>]; Kate Hamilton, *What the Electoral Count Reform Act Means for States*, CAMPAIGN LEGAL CTR. (Jan. 12, 2023),

federal election laws require state cooperation, the ECRA operates, as Cass R. Sunstein has observed, by “mak[ing] state law decisive.”¹⁰ Indeed, it is designed to ensure that each state submits a “single, conclusive slate of electors” to Congress by a mandatory, uniform deadline.¹¹ As a result, the new ECRA’s success hinges on states’ ability to select and certify a single slate of electors to Congress by the new deadline – processes entirely dictated by state law.

To establish a roadmap for states updating their election codes ahead of the 2024 presidential election, this Essay proceeds in three parts. First, Part I details how Congress crafted the ECRA to prevent the election subversion that nearly succeeded in 2020, and why the new legislation requires states to bring their own election laws into compliance. Part II identifies one of the ECRA’s most significant changes for state election administration – the replacement of the former “safe-harbor” date with a mandatory deadline – and its consequences for state election procedures. Finally, Part III offers urgent prescriptive suggestions for states to meet the new deadline as they enter their final legislative sessions before the 2024 presidential elections.

To be sure, there are myriad ways in which states can and should shore up their election codes to mitigate election-subversion risks. Among other interventions, they should limit frivolous challenges to voter eligibility, disallow partisan audits, and develop contingency plans for election emergencies. But while such changes can be contentious and fiercely partisan,¹² the ECRA’s overwhelming

<https://campaignlegal.org/update/what-electoral-count-reform-act-means-states> [<https://perma.cc/59ZT-56GU>]; Wendy Underhill, *What the Electoral Count Reform Act Means for States*, NAT’L CONF. ST. LEGISLATURES (Jan. 16, 2023), <https://www.ncsl.org/state-legislatures-news/details/what-the-electoral-count-reform-act-means-for-states> [<https://perma.cc/GRN9-2C78>]; and G. Michael Parsons & Drew Penrose, *Helping States Comply with the Electoral Count Reform Act*, ELECTION REFORMERS NETWORK (June 2023), https://global-uploads.webflow.com/642dcbc53f522476efc85893/649afe08b71a9e6974849007_jw-test1.pdf [<https://perma.cc/QLT5-BV36>].

10. Cass R. Sunstein, *The Rule of Law vs. “Party Nature”: Presidential Elections, the Constitution, the Electoral Count Act of 1887, the Horror of January 6, and the Electoral Count Reform Act of 2022*, 103 B.U. L. REV. 1171, 1179 (2023).
11. Matthew A. Seligman, *The New Bipartisan Bill to Prevent Another Jan. 6 Would Actually Work*, SLATE (July 21, 2022, 12:57 PM) (quoting Press Release, Sen. Susan Collins, One Pager on Electoral Count Reform Act of 2022 (July 20, 2022), https://www.collins.senate.gov/imo/media/doc/one_pager_on_electoral_count_reform_act_of_2022.pdf [<https://perma.cc/4FSH-5JJN>]), <https://slate.com/news-and-politics/2022/07/electoral-ref-orm-could-stop-next-jan-six.html> [<https://perma.cc/JW9T-J2L4>].
12. See, e.g., Sue Halpern, *The Ongoing Electoral Efforts to Up the Anti-Democratic Ante*, NEW YORKER (Oct. 4, 2022), <https://www.newyorker.com/news/daily-comment/the-ongoing-electoral-efforts-to-up-the-anti-democratic-ante> [<https://perma.cc/T4P3-8YXE>].

bipartisan support¹³ makes its implementation a natural and urgent starting point for states as they endeavor to safeguard the nonpartisan election administration that was for so long taken for granted in the United States.¹⁴

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13. Before its inclusion in the omnibus appropriations package in which it passed Congress, the Electoral Count Reform Act had obtained thirty-nine cosponsors in the Senate. Specifically, it had twenty-two Democrats, sixteen Republicans, and one Independent, including both Senate Majority Leader Chuck Schumer (D-NY) and Senate Minority Leader Mitch McConnell (R-KY). *S.4573—Electoral Count Reform and Presidential Transition Improvement Act of 2022*, CONG., <https://www.congress.gov/bill/117th-congress/senate-bill/4573/cosponsors> [<https://perma.cc/J322-Q5LT>] (listing cosponsors). Additionally, the legislation garnered support from a broad range of outside groups and individuals from across the ideological spectrum. An illustrative selection includes: the Cato Institute; the Center for American Progress; the Business Roundtable; the American Civil Liberties Union; the R Street Institute; the *New York Times*, *Washington Post*, and *Wall Street Journal* editorial boards; Republican election lawyer Benjamin L. Ginsberg; and Democratic election lawyer Bob Bauer. See, e.g., Thomas Berry, *Two Years After January 6, Electoral Count Act Reform Is Now Law*, CATO INST. (Jan. 6, 2023), <https://www.cato.org/blog/two-years-after-january-6-electoral-count-act-reform-now-law> [<https://perma.cc/H8NS-S7UA>]; Press Release, Center for American Progress, *Senate Proposal to Reform Electoral Count Act Is a Good Deal for Democracy that Lawmakers Should Pass* (Aug. 2, 2022), <https://www.americanprogress.org/press/release-senate-proposal-to-reform-electoral-count-act-is-a-good-deal-for-democracy-that-lawmakers-should-pass> [<https://perma.cc/98A5-YVHS>]; Editorial, *A Bill to Prevent Trump's Attempted Coup is Finally Ready—And Must Pass*, WASH. POST (July 20, 2022, 4:36 PM EDT), <https://www.washingtonpost.com/opinions/2022/07/20/electoral-count-reform-act-must-pass> [<https://perma.cc/CS5N-NUEY>]; Benjamin L. Ginsberg, *Republicans in Congress Should Update the Electoral Count Act Before It's Too Late*, NAT'L REV. (Dec. 5, 2021, 6:30 AM), <https://www.nationalreview.com/2021/12/republicans-in-congress-should-update-the-electoral-count-act-before-its-too-late> [<https://perma.cc/UE3T-D8BT>] (endorsing reform of the Electoral Count Act); Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, LAWFARE (July 24, 2022, 4:09 PM), <https://www.lawfaremedia.org/article/correcting-misconceptions-about-electoral-count-reform-act> [<https://perma.cc/22G2-6QP7>]; Kristen Lee, *Why the ACLU Supports the Electoral Count Reform Act*, ACLU (Dec. 2, 2022), <https://www.aclu.org/news/voting-rights/why-the-aclu-supports-the-electoral-count-reform-act> [<https://perma.cc/UV6K-8CSJ>]; Jonathan Bydlak, Matt Germer & Ryan Williamson, *R Street Testimony on the Electoral Count Act: The Need for Reform*, R ST. (Aug. 3, 2022), <https://www.rstreet.org/outreach/r-street-testimony-on-the-electoral-count-act-the-need-for-reform> [<https://perma.cc/28BZ-CWN4>]; Press Release, Bus. Roundtable, *Business Roundtable Welcomes Electoral Count Act Reform Legislation* (July 21, 2022), <https://www.businessroundtable.org/business-roundtable-welcomes-electoral-count-act-reform-legislation> [<https://perma.cc/9B2F-89Z5>]; Editorial, *Electoral Count Act Reform, at Last*, WALL ST. J. (Dec. 20, 2022, 6:39 PM ET), <https://www.wsj.com/articles/a-bad-way-to-govern-senate-omnibus-bill-electoral-count-act-reform-11671575058> [<https://perma.cc/QBB8-32AG>]; Editorial, *There's a Lot Congress Can Do Now, and It Starts With Changing a Law that Trump Exploited*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/opinion/congress-midterms.html> [<https://perma.cc/BPD8-SHSJ>].
14. For more thoughts on how the bipartisan agreement on the ECRA could serve as a point of departure for “broader support for the proposition that states should not be permitted to manipulate elections by changing the rules that determine who can vote and whose votes will be

I. “TRUMP-PROOFING” THE ELECTORAL COUNT

On January 2, 2021, Donald Trump convened a Zoom call of 300 state legislators.¹⁵ The agenda for the meeting? To convince the legislators to overturn President Joe Biden’s victory in the 2020 election by decertifying their states’ election results.¹⁶ On the call, Trump asserted baselessly that voter fraud had plagued the election, robbing him of his rightful victory. All fifty states have long selected electors through popular vote, but Trump argued that in Republican-controlled states where his opponent had won the popular vote, the legislators and their governors should simply decertify the election results and appoint alternate slates of electors that would deliver his victory.¹⁷

The plan came “perilously close” to working, in part due to weaknesses in the Electoral Count Act (ECA), which governed the casting and counting of electoral votes. The 130-year-old law was rife with gaps and ambiguities and had, in the words of one election law scholar, been “lying there like unexploded ordnance since 1887.”¹⁸ This Part explains how the ECA enabled the former president’s antidemocratic ploy and how the Electoral Count Reform Act (ECRA) that Congress passed in response addresses the same vulnerabilities exploited in 2020.

counted[.]” see Pamela S. Karlan, *The Virtues of the Electoral Count Reform Act*, ELECTION L. BLOG (Aug. 1, 2022, 7:30 AM), <https://electionlawblog.org/?p=131097> [<https://perma.cc/53DQ-9JUN>].

15. Jacqueline Alemany, Emma Brown, Tom Hamburger & Jon Swaine, *Ahead of Jan. 6, Willard Hotel in Downtown D.C. Was a Trump Team ‘Command Center’ for Effort to Deny Biden the Presidency*, WASH. POST (Oct. 23, 2021, 5:51 PM EDT), https://www.washingtonpost.com/investigations/willard-trump-eastman-giuliani-bannon/2021/10/23/c45bd2d4-3281-11ec-9241-aad8e48fo1ff_story.html [<https://perma.cc/LZE8-X9AS>].
16. *See id.*
17. *See* Paul Bedard, *Exclusive: Trump Urges State Legislators to Reject Electoral Votes, ‘You Are the Real Power,’* WASH. EXAM’R (Jan. 3, 2021), <https://www.washingtonexaminer.com/washington-secrets/exclusive-trump-urges-state-legislators-to-reject-electoral-votes-you-are-the-real-power> [<https://perma.cc/2NPB-ZDNX>]. On August 1, 2023, the Department of Justice indicted President Trump for the conduct described in this paragraph. *See* Charlie Savage, *Here Are the Charges Trump Faces in the Jan. 6 Case*, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/2023/08/01/us/politics/trump-indictment-charges-jan-6.html> [<https://perma.cc/SY3N-QPQ4>].
18. *See* Carl Hulse, *How a Bipartisan Senate Group Addressed a Flaw Exposed by Jan. 6*, N.Y. TIMES (Dec. 22, 2022), <https://www.nytimes.com/2022/12/22/us/politics/electoral-count-act-jan-6.html> [<https://perma.cc/V5Z5-A4YU>].

A. “Unexploded Ordnance”: An Antiquated Law Becomes a Vehicle for Election Subversion

Like the ECRA, the ECA was borne out of constitutional crisis. Congress passed the law in response to the presidential election of 1876, in which three southern states had transmitted two competing slates of electors to Congress supporting opposing candidates—a situation that no law at the time was equipped to handle.¹⁹ Rather, the Constitution supplied—and still does—only a barebones process by which electoral votes must be cast and counted. First, “each state shall appoint, in such manner as the Legislature may thereof direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress.”²⁰ Then, “[t]he Electors shall meet in their respective states and vote by ballot for President and Vice President,” ultimately sending a certificate to Congress.²¹ Finally, Congress shall “open all the certificates and the votes shall then be counted” with the Vice President presiding.²² The winner of the majority of those votes, “shall be President.”²³ But when members of Congress received competing submissions from the states in 1876, the Constitution provided no instructions on which to count.

Eager to avoid another disputed election, Congress wrote the ECA to provide a structure for states to submit slates of electors for president to Congress for counting, and guidance for Congress to determine the “real” slate of electors in case any state submitted multiple, rival slates.²⁴ Among other things, the legislation established a timeline for presidential elections. For example, it required that all states appoint electors on the “Tuesday next after the first Monday in November”—what we now know as Election Day—and set a date for the meeting of electors to send their states’ electoral votes to Congress.²⁵ It tasked the Vice President with sitting in the Speaker of the House’s chair and “preserv[ing]

19. See Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. Rev. 1653, 1960; see also Peter Baker, *You Think this Is Chaos? The Election of 1876 Was Worse*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2021/01/05/us/politics/trump-electoral-college.html> [https://perma.cc/PC8D-L3KC] (noting that three of the southern states that submitted competing slates of electors were still occupied by Union troops in 1876).

20. U.S. CONST. art. II, § 1.

21. *Id.*

22. *Id.*

23. U.S. CONST. amend XII.

24. Parsons & Penrose, *supra* note 9, at 4.

25. Electoral Count Act, 3 U.S.C. § 1 (2018) (current version at 3 U.S.C.A. § 1 (2023)); *The Electoral Count Act & the Process of Electing a President*, NAT’L TASK FORCE ON ELECTION CRISES 3 (2020), <https://www.electiontaskforce.org/electoral-count-act> [https://perma.cc/RBF7-XNSG].

order during the count,” and created a process by which members of Congress could lodge their objections to any states’ submissions.²⁶ Finally, it created a “safe-harbor” period: If a state appointed a slate of electors at least six days before the date on which electors were to meet to transmit their states’ results to Washington, that slate was to be treated as “conclusive” by Congress.²⁷

The statute’s purpose was critical, but its language bordered on unintelligible.²⁸ Far from setting clear rules to see the country through a contested election, the ambiguous text and structure of the ECA created confusion and presented opportunities for protracted partisan litigation. For example, it did not clearly delineate the limits of the Vice President’s power while presiding over the count, or the valid grounds on which Members of Congress could object to a state’s results.²⁹ It gestured to the possibility that state legislatures could directly appoint electors in the event of a “fail[ed]” election, but provided no definition or constraints on what would constitute such a failure.³⁰ And its optional “safe-harbor” date for states certifying election results to Congress created immense confusion over when states were required to finalize results and transmit them for counting and what might happen if they were late.³¹

As was vividly illustrated by the aftermath of the 2020 election, election deniers seize on confusion, litigation, and any other hints of irregularity to sow doubt in the outcome of legitimate elections.³² Widespread confusion and doubt

26. Electoral Count Act, 3 U.S.C. §§ 15, 16, 18 (2018) (current version at 3 U.S.C.A. § 15 (2023)); *The Electoral Count Act*, *supra* note 25, at 3.

27. *The Electoral Count Act*, *supra* note 25, at 3.

28. See *The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules & Admin.*, 117th Cong. (Aug. 3, 2022) (statement of Bob Bauer, Professor, N.Y.U.), <https://www.rules.senate.gov/imo/media/doc/Bauer%20Testimony.pdf> [<https://perma.cc/9BU3-XTBT>].

29. See *Congress Must Update the Electoral Count Act to Guard Against Crises During Future Presidential Elections*, NAT’L TASK FORCE ON ELECTION CRISES 2, <https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/6128044f8b752c57532dfoab/1630012496256/Congress+Must+Update+the+Electoral+Count+Act.pdf> [<https://perma.cc/LC8Y-4RVY>].

30. *Id.*; see also *A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election*, NAT’L TASK FORCE ON ELECTION CRISES 4, https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f625c790cefo66e940ea42d/1600281722253/State_Legislature_Paper.pdf [<https://perma.cc/U29T-AZE3>] (explaining that “Congress has never expressly defined what would constitute an election failure”).

31. See *id.* at 10 (noting that the safe-harbor deadline “has sown confusion in 2000, 2004, 2016, and 2020”).

32. See, e.g., Alanna Durkin Richer & Nomaan Merchant, *EXPLAINER: A Look at Trump’s Long-Shot Legal Challenges*, ASSOCIATED PRESS (Nov. 19, 2020), <https://apnews.com/article/donald-trump-legal-challenges-explained-075b2ef6f75e9dd3026d54fc38b81920> [<https://perma.cc/QKW2-BEFE>] (detailing how the Trump campaign used litigation to undermine the results of the 2020 election); Kevin Roose, *No, Sharpies Aren’t Invalidating Ballots in Arizona*, N.Y.

can then provide pretext for partisan election officials refusing to certify results.³³ In this way then, the ECA's ambiguity created a readily exploitable vehicle for anyone attempting to subvert the results of a presidential election. Indeed, President Trump focused the bulk of his efforts to overturn the 2020 election on exactly the vulnerabilities detailed above. In addition to pressuring state legislators to directly appoint slates of electors, he demanded that Vice President Mike Pence "unilaterally disqualify" slates of electors for his opponent while presiding over the count,³⁴ and filed baseless legal challenges that threatened states' ability to certify results within the safe-harbor period.³⁵

In the end, of course, Pence refused to bow to the pressure, even as a violent mob of Trump's supporters stormed the Capitol to disrupt the count.³⁶ No state legislature attempted or was able to formally decertify its own results before Pence certified the nationwide results, and no governor accepted a "fake" slate of electors.³⁷ Nonetheless, the attempted coup laid bare the ECA's many shortcomings. Once again faced with a near democratic catastrophe as a result of unclear

TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/technology/sharpies-ballots-arizona.html> [<https://perma.cc/37UP-EYQ9>] (describing how President Trump's campaign seized on a perceived irregularity — the use of Sharpie pens at some Arizona polling locations — to undermine confidence in the state's election results); Robert Yoon, *Trump's Drumbeat of Lies About the 2020 Election Keeps Getting Louder. Here Are the Facts*, ASSOCIATED PRESS (Aug. 27, 2023), <https://apnews.com/article/trump-2020-election-lies-debunked-4fc26546b07962fdbf9d66e739fbb5od> [<https://perma.cc/C9Z2-458E>] (using polling to demonstrate that Trump's multiyear effort to "undermine public confidence in the American electoral process" is "resonating" with Republicans).

33. See, e.g., 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> [<https://perma.cc/4BS2-86ZP>] (detailing instances in which election officials refused to certify election results in response to perceived election irregularities).
34. Michael S. Schmidt, *Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works.*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html> [<https://perma.cc/GA3B-NY79>].
35. See, e.g., Molly Beck, *With Case Pending in State Court, Wisconsin Is Only State to Miss Election Safe-Harbor Deadline*, MILWAUKEE J. SENTINEL (Dec. 8, 2022), <https://www.jsonline.com/story/news/politics/elections/2020/12/08/wisconsin-only-state-miss-election-safe-harbor-deadline/6496378002> [<https://perma.cc/63AG-V5SH>]; William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 5:01 PM EST), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001> [<https://perma.cc/JC3X-6R27>].
36. See Maggie Haberman, *Pence Aide Warned Against Blocking Electoral College Count, Memo Shows*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/06/11/us/politics/pence-jan-6-election-trump.html> [<https://perma.cc/B2FQ-T5AF>].
37. See Hasen, *supra* note 1, at 274; Seligman, *supra* note 11.

electoral rules, Congress set about drafting the ECRA to avert the possibility of a repeat.

B. The Electoral Count Reform Act

While democracy survived the ECA’s weaknesses and the attempted coup that relied on them, the events of January 6, 2021, were a stark warning that the law needed revision. The ECRA can be understood as a bipartisan effort to “Trump-proof” the electoral-count process by closing the same loopholes that the former president had tried to exploit.³⁸ As detailed above, Trump’s efforts focused heavily on invalidating or circumventing election results after the votes had been cast and counted. In response, Congress drafted the ECRA “around a core reform principle of utmost importance: our presidential elections should be run according to rules set in advance and in effect on Election Day.”³⁹ The ECRA put many of those rules into place, along with new guardrails to prevent their manipulation.

To that end, many of the ECRA’s changes address the process by which Congress must count the electoral votes it receives from the states. First, the ECRA specifies that the role of the Vice President in presiding over the count is “ministerial in nature” to avoid the sort of pressure campaign that Vice President Pence faced in 2020.⁴⁰ Second, it strictly limits opportunities for Congress to second-guess states’ certified election results by raising the threshold necessary for members to object to a state’s slate of electors from a single member of both chambers to one-fifth of the members of both chambers.⁴¹ And finally, instead of allowing Congress to determine whether a state’s slate of electors is legitimate or not, the ECRA provides for a panel of federal judges—with expedited review to the Supreme Court—to make that determination, which Congress must honor.⁴²

But since the Constitution delegates to states the power to “appoint, in such manner as the Legislature thereof may direct” the slate of presidential electors ultimately counted by Congress, any effort to prevent subversion of a presidential election must address the process by which states select their slates of electors

38. Greg Sargent, Opinion, *The GOP Is Quietly “Trump-Proofing” Our System Behind His Back*, WASH. POST (Dec. 20, 2022), <https://www.washingtonpost.com/opinions/2022/12/20/electoral-count-act-reform-omnibus-trump-2024> [https://perma.cc/7LPE-BE2W].

39. *The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules & Admin.*, 117th Cong. 2 (Aug. 3, 2022) (statement of Bob Bauer, Professor, N.Y.U.), <https://www.rules.senate.gov/imo/media/doc/Bauer%20Testimony.pdf> [https://perma.cc/9BU3-XTBT].

40. 3 U.S.C.A. § 15(b)(1) (2023).

41. 3 U.S.C.A. § 15(d)(2)(B) (2023).

42. 3 U.S.C.A. § 5(c)-(d) (2023).

in the first place.⁴³ Recognizing this, the ECRA includes a number of reforms to ensure that each state produces a single, conclusive slate of electors for Congress to count. First, it explicitly prohibits state legislatures from changing the law after Election Day to overrule their voters and the results of the popular election, and in doing so eliminates the concept of a “failed” election.⁴⁴ Second, to avoid conflicting authority over certification, it specifies that the state executive who must certify a state’s appointment of electors is the governor, unless state law enacted prior to the election designates a different executive to perform that function.⁴⁵ And lastly, in what is likely the most consequential change for routine state election administration, the ECRA replaced a formerly optional deadline with a requirement that each state certify its electors to Congress (via a “certificate of ascertainment” transmitted by the state’s executive) by a mandatory deadline of thirty-six days after Election Day, which is one day later than the former safe-harbor deadline.⁴⁶

As the country careens toward what is likely to be another contentious presidential election in 2024, the ECRA goes a long way toward preventing the type of subversion that was nearly successful in 2020. And while its passage was hailed across the ideological spectrum for protecting the will of the voters in future

43. U.S. CONST. art. II, § 1, cl. 2.

44. See 3 U.S.C.A. § 1 (2023) (requiring slates of electors for president and vice president to be “appointed, in each state, on election day, in accordance with the laws of the state enacted prior to election day”); see also *id.* § 21(1) (defining “election day” to include a modified voting period “as necessitated by force majeure events that are extraordinary and catastrophic, as provided under the laws of the state prior to such day”). In doing so, the ECRA repealed a provision of federal law (the former 3 U.S.C. § 2), which provided that where a “State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law,” the state’s electors may be appointed on a later date “in such a manner as the legislature of such State may direct.” *A State Legislature Cannot Appoint Its Preferred Slate of Electors to Override the Will of the People After the Election*, NAT’L TASK FORCE ON ELECTION CRISES 4 (2020), https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f625c790cefo66e940ea42d/1600281722253/State_Legislature_Paper.pdf [<https://perma.cc/L7W4-DUEZ>].

45. 3 U.S.C.A. § 21(3) (2023).

46. The ECRA states that the certificate must be issued “[n]ot later than the date that is 6 days before the time fixed for the meeting of the electors.” 3 U.S.C.A. § 5(a)(1) (2023). The ECRA fixes the time for the meeting of electors on “the first Tuesday after the second Wednesday in December,” which is 42 days after Election Day, so the certificate must be submitted six days prior, on the 36th day following Election Day. *Id.* § 7. For details on the former deadline, see *Electoral Count Reform Act Implementation*, CAMPAIGN LEGAL CTR. 2-3 (2023), <https://campaignlegal.org/sites/default/files/2023-01/ECRA%20Implementation%20Explainer.pdf> [<https://perma.cc/6EZL-2P6J>]. In addition to providing that the state’s default certifying executive is the governor, the ECRA’s other main change to routine state election administration is a requirement that the certificate of ascertainment issued by state executives must include a “security feature.” 3 U.S.C.A. § 5(a)(2)(C) (2023).

elections,⁴⁷ these protections remain incomplete without state implementation. In particular, states must grapple with the federal law’s new, mandatory certification deadline – and determine how they will meet it – before the 2024 presidential election.

II. THE UNSAFE HARBOR: A NEW, MANDATORY DEADLINE

As described in Part I, the ECRA is aimed at ensuring that each state certifies to Congress a single, conclusive slate of electors that have been selected according to state law prior to Election Day. And in order to ensure that any disputes over a state’s certificate can be resolved by federal courts before any conflicting slates reach Congress, the ECRA requires that states certify their slates of electors during a thirty-six-day window following the election. While states should check multiple aspects of their election procedures against the requirements set forth in the new federal law,⁴⁸ this Part focuses on the underexplored significance of the mandatory certification deadline compared to the optional one it replaced, and why states must take urgent action to ensure they will be able to meet it. Failure to do so could potentially risk rejection of the state’s electoral votes by Congress and could provide a hook for anyone wishing to undermine the legitimacy of the presidential election.

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47. See, e.g., Press Release, Angus King, Sen., King Celebrates Passage of Electoral Count Act Reforms to Protect Democracy (Dec. 22, 2022), <https://www.king.senate.gov/newsroom/press-releases/king-celebrates-passage-of-electoral-count-act-reforms-to-protect-democracy> [<https://perma.cc/4BZ8-NMU8>]; Thomas A. Berry, *Two Years After January 6, Electoral Count Reform Act Is Now Law*, CATO INST. (Jan. 6, 2023), <https://www.cato.org/blog/two-years-after-january-6-electoral-count-act-reform-now-law> [<https://perma.cc/MWQ4-8ZHT>]; Press Release, ACLU, ACLU Comment on Passage of the Electoral Count Act (Dec. 22, 2022), <https://www.aclu.org/press-releases/aclu-comment-passage-electoral-count-act> [<https://perma.cc/L76J-PLGJ>]; Derek T. Muller, *Congress Passes Legislation that Will Close off Presidential Election Mischief and Help Avoid Another Jan. 6*, CONVERSATION (Dec. 12, 2022), <https://theconversation.com/congress-passes-legislation-that-will-close-off-presidential-election-mischief-and-help-avoid-another-jan-6-196204> [<https://perma.cc/PE6N-GUF5>].
48. For example, as discussed in Part I, the new ECRA provides that the default executive responsible for certification is the governor of the state, unless otherwise specified by state law prior to Election Day. See *supra* note 45 and accompanying text. States with certifying executives other than the governor should thus make sure that the duty is clearly assigned to the alternative executive to avoid any potential for conflicting authority. Additionally, the ECRA provides that states may provide alternative periods of voting in the case of “force majeure events that are extraordinary and catastrophic.” 3 U.S.C. § 21(1). Any modifications must be made according to laws made prior to Election Day, so states should consider how their current laws handle potential election emergencies, and whether the procedures in place are adequate. For more longer-term recommendations for states implementing the ECRA, see Parsons & Penrose, *supra* note 9, at 7-8.

A. From Optional to Mandatory

Thirty-six days may seem like ample time to certify an election, but the certification process encompasses far more than simply closing polls and tabulating votes. Indeed, while the certification process is different in every state, it typically requires the completion of four separate postelection processes, all conducted by procedures determined by state law.⁴⁹ These processes include (1) local and state canvasses in which votes are counted and verified;⁵⁰ (2) any recounts performed whether they are automatic or requested by the losing candidate;⁵¹ (3) any election contests, through which losing candidates can bring legal or administrative challenges claiming that an election was not conducted properly or results were not properly determined;⁵² and (4) postelection audits, which in some states must be completed before certification of the final results can occur.⁵³

Each of the individual postelection processes detailed above can take significant time, especially in a close or contested election. The former optional deadline under the ECA allowed states some leeway. Under the prior regime, there was no mandatory certification deadline, but instead, a “safe-harbor” date that states could take advantage of.⁵⁴ If states were able to finalize their results and appoint a slate of electors prior to the “safe-harbor” deadline—i.e., within the thirty-five-day period following Election Day⁵⁵—then Congress would treat that slate as “conclusive.”⁵⁶ Specifically, to qualify for the safe-harbor protection, states were required to make a “final determination” of any dispute “by judicial

49. For a fifty-state survey of major postelection processes and deadlines, see *Canvass, Certification and Contested Election Deadlines*, NAT’L CONF. ST. LEGISLATURES (Oct. 26, 2022), <https://www.ncsl.org/elections-and-campaigns/canvass-certification-and-contested-election-deadlines-and-voter-intent-laws> [<https://perma.cc/HYR6-UR6L>].

50. *Id.*

51. *Election Recounts*, NAT’L CONF. ST. LEGISLATURES (June 6, 2022), <https://www.ncsl.org/elections-and-campaigns/election-recounts> [<https://perma.cc/B2VY-YBF4>].

52. NAT’L CONF. ST. LEGISLATURES, *supra* note 49.

53. *Post-Election Audits*, NAT’L CONF. ST. LEGISLATURES (Sept. 22, 2022), <https://www.ncsl.org/elections-and-campaigns/post-election-audits> [<https://perma.cc/K2YJ-GQ62>].

54. 3 U.S.C. § 5 (2018), amended by 3 U.S.C. § 5(a)-(d) (2022); see also *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77-78 (2000) (describing the pre-2022 version of 3 U.S.C. § 5 as a “safe harbor” provision).

55. Specifically, the safe-harbor date was set for six days prior to the meeting of the electors, which under the Electoral Count Act was set for the first Monday after the second Wednesday in November. 3 U.S.C. § 7 (2018), amended by 3 U.S.C. § 7 (2022). Taken together, that created a thirty-five-day window for states to finalize their results in order to take advantage of the safe harbor.

56. See sources cited *supra* note 54.

or other methods or procedures” pursuant to state law enacted prior to Election Day.⁵⁷ In other words, by submitting a final slate of electors to Congress by the safe-harbor deadline, states could guarantee that Congress would count those electors under the processes dictated by the ECA. Alternatively, if they failed to do so, there was ostensibly no guarantee that Congress would count the slate of electors ultimately submitted.

States thus had strong incentive to submit their slates of electors by the ECA’s safe-harbor date to avoid the uncertainty that would attend a late submission. In fact, the old law created such a powerful impetus for states to meet the safe-harbor date that, in *Bush v. Gore*, the Supreme Court overturned the Florida Supreme Court’s manual recount order following the 2000 election in part because the manual recount threatened Florida’s ability to submit a slate of electors before the ECA’s safe-harbor date.⁵⁸ The per curiam opinion in that case criticized any remedy that threatened the state’s ability to “obtain the safe-harbor benefits of 3 U.S.C. § 5,”⁵⁹ and the concurrence authored by Chief Justice Rehnquist agreed that deference to Florida’s legislative scheme compelled the Court to “ensure that postelection state-court actions do not frustrate the legislative desire to attain the ‘safe harbor’ provided by § 5.”⁶⁰

And yet despite the Supreme Court’s deference to the safe-harbor date, the reality is that states could – and occasionally did – fail to submit electors by the ECA’s safe harbor with few consequences.⁶¹ For example, as recently as the 2020 presidential election, Wisconsin was unable to finalize its slate of electors before the ECA’s safe-harbor date; its courts were still adjudicating a recount-appeal lawsuit brought by Trump’s campaign in an effort to overturn Biden’s victory.⁶² At the time, election-law scholar Rebecca Green explained the significance of the

57. *The Electoral Count Act and the Process of Electing a President*, NAT’L TASK FORCE ON ELECTION CRISES 3 (2020), <https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/5f59223d94b21d2ebe8e6957/1599676990875/Electoral+Count+Act.pdf> [https://perma.cc/DLS8-BRY5].

58. *Bush v. Gore*, 531 U.S. 98 (2000).

59. *Id.* at 111.

60. *Id.* at 113 (Rehnquist, C.J., concurring).

61. In addition to the Wisconsin example detailed in this paragraph, Hawaii did not submit the slate of electors ultimately counted by Congress for the 1960 presidential election until January 4, 1961, well after the safe-harbor deadlines. *Id.* at 127 (Stevens, J., dissenting) (citing the Hawaii 1960 example to argue that the safe-harbor date simply provided “rules of decision for Congress to follow when selecting among conflicting slates of electors” and should “not prohibit [Florida] from counting what the majority concedes to be legal votes until a bona fide winner is determined”).

62. Laurel White, *Wisconsin Set to Miss Federal ‘Safe Harbor’ Election Deadline*, WIS. PUB. RADIO (Dec. 8, 2020, 12:45 PM), <https://www.wpr.org/wisconsin-set-miss-federal-safe-harbor-election-deadline> [https://perma.cc/A2ER-7WQU].

state's failure to meet the safe-harbor date: "If a state doesn't complete any post-election processes by the 'safe harbor' deadline, that doesn't mean its electoral votes will be thrown out or that Congress won't accept them." Rather, "it just means that Congress isn't *obligated* to accept them."⁶³

Ultimately, the Wisconsin Supreme Court upheld Biden's victory in the state – thus finalizing its presidential-election results – less than an hour before the Electoral College was scheduled to meet, and six days after the safe-harbor period had ended.⁶⁴ Nonetheless, while some members of Congress attempted to object to Wisconsin's electoral votes, the objection failed and Congress counted the state's slate of electors for Joe Biden, even though it had not been finalized before the safe-harbor date.⁶⁵ As Green had predicted, Wisconsin, by missing the safe-harbor date, was no longer statutorily guaranteed that its slate of electors would be accepted by Congress, but the state's tardiness did not foreclose its ability to have its slate of electors counted.

While Wisconsin faced few consequences for its inability to meet the ECA's safe-harbor date in 2020, it is unclear whether that same lenience would be extended in 2024 now that the ECRA has supplied a mandatory deadline. Indeed, the text of the ECRA now simply provides that the executive of each state "shall issue a certificate of ascertainment of appointment of electors" no later than "6 days before the time fixed for the meeting of electors" in their respective states.⁶⁶ As explained in Part I, this requirement functionally gives states thirty-six days to certify presidential results. Unlike its predecessor, which provided that states were required to certify by the safe-harbor date in order to have the resulting slate treated as conclusive, the ECRA does not specify consequences for states failing to meet the new deadline.

On the one hand, this is not unusual. As the Supreme Court has explained, the use of "shall" in a federal statute denotes a duty that is "mandatory and self-executing."⁶⁷ It is therefore unnecessary to follow the word "shall" with an "or else." But on the other hand, recent history shows how possible it is for states to miss the federal deadline, and the growth in election-related litigation is likely to

63. *Id.* (emphasis added).

64. Trump v. Biden, 951 N.W.2d 568, 577 (Wis. 2020); Patrick Marley, *Wisconsin Supreme Court Upholds Biden's Win, Rejects Trump Lawsuit*, MILWAUKEE J. SENTINEL (Dec. 14, 2020, 11:11 AM CT), <https://www.jsonline.com/story/news/politics/elections/2020/12/14/wisconsin-supreme-court-upholds-joe-bidens-win/6529642002> [<https://perma.cc/C2YX-B8Q5>].

65. See, e.g., 167 CONG. REC., at H114 (Jan. 6, 2021) (Statement of Rep. Louie Gohmert); *id.* at H115 (containing a table of official electoral-vote totals by state).

66. 3 U.S.C. § 5(a)(1).

67. NLRB v. SW Gen., Inc., 580 U.S. 288, 303 (2017).

further extend state postelection processes.⁶⁸ It is not clear what would happen to these states – and their electoral votes – if they fail to meet the deadline under the new regime. But what *is* clear is that a bad-faith actor bent on undermining the legitimacy of the election could capitalize on that uncertainty to sow chaos and doubt.

One can speculate as to potential legal consequences for missing the deadline, ranging from “none” to abject pandemonium. The “none” end of the spectrum would resemble the Wisconsin 2020 example: A state certifies a single slate of electors, appointed pursuant to state law enacted prior to Election Day, after the federal deadline but before the fixed date on which electors must meet in their states. If there was no doubt surrounding the legitimacy of the certificate of ascertainment beyond its tardiness, it’s conceivable that Congress could simply count the electors even if they were not submitted on time. In the absence of a court order, though, it is also theoretically possible that Congress could reject the electors as untimely and exclude the state entirely from the electoral count; it is unclear from the text of the ECRA that a slate of electors certified after the deadline without a federal or state court determination would be lawful. Most likely, then, is that litigation would ensue to validate the post-deadline electors and compel Congress to accept the slate. But as the hypothetical scenarios grow increasingly complex – for example, a blown federal deadline and competing slates of electors or ongoing legal challenges in both state and federal courts – the likelihood increases that we will witness the very chaos the ECRA was designed to prevent, and that election deniers could seize upon.

B. *Compelling Compliance*

Despite the unclear consequences of missing the deadline, there are two potential mechanisms in place to compel states to produce valid certificates for Congress to count. First, the ECRA creates a procedure by which federal courts can hear federal claims brought by presidential candidates “with respect to a state executive’s duty to issue and transmit to Congress the certification of appointed electors.”⁶⁹ In other words, if a presidential candidate brings a claim under

68. See, e.g., Sam Gringlas, Audie Cornish & Courtney Dorning, *Step Aside Election 2020: This Year’s Election May Be the Most Litigated Yet*, NPR (Sept. 22, 2020, 5:00 AM ET), <https://www.npr.org/2020/09/22/914431067/step-aside-election-2000-this-years-election-may-be-the-most-litigated-yet> [https://perma.cc/DEP4-KZNM]; Tierney Sneed & Fredreka Schouten, *Avalanche of Early Lawsuits Could Pave Way for Disputes over Tuesday’s Election Results*, CNN (Nov. 7, 2022, 7:15 AM EST), <https://www.cnn.com/2022/11/07/politics/election-lawsuits-midterms-challenges/index.html> [https://perma.cc/L6YT-JTZQ].

69. *Understanding the Electoral Count Reform Act*, PROTECT DEMOCRACY 2 (Dec. 20, 2022), <https://protectdemocracy.org/wp-content/uploads/2022/12/Protect-Democracy-Electoral->

federal law – which could be statutory or constitutional – and successfully argues that they are entitled to a state’s electoral votes, then the ECRA-created three-judge panel could order a state executive to issue a certificate of ascertainment. That court-ordered slate of electors would then become the state’s single slate of electors to be counted by Congress, even if not initially certified before the federal deadline.⁷⁰ But the ECRA’s federal judicial process is meant to be a last resort, and for good reason: It would be dangerous to create the impression that elections are routinely decided by “judicial fiat,” as critics and losing candidates would almost certainly charge.

Second, aggrieved candidates could turn to state courts to force any recalcitrant state officials to perform their legal duties under state law. As Derek T. Muller has written, the writ of mandamus – a remedy issued to public officials requiring them to perform the “clear legal duty” with which they are tasked by state law – is a potentially useful tool for combatting election subversion caused by state officials refusing to perform their nondiscretionary duties.⁷¹ Mandamus has a clear use as a remedy in the event that a public official – for example, an administrator or member of a board of elections – refuses to perform the ministerial duty required of them by state law, such as canvassing or certifying election results. Muller also suggests that mandamus can be used by state courts to enforce the ECRA’s federal certification deadline of thirty-six days after the election, or six days prior to the meeting of the electors. Indeed, he argues, by instituting a federal deadline by which state executives must certify their election, the ECRA “created a clear legal duty on the executive. That legal duty can be readily enforceable in mandamus proceedings in state court.”⁷²

But Muller’s theory that mandamus can be used to enforce the federal deadline may overlook an important possibility: that a state’s noncompliance with the federal deadline is not due to the recalcitrance of its executive, but because its postelection processes are not yet complete.

To be sure, a state executive’s noncompliance with the ECRA’s mandatory deadline would be illegal regardless of any timelines provided by state law.⁷³

Count-Reform-Act-ECRA-Explainer.pdf [https://perma.cc/ETU2-B45U] (describing Section 104 of the Electoral Count Reform Act); 3 U.S.C. § 5(c)-(d).

70. Electoral Count Reform Act, Pub. L. No. 117-328, § 104(a), 136 Stat. 4459, 5235 (codified at 3 U.S.C. § 5(c)(1)(B)).

71. Derek T. Muller, *Election Subversion and the Writ of Mandamus*, 65 WM. & MARY L. REV. (forthcoming 2023) (manuscript at 13), <https://ssrn.com/abstract=4380829> [https://perma.cc/SC5G-3TY9].

72. *Id.* (manuscript at 28).

73. See U.S. CONST. art. VI, cl. 2 (establishing the Constitution and federal laws made pursuant to it as “the supreme Law of the Land,” any “Laws of any State to the Contrary notwithstanding”).

However, enforcing the federal certification deadline via mandamus even though the state had not finalized its election results pursuant to state law would likely be legally complicated and time-consuming. It would also raise the same concerns about judicial interference in elections as using the ECRA's federal judicial process to compel a certificate of ascertainment.

And ultimately, even if judicial remedies are available to ensure that Congress counts a state's slate of electors, the very act of missing the deadline could be damaging from an election-subversion standpoint. As the country witnessed following the 2020 and 2022 elections, litigation and perceived departures from protocol can swiftly fuel rumors that an election is illegitimate. And those rumors can quickly give rise to action, whether it is a local election official's refusal to certify results or a mob storming the Capitol to disrupt the counting of electoral votes. A state's failure to meet a very real federal deadline – regardless of whether a state or federal court ultimately compels a certificate – could easily foment damaging allegations of illegitimacy.

The surest way to avoid these subversion risks is thus to guarantee that states meet the ECRA's certification deadline. States can do so by updating their laws to ensure that all state precertification processes will reliably be completed by the federal deadline. As this Part has illustrated, the exact consequences for states' failure to do so are not altogether clear and not easily remedied. But the ECRA – and its ability to foreclose future sabotage in presidential elections – is predicated on states' ability to certify a slate of electors, six days before electors meet and thirty-six days after Election Day. It is therefore imperative that states use their final legislative sessions before the 2024 presidential elections to make any adjustments to their laws necessary to meet the new federal deadline. By doing so, they can mitigate the risk that Congress will reject their votes and exclude them from the electoral count or that bad actors will seize upon a missed deadline to undermine election results.⁷⁴

III. IMMEDIATE STEPS FOR STATES TO IMPLEMENT THE ECRA'S DEADLINE

The new ECRA will face its first test in the 2024 presidential elections. Because state legislatures are typically active in the first half of each calendar year, this leaves for most states only one legislative session before they will have to

74. See *2023 State Legislative Calendar*, NAT'L CONF. ST. LEGISLATURES (Sept. 25, 2023), <https://www.ncsl.org/about-state-legislatures/2023-state-legislative-session-calendar> [<https://perma.cc/G5NS-RW2C>] (demonstrating that most state legislatures have adjourned for the 2023 session, leaving a single legislative session to align their state codes with the ECRA's certification deadline before the 2024 presidential election).

meet the new, mandatory certification deadline for the first time.⁷⁵ This Part provides guidance on the steps that state legislatures should take to update their laws in order to ensure that they can certify their results in time to meet the ECRA's mandatory deadline.

As detailed in Part II, the ECRA's new certification deadline falls thirty-six days after Election Day, which means that states have thirty-six days to complete canvassing, recounts, challenges, and any precertification audits. The first step for states, then, is to add up the maximum possible number of days that their postelection processes may take and see if it is greater than thirty-six. In other words, how many days will the state's postelection processes take to be completed if every process extends as long as it possibly can? This means assuming that every possible recount will take place, every permitted audit sought, and every conceivable challenge lodged and then appealed. This assumption is especially important because those seeking to undermine election results often operate by throwing sand into every possible gear and taking advantage of the cascading effect that delays at one stage of the process can have on subsequent steps.⁷⁶

In completing this analysis, some states will likely find that their postelection processes are guaranteed to be completed within thirty-six days, as a result of the deadlines already provided by their state codes. Others will find that their current deadlines would allow the certification process to last longer than thirty-six days under certain circumstances. And still some will find that they have not even supplied deadlines for every postelection process, meaning that those processes could theoretically extend indefinitely – and well beyond the ECRA's certification deadline. As examples of this range, Virginia's election code already provides that all recounts and election contests “shall be held promptly and completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before

75. *Id.*

76. See, e.g., Nick Corasaniti & Alexandra Berzon, *Activists Flood Election Offices with Challenges*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/28/us/politics/election-activists-voter-challenges.html> [<https://perma.cc/UTW4-7WSB>] (describing how activists “driven by false theories about election fraud” worked in several states to challenge voters’ legitimate registrations and in doing so “sow[ed] distrust and threaten[ed] further turmoil”); *GOP-Controlled Arizona County Refuses to Certify 2022 Midterm Election Results*, CBS NEWS (Nov. 28, 2022), <https://www.cbsnews.com/news/cochise-county-arizona-republicans-refuse-to-certify-2022-midterm-election-results> [<https://perma.cc/CY7W-BL4N>] (noting that Republican supervisors in one Arizona county refused to certify the county’s election results in the wake of “conspiracy theories” regarding vote-counting machines); William Cummings, Joey Garrison & Jim Sergeant, *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 5:01 PM EST), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001> [<https://perma.cc/JC3X-6R27>] (detailing sixty-one failed lawsuits by the former president objecting the results of the 2020 presidential election).

the time fixed for the meeting of the electors.”⁷⁷ These provisions effectively align the state’s postelection processes with the ECRA’s deadline, placing Virginia’s timeline in compliance with the new law. By contrast, New Hampshire law provides no deadline at all by which recounts must be completed.⁷⁸ This missing deadline creates the possibility that the state’s recount—and subsequent recount-appeals process⁷⁹—could theoretically stretch well past the ECRA’s certification deadline.

States will need to respond to their findings by altering and supplying the intermittent deadlines necessary to ensure that all postelection processes can be completed in thirty-six days. Exactly how the thirty-six days is divided can depend on how the state already conducts its postelection processes. For example, some states conduct the initial canvassing process quickly, leaving time for recounts,⁸⁰ contests, and audits, while others have a multistep canvassing process that takes more time.⁸¹ Because the thirty-six-day window is fixed, shaving time from one postelection process (e.g., the canvass) frees up time for other postelection processes (e.g., contests). For this reason, states should consider setting deadlines that encourage the postelection process at issue to be completed before the deadline. One way to do so is to write all deadlines in the format “as soon as practical, but in no event later than,” to motivate administrators, candidates, and state courts to take action earlier than they absolutely must under state law.⁸²

States can also create more time for postelection processes by allowing officials to “preprocess” absentee and mail ballots if they don’t already do so. All absentee and mail ballots must be processed before they can be counted. Exactly what this process entails varies by state, but it usually requires a signature match in which officials compare the signature on the ballot envelope to the voter’s signature on record to ensure that they are the same, opening the envelope, removing the ballot, and preparing it for tabulation by flattening it and stacking it with other ballots.⁸³ Thirty-eight states currently allow officials to begin processing

77. VA. CODE ANN. § 24.2-801.1(E) (2023); VA. CODE ANN. § 24.2-805 (2023).

78. See N.H. REV. STAT. ANN. § 660:6 (2021).

79. See N.H. REV. STAT. ANN. § 665:8 (2021). Candidates wishing to appeal a recount determination must do so “within three days” of the determination. *Id.* But since there is no deadline for the recount determination in the first place, there is no guaranteed date by which the recount-appeals process will begin, let alone end.

80. See, e.g., GA. CODE ANN. §§ 21-2-493, 21-2-499 (2023).

81. See, e.g., 25 PA. STAT. AND CONS. STAT. ANN. §§ 3154, 3159, 3166 (West 2023).

82. The “as soon as practicable, but in no event later than” language was initially suggested by Parsons & Penrose, *supra* note 9, at 10.

83. Table 16: *When Absentee/Mail Ballot Processing and Counting Can Begin*, NAT’L CONF. ST. LEGISLATURES (Jan. 18, 2023), <https://www.ncsl.org/elections-and-campaigns/table-16-when-absentee-mail-ballot-processing-and-counting-can-begin> [<https://perma.cc/U49L-B39M>].

absentee and mail ballots before Election Day.⁸⁴ Doing so speeds up the tabulating process after polls close and eases the workload on election officials who may then focus on other important postelection tasks. Now that states have a rigid, thirty-six-day period to complete all postelection processes, they should complete as much work as possible before Election Day to relieve pressure on that thirty-six-day window.

While ensuring compliance with the new federal deadline ahead of the 2024 presidential-election process does require states to evaluate their postelection procedures and make changes in a short period of time, there is reason to believe that doing so is doable; in many cases, adjusting state-law deadlines to comply with the ECRA will merely require changing dates. Furthermore, implementing the ECRA's deadline on the state level should theoretically be no more controversial than passing the law at the federal level—a process that drew historic levels of support from across the political spectrum—particularly when state-law changes are merely being made to bring the state into compliance with existing federal law.

At least two states with vastly different political landscapes have already adjusted their postelection processes to accommodate the new federal deadline, demonstrating the feasibility of these interventions when prioritized by state legislatures. These changes are especially instructive given that the ECRA was signed into law just days before states began their 2023 legislative sessions, leaving little time to analyze the new law and implement it that same session.⁸⁵ During the 2023 legislative cycle, Colorado—where Democrats hold a supermajority in the House and a 23-12 majority in the Senate—passed a law shortening each of the state's recount processes in order to comply with the new federal deadline.⁸⁶

Likewise, Kansas, where Republicans hold a supermajority in the House and a 29-11 Republican majority in the Senate,⁸⁷ passed a law mandating that “any

84. *Id.*

85. President Biden signed the ECRA into law on December 9, 2022, as part of an omnibus appropriations package. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. P tit. I, 136 Stat. 4459, 5233 (2022). 2023 state legislative sessions began as early as January 2, 2023.

86. S.B. 23-276, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023). Section 38 of the bill requires recounts to be ordered no later than the twenty-fourth day after the election (instead of the current deadline of thirty days) and completed by the thirty-first day after the election (instead of the thirty-fifth day). *Id.* § 38. For recounts requested by interested parties, Section 40 of the bill provides that requests must be between ten and twenty-two days after the election, instead of the current twenty-eight days; it also provides that all requested recounts must be completed by the thirty-fifth day after the election instead of the thirty-seventh day. *Id.* § 40.

87. Tim Carpenter, *GOP Clings to Kansas House Supermajority Entering Kelly's Second Term as Governor*, KAN. REFLECTOR (Nov. 10, 2022), <https://kansasreflector.com/2022/11/10/gop-clings->

contest to the election of presidential electors shall be made in accordance with the provisions of 3 U.S.C. § 5,” which is the section of the ECRA that sets the new federal deadline.⁸⁸ While this may seem to be a small change, it creates an obligation under state law that the contest process—which could formerly stretch beyond the ECRA’s certification deadline—be completed ahead of it.⁸⁹ Removing any conceivable daylight between state and federal deadlines also creates more effective enforcement opportunities: Kansas election administrators can be forced, via mandamus, to wrap up the contest process by the state-law deadline, and the Kansas certifying executive can be forced, via mandamus, to certify the results by the federal deadline.⁹⁰ Now that those two deadlines are the same, courts can intervene to ensure that postelection processes *and* certification are completed by the federal deadline.

The new laws in Kansas and Colorado demonstrate that harmonizing state procedures with the ECRA does not necessarily require a wholesale rewrite of the state’s election code; it can be as simple as adjusting a state deadline or adding a cross-reference to 3 U.S.C. § 5. And the fact that a Republican-controlled legislature and a Democrat-controlled legislature were able to quickly make these necessary updates to their election codes shows that ECRA implementation need not be tinged with the same partisanship and distrust that animates most debates over election administration.⁹¹

Nor should it be. While the two parties are sharply divided on nearly every issue related to managing our elections, the bipartisan support for the ECRA reflects widespread support for the law’s fundamental premise: that politicians should not be able to substitute their own preferences for the will of the voters. States now have an opportunity to ensure that the new federal law lives up to its promise by bringing their own codes into compliance with the ECRA’s framework.

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[<https://perma.cc/JT2S-AAFX>].

88. H.B. 2087, 2023 Leg., Reg. Sess. (Kan. 2023).

89. See Derek Muller, *How Are State Legislatures Responding to the Electoral Count Reform Act?*, ELECTION L. BLOG (May 24, 2023, 11:26 AM), <https://electionlawblog.org/?p=136396> [<https://perma.cc/6LAX-KV4V>].

90. See discussion of writs of mandamus to compel certification, *supra* note 71 and accompanying text.

91. See, e.g., Stephen Groves & Christina A. Cassidy, *Deep Partisanship Will Be on Display as Congress Releases Competing Voting Bills*, ASSOCIATED PRESS (July 10, 2023, 12:25 AM EDT), <https://apnews.com/article/congress-voting-rights-republicans-democrats-georgia-michigan-66223cf21f83cf89cc44a8dbe6277198> [<https://perma.cc/VLP3-RTKA>].

CONCLUSION

The 2020 election culminated in an unprecedented attempt to subvert the will of the voters by exploiting weaknesses in the ECA's process for casting and counting Electoral College votes. Surveying the near wreckage of that effort, conservative lawyer and former Fourth Circuit Judge Michael Luttig observed that “[i]t is hardly overstatement to say that the future of our democracy depends on reform of the Electoral Count Act.”⁹² Both parties in Congress rose to the challenge and passed the ECRA to safeguard our presidential-election process against future efforts to sabotage it. But the reform of the Electoral Count Act is not complete – and the future of democracy is not assured – with federal action alone. States must harmonize their own election codes with the new federal law to ensure that it is able to serve its intended purpose: ensuring that former President Trump's campaign to overturn the 2020 presidential election is not simply a dress rehearsal for more successful efforts in 2024 and beyond.

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92. J. Michael Luttig, Opinion, *The Conservative Case for Avoiding a Repeat of Jan. 6*, N.Y. TIMES (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/opinion/electoral-count-act.html> [<https://perma.cc/RKH3-VHV9>].