

# Election Certification Is Not Optional

Why refusing to certify the 2024 election would be illegal

MARCH 2024

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Suggested citation: Protect Democracy, *Election Certification is Not Optional* (March 2024)

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# Introduction

**IN MID-NOVEMBER OF 2020**, about two weeks after Michigan voters had gone to the polls and helped elect Joe Biden by a statewide margin of more than 150,000 votes, the Wayne County Board of Canvassers met for what had historically been an uneventful administrative matter—to officially certify the county’s election results. Wayne County includes Detroit and had voted overwhelmingly for Biden. But by the time the County Board was scheduled to meet, a deliberate disinformation effort about the outcome of the

a step in the post-election process that 99.9% of Americans had not known existed until that moment. After about 24 hours and immense public pressure, the recalcitrant board members backed down (in exchange for the promise of a post-election audit) and the county’s results were certified. The next day—after being pressured by then-President Trump—the two Board members attempted to rescind their certification; fortunately, Michigan law provided no option for them to do so.

“ As a matter of state law, certification is a mandatory, ministerial duty, meaning that officials have no discretion to refuse to certify election results.

election—one that continues to this day and that would lead, several weeks later, to a violent insurrection at the U.S. Capitol—had already begun.

In the face of pressure from election conspiracy theorists—and citing tiny discrepancies in the vote count—two of the four members of the Board of Canvassers refused to certify the election results. For a day, the Board was at an impasse, and the nation’s attention was fixed on Wayne County and

This was the opening salvo in what has become a growing and disturbing trend. After the voters go to the polls in an election, the votes must be counted and a winner declared. This process is generally known as canvassing and certification. Historically a routine part of election administration, the certification process evaded the radar of all but the most avid election enthusiasts until 2020 and the events in Wayne County. Since

then—along with a rise in election conspiracy theories—there have been several instances where the process has been weaponized for partisan purposes. Over the past four years, a handful of officials—mostly, but not exclusively, at the county level—have attempted to make a political statement by refusing (or threatening to refuse) to certify their county’s election results. Often citing unfounded conspiracy theories, they have claimed a “patriotic duty” to protect “election integrity” and obstruct the will of the voters because the results are incompatible with their own political preferences.

Fortunately, as we will show in this paper, those attempts are ultimately unlikely to prevent election results from being certified. Contrary to what some have come to believe, refusing to certify an election is simply not a viable option, as courts and lawmakers throughout history have shaped the certification process intentionally to protect against manipulation by undemocratic actors. As a matter of state law, certification is a mandatory, ministerial duty, meaning that officials have no discretion to refuse to certify election results. Should they nevertheless attempt to ignore the law, multiple legal remedies exist to force them to

**“ Ultimately, protecting the certification process will help ensure that elections are concluded in a timely manner and the will of the voters is recognized.**

While the absolute number of such incidents is small relative to the number of counties and elections every year—by our count, we have seen it play out in at least 21 counties across eight states since November 2020—the trend is concerning. Election denialism remains a powerful force in American politics, and the pressure on election officials not to certify results in certain jurisdictions around the country is likely to be considerable in the coming presidential election. There is a very real possibility that some officials will attempt to use certification as a tool to achieve political ends if the electoral process fails to deliver their preferred outcome in November 2024.

certify, and should they continue to refuse, legal consequences—ranging from civil lawsuits to criminal prosecution—can hold them accountable for their dereliction of duty.

But that does not mean that we should take threats to certification lightly. On the contrary, the mere threat of a refusal to certify in a single election jurisdiction or state can be a breeding ground for conspiracy theories and can have a snowball effect. And an actual attempt to disrupt certification can cause delays in the post-election process—in extreme cases, it could threaten a state’s ability to certify its election results by the federal deadline

imposed by the Electoral Count Reform Act (which, for the 2024 presidential election, is December 11). Therefore, it is imperative that any refusal to certify results in a timely manner be met with swift condemnation and appropriate legal action.

**This paper aims to provide the following:**

- A brief explanation of election certification and why it is not intended to be either discretionary or the vehicle for identifying or correcting issues that might occasionally arise in the administration of elections (as we note at the end of this paper, state laws provide other mechanisms for identifying and resolving problems outside of the certification process);
- A survey of the emergent threats to the county-level certification process, including some of the driving forces behind them;
- An explanation of why we might continue to see these threats manifest in the 2024 election and why that should be a cause for concern; and
- An overview of the myriad legal responses available to compel recalcitrant officials to certify, and to hold accountable those who abuse the certification process.

Election certification is a mandatory part of the democratic process, not an avenue to challenge election results or processes or to spread baseless conspiracy theories. In the relatively rare event of actual election irregularities, state law provides other avenues for candidates, voters, and officials to challenge the results and correct any errors, whether the result of benign accident or malicious interference. The certification process is not designed to be a mechanism for resolving any such issues, and any attempt to interfere with the certification process should be met with an immediate response. Ultimately, protecting the certification process will help ensure that elections are concluded in a timely manner and the will of the voters is recognized. And holding accountable those who violate their legal duties by refusing to certify decreases the chances that this practice will remain a tool of election subversion in the future.

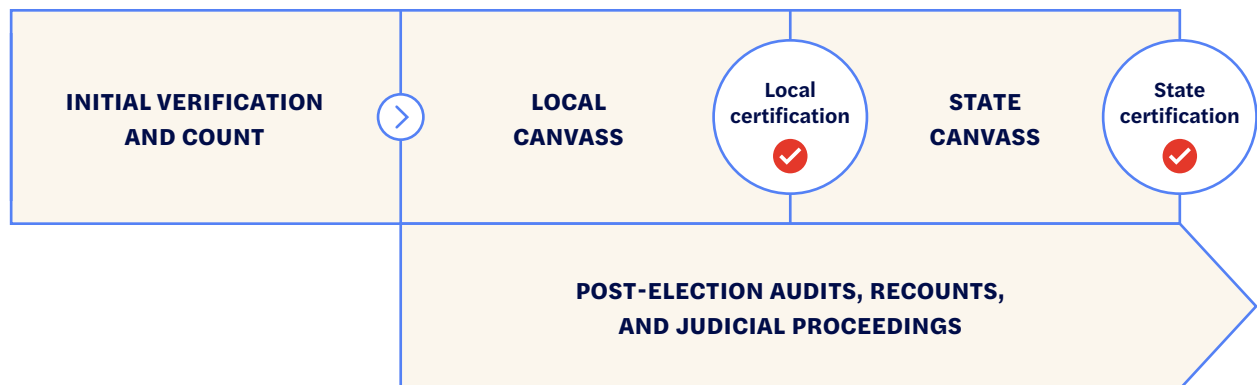
# The Role of Election Certification

**OFFICIALS WHO HAVE REFUSED** to complete certification of an election—or threatened to do so—fundamentally misunderstand both their legal obligations and the actual purpose of certification. Certification is a substantively minor—but practically crucial—step that formally ends the canvass (i.e., the process of counting and aggregating ballots, and ensuring that every valid ballot is counted). Depending on the election and the entity doing the certifying, the act of certification either officially sends results up the chain (e.g., from a county board of elections to a state board of elections) or declares the winner of the election. In that sense, it is a formality, although a crucial one both legally and symbolically.

Critically, the purpose of certification is not to ensure that votes have been accurately counted or identify irregularities or errors. There are multiple other steps of the post-election process that play

this role, both before and after certification. While the details of the post-election process depend on state law and vary from state to state, in general the pre- and post-certification mechanisms that ensure the accuracy and integrity of the election include an initial count of ballots, a canvass to ensure that every ballot is accounted for and included in the tally, and post-election audits.<sup>1</sup> In some states the counting and canvassing of ballots can begin as soon as voting begins. In others, the law prohibits officials from starting to tabulate ballots until election day or after the polls close. But regardless of when counting actually begins, there is a robust process to ensure that every ballot is counted and the count is accurate. This process includes cross-checking the ballots received and total vote tallies against the voter lists for both in-person voting and mail-in ballots, building a chain of custody to log the origin and movement of each ballot received, verifying

## Typical Post-election Process



“ Election certification does not occur until the results have already been repeatedly verified during the canvass and audit process.

ballots (including steps like signature verification for mail-in ballots), and reconciling vote totals. Officials also continually flag and scrutinize any irregularities that arise, and, if necessary, refer any concerns to law enforcement for further investigation. Throughout this process, election officials consult and compile numerous sources of information—checking log sheets, tallying vote totals, tracking paper ballots and mail-in ballots, and reconciling the number of voters and ballots received for every source of ballots from each voting location. Much like a financial audit, administrators ensure all the books are balanced and check for potential errors or irregularities.

Again, election certification does not occur until the results have already been repeatedly verified during the canvass and audit process.<sup>2</sup> The role of certification is therefore not to *verify* the final vote count, but simply to sign off on the comprehensive verification process already performed. When

county election officials in charge “certify” the canvass, they are attesting with a signature that the results are a complete and accurate reflection of all of the returns provided to them by the officials responsible for compiling those returns. In a statewide election, they then transmit these results to the state-level election authority—usually the state board of elections or secretary of state. The state repeats the canvass and certification process, officially bringing the election to an end. Each state’s election laws outline slightly different processes, including timelines and the relevant body or individuals responsible for each step—usually a board, committee of county supervisors, county commissioners, or a county board of elections, etc.—but every jurisdiction performs a comprehensive canvass, and certification is a way to attest that the canvass is complete.



# Refusal To Certify as an Emerging Threat

**CERTIFICATION ITSELF IS A** relatively straightforward component of the election process, and state laws explicitly lay out each step that election officials must take throughout the canvass and certification process. The duty to certify the election is mandatory and purely ministerial. In fact, the modern certification process was intentionally designed as non-discretionary in direct response to past partisan attempts to sabotage certification in order to change election outcomes— attempts that both lawmakers and courts recognized as a threat to democracy.<sup>3</sup> These past abuses of the certification process prompted legislative and judicial efforts to insulate elections from partisan manipulation and shaped today’s ministerial certification process, leaving no opportunity for meddling. Nonetheless, individuals motivated by election conspiracy theories or skepticism about the election process have recently attempted to disrupt the certification process in ways that echo past abuses.

In the wake of former President Trump’s insistence that only widespread fraud could explain his electoral loss in 2020, a contagion of conspiracy-fueled attacks on election processes ensued nationwide and continue to this day. Some county officials have embraced election conspiracy theories and have sought to abuse the power of their positions to disrupt subsequent elections if they disagreed with the outcome. Such attempts have manifested in various ways, including instances where a determinative number of county officials have delayed certification or refused to certify altogether, where a minority refused to certify but

was outvoted, where officials simply threatened to not certify, or where the process of certification was delayed due to external factors and legal disputes. So far, in every such instance the election was ultimately certified through the proper channels, whether by court order enforcing non-discretionary certification or administrators eventually opting to perform their legal duties.

Some recent examples of attempts to disrupt or interfere with the certification process include:



## Michigan, November 2020

As described above, the first such recent attempt to disrupt the county certification process played out on the national stage in November 2020. The two Republican members of the four-person Board of Canvassers in Wayne County, Michigan (which includes Detroit) cited concerns with minor vote tallying discrepancies (none of which was indicative of fraud or major unexplained errors in vote-counting) and initially refused to certify, which deadlocked the vote 2-2.<sup>4</sup> After these two county officials reconsidered and voted in favor of certification, former President Trump himself personally called and pressured them not to sign, indicating that the Republican National Committee would provide them with lawyers.<sup>5</sup> The two officials attempted to rescind their “yes” votes by filing affidavits, but they were unsuccessful. They had already signed off on certification, and with that vote the process was considered finalized. And under Michigan law, even if their

affidavits had been effective, any uncertified result would have been passed up to the state board to certify.<sup>6</sup>



## **New Mexico, June 2022**

The next major federal election in 2022 brought with it more threats. In the 2022 primary, New Mexico's Otero County Commissioners voted against certification, citing conspiracy-fueled skepticism of voting machines. A court swiftly ordered certification, and the Commissioners voted 2-1 to certify the results of the election.<sup>7</sup> The one holdout was subsequently removed from office as a result of his participation in the January 6, 2021 insurrection at the U.S. Capitol.<sup>8</sup>



## **Arizona, November 2022**

Just a few months later in Cochise County, Arizona, two out of three County Supervisors refused to certify the midterm elections. They made similar unfounded claims of mistrust of voting machines and early-voting procedures, and acted against advice from the County Attorney that their duty to certify was non-discretionary. The Arizona Secretary of State sued to force certification, and the court ordered the county to certify immediately. Legally compelled, they voted 2-0 to certify (with one originally noncompliant supervisor voting in favor of certification, and the other abstaining).<sup>9</sup> The two County Supervisors who initially refused to certify are now facing criminal prosecution.<sup>10</sup>

## **Other certification threats in 2022 and 2023**

In Arizona, Pennsylvania, North Carolina, Nevada, New Mexico, Colorado, and Georgia, various counties certified their elections on time, but only after one or more election officials voted against certification (or threatened to and reversed course), many explicitly echoing conspiracy theories around issues like voting machines, paper ballots, and early voting. In Mohave County, Arizona, local officials went so far as to delay their 2022 midterm certification vote in "solidarity" with former President Trump and the false narrative that the 2020 election was fraudulent, openly admitting they had no other justification or evidence of malfeasance.<sup>11</sup> In every instance of uncertainty surrounding certification in a particular county, legal remedies ultimately prevailed and the election results were certified.

# Concerns About Certification in 2024

**GIVEN WHAT HAS OCCURRED** since 2020, we are likely to see some officials attempt to use interference with certification as a tool to slow down the conclusion of the 2024 election if they disagree with the results. It is not inconceivable that this could happen at the state level, but for several reasons—including the fact that most past attempts to interfere with certification have originated at the county level, and the fact that there are far more election officials who subscribe to conspiracy theories at the sub-state level—we think it more likely that any such threat will start at the county or local level.

distinctive skepticism of the election process and parroting of unfounded election conspiracy theories. Some officials have been more open about their partisan or conspiracy-fueled motivations, citing solidarity with former President Trump’s grievances over the 2020 election or “rigged” voting machines. Others have capitalized on specific issues to give their actions a veneer of legitimacy, pointing to particular questions or minor errors related to election administration in their county and calling for investigations or clarifications before they certify. There are two categories of factors that may increase certification risks in 2024.

“ Some officials may still choose to illegally decline to perform their mandatory duty in order to advance their own political preference or make a political statement.

While certification is ministerial and officials have no discretion not to certify as required by law, some officials may still choose to illegally decline to perform their mandatory duty in order to advance their own political preference or make a political statement. Previous attempts to subvert the election certification process all share a

First, the continued vitality of election disinformation, sown in a chaotic information ecosystem and atmosphere of distrust, may drive refusals to certify. Prominent figures in the election denial movement have created or spread election conspiracy theories to suit their political agenda. For example, in New Mexico, David and Erin Clements,

two prominent election denial “influencers,” traveled the state sowing distrust of Dominion voting machines and even gave presentations and advice to at least one Otero County Commissioner, resulting in the Otero County Commission voting not to certify the election in the 2022 primary.<sup>12</sup> In the 2022 Arizona midterm elections, an online frenzy erupted over a social media video that depicted a routine transfer of ballots from the Maricopa County Elections Department to the facility of their election services contractor. Online conspiracists from a right-wing political news website filmed it, claiming the video depicted clear “fraud” and a broken chain of custody. The post garnered significant attention, even after multiple local and national news outlets demonstrated the claims to be false.<sup>13</sup> Now, fake images of ballot-tampering and “deepfakes”—aided by increasingly sophisticated artificial intelligence capabilities—could sow further confusion.<sup>14</sup>

mistakes as fuel for conspiracy theories. The past four years have not been easy on election administrators, who face unfounded accusations of fraud, threats of violence, limited resources, and new administrative burdens seeking to complicate election processes.<sup>16</sup> Many experienced election officials have left the field, taking with them decades of institutional knowledge.<sup>17</sup> In reality, thanks to the safeguards in place, most errors—like printing errors, ballot shortages, or equipment failures—are caught quickly and do not affect the outcome or trustworthiness of election results. While it is understandable that some citizens have good-faith questions about election processes, there are many bad-faith actors who have distorted these minor errors to fuel their disinformation campaigns.<sup>18</sup> For example, during the 2022 election in Maricopa County, Arizona, ballot printer problems created long waits at the polls.<sup>19</sup> Ironically, the printer malfunctions resulted

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Second, legal changes to election procedures,<sup>15</sup> the chronic underfunding of election departments, and election worker turnover—a direct result of recent harassment and intimidation—may lead to greater pressure on the administration of the 2024 election, allowing disinformation spreaders to weaponize honest

from a format and paper change that officials implemented partially in response to conspiracy theories.<sup>20</sup> After the midterms, some candidates blamed their losses on these printer problems, without evidence. Officials in nearby Cochise County believed these conspiracy theories and as a result refused to certify the election until a

judge ordered them to do so.<sup>21</sup> Bad-faith election deniers took a small, honest mistake that did not change the outcome of the election and created a new conspiracy theory that spread aggressively to affect the whole state's certification process.

Given the thrust of this paper—that certification is ministerial and non-discretionary, and that any refusal to certify is likely to lead to swift legal action and potential consequences for the recalcitrant officials—it is reasonable to ask why we should be concerned that some officials might engage in a losing strategy. There are at least two reasons why attempts to interfere with certification should still be of some concern.

First, even ultimately unsuccessful interference with certification—indeed, even mere threats not to certify—can amplify election conspiracy theories and further undermine public confidence in our election system. Relatedly, refusals to certify based on election conspiracy theories can be contagious—as we saw in Arizona in 2022, where a threat to certification in Mohave County seems to have been inspired at least in part by the refusal to certify in Cochise County.

Second, even though any attempt to interfere with certification is likely to be futile—in the sense that officials will ultimately be forced to certify—it can lead to delays in the post-election process. Any delays are particularly significant in a presidential election year, as federal law imposes a hard deadline on all states to certify the results of the presidential contest. (In 2024, that deadline is December 11.)<sup>22</sup>

Therefore, officials, courts, candidates, and others must be prepared to respond quickly and decisively to any threat to certification, including by using every legal tool at their disposal. Those tools are the subject of the next section of this paper.

# Responding If Counties Refuse to Certify

**IF AND WHEN WE** do see some county officials refuse to certify elections in 2024, our legal system has tools to ensure that such refusals do not ultimately prevent certification. As we saw in 2022, state officials and courts can (and should) step in when needed to protect the will of the voters.

## Certification as a ministerial process

States require local and state certifying officials to certify the results presented to them by the statutory deadline. State laws treat certification as a mandatory and ministerial duty, meaning that officials have *no discretion* at the moment of certification to investigate the validity of ballots, to arbitrarily reject or refuse to count certain ballots, or to refuse to certify the returns presented to them.<sup>23</sup> This requirement generally applies even when there are questions about the conduct of the election or the validity of certain ballots. In such a circumstance, state law provides other mechanisms (discussed more below) for candidates, officials, or voters to contest the election results. Depending on the state, that alternative mechanism may take place after the election has been certified or temporarily suspend the certification deadline, but it is not part of the certification process and does not change the ministerial nature of certification.

## Court enforcement of the duty to certify

Because certification is a ministerial duty—the careful result of centuries of legal developments in order to prevent fraud and misconduct<sup>24</sup>—it can ultimately be compelled by a court. While the precise mechanisms for enforcing that duty vary from state to state, they typically include either (1) a writ of mandamus or (2) another civil remedy under either a state statute or state constitution. The bottom line is that any effort to disrupt certification is highly likely to fail, and could very well result in serious consequences for those involved.

### Writ of mandamus

In most states, the primary mechanism to force an official to certify an election is a civil lawsuit seeking a writ of mandamus, which asks the court to compel a government official to perform their legal duties.<sup>25</sup> While the precise requirements for mandamus differ from state to state, as a general matter, a party seeking a writ of mandamus must satisfy three elements: 1) it must be clear from state law that the official has a non-discretionary and ministerial duty; 2) mandamus must be the only adequate remedy for the situation; and 3) the person or entity bringing the lawsuit must have a clear legal right to the action requested.<sup>26</sup> These requirements will generally be easy to satisfy when certification has been withheld—and, indeed, successful mandamus

actions resolved the refusals to certify in Otero County, New Mexico, and Cochise County, Arizona, in 2022. Candidates and state officials, as well as voters in some states (including Pennsylvania, Georgia, and North Carolina), all have the right to go to court to seek this type of court order.<sup>27</sup> New Mexico explicitly provides for a statutory mandamus action that any voter can bring to compel the county canvassing board to certify election results.<sup>28</sup>

### Other state law civil remedies

In some circumstances, other civil remedies besides mandamus might be appropriate. If the wrong candidate is certified, for example, one such remedy is the writ of quo warranto, which is a mechanism to legally challenge someone's right to hold public office. Another similar remedy, available in some states (Georgia is one example), is a post-certification election contest, which allows voters to challenge the results after certification.

State constitutions might also provide a legal pathway to mandating certification, as almost every state constitution contains language guaranteeing the right to vote or the right to a free and fair election. For example, Pennsylvania's constitution states that "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."<sup>29</sup> As Pennsylvania's highest court stated, this provision guarantees "the right to cast [a] ballot and have it honestly counted."<sup>30</sup> Failure to certify an election would arguably infringe on this right, because such a failure would render each citizen's vote not "honestly counted."

Admittedly, constitutional remedies to mandate certification may involve novel applications of the law. But the stark consequences of refusing to certify an election—the disenfranchisement of a jurisdiction's voters and the chaos that could

ensue—and officials' unambiguous legal duty to certify should make courts more willing to break new ground to prevent an election crisis.

### Legal remedies for defiance of a court order

In most cases, we expect that a court order directing a county or state official to certify the election result will be the end of the matter. But in this heightened political climate, it is possible that officials may see political opportunity in defying a court order. In the 2022 Otero County case, for example, County Commissioner Couy Griffin refused to vote to certify the election even after he was ordered to do so by a court.<sup>31</sup> (The other commissioners did obey the court, thereby resolving the standoff.)

Even in this extreme scenario, however, additional legal tools may be available to put further pressure on officials to certify. A judge may, for example, hold the official in contempt of court for illegally disobeying the order. The penalty for contempt may be a censure, fine, or imprisonment. In North Carolina, the court could imprison the official for up to 12 months total as long as they continue to disobey. As discussed further below, the prospect of criminal penalties should also be invoked to pressure officials to comply with court orders to certify the results.

And if contempt of court and the prospect of criminal penalties are still insufficient to force compliance, there may be other measures to ensure that certification is completed, though this is not uniform across states. In Michigan, for example, the Board of State Canvassers can certify the results if a county refuses to do so. The board of county canvassers is required to complete its canvass and certification by fourteen days after the election.<sup>32</sup> If it fails to certify the results by the fourteenth day, it must deliver its records to the State Board, which is then required to certify the results by the

twentieth day after the election. In some states, like New Mexico, North Carolina, and Ohio, a court may have the power to direct another person or entity to complete certification if the relevant election official(s) refuse to do so.<sup>33</sup> In some states, the remedy may be less straightforwardly prescribed (and should be the subject of future research).

certify an election. In Arizona, the Cochise County supervisors who voted twice to refuse to certify the 2022 election results were recently indicted on felony charges of conspiracy and interference with an election officer.<sup>34</sup> Other states have similar election-specific criminal laws that could be used to punish refusals to certify. For example, in North Carolina, an election official fraudulently omitting

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### **Criminal penalties and removal from office for certification refusers**

Wrongfully refusing to certify election results also likely violates a range of state and federal criminal laws. These criminal prohibitions are not direct pathways to ensuring the appropriate certification is made, but they can be invoked to deter officials from attempting to wrongfully withhold certification. And once the election is over, state and federal prosecutors should seriously consider whether charges would be appropriate against any officials who wrongfully refuse to certify the outcome. Appropriately pursuing criminal accountability is key to deterring future officials from trying to exploit the certification process to subvert the election.

Many states impose criminal penalties on officials who fail to fulfill election-related duties or interfere with election processes. And we have already seen one case in which such provisions have been used against officials who refused to

do any act or certifying false returns could be prosecuted as a felony.<sup>35</sup> The refusal to certify an election may also implicate other more general criminal prohibitions, including a failure to perform official duties, fraud, violation of official oaths, and obstruction of justice.<sup>36</sup>

In addition to these state criminal laws, officials who delay or refuse to certify an election may also be violating federal law. For example, Section 11(a) of the Voting Rights Act makes it illegal to “willfully fail or refuse to tabulate, count, and report” lawful votes.<sup>37</sup> Officials who violate Section 11(a) could face fines and imprisonment for up to five years.<sup>38</sup> Similarly, it is a federal crime 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” federal law.<sup>39</sup> Voting is one such right. Officials who violate this provision may be imprisoned for up to ten years. It is also a misdemeanor for an official to willfully deprive a person “of any rights,



privileges, or immunities secured or protected by the Constitution or laws of the United States,” like voting.<sup>40</sup> Other federal civil or criminal statutes may also apply.

Officials who refuse to certify election results should also be promptly removed from office where state law provides a method to do so. This process varies by state. In North Carolina, for instance, the State Board of Elections can remove county board of elections members for wrongdoing.<sup>41</sup> In 2023, the State Board removed two members of the board of elections in Surry County, North Carolina, after they voted against certifying the 2022 election results.<sup>42</sup> In Pennsylvania, election administrators sit on the county board of elections and are civil officials, and may be impeached by the House of Representatives or removed by the relevant governing body, depending on whether the board is elected or appointed.<sup>43</sup>

By enforcing the non-discretionary nature of certification, civil and criminal penalties help protect the intent of state legislation intended to prevent fraud and misconduct. In addition to ensuring that elections are certified in a legal and timely manner, these penalties provide consequences when election officials go so far as to neglect or openly defy the legal duties of their official position. Consistent enforcement of the laws that govern certification can have deterrent effects for offending individuals, but also puts a broader audience on notice that election officials must perform their official duties and do not have unilateral discretion to interrupt the election process. If an election official has legitimate questions or concerns about the result of the canvass they are duty-bound to certify, state law provides other mechanisms outside the certification process to address and resolve them.

# Addressing Genuine Concerns and Irregularities

**AS WE HAVE EXPLAINED** throughout this paper, certification is a ministerial and non-discretionary duty, and not the process by which actual problems with the election are considered or resolved. That prompts the question: what happens in the rare cases where there is real uncertainty about the accuracy of the results? Election processes are a professionalized system with layers of checks and balances and a strict method by which ballots are received, tabulated, cross-checked, and verified. But given the sheer scale of elections in this country—and the fact that they are administered across thousands of distinct jurisdictions—it is inevitable that errors or mistakes will occasionally occur (although they are typically far too minor to affect the outcome of the election).

State laws account for the possibility of errors. Every state provides some mechanism—outside the certification process—by which the results or procedural integrity of an election can be challenged and further investigated. This can happen through recounts (which are sometimes automatically triggered in close elections), audits, or other direct legal challenges to election results. In each scenario, election processes provide specific steps that a county or state must take to respond to these challenges and ensure the results are accurate. In the event that any issues or unexplained irregularities appear in the results and are not adequately resolved in the canvassing process, these processes would serve to address them.

The 2018 race for North Carolina’s 9th Congressional District illustrates how addressing

unresolved irregularities can play out. In that race, the Republican candidate, Mark Harris, appeared to win the initial ballot tally by nearly 1,000 votes. But evidence emerged of irregularities and potential fraud stemming from an absentee ballot operation affiliated with Harris’s campaign. The State Board of Elections, under North Carolina’s election protest statute, conducted a full investigation that uncovered significant evidence of fraud, potentially implicating Harris. At a dramatic hearing in February 2019, Harris conceded that a new election was warranted and withdrew from the race. (Due to a quirk of North Carolina law, discussed further below, the election protest delayed the deadline for certification, so the race was not certified before the contest was resolved. But it was the election protest process, and not certification, that provided the forum for adjudicating the dispute.)

States have their own specific timelines and requirements for an election challenge. In Georgia, an election contest must be filed within five days of certification, to be heard by the superior court of the relevant county under expedited procedures, with the opportunity for the state supreme court to hear appeals if necessary.<sup>44</sup> Pennsylvania allows a longer runway to file election challenges—up to 20 days after certification—but also requires a threshold number of voters to petition for such a challenge.<sup>45</sup> In Wisconsin, election contests, in the form of recounts, can only be brought by a candidate who lost by 1% or less, and must be filed within one to three days of certification, although appeals through Wisconsin’s court system can take far longer.<sup>46</sup>

While each state or county's system for addressing concerns about the process or returns of an election may differ, their existence is itself entirely independent from any certification process, and should serve to bolster our confidence in the separate and ministerial process of certifying an election. Once the election is certified, the law

Where possible, states should update their laws to ensure that certification is not delayed by the filing of a contest.<sup>47</sup> But the existence of pre-certification election contest procedures does not change the fact that certification itself is a ministerial step—these laws simply postpone that step until contests have been resolved.

**“ Once the election is certified, the law provides opportunities to raise questions or issues through other, more appropriate channels.**

provides opportunities to raise questions or issues through other, more appropriate channels. Note, however, that many states allow election contests to be filed only *after* certification is complete. A delay in certification—for example, because the certifying official refuses to certify the result—only delays the ability to resolve election disputes through appropriate channels and with appropriate expertise and investigative resources.

But we should note that in some states, including North Carolina, the election contest process actually happens in parallel or prior to certification. This means that (as happened in the 2018 congressional race discussed above) the filing of an election contest can potentially delay the date by which an election is certified while an investigation takes place. This is potentially troubling, particularly in a presidential race where states have a firm deadline for certifying the election (this year, December 11).

Finally, it is important to emphasize that the mere fact that a legal challenge is raised does not itself constitute evidence of significant errors or intentional fraud (which are both exceedingly unlikely and uncommon). In 2020, for instance, former President Trump and his supporters filed 64 cases challenging the results of the presidential election; of those, they prevailed in only one (which did not concern enough votes to affect the outcome).<sup>48</sup> Given the prevalence of election conspiracism today, we should anticipate some baseless challenges to election results and should exercise caution before amplifying or validating those challenges.

# Conclusion

**WHILE UNCERTAINTY STILL LOOMS** over many aspects of the 2024 election, election law is clear about certification. Under state laws, the act of certification is a formality, a signature that affirms the conclusion of a comprehensive canvass process, not one intended to verify the final vote count. Election officials have no discretion to fail to carry out their duty to certify—indeed, the process has been designed that way specifically to prevent partisan interference with elections. Should officials choose to ignore their obligations and interfere with the election process anyway, civil and criminal remedies exist to ensure that the process proceeds and to hold them accountable for their abuse of their office. If there are legitimate concerns about the final count, state law provides mechanisms for officials, candidates, and voters to contest the election results—that is not the role of the certification process.

Though abusing certification is destined both to fail and to create legal problems for the offender, we should still take the threat seriously and anticipate attempts during the 2024 election. Even ultimately unsuccessful threats to interfere with certification can amplify election conspiracy theories, further undermining public confidence in our election system, and delay the election process, increasing the chances that a state would miss its federally mandated certification deadline. Our hope is that by sharing the many legal remedies that exist to protect the certification process, we can remove one more tool from the election subversion toolkit and bolster the chances of a timely and smooth conclusion to the 2024 election. Regardless of the outcome, it should be the voters—and not the vote counters—who choose the next U.S. president.

# Notes

- 1 For a state-by-state breakdown of the post-election processes, see U.S. Election Assistance Commission, “Election Audits Across the United States,” October 6, 2021, [https://www.eac.gov/sites/default/files/bestpractices/Election\\_Audits\\_Across\\_the\\_United\\_States.pdf](https://www.eac.gov/sites/default/files/bestpractices/Election_Audits_Across_the_United_States.pdf).
- 2 The exact timing of post-election audits varies from state to state. In some states, audits take place before results are certified. In others, audits occur after certification, but state law provides for revising the certification if the audit reveals any issues sufficient to change the results. See Lauren Miller & Will Wilder, “Certification and Non-Discretion: A Guide to Protecting the 2024 Election,” 35 *Stanford Law & Policy Review* 1 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4648560](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4648560). But regardless of when a formal audit takes place, every state and election jurisdiction goes through a substantial verification process before certification.
- 3 For a thorough review of this history, see Miller & Wilder at 19-26.
- 4 Clara Hendrickson, “GOP Members Reverse Course, Vote to Certify Wayne County Election Results,” *The Detroit Free Press*, November 17, 2020, <https://www.freep.com/story/news/local/michigan/detroit/2020/11/17/wayne-county-election-certification/6309668002>.
- 5 Craig Mauger, “Trump Recorded Pressuring Wayne County Canvassers Not to Certify,” *Detroit News*, December 21, 2023, <https://www.detroitnews.com/story/news/politics/2023/12/21/donald-trump-recorded-pressuring-wayne-canvassers-not-to-certify-2020-vote-michigan/72004514007>.
- 6 Mich. Comp. Laws Ann. § 168.822(2) (“If 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.”).
- 7 Jane C. Timm, “Under Court Order, GOP Officials in New Mexico County Certify Election Results,” *NBC News*, June 17, 2022, <https://www.nbcnews.com/politics/2022-election/court-order-gop-officials-new-mexico-county-certify-election-results-rcna34219>.
- 8 Hannah Rabinowitz, Holmes Lybrand, and Scott Bronstein, “New Mexico County Commissioner and Cowboys for Trump Founder Removed from Elected Office for Role in US Capitol Riot,” *CNN*, September 6, 2022, <https://www.cnn.com/2022/09/06/politics/couy-griffin-new-mexico-january-6>.
- 9 One county supervisor abstained from the final vote. See Jen Fifield, “Cochise County Officials Who Refused to Certify Election Now Under Investigation by Arizona Attorney General,” *Votebeat Arizona*, October 30, 2023, <https://www.votebeat.org/arizona/2023/10/30/cochise-county-election-investigation-tom-crosby-peggy-judd>.
- 10 *Id.*
- 11 “GOP-Controlled Arizona County Refuses to Certify 2022 Midterm Election Results,” *CBS News*, November 28, 2022, <https://www.cbsnews.com/news/cochise-county-arizona-republicans-refuse-to-certify-2022-midterm-election-results>.
- 12 Andrew Beale, “The Two People Behind the Election Denial Movement in New Mexico,” *Source New Mexico*, July 19, 2022, <https://sourcenm.com/2022/07/19/the-two-people-behind-the-election-denial-movement-in-new-mexico>; Andrew R.C. Marshall, et al., “Ex-academic Forges a New Career Rallying Trump Faithful Behind Voter-fraud Claims,” *Reuters*, December 21, 2022, <https://www.reuters.com/investigates/special-report/usa-election-clements>.
- 13 “Maricopa County Says Bipartisan Staff Transport Mail-In Ballots for Preparation of Signature Verification,” *Reuters*, November 22, 2022, <https://www.reuters.com/article/idUSL1N32I2JO>.
- 14 Matthew Rosenberg & Nick Corasaniti, “Close Election in Kentucky Was Ripe for Twitter, and an Omen for 2020,” *The New York Times*, November 10, 2019, <https://www.nytimes.com/2019/11/10/us/politics/kentucky-election-disinformation-twitter.html>.
- 15 “A Democracy Crisis in the Making,” *Protect Democracy*, December 7, 2023, <https://protectdemocracy.org/wp-content/uploads/2023/12/DCIM-DEC2023-03.pdf>.
- 16 Ruby Edlin & Lawrence Norden, “Poll of Election Officials Shows High Turnover Amid Safety Threats and Political Interference,” *The Brennan Center for Justice*, April 25, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/poll-election-officials-shows-high-turnover-amid-safety-threats-and>; *Protect Democracy*, *supra* note 15.

- 17 Michael Waldman, “The Great Resignation of Election Officials,” The Brennan Center for Justice, April 25, 2023, <https://www.brennancenter.org/our-work/analysis-opinion/great-resignation-election-officials>.
- 18 David Levine and Krystyna Sikora, “Countering the Weaponization of Election Administration Mistakes,” The Alliance for Securing Democracy, July 6, 2023, <https://securingdemocracy.gmfus.org/weaponization-election-mistakes>.
- 19 Jonathan J. Cooper, “Paper Changes Caused Maricopa County Printer Failure: Report,” Associated Press, April 10, 2023, <https://apnews.com/article/maricopa-county-ballot-printers-mcgregor-kari-lake-9edee525b8afac-b767a4960bf951ea1>.
- 20 *Id.*
- 21 Charles Homans, “G.O.P.-Controlled County in Arizona Holds Up Election Results,” The New York Times, November 28, 2022, <https://www.nytimes.com/2022/11/28/us/politics/arizona-county-election-results-cochise.html>.
- 22 3 U.S.C. § 5(a)(1) (“Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.”).
- 23 For example, the Pennsylvania Supreme Court has stated, “The duties of the County Board of Elections are purely ministerial. They are prescribed by the Election Code. They are given no discretion.” *Shroyer v. Thomas*, 368 Pa. 70, 74 (1951). The Michigan Constitution explains that certification is a “ministerial, clerical, nondiscretionary duty.” Mich. Const. Art. II, § 7, Cl. 3.
- 24 See *Miller & Wilder* at 23-31.
- 25 See Derek Muller, “Election Subversion and the Writ of Mandamus,” 65 *William & Mary Law Review* 327 (2023).
- 26 See, e.g., O.C.G.A. § 9-6-20 (Georgia’s mandamus statute); Ohio Rev. Code Ann. § 2731.01 (Ohio’s mandamus statute); *In re T.H.T.*, 362 N.C. 446, 454 (2008) (describing North Carolina’s mandamus requirements).
- 27 *Fagan v. Smith*, 615 Pa. 87, 91 (2012); *Barrow v. Raffensperger*, 308 Ga. 660, 667 (2020); *Bd. of Educ. of Yancey Cnty. v. Bd. of Comm’rs of Yancey Cnty.*, 189 N.C. 650 (1925).
- 28 N.M. Stat. Ann. § 1-13-12.
- 29 Pa. Const. Art. I, § 5.
- 30 *Shankey v. Staisey*, 436 Pa. 65, 69 (1969).
- 31 Annie Gowen, “New Mexico County Certifies Election Results, Bowing to Court Order,” The Washington Post, June 17, 2022, <https://www.washingtonpost.com/politics/2022/06/17/new-mexico-county-weighs-defying-order-certify-election-results>.
- 32 Mich. Comp. Laws Ann. § 168.822.
- 33 N.M. R. Civ. P. Dist. Ct. 1-070; N.C. Gen. Stat. Ann. 1A-1, 70; Ohio Civ. R. 70; see also Muller at 353, 384.
- 34 Jen Fifield, “Two Cochise County Supervisors Indicted for Refusing to Certify Midterm Election,” Votebeat Arizona, November 29, 2023, <https://www.votebeat.org/arizona/2023/11/29/arizona-cochise-county-supervisors-indicted-refusing-certify-2022-election>.
- 35 N.C. Gen. Stat. § 163-275(3); N.C. Gen. Stat. Ann. § 163-275(9).
- 36 See, e.g., 18 Pa. C.S.A. § 5101 (criminalizing the obstruction of any governmental function). See also Mich. Comp. Laws Ann. §§ 750.478, 768.19, 750.249, 750.248, 750.478(a); O.C.G.A. §§ 16-10-8, 16-10-20, 16-10-1.
- 37 52 U.S.C. § 10307(a); see also Jacek Pruski & Helen White, “Election Denying Officials Who Refuse to Certify Election Results Could Face Prosecution,” Just Security, November 7, 2022, <https://www.justsecurity.org/83975/election-denying-officials-who-refuse-to-certify-election-results-could-face-prosecution>.
- 38 52 U.S.C. § 10308(a), (c).
- 39 18 U.S.C. § 241.
- 40 18 U.S.C. § 242.
- 41 N.C. Gen. Stat. Ann. § 163-22(c).
- 42 Hannah Schoenbaum, “N.C. Board Removes Election Officials Who Refused to Certify,” Associated Press, March 28, 2023, <https://apnews.com/article/election-certification-officials-removed-north-carolina-77bc8b7016277eb-090dad38b9b11c687>.
- 43 Pa. Const. Art. VI, § 7; Pa. Const. Art. VI, § 4. *Martin v. Donegal Twp.*, 293 A.3d 765, 778 (Pa. Commw. Ct. 2023).
- 44 O.C.G.A. § 21-2-521-524.
- 45 25 P.S. § 3452-56.
- 46 Wis. Stat. Ann. § 9.01; see also *Carlson v. Oconto County Board of Canvassers*, 240 Wis. 2d 438 (2000) (“[Wisconsin’s recount statute] is the exclusive remedy for any claimed election fraud or irregularity.”).
- 47 National Task Force on Election Crises, “States Must Ensure Compliance with the Electoral Count Reform Act,” <https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/654aa6e6ae9116265259a2b9/1699391206823/National+Task+Force+on+Election+Crises+ECRA+compliance.pdf>.
- 48 Sen. John Danforth, et al., “Lost Not Stolen: The Conservative Case that Trump Lost and Biden Won the 2020 Presidential Election,” at 3, <https://lostnotstolen.org>.



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