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Election Law Manual

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SECOND EDITION

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CHAPTER 9

Election Contests

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I. INTRODUCTION

Election contests usually take place after the votes have been counted and a recount has been conducted.[1] Those petitioning for an election contest seek to have certified votes overturned due to election irregularities.[2] Election laws reflect a public policy preference for the pre-election resolution of most election-related problems, concerns, and improprieties. Nevertheless, irregularities may occur immediately before or during an election,[3] rendering pre-election relief unavailable. In such instances, post-election relief in the form of recounts or election contests are available.

Election contests differ from recounts in a number of ways. While contests investigate whether there were fundamental flaws in the election or its administration, recounts address errors in the tabulation of ballots.[4] Election contests involve allegations that fraud, illegalities, irregularities, or other problems changed the election's outcome or rendered the outcome uncertain.[5]

State statutes generally confine standing to contest elections to losing candidates. Some state statutes authorize voters to contest elections.[6] In such states, restrictions typically limit voter-initiated contests such as allowing voters to only contest the results of ballot measure elections,[7] or requiring a minimum number of voters to initiate a contest.[8] Those who contest elections are requesting a court to overturn election results or order a new election. Contestees seek to uphold the

1. Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 4 (2013). *But see* State *ex rel.* Jordan v. Warren Cir. Ct., 157 N.E.2d 732 (Ind. 1959) ("[A] recount could be had in connection with a contest proceeding when the contest was based upon fraud or mistake in the official count, as is the case in the petition here in question.").
2. *Id.*
3. *See, e.g.*, Toney v. White, 488 F.2d 310, 313-14 (5th Cir. 1973) (en banc) (holding injunctive relief was appropriate because purges occurred directly before the election and Defendants failed to prove Plaintiffs purposefully refrained from seeking pre-election relief).
4. *See supra* Chapter 8: Canvassing, Certification, and Recounts for additional information on recounts.
5. *See, e.g.*, COL. REV. STAT. § 1-13.5-1401; ALASKA STAT. § 15.20.540; LA. REV. STAT. § 18:1401; UTAH CODE ANN. § 20A-4-402; CAL. ELEC. CODE § 16100.
6. *See, e.g.*, FLA. STAT. § 102.168; GA CODE ANN. § 21-2-521; MINN. STAT § 209.02; ALA. CODE § 11-46-69; CAL. ELEC. CODE § 16100; ALASKA STAT. § 15.20.540; ARIZ. REV. STAT. ANN. § 16-674; ARK. CODE ANN. § 3-8-309; CONN. GEN. STAT. § 9-324; HAW. REV. STAT. § 11-172; KANSAS STAT. ANN. § 25-1435.
7. *See, e.g.*, S.D. CODIFIED LAWS § 12-22-3; IOWA CODE §57.1; KY. REV. STAT. ANN. § 120.250.
8. *See, e.g.,* ARK. CODE ANN. § 3-8-309; ALASKA STAT. § 15.20.540.

election results in order to take or keep office. In some states, government officials may be defendants alongside or in place of contestees.[9]

Courts have sometimes prevented the purported winner from taking office while the court election contest is ongoing.[10] Although postponing the swearing-in ceremony means voters are not represented in the challenged office, this outcome is frequently considered preferable to granting political power to an unauthorized person.[11]

Courts have sometimes prevented the purported winner from taking office while the court election contest is ongoing.

The common law recognized election contests only when fraud infects an election.[12] Modern election contest statutes reflect the importance and value placed on ensuring that the will of legal voters is accurately recorded by providing expanded grounds for election contests.[13] This statutory expansion is not without costs: contests may result in special elections that consume public and private time and money[14] and the challenged office may remain vacant if the

9. *See, e.g.*, TEX. ELEC. CODE ANN. § 232.004; TEX. ELEC. CODE ANN. § 232.005; MO. REV. STAT. § 115.553; FLA. STAT. §102.168; LA. STAT. ANN. § 18:1402.
10. Marks v. Stinson, 19 F.3d 873, 887 (3d Cir. 1994) (upholding an injunction preventing the winner from taking office while the trial court on remand determined whether the election outcome would have been different had the irregularities not occurred; here, this also overturned the trial court's declaring the contestant to be the real winner because it did not adequately determine the irregularities' effects).
11. *Id.* at 889 (noting that no candidate should be certified unless the record supports the conclusion that the named candidate would have been won without the irregularities supported sufficiently to be worthy of the electorate's confidence).
12. Mark White, *The Election Contest*, 5 TEX. S. U. L. REV. 1, 1 (1978) ("Under the common law…the only remedy…[was] a quo warranto proceeding or an information alleging fraud or other illegalities in the particular election").
13. *See, e.g.*, CAL. ELEC. CODE § 16100 (finding grounds of contest to include misconduct "malconduct," eligibility, bribery, illegal votes, denial of eligible voters, substantial errors made by the precinct board, or errors in the summation of ballot counts); GA CODE ANN. § 21-2-522 (finding grounds of contest to include misconduct, fraud, irregularity, ineligibility, illegal votes, errors in counting votes, or "for any other cause which shows that another was the person legally nominated").
14. Primary election contests, for example, reduce the campaigning time available to primary winners, and general election contests shorten the preparation, organization, and transition time available to newly elected office holders. *See* The Harv. L. Rev. Ass'n, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1301 (1975) [hereinafter Elections] (discussing factors underlying the denial post-election relief where pre-election relief is available). *See also 2020 Election to Cost $14 Billion, Blowing Away Spending Records*, OPEN SECRETS (Oct. 28, 2020) https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/ (estimating 2020 election contests totaled $6.6 billion, becoming the most costly of all time).

existing office holder's term expires before the contest suit is decided.[15] Courts, therefore, usually strictly construe election contest statutes,[16] both because of the costs associated with election contests and because of policy preferences that favor electoral finality and political stability.[17]

Contest procedures are intensely state-specific and varied as between states. With this in mind, this Chapter discusses the most significant legal issues commonly raised in election contests along with the processes and analyses courts use to resolve them.

II. WHO HEARS ELECTION CONTESTS

Depending on the type of election, contests can be decided by courts or legislators. Courts typically decide election contests for primary elections as well as general elections for county and local seats.[18] Election contests over legislative seats are usually heard by that legislative body. Contests over state executive officers are conducted by either the courts or the legislature.[19]

Decision makers hearing election contests usually confront the following three issues:

1) Did the petitioner follow statutorily mandated procedures to bring the contest?
2) Did enumerated irregularities or infractions during the election process occur?
3) If irregularities or infractions occurred, are they alone enough to overturn or void an election (and, relatedly, must the petitioner prove such irregularities were outcome-determinative)?[20]

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15. Some states have implemented procedures to prevent disruption. *See*, *e.g.*, N.M. STAT. ANN. § 1-14-2 (allowing the individual holding the certificate of election to assume the duties of office until the contest is decided); IND. CODE ANN. § 3-13-7-4 (providing vacancies resulting from an election contest involving an incumbent will be filled temporarily).
16. Both the strict construction of election contest statutes and the looser construction given to statutes governing most other aspects of the election work to favor the court's upholding of the just-concluded election if at all possible.
17. *See* Staber v. Fidler, 65 N.Y.2d 529, 534 (N.Y. 1975) ("Broad policy considerations weigh in favor of requiring strict compliance with the Election Law … [for] a too-liberal construction … has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process"); Heleringer v. Brown, 104 S.W.3d 397, 404 (Ky. 2003) (identifying the public policy interests surrounding elections).
18. Elections, *supra* note 14, at 1302-03.
19. *Id*. at 1303-05.
20. *Id*. at 1305-06.

III. STATUTORY REQUIREMENTS

Generally, election contests procedures are dictated by state statute and vary greatly.[21] However, most states permit losing candidate,[22] an eligible voter,[23] or both[24] to bring elections contests. Some states also allow political parties[25] or the county clerk who conducted the election to file an election contest.[26] A contestant encounters significant barriers to success, not the least of which are requirements to operate quickly, thoroughly, and provide specific factual allegations that validate the contestant's claims.

Courts can generally dismiss election contests that fail to meet all statutory prerequisites, the most common of which include:

A. requesting a recount before initiating a contest action,[27]
B. filing within the limitations period,[28]
C. citing appropriate grounds with specific factual allegations, and[29]

21. *Id*. at 1306-07. A losing candidate may have standing to file an election contest even if he does not seek to be declared the winner. *See* Files v. Hill, 594 S.W.2d 836 (Ark. 1980).
22. *See, e.g.*, DEL. CODE ANN. TIT. 15, §5941; IOWA CODE § 57.1; MICH. COMP. LAWS ANN. § 168.110 ("…any candidate for such office…."); N.M. STAT. ANN. § 1-14-1 ("[a]n unsuccessful candidate…).
23. *See, e.g.*, ALA. CODE § 11-46-69; ARIZ. REV. STAT. ANN. § 16-674; CAL. ELEC. CODE § 16100; CONN. GEN. STAT. § 9-324.
24. *See, e.g.*, ALASKA STAT. § 15.20.540 (allowing a candidate or ten qualified voters to bring an election contest); 10 ILL. COMP. STAT. ANN. 5/23-1.2a (allowing a candidate or a voter who submits a verified petition signed by at least as many voters as would satisfy a nominating petition to file an election contest); N.J. STAT. ANN. § 19:29-2 (allowing a candidate or twenty-five voters to contest an election).
25. *See, e.g.*, HAW. REV. STAT. § 11-172 (allowing a political party directly interested in the election to file an election contest); IND. CODE ANN. § 3-12-11-1 (allowing the state chairman of the candidate's political party to file an election contest if the losing candidate fails to do so within the statutory deadline).
26. *See, e.g.*, OR. REV. STAT. § 258.016 (allowing a voter, candidate, county clerk who conducted the election, or secretary of state (if the election involved a state measure, recall of a state officer, or candidate for whom the secretary of state is the filing officer) to contest the election).
27. *See generally*, Miller v. Cty. Comm'n of Boone Cty., 208 W.Va. 263, 270 (W. Va. 2000); Mansfield v. McShurley, 911 N.E.2d 581 (Ind. Ct. App. 2009); Laite v. Stewart, 112 Ga. App. 853, 146 S.E.2d 553 (1965) (finding that the candidate's failure to request a recount of absentee ballots foreclosed his opportunity to demonstrate that the election results would have been substantially changed).
28. *See generally*, Chastain v. James, 463 S.W.3d 811, 821-822 (Mo. Ct. App. 2015); McDaniel v. Cochran, 158 So. 3d 992, 1000 (Miss. 2014); McCastlain v. Elmore, 340 Ark. 365 (2000); *In re* Gen. Election for Twp. Supervisor, 152 Pa. Commw. 590 (Pa. Commw. Ct. 1993); Wadley v. Hall, 261 Ga. 681 (1991) (finding there was no jurisdiction to hear the case because the contestant had filed the petition a day late).
29. *See, e.g.*, Bergstrom v. McEwen, 960 N.W.2d 556, 566 (Minn. 2021); Felker v. Sikeston, 334 S.W.2d 754, 755 (Mo. Ct. App. 1960); Kraft v. King, 585 N.E.2d 308, 309 (Ind. Ct. App. 1992); Denny v. Arntz, 55 Cal. App. 5th 914, 918 (2020).

D. satisfying pleadings requirements.[30]

Michigan and New York don't have statutes discussing election contests but allow for quo warranto suits.[31] These allow for the ouster of a candidate that has taken office and operate as common law election contests.[32] In both states, the attorney general is responsible for screening the cases, but in Michigan private parties may bring suit when the attorney general refuses to do so while the attorney general alone decides whether to proceed in New York. [33] In the modern era, all other states have enacted election contest statutes.[34]

A. Recount Requirement

Recounts[35] may be a required pre-contest process in certain jurisdictions[36] and may be automatic.[37] Recounts may always be required[38] or may be necessary only under certain circumstances,[39] for instance, when a contest is based on challenges to specific ballots or the outcome of an election is determined by a negligible

30. *See, e.g.*, Napp v. Dieffenderfer, 364 So. 2d 534 (Fla. 3d DCA 1978) (complaint challenging city council election dismissed for failing to allege that, if corrected, irregularities complained of would cause a different result); Wiedenheft v. Frick, 234 Iowa 51, 11 N.W.2d 561, 564 (1943) (contestant must show that alleged misconduct and corruption on part of election judges is sufficient to change the result); Hansen v. Lindley, 152 Kan. 63, 102 P.2d 1058 (1940) (statutes providing for election contests not contemplating that technical rules with reference to pleadings should be strictly followed); Johnstun v. Harrison, 114 Utah 94, 197 P.2d 470 (1948) (finding that, although two propositions set up by plaintiff failed to state sufficient facts to show cause of action, third proposition was sufficient).
31. MICH. COMP. LAWS ANN. § 600.4501 (West 1996); N.Y. EXEC. LAW § 63-b (McKinney 2010).
32. *See* Douglas, *supra* note 1 (citing Steven F. Huefner, *Just How Settled Are the Legal Principles that Control Election Disputes?*, 8 ELECTION L.J. 233, 235–36, 235 n.8 (2009); Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning From Florida's Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 183 (2001) ("Prior to the adoption of statutory election contest provisions, the primary methods of contesting elections were quo warranto and mandamus actions, common law actions to test the validity of an election and compel the performance of a duty, respectively.").
33. *Id.* at 11 (citing N.Y. EXEC. LAW § 63-b(1) and MICH. COMP. LAWS ANN. § 600.4515).
34. *Id.* at 10.
35. *See* Chapter 8: Recounts from additional information on recounts.
36. *See, e.g.*, W. VA. CODE ANN. § § 3-7-6, 3-6-9.
37. *See, e.g.*, ALA. CODE § 17-16-20 (West 2021); Alaska Stat. Ann. § 15.20.430 (West 2019). For a full list of automatic recount states, see *Election Recounts*, NAT. CENTR. FOR STATE LEGISLATURES, https://www.ncsl.org/research/elections-and-campaigns/automatic-recount-thresholds.aspx#AR.
38. *See*, *e.g.*, *Miller*, 539 S.E.2d at 776 (interpreting the state's recount and contest statutes to imply sole remedy under recount where allegations regarding errors in counting are at issue).
39. For example, in certain jurisdictions an automatic recount is triggered when a candidate wins by a specific margin. *See*, *e.g.*, ALA. CODE § 17-60-20; ALASKA STAT. § 15.20.430; ARIZ. REV. STAT. § 16-661; COLO. REV. STAT. § 1-10.5-101; CONN. GEN. STAT. § 9-311a; FLA. STAT. § 102.141; N.Y. ELEC. LAW § 9-208; WASH. REV. CODE § 29A.64.021.

margin.[40] However, allegations involving the election's illegality, fraud, or voter eligibility are typically not subject to a recount requirement.[41]

B. Filing Within the Limitations Period

In the interest of finality and enabling new office holders to transition effectively, election contests are designed to be resolved quickly: contestants must file within a short time after the election results are canvassed or certified.[42] These filing deadlines range from a few days[43] to more than a month.[44] Only four states—Maine, Massachusetts, New York, and Rhode Island—do not have statutory deadlines challengers must meet if they hope to move forward with their contest claims.[45]

In contests, filing deadlines are strictly construed.[46] These deadlines can be triggered by different election-related events.[47] Some of these triggers have been

40. *See, e.g.*, ALA. CODE § 17-16-20; FLA. STAT. § 102.141(7); N.D. CENT. CODE § 16.1-16-01; *but see* ALASKA STAT. § 15.20.430; COLO. REV. STAT. § 1-10.5-101; D.C. CODE § 1-1001.11; OR. REV. STAT. § 258.280.

41. *See, e.g.*, CAL. ELEC. CODE §§ 16100, 16401; ALA. CODE §§ 17-16-40, 17-16-47; 10 ILL. COMP. STAT. 5/22-9.1.

42. *See, e.g.*, Elections, *supra* note 14 at 1307 (1975) (citing DEL. CODE ANN. TIT. 15, § 5945 (within twenty days of the result; FLA. STAT. ANN. § 102.168 ("[W]ithin ten days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election being contested."); HAW. REV. STAT. §§ 11-173.5 ("[N]o later than 4:30 p.m. on the thirteenth day after a primary or special primary election…"); KY. REV. STAT. ANN. §§ 120.055, 120.155 (within ten days of a primary election or thirty days of a general election).

43. *See, e.g.*, MD. CODE ANN., ELEC. LAW § 12-202(b)(2) (3 days after the election results are certified).

44. OR. REV. STAT. § 258.036 (Not later than the 40th day after the election or the seventh day after completion of a recount of votes cast in connection with the election…). In a presidential election, Oregon's statutory deadline would authorize a contest action even after the federal safe harbor provision has passed and just before the meeting of electors. *See* 3 U.S.C. § 5.

45. *See* Douglas, *supra* note 1, at 34; R.I. GEN. LAWS § 17-19-37.4; N.Y. LEGIS. LAW § 64; ME. REV. STAT. TIT. 21-A, § 1125; MASS. ANN. LAWS CH. 54, § 134.

46. *See, e.g.*, Pearson v. Alverson, 49 So. 756, 757 (Ala. 1909) (holding the expiration of the limitations period prevented the contestant from amending his original pleading to cure its defective omission of a statutorily-required statement that the contestant was a qualified elector); *see also* Donaghey v. Attorney General, 584 P.2d 557, 559 (Ariz. 1978) (noting that the public policy favoring electoral stability and finality justifies enforcing strict compliance with the statute of limitations); *Pullen*, 561 N.E.2d at 589 (explaining that when courts are given power to hear election contests by statute, they must do so in the manner dictates by the statute and therefore can only hear cases that were filed within the statutorily prescribed filing deadlines).

47. *See, e.g.*, Minn. Stat. § 209.021 (allowing ten days for claims involving "a deliberate, serious, and material violation of the election laws that was discovered from the statements of receipts and disbursements" as opposed to three days for claims contesting who received the highest number of votes).

the final canvass returns[48] or the date the original canvassing board illegally threw out elections returns.[49]

Expiration of the limitations period generally forecloses both the would-be contestant's right to file an election contest and a court's power to hear it.[50] However, statutes or court rules may allow a court to accept *nunc pro tunc*[51] election contest petitions from contestants who miss the statutory filing deadline because of election officials' errors.[52] Timely-filed contest petitions cannot usually be defeated by a court employee's error.[53] But a contestant who files late based on incorrect information from an election official may be unable to salvage the contest because the contestant bears responsibility for knowing the steps and timetables governing election contests.[54]

48. *Pullen*, 561 N.E.2d at 589-95 (determining the triggering event for the running of Illinois's ten-day time limit for filing the action was the state board of elections final canvass returns); Hall v. Martin, 208 S.W. 417 (Ky. Ct. App. 1919).
49. Sears v. Carson, 551 So.2d 1054 (Ala. 1989) (imposing a five-day time limit from the date the board illegally threw out election returns).
50. Cooper v. Dix, 771 P.2d 614, 617 (Okla. 1989) (holding the court was unable to hear untimely filed cross petitions); *see also* Koter v. Cosgrove, 844 A.2d 29, 33 (Pa. Commw. Ct. 2004) (en banc) ("The purposes underlying the referendum process would be eviscerated if a referendum's passage could be challenged at any time."); Wadley v. Hall, 410 S.E.2d 105, 107 (Ga. 1991) (denying contestant's petition that was filed after the five-day statutes of limitations period solely because election officials wrongfully withheld information essential to the petition after noting the court's liberal acceptance of amendments meant the contestant should have filed a skeleton petition that he could amend when he finally received the withheld information). A losing candidate might inadvertently foreclose her contest opportunity by filing too early, such as before a winner was officially declared or certified. *See, e.g.*, Tazwell v. Davis, 130 P. 400, 402 (Ore. 1913) (finding there was insufficient evidence to support the claimant's allegations); Wells v. Noldon, 679 S.W.2d 889, 890 (Mo. Ct. App. 1984) (holding that Plaintiff's early filing prevented the court's subject matter jurisdiction).
51. *Nunc pro tunc*—literally "now for then"—filings operate as if they were filed on an earlier date that was within the statute of limitations period even though they are filed after the limitations period has run. Pennsylvania appears to be the only state to recognize these filings in election contests. *See* Thomas v. York County Board of Elections, 59 Pa. D. & C.2d 377, 379 (Ct. Com. Pl. 1972) (allowing a *nunc pro tunc* contest where the contestant had no knowledge that election officials' incorrectly transcribed precinct level tallies until it resulted in certification of his opponent as the winner). *But see in re* Recanvass of Certain Voting Machs. & Absentee Ballots, 887 A.2d 330, 333 (Pa. Commw. Ct. 2005) (finding *nunc pro tunc* filing unavailable without an electoral board error).
52. *See* Thomas, 59 Pa. D. & C.2d 377, 381 (holding that contestant's late filing was excused when election returns posted at the polling place indicated he won and he was unaware the final canvass declared his opponent the winner).
53. *See, e.g.*, Redding v. Balkcom, 272 S.E.2d 324, 325-26 (Ga. 1980) (finding the claimant had timely filed a petition and that the clerk's failure to issue special process did not hinder a hearing).
54. *See* White v. District of Columbia Bd. of Elections and Ethics, 537 A.2d 1133, 1135 (D.C. 1988) (per curiam) (holding that a computer coding error did not relieve the Plaintiff of observing the filing deadline).

States also vary on whether, and when, election contest-related discovery is allowed.[55] States that permit discovery do not always require it before an election contest can be filed.[56]

States have differing policies on whether contestants can amend their petitions after the contest statute of limitations period expires, with some allowing amendments at the court's discretion.[57] Election contest trials are generally placed on expedited calendars.[58] States adopt various methods to ensure the acceleration of contest proceedings. For instance, in California, a contest takes priority over all other civil litigation.[59] In Illinois, a circuit judge may appoint the State Board of Elections to "expedite the hearing and determination of the contest."[60] During a primary contest, Texas provides for an accelerated appeal.[61]

Election contest trials are generally placed on expedited calendars.

55. Compare LA. STAT. ANN. § 18:1415 (providing a period of limited discovery prior to contest), with IDAHO CODE § 34-2108 (requiring the contestant to provide a list of witnesses subject to anticipated discovery), and 10 ILL. COMP. STAT. ANN. 5/22-9.1 (allowing an optional limited discovery even if no contest is pursued).
56. *See, e.g.*, *In re* Contest of Election for Offices of Governor and Lieutenant Governor Held at General Election on November 2, 1982, 93 Ill.2d 463, 500 (Ill. 1983) ("[D]iscovery need not be a prerequisite to initiating an election contest…if the results of the discovery are not sufficiently favorable, the discovery effort shall not prevent the bringing of such an election contest").
57. Ross v. Kozubowski, 538 N.E.2d 623, 629 (Ill. App. Ct. 1989) (noting the court's discretionary right to grant an amendment). Courts in states that allow amendments may strictly enforce the initial limitations period because the opportunity to amend the pleading to add necessary details means the contestant should be able to file something within the limitations period. *See Wadley*, 410 S.E.2d at 105. In states that do not allow amendments, the running of the limitations period generally prevents the contestant from filing additional pleadings that state new and distinct contest grounds, even those filed in response to the contestee's answer. *See, e.g.*, Harmon v. Tyler, 83 S.W. 1041, 1044 (Tenn. 1904) (noting considerations other courts weight in determining if pleadings could be amended and not considering the contestant's response to the assertion that the election fraud benefited the contestant more than the contestee). *See Pearson*, 49 So. at 757. King v. Whitfield, 39 Ark. 176, 189-91 (Ark. 1999) (finding a claimant could not amend their complaint with additional external facts after time for contesting the election had expired).
58. *Elections*, *supra* note 14, at 1307-08 (1975) (citing ARK. STAT. ANN. § 3-1002 (Supp. 1973); IDAHO CODE § 34-2011 (1963); NEV. REV. STAT. § 293.413 (1973); ORE. REV. STAT. §§ 251.070, .090 (1973); TENN. CODE ANN. § 2-1706 (Supp. 1974)).
59. CAL ELEC. CODE § 16003 (setting judgment to be rendered at least six days before the first Monday after the second Wednesday in December).
60. 10 ILL. COMP. STAT. 5/23-1.8b (allowing the Board to recount the ballots, take testimony, examine evidence, examine records, examine equipment, record all objections heard by the circuit court, and conduct hearings as may be necessary and proper).
61. TEX. ELEC. CODE ANN. § 232.014 (permitting judges to make orders to expedite appeals including reducing the time allowed for filing appellate briefs, refusing to permit a motion for rehearing, or reduce the time for filing a motion.).

Many contest statutes also include deadlines by which the contests must be resolved.[62] These deadlines are often interpreted to be mandatory and strict.[63] For example, Arkansas requires election contests to be "given precedence and be speedily determined."[64] In response, judges may adjourn other courts, call another judge to sit in other courts, or vacate the bench of other courts, or elect a special judge to hold the court in election contest proceedings.[65] Other states set specific deadlines around when a decision maker must hear or decide a case.[66] Some even limit adjournments or continuances during election contests.[67]

C. Adequate Grounds for a Contest

Complaints must specify the grounds of the contestant's claims for two important reasons. First, the complaint notifies the contestee—who holds *prima facie* title to the office, having the most votes after the initial canvas—of the specific facts the contestant relies upon in their attempt to dislodge the contestee from office.[68] Second, the complaint provides information necessary to demonstrate that the

62. *See, e.g.*, ALA. CODE §17-13-86 (requiring primary election contests to be resolved "not later than 90 days before the general election for a county office and not later than 83 days before the general election for a state office"); TEX. ELEC. CODE § 232.012 (applying "accelerated procedures" to certain contests by limiting continuances and issuing a trial date no later than five days after an answer is filed); ARIZ. REV. STAT. § 16-676 (providing a court date within ten days of the initial filing and a decision within five days of the proceedings); LA. STAT. ANN. §18:1409 (rendering a decision within twenty-four hours of the case's submission and limiting appellate review within forty-eight hours of the record's lodging).

63. *See, e.g.*, Pullen v. Mulligan, 561 N.E.2d 585, 589 (Ill. 1990) (holding that the court did not have jurisdiction to hear an election contest that was not filed in a timely fashion).

64. ARK. CODE ANN. § 7-5-802 (providing that cases during the regular term with sufficient facts will be speedily determined). *See also*, VA. CODE ANN. § 24.2-810 (2011) (judges should decide election contests "as soon as possible"); S.D. CODIFIED LAWS § 12-22-18 (2004) (allows the state supreme court chief justice to relieve lower court judges of his or her official duties so that they can hear the election contest).

65. *Id.*

66. N.J. STAT. ANN. §§ 19:29-3 (requiring judges to hear election contest complaints within fifteen to thirty days after filing); ARIZ. REV. STAT. ANN. § 16-676(B) (judges must make its decision within five days after the hearing); CONN. GEN. STAT. ANN. § 9-323 (election contests must be decided "before the first Monday after the second Wednesday in December").

67. OHIO REV. CODE ANN. § 3515.11 (adjournments cannot be allowed for more than thirty days); TEX. ELEC. CODE ANN. § 232.012(e) (continuances can only last for ten days—unless both parties consent—during election contests involving a primary or a runoff election).

68. *See Tazwell,* 130 P. at 403 (Or. 1913) (holding general allegations afford the contestee insufficient notice); Nelson Sneed, 83 S.W. 786, 788-89 (Tenn. 1904) ("[A] contestant shall file . . . a clear statement of the grounds on which he proposes to contest the election of his opponent, presenting issues of fact or law") (quoting Blackburn v. Vick, 49 Tenn. 377 (1871)).

true will of the electorate—which receives deference even when it is irregularly expressed—was not reflected in the official election returns.[69]

Some states specify grounds for election contests in very broad or specific language.[70] For example, Hawaii provides a short and non-exhaustive list of causes for contests that must be stated in the complaint: "such as but not limited to provable fraud, overages, or underages, that could cause a difference in the election results."[71] Oregon, on the other hand, only permits election contests on the following grounds:

1) Deliberate and material violation of any provision of the election laws in connection with the nomination, election, recall election or approval or rejection of a measure.
2) Ineligibility of the person elected to the office to hold the office at the time of the election.
3) Illegal votes.
4) Mistake or fraud in the canvass of votes.
5) Fraud in the count of votes.
6) Nondeliberate and material error in the distribution of the official ballots by a local election official, as that term is defined in ORS 246.012, or a county clerk.
7) A challenge to the determination of the number of electors who were eligible to participate in an election on a measure conducted under sect 11(8), Article XI of the Oregon Constitution.[72]

These requirements are often strictly observed.[73] For example, a Pennsylvania court dismissed an election contest petition for lack of specificity when the

69. *Files*, 594 S.W.2d at 839 (Ark. 1980) (upholding the election results, although irregular, when the pleadings did not specify the results would have been different nor indicate in which precincts problems existed and the nature of the "clear and flagrant" wrongs attendant to the election); Akaka v, Yoshina, 935 P.2d 98, 103 (Haw. 1997) (finding complaint legally insufficient in the absence of facts demonstrating the claimed irregularities exceed the winning margin and noting the court disfavors "fishing expeditions") (citation omitted).

70. *Compare* N.J. STAT. ANN. § 19:29-1 (listing nine distinct grounds for contest) *with* MD. CODE ANN., ELEC. LAW § 12-202 (describing grounds generally as "acts" or "omissions").

71. HAW. REV. STAT. ANN. § 11-172 (West). *See also* MINN. STAT. § 209.02(1) ("irregularit[ies] in the conduct of an election or canvass of votes or … deliberate, serious, and material violations of the provisions of the Minnesota election law."); KY. REV. STAT. ANN. §§ 120.015, .065, .165 (corrupt practice or fraud, intimidation, bribery or violence); LA. REV. STAT. ANN. § 18.364(B) (primary election only) (fraud or irregularities); N.C. GEN. STAT. §163-22, *id*. § 163-22.1 (irregularities, fraud or violations of election law); OKLA. STAT. ANN. tit. 26, § 8-118 (Supp. 1974) (fraud or irregularities).

72. OR. REV. STAT. ANN. § 258.016 (West). For other examples, *see* IDAHO CODE ANN. § 34-2001; ALASKA STAT. ANN. § 15.20.540.

73. *See* Ward v. Story, 258 S.W.2d 515, 516-17 (Ky. 1953) ("We have consistently recognized that election contest proceedings stand in a class by themselves and the liberal rules of practice which are observed in most other cases do not apply to this type of action.").

petitioners failed to state how alleged illegal voter assistance was furnished and how alleged voter assistance affected the outcome.[74] In other examples, courts dismissed election contests when petitioners failed to state with sufficient detail, the irregularities complained of.[75] Many other contests have been thrown out—and petitioners have not been given the opportunity to remedy their mistakes or amend their pleadings—for noncompliance with bond requirements[76] or notice and service provisions.[77]

D. Pleadings

Some states allow a contestee to answer the contestant's pleadings.[78] A contestee usually has the right to demonstrate that the contestant's claims are untrue and that the contestant did not receive a majority of the legally cast votes.[79] The contestee may also be permitted to allege that the contestant received fraudulent and illegal votes, that legal votes were omitted from the contestee's vote totals, or any other statutorily recognized grounds permitting votes totals to be challenged or adjusted in the contestee's favor.[80] Generally, however, a contestee cannot file a cross-contest because her status as the recognized winner means no one else has a right to the office; thus she has nothing to contest.[81]

Contestees sometimes plead laches. Laches is an equitable doctrine—frequently characterized as an equitable defense—that allows a court to dismiss a lawsuit when the plaintiff's unreasonable delay in pursuing the claim prejudiced another

74. *In re* Wilkes-Barre Election Contest, 400 Pa. 507, 518-21 (1960).

75. *See, e.g.*, Jones v. Etheridge, 242 Ark. 907, 911 (Ark. 1967) (finding the contestant could not amend his petition with the names of those alleged to have illegally voted because it would be as though he had asserted his cause of action for the first time after the statutory deadline); Haydel v. Town of Gramercy, 154 So. 2d 504, 505-06 (La. Ct. App. 1963) (finding the petition was properly dismissed because the contestant failed to allege the number of participants illegally permitted to vote and the basis for disqualification). *But see* Johnson v. May, 305 Ky. 292. 295-98 (Ky. Ct. App. 1947) (finding contestants need only allege that the volume of voters illegally purged from the registration books could plausibly impact the outcome of the election).

76. *In re* Election of Tax Collector, 356 Pa. 60, (Pa. C.P. 1957); *In re* Philadelphia Municipal Elections, 80 Pa. D. & C. 477 (C.P. 1952); *In re* McChesney's Contested Election, 326 Pa. 438, 192 A. 415 (1937). For other cases dismissed for noncompliance with bond requirement technicalities, see Moritz's Contested Election, 256 Pa. 537 (1917); *In re* Election in Blythe Township, 10 Pa. D. & C. 810(C.P. 1928); *In re* Geiger's Election Contest, 16 Leh. L.J. 360 (Pa. Quar. Sess. 1936); Case of Hanna, 46 Pa. C.C. 162 (Quar. Sess. 1917).

77. Price v. Cheek, 130 Ga. App. 506, 203 S.E.2d 751 (1973). *See also, e.g.*, Hawkins v. Colbert, 292 Ky. 84, 165 S.W.2d 984 (1942); *In re* Contest of Special Election, 136 Ohio St. 279, 25 N.E.2d 458 (1940).

78. *See, e.g.*, LA. STAT. ANN. § 18:1406; MINN. STAT. § 209.03; FLA. STAT. §102.168.

79. *Id.* ([The] contestee has the right to show that [the contestant's allegations are] untrue…").

80. *Id.*

81. *Cooper*, 771 P.2d at 614 (Okla. 1989) (finding that without statutory authorization for a cross-petition, the court could not hear it). *See also Harmon*, 83 S.W. at 1046.

party, usually the defendant.[82] Although similar in operation to a statute of limitations, laches is separate from it.[83] Courts commonly use laches to dismiss election-related cases when the contestant knew of, or could have discovered and challenged, the now targeted irregularities before the election.[84] Laches may not apply, however, if the contestant attempted to file a pre-election complaint but was prevented from doing so.[85]

IV. CONTEST TYPES

Often state contest statutes require differing procedures depending on which office or type of election is involved. This section gives an overview of how state contest statutes vary and the implications those differences have on the judiciary. The election types covered are:

A. primary elections,
B. state legislative elections,
C. governor and lieutenant governor elections,
D. judicial elections,
E. congressional elections,
F. presidential elections, and
G. ballot measure elections.

82. Loveland Camp, W. O. W. v. Woodmen Bldg. & Benevolent Ass'n, 108 Colo. 297, 305 (Colo. 1941) ("The essential element of laches is unconscionable delay in enforcing a right under the circumstances, usually involving a prejudice to the one against whom the claim is asserted…The term 'laches,' in its broad legal sense as interpreted by the courts of equity, signifies such unreasonable delay in the assertion of and attempted securing of equitable rights as to constitute in equity and good conscience a bar to recovery").

83. Ellis v. Swensen, 16 P.3d 1233, 1241-42 (Utah 2000) (noting that laches may bar even a timely filed case). *See infra* Chapter 10: Statutes of Limitations and Laches for additional information on laches.

84. *See, e.g.*, *Dayhoff*, 808 A.2d at 1009 (Pa. Commw. Ct. 2002) (ballot irregularities); Thurston v. State Board of Elections, 392 N.E.2d 1349, 1350 (Ill. 1979) (validity of winning candidate's nomination); Tate v. Morley, 153 S.E.2d 437, 439 (Ga. 1967) (winning candidate's nomination); Thirty Voters v. Doi, 599 P.2d 286 (Haw. 1979) (per curiam) (ballot measure wording); Kilbourne v. City of Carpinteria, 128 Cal. Rptr. 133 (Ct. App. 1976) (recall election where the successfully recalled official's name was misspelled on the ballot, which had been published before the election); Rogers v. State Election Board of Oklahoma, 533 P.2d 621, 623 (Okla. 1974) (winning candidate's residency as stated on his declaration of candidacy); McKinney v. Superior Court, 21 Cal. Rptr. 3d 773 (Ct. App. 2004) (city charter does not allow write-in votes in run-off races).

85. D'Amico v. Mullen, 351 A.2d 101, 104 n.6 (R.I. 1976) (finding laches inapplicable when the contestant lodged pre-election objections to another candidate's nominating papers by every reasonable means) (citing Dupre v. St. Jacques, 153 A. 240 (1931)).

A. Primary Elections

Primary elections are one means by which political party nominees are selected for the general election ballot. Because of this status, primary election contests may entail additional considerations not found in general election contests. First, primary election candidates sometimes suggest they have received the party's endorsement when they have not.[86] Second, primary contests are conducted under the shadow of the impending general election, which intensifies the time pressures.[87] Third, because primary elections select a political party's nominee, voter participation is usually low, leaving a greater opportunity for contestants to claim that voting by ineligible individuals affected the outcome.[88] Fourth, state statues may limit courts' participation in primary contests in favor of resolution by the political party.[89] Despite these additional considerations, the public has an important right to cast its general election ballot for a candidate who won the primary election.[90]

86. *See In re* Contest of Election in DFL Primary Election, 344 N.W.2d 826 (Minn. 1984) (ordering a new primary election because contestee willfully circulated misleading sample ballots that suggested she was the party's preferred nominee); Lynch v. Duffy, 172 A.D.3d 1370 (N.Y. App. Div. 2019) (holding that Duffy had misled voters by deleting the name of the endorsed candidate from the designating petition and substituting her own).

87. Flores v. Villarreal, 2020 WL 5050638 at *10 (Ct. App. Tx. 2020) ("[P]rimary election contests are subject to exceptionally strict statutory timelines . . . the trial court could have reasonably determined that any further delay of discovery deadlines or the trial date would have seriously jeopardized its ability to hear and decide the case before the general election"). *See* Lazar v. Ganim, 220 A. 3d 18, 24 (Conn. 2019) (hearing an expedited appeal due to the impending general election); Young v. Washington, 127 Ill. App. 3d 1094, 1097 (Ill. App. Ct. 1984) ("A primary contest must be quickly determined so that the party nominee's name appears upon the general election ballot....If liberal amendment procedures [were applicable] to primary contests, the legislative intent of a rapid and summary disposition for all primary election contests would be significantly frustrated").

88. Nageak v. Mallott, 426 P. 3d 930, 937 (Alaska 2018) (arguing that the two ballot system allowed for non-republican voters to vote in the republican primary). *See generally* Clingman v. Beaver, 544 U.S. 581 (2005) (finding that a state statute limiting the participation of certain parties in primary elections was constitutional as it advanced the state's interest in preserving political parties as identifiable groups).

89. *See, e.g.*, S.C. CODE ANN. § 7-17-250 ("Appeals from decisions of the State Board shall be taken directly to the Supreme Court on petition of a writ of certiorari only based on the record of the State Board hearing and shall be granted first priority of consideration by the court...Provided, however, that when a contest or protect concerns the election of a state Senator, appeals from decisions of the State Board shall be only to the Senate and when the election of the House of Representatives is concerned, the appeal shall only be to the House of Representatives.").

90. *Redding*, 272 S.E.2d at 326 ("The right of the public to vote in the general election on the candidates receiving the majority of the votes in the primary election is an important one. This right should not be violated because of time restraints or limitation not caused by either the candidate or the public").

Election codes may limit the time to file primary election contests.[91] Some courts have declined to resolve a primary election contest before the general election.[92] As a result, courts may need to decide how to handle the general election if the primary contest appears unlikely to be resolved before the scheduled general election. Under these circumstances, some courts have stayed the general election,[93] while others have allowed the general election to proceed, with the purported primary winner's name on the ballot, after reserving the right to continue the contest after the general election is concluded.[94]

Some courts have declined to resolve a primary election contest before the general election.

When a court allows the general election to proceed even though the primary contest remains unresolved, it permits the other offices on the ballot to be filled and avoids the expense of a new election should the primary contestee win.[95] However, allowing the general election to proceed before resolving the primary election contest is not without potential pitfalls. If the contestant prevails in the primary contest after the contestee was elected in the general election, the court must fashion an appropriate remedy.[96] For example, in a contested judicial primary election, the contestant was named the winner of the contest after the contestee had taken office.[97] The court's remedy, upheld on appeal, was to name

91. McDunn v. Williams, 620 N.E.2d 385, 406 (Ill. 1993) (noting that delay did not result from a party's bad faith nor were third-party rights adversely affected by it); State *ex rel.* Edwards v. Gibson, 680 S.E.2d 21, 27 (W. Va. 2009) (citing statutory deadline of ten days after election to file election contest, but holding that "the hearing or trial in an election contest should be held at the earliest possible time").

92. *See, e.g.*, Montana Republican Party v. Graybill, 2020 WL 4669446 (Mont. 2020) ("We have refused to engage in 'hasty pre-election review' of constitutional ballot questions...."); *McDunn*, 620 N.E.2d at 404 (resolving primary contest eight months after the general election).

93. Sometimes a court will stay the general election because it ordered that a new primary election was required. *See* Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (finding state's refusal to count absentee ballots cast in violation of state statutes violated voters' constitutional rights because the state had induced voters to vote absentee). *See also*, De La Paz v. Gutierrez, 2019 WL 1891137 (Ct. App. Tx. 2019) (urging legislatures to "explicitly authoriz[e] a primary contest tribunal to order a new general election when the originally scheduled general election takes place before the tribunal's judgment becomes final").

94. *See, e.g.*, *Redding*, 272 S.E.2d 324 (allowing the general election to proceed but staying the certification of the winner until the primary contest concluded); *McDunn*, 620 N.E.2d 385.

95. *McDunn,* 620 N.E.2d at 404-05 ("Allowing the election to proceed while suppressing the results was not intended to settle the issue by rendering it moot, but intended instead to facilitate the continuance of the lawsuit without jeopardy to candidates for other offices and to possibly avoid the expense of another election if [the candidate] prevailed in the suit."

96. *Id.* at 395.

97. *Id.* at 389-92.

the contestant the official party nominee for the general election that took place two years *after* the contested election.[98]

Courts deciding to continue a primary contest until after the general election may take steps to to preserve the ability to do so.[99] For example, one court preserved the primary election contest while allowing both tied primary election judicial candidates' names printed on the general election ballot.[100]

Sometimes, the preference for pre-election resolution is so strong that a case may be dismissed when an appeal to a primary election contest's decision is not filed until after the general election, even when the general appeals statute of limitations has not run.[101] In one Georgia contest case, a candidate filed an appeal within the civil statute of limitations, which would have extended beyond the general election date, but because the contestant/appellant did not request a stay of the general election during the appeal, the court held that the general election mooted the contest.[102]

Because primary elections exist to select a political party's general election nominees, voting can be restricted to party-affiliated or non-affiliated voters, the latter at the party's invitation.[103] Thus, the pool of ineligible voters whose participation may provide grounds for a contest is greater in a primary election than in a general election and may include:

- unaffiliated voters,
- voters affiliated with a different political party, and

98. *Id.* (finding the primary contest was not mooted by the general election because the trial court forbid publication of the general election results, thus preserving the status quo).
99. *See* Jordan v. Cook, 587 S.E.2d 52 (Ga. 2003) (dismissing appeal because contestant did not ask for a stay of the general election); Keane v. Smith, 485 P.2d 261 (Cal. 1971) (en banc) (continuing primary contest until after the general election where both candidates' names appeared on the ballot after primary resulted in a tie) *and McDunn,* 620 N.E.2d 385, 404-05 (ordering results of general election suppressed until primary contest could be determined). *But see* Dawkins-Haigler v. Anderson, 799 S.E.2d 180, 181 (Ga. 2017) ("'The established rule in Georgia is that a primary election contest becomes moot after the general election has taken place.'") (citing Payne v. Chatman, 267 Ga. 873, 875, 485 S.E.2d 723 (1997)).
100. *Keane*, 485 P.2d at 263.
101. *Dawkins-Haigler*, 799 S.E.2d at 181; *Jordan*, 587 S.E.2d 52 (upholding dismissal of appeal ruling when one candidate met residency qualifications for position because the appeal was not filed until after the general election was held, though this was within the statutory time limits in which appeals may generally be filed; here intervening election mooted appeal. He should have requested a stay of the general election pending his appeal).
102. *Jordan*, 587 S.E.2d 52.
103. Arizona Libertarian Party v. Hobbs, 925 F.3d 1085 (9th Cir. 2019) (holding "the party's policy choice to exclude all non-members from its primary and its preference to obtain signatures only from party members [did not impose a severe burden]").

- voters who signed nominating petitions for a candidate not affiliated with the party holding the primary.[104]

Courts also occasionally, though rarely, void and rerun primary elections. In one instance, a court voided a primary election because one candidate distributed a sample ballot that incorrectly implied party endorsement.[105] Another court ordered a new primary election after election officials committed a constitutional violation.[106] Equally rare, courts sometimes must contend with the legal effect of votes cast for a deceased primary election winner.[107]

B. State Legislative Elections

When election contests for state house and senate seats are brought, the respective state legislative body typically resolves contests brought.[108] A minority of states provide for a different venue. For example, North Dakota law mandates that legislative election contests be decided in court as any other election contest.[109] Similarly, in Hawaii, legislative house election contests must be

104. Lesniak v. Budzash, 625 A.2d 1139 (N.J. Super. Ct. App. Div. 1993) (disqualifying signatures in democratic primary from republican signees); Alfieri v. Bravo, 172 A.D.3d 1360 (N.Y. 2019); Hamm v. Bd. Of Elections in New York, 194 A.D.3d (N.Y. 2021) (primary contest based off failure of ballots to specify party affiliation).

105. Contest of Election in DFL Primary Election Held on Tues., Sept. 13, 1983 v. Hilary, 344 N.W.2d 826 (Minn. 1984).

106. Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (finding an Equal Protection violation when election officials invalidated absentee and shut-in ballots, although the absentee and shut-in ballots had been distributed in violation of the election code, because the election officials encouraged absentee ballot use). A shut-in ballot is a ballot for those who are unable to leave their residence.

107. *See* Kentucky State Bd. of Elections v. Faulkner, 591 S.W.3d 398 (Ky. 2019) (holding winners death did not elevate third-place candidate to entitle them a spot on the general election ballot); Barber v. Edgar, 294 A.2d 453 (Me. 1972) (holding that votes cast for primary candidate who died on election day were valid, thus the second-place finisher was not the nominee and upholding the governor's actions in letting party personnel fill the vacancy as statutes directed).

108. Douglas, *supra* note 1, at 5. Most state constitutions allow each house to judge its members' "qualifications, elections and returns." *Id. See, e.g.*, U.S. Const. art. I, § 5, cl. 1; ALA. CONST. art. IV, § 51; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. IV, pt. 2, § 8; ARK. CONST. art. 5, § 11; CAL. CONST. art. IV, § 5; COLO. CONST. art. V, § 10; CONN. CONST. art. III, § 7; DEL. CONST. art. II, § 8; FLA. CONST. art. III, § 2; GA. CONST. art. III, § 4, para. 7; HAW. CONST. art. III, § 12; IDAHO CONST. art. III, § 9; ILL. CONST. art. IV, § 6; IND. CONST. art. IV, § 10; IOWA CONST. art. III, § 7; KAN. CONST. art. II, § 8; KY. CONST. § 38; LA. CONST. art. III, § 7; ME. CONST. art. IV, pt. 3, § 3; MD. CONST. art. III, § 19; MASS. CONST. pt. 2, ch. 1, §§ II, art. IV, III, art. X; MICH. CONST. art. IV, § 16; MINN. CONST. art. IV, § 6; MISS. CONST. art. IV, § 38; MO. CONST. art. III, § 18; MONT. CONST. art. V, § 10; NEB. CONST. art. III, § 10; NEV. CONST. art. IV, § 6; N.H. CONST. pt. II, arts. 22, 35; N.J. CONST. art. IV, § 4, para. 2; N.M. CONST. art. IV, § 7; N.Y. CONST. art. III, § 9; N.C. CONST. art. II, § 20; OHIO CONST. art. II, § 6; OKLA. CONST. art. V, § 30; OR. CONST. art. IV, § 11; PA. CONST. art. II, § 9; R.I. CONST. art. VI, § 6; S.C. CONST. art. III, § 11; S.D. CONST. art. III, § 9; TENN. CONST. art. II, § 11; TEX. CONST. art. III, § 8; UTAH CONST. art. VI, § 10; VT. CONST. ch. II, §§ 14, 19; VA. CONST. art. IV, § 7; WASH. CONST. art. II, § 8; W. VA. CONST. art. VI, § 24; WIS. CONST. art. IV, § 7; WYO. CONST. art. III, § 10.

109. N.D. CENT. CODE § 16.1-16-10 (2009).

resolved in court, but the Houses can ascertain "whether the parties have properly invoked the jurisdiction of a competent court to judge the contest".[110]

Other states require courts to play a role in these election contests, though ultimate resolution is issued by the respective legislative body. In Kansas, for example, district court judges may make findings of fact as to the number of legally cast votes the candidates received.[111] Some states allow courts to decide election contests, while also permitting the houses to consider that decision and make its own.[112] Pennsylvania allows its court of common pleas in the county where the winner resides to determine election contests, which can be brought to the proper state house for a final resolution by a petition from any claimant to the seat.[113] Other states, like Arkansas, give fact-finding power to the Arkansas State Claims Commission which makes a nonbinding recommendation to the legislature on how to resolve the election contest.[114]

C. Governor and Lieutenant Governor Elections

In this context, processes to resolve election contests provided by state statutes vary widely and can involve the judiciary,[115] state legislature,[116] and special committees.[117]

110. Akizaki v. Fong, 461 P.2d 221, 223 (Haw. 1969).

111. KAN. STAT. ANN. § 25-1442 (2000); KAN. STAT. ANN. § 25-1451 (2000).

112. *See* MINN. STAT. ANN. § 209.10 (West 2009); OHIO REV. CODE ANN. § 3515.14 (West 2012); 25 PA. STAT. AND CONS. STAT. §§ 3401-3409 (West 2021).

113. 25 PA. STAT. AND CONS. STAT. §§ 3401-3409 (West 2021).

114. ARK. CODE. ANN. § 7-5-805(b)(1)(D)(2) (West 2011).

115. ALASKA STAT. § 15.20.550 (2010); ARIZ. REV. STAT. ANN. § 16-672(B) (2006); CAL. ELEC. CODE § 16400 (West 2003); CONN. GEN. STAT. ANN. § 9-324 (West 2009); FLA. STAT. ANN. § 102.168 (West 2008); GA. CODE ANN. § 21-2-523 (2008); LA. REV. STAT. ANN. § 18:1403 (2012); MASS. ANN. LAWS ch. 55, § 35 (West 2001); MONT. CODE ANN. § 13-36-103 (West 2011); NEB. REV. STAT. ANN. § 32-1102(2) (West 2008); N.J. STAT. ANN. § 19:29-2 (West 1999); N.M. STAT. ANN. § 1-14-3 (West 2003); N.D. CENT. CODE § 16.1-16-04 (West 2009); OR. REV. STAT. § 258.036(1) (West 2011).

116. MD. CONST. art. II, § 4; MISS. CONST. art. V, § 140; ALA. CODE § 17-16-65 (West 2007); ARK. CODE ANN. § 7-5-806 (2011); COLO. REV. STAT. §§ 11-205 to -207 (West 2009); IDAHO CODE ANN. § 34-2104 (West 2008); KY. REV. STAT. ANN. § 120.205(5) (LexisNexis 2004); NEV. REV. STAT. § 293.433(1) (West 2008); N.C. GEN. STAT. § 163-182.13A(a) (West 2007); TENN. CODE ANN. § 2-18-101 (West 2003); TEX. ELEC. CODE ANN. § 221.002(b) (West 2010); VA. CODE ANN. § 24.2-804 (West 2011); W. VA. CODE ANN. § 3-7-2 (West 2011). For more information see Douglas, *supra* note 1.

117. Some states—such as New Hampshire, Rhode Island, and South Carolina—have a nonjudicial body or committee hear elections contests. N.H. REV. STAT. ANN. § 665:5 (West 2008); R.I. GEN. LAWS § 17-7-5(a)(11) (2003); S.C. CODE ANN. § 7-17-250 (West 1977).

Typically, states allow losing candidates to sue in trial court,[118] though the appeals process varies.[119] Uniquely, the state supreme courts in Kansas and Minnesota must appoint a three-judge trial court to review evidence in election contests and decide the outcome.[120]

The state supreme courts in Hawaii,[121] Illinois,[122] Maine,[123] Missouri,[124] and South Dakota[125] have original jurisdiction to hear election contests for chief executives, with no opportunity for appeal. Ohio, on the other hand, requires one supreme court justice to hear the election contest and allows the decision to be appealed to the full court.[126] Washington permits parties to file election contests with the supreme court, the court of appeals, or a superior court.[127]

In some states, determining executive election contests falls to the state legislature.[128] In these settings, decisions are usually not reviewable[129] and can involve the entire legislature, or smaller groups of members review the claims and report out to the full body.[130] In a few states, the Board of Elections or other

118. ALASKA STAT. § 15.20.550 (West 2010); ARIZ. REV. STAT. ANN. § 16-672(B) (West 2006); CAL. ELEC. CODE § 16400 (West 2003); CONN. GEN. STAT. ANN. § 9-324 (West 2009); FLA. STAT. ANN. § 102.168 (West 2008); GA. CODE ANN. § 21-2-523 (West 2008); LA. REV. STAT. ANN. § 18:1403 (West 2012); MASS. ANN. LAWS ch. 55, § 35 (West 2001); MONT. CODE ANN. § 13-36-103 (West 2011); NEB. REV. STAT. ANN. § 32-1102(2) (West 2008); N.J. STAT. ANN. § 19:29-2 (West 1999); N.M. STAT. ANN. § 1-14-3 (West 2003); N.D. CENT. CODE § 16.1-16-04 (West 2009); OR. REV. STAT. § 258.036(1) (West 2011); UTAH CODE ANN. § 20A-4-403 (West 2010); VT. STAT. ANN. tit. 17, § 2603 (2002 & Supp. 2011); WIS. STAT. ANN. § 9.01(6) (West 2004); WYO. STAT. ANN. § 22-17-102 (West 2011).

119. Douglas, *supra* note 1, at 10 (discussing different appeals processes).

120. KAN. STAT. ANN. § 25-1443 (2000); MINN. STAT. ANN. § 209.045 (West 2009).

121. HAW. REV. STAT. § 11-174.5 (West 2008).

122. 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010); 10 ILL. COMP. STAT. ANN. 5/23-1.8a (West 2010) (requiring the assistance of a circuit judge to oversee parts of the process).

123. ME. REV. STAT. ANN. tit. 21-A, § 737-A (10) (West 2019).

124. MO. ANN. STAT. § 115.555 (West 2003); MO. ANN. STAT. § 115.561 (West 2003) (requiring the appointment of a commissioner of the court to take testimony the supreme court specifies as points of fact).

125. S.D. CODIFIED LAWS § 12-22-7 (West 2004).

126. OHIO REV. CODE ANN. § 3515.08(B) (West 2012); OHIO REV. CODE ANN. § 3515.15 (West 2012).

127. WASH. REV. CODE ANN. § 29A.68.011 (West 2005); § 29A.68.120. *See also In re* Coday, 130 P.3d 809, 817 (Wash. 2006) (holding that despite the state constitution's conference of the legislature the power to decide election contests for governor, they had authority to decide the 2004 election contest for governor).

128. Douglas, *supra* note 1, at 12-13.

129. MD. CONST. art. II, § 4; MISS. CONST. art. V, §§ 128, 140; ALA. CODE § 17-16-65; ARK. CODE ANN. § 7-5-806; COLO. REV. STAT. §§ 11-205 to -207; IDAHO CODE ANN. § 34-2104; KY. REV. STAT. ANN. § 120.205(5); NEV. REV. STAT. § 293.433(1); N.C. GEN. STAT. § 163-182.13A(a); TENN. CODE ANN. § 2-18-101; TEX. ELEC. CODE ANN. § 221.002(b); VA. CODE ANN. § 24.2-804; W. VA. CODE § 3-7-2.

130. Douglas, *supra* note 1 at 12-13.

nonjudicial body hears election contests of statewide executive offices, all permitting, but not necessarily granting a right to, appeal.[131]

D. Judicial Elections

In states that elect the members of their judiciaries, election contests may be resolved by the courts. In a few states—like Idaho, Ohio, and South Dakota—the supreme court resolves election contests concerning its own members.[132] Some such states differ in their approaches. For example, the Governor helps resolve these contests in Idaho if the supreme court cannot agree;[133] in Ohio, only one justice decides judicial election contests;[134] and in South Dakota, the state supreme court decides contests involving state offices and judicial officers.[135]

In states where the legislature resolves supreme court election contests, courts may still resolve questions of election and constitutional law.

In states where the legislature resolves supreme court election contests, courts may still resolve questions of election and constitutional law. For example, in *Roe v. Alabama*, the Alabama Supreme Court resolved a certified question of state election law from the U.S. Court of Appeals for the 11th Circuit.[136] The judge in that case explained that while the contest must be resolved by the state legislature, the federal constitutional issues presented were best resolved by the state supreme court.[137]

Many other states use trial courts to decide election contests both for the state supreme court and the lower court judicial elections.[138] Some, like Pennsylvania,

131. *Id.* at 19 (Winter 2013) (citing N.H. REV. STAT. ANN. § 665:5 (2008); R.I. GEN. LAWS § 17-7-5(a)(11) (2003); S.C. CODE ANN. § 7-17-250 (1977)).
132. DAHO CODE ANN. § 34-2004 (West 2008); MO. ANN. STAT. § 115.555 (West 2003); OHIO REV. CODE ANN. § 3515.08(B) (LexisNexis 2012); S.D. CODIFIED LAWS § 12-22-7 (West 2021).
133. IDAHO CODE ANN. § 34-2004.
134. OHIO REV. CODE ANN. § 3515.08(B).
135. S.D. CODIFIED LAWS § 12-22-7 (2021) (the "circuit court of a county . . . where the election or some part thereof was conducted" decide all other election contests); *see also*, Mo. Rev. Stat. §§ 115.555 (the state supreme court hears all contests for governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, constitutional amendments, state statutes submitted or referred to the voters, and questions relating to the retention of appellate and circuit judges subject to Article V, Section 25 of the Missouri Constitution).
136. 43 F.3d 574 (11th Cir. 1995) (ruling after plaintiffs—voters and unsuccessful candidates—brought a § 1983 claim in federal court).
137. *Id.* at 582 ("By certifying the question to the Supreme Court of Alabama, we can accommodate Alabama's interest in having its high court settle the question whether a notarization or the signatures of two witnesses is required before an absentee ballot may be counted.").
138. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/23-3 (West 2010); LA. REV. STAT. ANN. §§ 18:1403, :1409(H) (West 2012); OR. REV. STAT. §§ 258.036(1)(a), .085 (West 2011).

use panels of judges.[139] However, a majority of states resole judicial election contests no differently than any other election contest.[140]

E. Congressional Elections

While the U.S. Constitution expressly delegates the authority to decide congressional election contests to Congress,[141] state courts also have some authority in the area.[142] Some states have interpreted a 1972 Supreme Court case[143] holding that states have the power to order a recount in a congressional election to mean states can also hear congressional election contests as long as the respective congressional house has final decision-making power.[144] For example, the Minnesota State Supreme court decided the U.S. Senate election contest between Al Franken and Norm Coleman.[145] After losing his election contest appeal in the state supreme court, Coleman could have petitioned the U.S. Senate to determine the proper winner, but chose to concede the race.[146]

Given this reading, some states have developed procedures for handling congressional election contests.[147] Among these, some have developed highly specialized procedures,[148] while others expressly prohibit the hearing of Congressional election contests.[149] In the latter, candidates seeking to contest congressional elections are able to bring those challenges in federal court or the respective congressional house.[150] A number of states fall somewhere in the

139. 25 PA. CONS. STAT. ANN. §§ 3351, 3377 (West 2007); *see In re* Morganroth Election Contest, 50 Pa. D. & C. 143 (Pa. Ct. C.P. 1942) (three-judge court). Although three judges hear an election contest for Class III cases (judges), two judges hear Class II cases (including judges elected statewide). §§ 3291, 3351, 3377.

140. Douglas, *supra* note 1, at 24.

141. U.S. CONST. art. I, § 5.

142. U.S. CONST. art. I, § 4; Douglas, *supra* note 1, at 26.

143. Roudebush v. Hartke, 405 U.S. 15, 21 (1972).

144. Douglas, *supra* note 1, at 25.

145. Sheehan v. Franken, 767 N.W.2d 453 (Minn. 2009) (per curiam).

146. Douglas, *supra* note 1, at 25.

147. *Id*. at 26.

148. *Id*. at 26-27 (describing how Connecticut, Indiana, Iowa, New Hampshire, and South Carolina deal with congressional election contests).

149. *Id*. at 27-28 (describing how Kansas, Nevada, Ohion, and Texas ban these types of election contests from being heard in the state). Texas courts can, however, still hear election contest for congressional primary election. TEX. ELEC. CODE ANN. § 221.001(1); Rodriguez v. Cuellar, 143 S.W.3d 251 (Tex. App. 2004).

150. Douglas, *supra* note 1, at 28.

middle, broadly referencing congressional elections in their contest laws[151] or not mentioning them at all.[152]

F. Presidential Election

Voters do not vote for the President directly but vote for electors in the Electoral College "in such Manner as the Legislature thereof may direct."[153] Because virtually all states appoint electors based on statewide popular vote,[154] most election contests resemble other statewide election contests.[155]

Only some of the states provide specific guidance for presidential election contests and these procedures vary.[156] Some allow trial courts to hear these cases,[157] some form special courts,[158] and others give their supreme courts original jurisdiction.[159] Other states do not use the courts, and instead resolve contests

151. GA. CODE ANN. § 21-2-521 (West 2008); GA. CODE ANN. §§ 21-2-523, -528 (West 2008); OR. REV. STAT. § 258.036(1)(a) (West 2011) (the Circuit Court for Marion County is the proper venue); VT. STAT. ANN. tit. 17, § 2603(c) (West 2002 & Supp. 2011) (parties wishing to contest an election for a congressional seat must file in the Superior Court for Washington County); 25 PA. CONS. STAT. ANN. §§ 3291, 3351, 3401 (West 2007); ARK. CODE ANN. §§ 7-5-801(b), -810 (West 2011).

152. S*ee, e.g.,* UTAH CODE ANN. § 20A-4-402(1); MASS. ANN. LAWS ch. 54, §134 (West 2021); N. M. STAT. ANN. § 1-14-1 (West 2011); 10 ILL. COMP. STAT. ANN. 5/23 (West 2021).

153. U.S. CONST. art. II, § 1, cl. 2.

154. Only Maine and Nebraska appoint their electors proportionally based on the vote in each congressional district. ME. REV. STAT. ANN. tit. 21-A, § 802 (West 2008); NEB. REV. STAT. ANN. § 32-714 (West 2008).

155. Douglas, *supra* note 1, at 30. There is no federal mechanism for resolving presidential election contests. *Id.*

156. CAL. ELEC. CODE § 16401 (West 2003 & Supp. 2012); COLO. REV. STAT. ANN. § 1-11-204 (West 2009 & Supp. 2011); CONN. GEN. STAT. ANN. § 9-323 (West 2009); DEL. CODE ANN. tit. 15, §§ 5921 -28 (2007); D.C. CODE § 1-1001.11(a)(2), (b)(1) (2011); IND. CODE § 3-12-11-19.5 (2005); IOWA CODE ANN. §§ 57.1, 60.1-.7 (West 2012); KAN. STAT. ANN. § 25-1435, -1437 (2000); MINN. STAT. ANN. § 209.01 (West 2009); MO. ANN. STAT. § 128.100 (West 2003); N.H. REV. STAT. ANN. § 665:16 (2008); OHIO REV. CODE ANN. § 3515.08(A) (LexisNexis 2012); OR. REV. STAT. § 258.036(1)(a) (2011); 25 PA. CONS. STAT. ANN. § 3291 (West 2007); S.C. CODE ANN. § 7-17-260 (1977 & Supp. 2011); S.D. CODIFIED LAWS §§ 12-22-4, -5, -6, -13 (2004); TENN. CODE ANN. § 2-17-103 (2003); TEX. ELEC. CODE ANN. § 221.002 (West 2010); VT. STAT. ANN. tit. 17, § 2603(c) (2010); VA. CODE ANN. § 24.2-805 (2011); WYO. STAT. ANN. § 22-17-114 (2011).

157. CAL. ELEC. CODE §§ 16400, 16900 (West 2003); DEL. CODE ANN. tit. 15, § 5927 (2007); OR. REV. STAT. §§ 258.036, .085 (2011); VT. STAT. ANN. tit. 17, § 2603 (2010); S.D. CODIFIED LAWS §§ 12-22-7, -25 (2004). South Dakota law provides that appeal lies directly to the supreme court as in a normal civil proceeding. See § 12-22-25.

158. 25 PA. CONS. STAT. §§ 3291, 3351; IOWA CODE ANN. § 60.1 (West 2021); MINN. STAT. ANN. §§ 209.01(2) (West 2015) (defining a "statewide office" to include presidential electors), 209.045; KAN. STAT. ANN. §§ 25-1437, -1443, -1450 (West 2000).

159. COLO. REV. STAT. ANN. § 1-11-204 (West 2009); CONN. GEN. STAT. ANN. § 9-323 (West 2011).

through boards,[160] tribunals,[161] the legislature,[162] or the governor.[163] Most states, however, do not have specific laws concerning the presidential election contests[164] and only one—Ohio—delegates resolution of U.S. presidential election contests to federal law.[165]

Congress passed the Electoral Count Act of 1887 (ECA) after the Hayes-Tilden controversy the year prior. The ECA establishes guideposts for states to follow when resolving Presidential election controversies, such as the "safe harbor" provision that requires states to resolves election contests six days before the meeting of presidential electors if the states want their electoral votes to count.[166] The ECA is complex and arcane, leading to many disputes as to its requirements, most notably in 2000 and 2020 leading to strident calls for ECA reform.[167]

G. Ballot Measures

The results of ballot measure elections may also be contested. The circumstances and requirements for ballot measures contests can vary from those applicable to contests for elective office.[168] For example, state statutes frequently require explanations or other information about ballot measures to be printed on the

160. IND. CODE §§ 3-12-11-1, -19.5 (West 2013); N.H. REV. STAT. ANN. § 665:8(II) (West 2008); S.C. CODE ANN. § 7-17-260 (West 1977 & Supp. 2011).

161. TENN. CODE ANN. § 2-17-103(a) (West 2003).

162. WYO. STAT. ANN. § 22-17-114 (West 2011).

163. TEX. ELEC. CODE ANN. § 221.002(e) (West 2010).

164. Douglas, *supra* note 1, at 33.

165. OHIO REV. CODE ANN. § 3515.08(A) (West 2012) ("The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter. Contests of the nomination or election of any person to any federal office shall be conducted in accordance with the applicable provisions of federal law.").

166. Douglas, *supra* note 1, at 30 (citing 3 U.S.C. § 5 (2006) ("If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.").

167. *See* Bush v. Gore, 531 U.S. 98 (2000); Miles Parks, *Congress may change this arcane law to avoid another Jan. 6*, NPR (Jan. 8, 2022, 7:00 AM), https://www.npr.org/2022/01/08/1071239044/congress-may-change-this-arcane-law-to-avoid-another-jan-6.

168. Friends of Sierra Madre v. Sierra Madre 19 P.3d 567 (Cal. 2001) (holding the power of the court to invalidate a ballot measure on constitutional grounds is an exception to the statutory limitation on the permissible bases for election contest proceedings). *But see*, CAL. ELECTION CODE § 16000 (West 2021) (applying general election contest provisions to ballot measure recounts).

ballot itself.[169] Disagreements over the sufficiency of the information provided to voters can form the basis of an election contest.[170] For example, a court upheld a challenge based on the measure's description because although the ballot included the measure's correct wording, its presentation without comparison to then existing statutes, read as if it granted powers instead of curtailed powers.[171] The court determined the defective language extended beyond mere non-compliance with the required form of the information because the chief purpose of the initiative was omitted.[172]

Ballot measure contest statutes may limit judicial review to determining if the election complied with governing laws, with an election invalidated if there was not substantial compliance. In some cases, technical noncompliance may not be enough to void an election.[173] In these cases, courts may be prevented from reviewing circumstances and considerations beyond statutory compliance, such as the motives behind a ballot measure.[174]

Ballot measure elections too may be invalidated if illegal votes affected the outcome in an election contest. In one case, a court ordered a new annexation election after determining that the illegal votes had changed the election results.[175]

169. *See, e.g.*, OR. REV. STAT. ANN. § 250.035 (West 2009) (requiring "a concise and impartial statement of not more than 175 words summarizing the measure and its major effect").

170. *See* Pippens v. Ashcroft, 606 S.W.3d 689 (Mo. Ct. App. 2020).

171. Wadhams v. Board of County Commissioners of Sarasota County, 567 So.2d 414 (Fla. 1990).

172. *Id.* at 416. *See also* Dotson v. Kander, 464 S.W.3d 190 (Mo. 2015) (holding that a post-election challenge to ballot language (specifically the title) may also be brought). *But see* Andrews v. City of Jacksonville, 250 So.3d 172 (Fla. Dist. Ct. App. 2018) ("The ballot summary didn't have to contain every detail or ramification . . . to provide its chief purpose"); People v. Scott, 98 Cal. App. 4th 514, 519 (Cal. Ct. App. 2002) ("When a challenge to alleged deficiencies in a ballot measure is made postelection, as here, we review the matter to determine whether there was substantial compliance with the Elections Code and whether the purported deficiencies 'affected the ability of the voters to make an informed choice.'").

173. Quarles v. Kozubowski, 107 Ill. Dec. 439 (Ill. App. Ct. 1987) (a liquor control election was found to have substantial complied with petition requirements despite technical noncompliance that included inaccurately naming the targeted liquor licensees, omitting the time of the election, and inexactly describing the affected area's boundaries).

174. Olson v. City of Hawthorne, 45 Cal. Rptr. 48, 52 (Ct. App. 1965) (holding whether the city's motives behind holding an annexation election were appropriate was not justiciable); *see also* Denny v. Arntz, 55 Cal. App. 914 (Cal. 1st Dist. Ct. App. 2020) (refusing to invalidate a ballot measure due to misdeeds of the measures proponents unless the misdeeds affected the outcome of the election).

175. Creamer v. City of Anderson, 124 S.E.2d 788 (S.C. 1962).

V. EVALUATING EVIDENCE IN ELECTION CONTESTS

In some contest proceedings, secret ballots stymie the effort to determine whether the election achieved the correct outcome. Some states allow and/or require voters to testify as to how they voted. For example, Texas allows allegedly illegal voters to be compelled to testify in election contest hearings as to whom they voted for or how they voted on a measure.[176] Some states do not compel voters to make public how they voted given the strong state interest in the secrecy of the ballot.[177] Other states—like Maine—have an evidentiary privilege that allows individuals to refuse to disclose how they voted unless a court finds that vote was cast illegally or the voter must testify pursuant to the state's election laws.[178] Most

176. TEX. ELEC. CODE ANN. § 221.009(a) ("A voter who cast an illegal vote may be compelled, after the illegality has been established to the satisfaction of the tribunal hearing the contest, to disclose the name of the candidate for whom the voter voted or how the voter voted on a measure if the issue is relevant to the election contest."); *see also* IOWA CODE ANN. § 62.17 (West 2012) ("The court may require any person called as a witness, who voted at such election, to answer touching the person's qualifications as a voter, and, if the person was not a registered voter in the county where the person voted, then to answer for whom the person voted.").

177. *See* Douglas, *supra* note 1, at 39 ("[A] few states have addressed whether a court can compel voters to testify as to how they voted, with some states allowing this practice and others finding it an unwarranted invasion of a voter's privacy."); *see, e.g.*, Indiana C.L. Union Found., Inc. v. Sec. of State, 229 F. Supp. 3d 817 (S.D. Ind. 2017) (finding states interest of preserving ballot secrecy a compelling interest on its face, although the law was not necessary to serve that interest); Silderberg v. Bd. of Elections, 272 F. Supp. 3d 454, 471 (S.D.N.Y. 2017) ("There can be no doubt that the state's interest in preventing vote buying and voter intimidation through ensuring the secrecy of the ballot is a compelling one."); Huggins v. Super. Ct. in & for Cnty. of Navajo, 788 P.2d 81, 83-84 (Ariz. 1990) ("[O]ur constitution explicitly assures secrecy in voting."); *see also* Williams v. Fink, 2019 WL 3297254 (Ct. App. Ariz. 2019).

178. ME. R. EVID. 506. *See also* McCavitt v. Registrars of Voters, 434 N.E.2d 620, 630–31 (Mass. 1982); WASH. REV. CODE ANN. § 29A.68.100 (West 2005) ("No testimony may be received as to any illegal votes unless the party contesting the election delivers to the opposite party, at least three days before trial, a written list of the number of illegal votes and by whom given, that the contesting party intends to prove at the trial. No testimony may be received as to any illegal votes, except as to such as are specified in the list."); MO. CONST. art. VIII, § 3 ("All election officers shall be sworn or affirmed not to disclose how any voter voted; provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, and received as evidence.").

jurisdictions require direct evidence,[179] but a few accept circumstantial evidence.[180]

A few states stop short of requiring voter testimony but give judges special powers that allow them to order amendments to a contest petition compelling "the production of all ballot boxes, books, papers, tally lists, ballots and other documents which may be required at such hearing."[181]

Courts often require a showing that the complained of acts actually altered election outcomes as courts are hesitant to provide postelection remedies.

Courts often require a showing that the complained of acts actually altered election outcomes as courts are hesitant to provide postelection remedies.[182] Decision makers are also generally reluctant to remove a winning candidate from office and install a new office holder unless the petitioner can show that new officer holder would have won the election but for the complained of acts.[183] Other available alternatives to declaring a new winner include voiding the contested election and holding a new election[184] and filling the office by non-elective means.[185] The primary justification for permitting election

179. *See, e.g.*, Willis v. Crumbly, 268 S.W. 288 (Ark. 2007); Bradley v. Jones, 300 S.W.2d 1, 3, 5 (Ark. 1957); Ganske v. Independent School Dist. No. 84, 136 N.W.2d 405, 408 (Minn. 1965); Oliphint v. Christy, 299 S.W.2d 933 (Tex. 1957); Kaufmann v. La Crosse City Bd. of Canvassers, 98 N.W.2d 422, 424 (Wis. 1959); Fugate v. Mayor and City Council of Buffalo, 348 P.2d 76, 86 (Wyo. 1960).

180. *See, e.g.*, In re November 2, 2010 General Election for Office of Mayor in South Amboy, Middlesex County, 423 N.J. Super. 190 (2011); Canales v. City of Alviso, 474 P.2d 417, 421 (Cal. 1970); Leach v. Johnson, 313 N.E.2d 636, 641 (App. Ct. Ill. 5th 1974); Application of Murphy, 243 A.2d 832, 833-36 (N.J. Super. 1968) (dictum).

181. N.J. STAT. ANN. §§ 19:29-5, -6; *see also* OHIO REV. CODE ANN. § 3515.12 (West 2012).

182. *Postelection Remedies*, 88 HARV. L. REV. 1298, 1315 (1975). Some state statutes require as much. *See, e.g.*, CONN. GEN. STAT. ANN. § 9-329a (2011); HAWAII REV. STAT. §§ 11-173.5, -174.5 (2019); 10 ILL. COMP. STAT. ANN. 5/7 (West 2006); ALA. CODE tit. 17, §§ 232, 375 (West 1958); ALASKA STAT. § 15.20.540 (West 1971); DEL. CODE ANN. tit. 15, § 5942 (West 1995); IDAHO CODE § 34-2001 (West 2021); IOWA CODE ANN. § 43.5 (West 2018), *Id.* § 57.1 (1973); KAN. STAT. ANN. §§ 25-308,1411,1412 (West 2021); NEV. REV. STAT. § 293.410 (West 2017); N.J. STAT. ANN. § 19:29-1 (West 2021); ORE. REV. STAT. § 258.026 (West 2021).

183. *Id.* (citing Thompson v. Stone, 205 Ga. 243, 53 S.E.2d 458 (1949); Dupin v. Sullivan, 355 S.W.2d 676 (Ky. 1962); Richards v. Barone, 114 N.J. Super. 243, 275 A.2d 771 (1971); Pawlowski v. Thompson, 64 S.D. 98, 264 N.W. 723 (1936)).

184. *See In re* Protest of Atchison, 666 S.E.2d 209 (Ct. App. N.C. 2008) (ordering new election due to voting irregularities); Denny v. Doss, 2020 WL 2071949 at *6 (Ct. App. Tex. 2020) (ordering new election after number of disenfranchised voters exceeded the margin of difference).

185. *See* United States v. Brown, 561 F.3d 420 (Ct. App. 5th 2009) ("[V]oiding entire elections is a drastic remedy requiring sufficient need."); Nowakowski v. City of Rutland, 2020 WL 619127 at *1 (Vt, 2020) ("[V]oiding an election is 'one of the more extreme remedial measures available to a court'").

contests is to ensure the will of the electorate is accurately reflected in the election's results.[186]

Challengers generally need "but for" causation to be successful and usually cannot maintain a contest on the mere belief that an irregularity occurred or on indefinite information.[187] Some courts require that contestants prove that more legal votes were actually cast for the contestant than the contestee.[188] Others require only that contestants prove that more legal votes were probably cast for them than the announced winners.[189] Some courts permit contestants to claim the outcome was uncertain because of electoral fraud or irregularities, such as when the number of allegedly illegal votes exceeds the margin of victory.[190] Uncertain outcome claims may also occur when a sufficient numbers of legal voters were disenfranchised or enough legal votes were wrongly rejected to affect the outcome.[191] In these cases, contestants must prove that "no reasonable certainty"

186. *Postelection Remedies, supra* note 182 at 1316-17.

187. *See* Lazar v. Ganam, 220 A.3d 18 (Conn. 2019) (holding "that the provision of § 9-329a (b) authorizing the court to order a new primary election if it finds that the result of the primary might have been different but for the improprieties complained of, without any limits on the timing of such an order, implicitly authorizes the judge to order a new general election if the first general election is invalidated by operation of the judge's order invalidating the primary election"); Lopresti v. State, 2019 WL 166995 (Haw. 2019); Akaka v. Yoshina, 935 P.2d 98, 103 (Haw. 1997); Nelson v. Sneed, 83 S.W. 786, 789 (Tenn. 1904).

188. *Developments in the Law-Voting and Democracy, VI. Deducting Illegal Votes in Contested Elections*, 119 HARV. L. REV. 1155, 1155-56 (2006) [hereinafter *Voting and Democracy*]. *See also* Jordan v. Officer, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (stating that if the complaint does not involve improprieties by election officials, then the contestant must prove which candidate received each illegal vote as well as demonstrate that the contestee receive a sufficient number to alter the result or the contestant's petition fails); Forbes v. Bell, 816 S.W.2d 716, 719 (Tenn. 1991) (finding the contestant's claim she was the true winner unavailing because the contestant did not demonstrate that adjusting for the effects of illegal counted votes or wrongfully withheld votes would have changed the outcome).

189. *See Voting and Democracy, supra* note 188, at 1556.

190. *See* Stuart v. Anderson C'nty Election Com'n, 237 S.W.3d 297 (Ct. App. Tenn. 2007); *Voting and Democracy, supra* note 188, at 1155-56; Carlson v. Oconto County Bd. of Canvassers, 623 N.W.2d 195, 198 (Wis. Ct. App. 2000).

191. *See In re* Election for Atlantic C'nty Freeholder District 3 2020 General Election, 258 A.3d 388 (N.J. Super. 2021) ("A petitioner contesting the outcome of an election based on the rejection of legal votes 'need not identify for whom the rejected voter voted or would have voted, only that the rejected votes were sufficient in number that, if all were credited to him, the results of the election would change.'") (quoting *In re* Contest of Nov. 8, 2005 Gen. Election for Off. of Mayor for Twp. Parsippany-Troy Hills, 388 N.J. Super. 663, 677, 909 A.2d 1199 (App. Div. 2006) (Parsippany I), *aff'd as modified on other grounds by* Parsippany II, 192 N.J. at 572, 934 A.2d 607.); Crow v. Bryan, 113 S.E.2d 104, 107 (Ga. 1960); *see also* United States v. City of Hamtramck, 2000 WL 34592762 (E.D. Mich. 2000) (uncertain outcome caused by voter disenfranchisement).

exists as to the preferred candidate's identity.[192] They must only allege that the taint clouded the outcome and left the true winner's identity uncertain.[193] A successful challenge under the uncertain outcome standard results in a voided election.[194] The resulting office vacancy is filled as the state's statutes direct, generally by a special election or by appointment.[195]

A. Tests Applied

There are a number of available methods used by courts to eliminate illegal votes to reflect legal vote totals.[196]

1. Intuitive Approach

This approach involves judges comparing the margin of victory with the number of illegal votes and ordering a new election when the number of illegal votes is significantly larger than the margin of victory.[197] This approach has led to varied outcomes, even in the same jurisdiction. For example, two New York states courts, heard two years apart, came to different results with similar facts: a new election was ordered in a case concerning 101 illegal votes and a 17-vote margin of victory,[198] while a petition for a new election was denied in a case concerning 136 illegal votes and a 62-vote margin of victory.[199]

2. Elimination of Uncertainty

Some state supreme courts—for example in Georgia, Massachusetts, South Carolina, and Hawaii—have adopted the Elimination of Uncertainty approach. In this approach the court orders a new election when the petitioner shows that the

192. Hardin v. Montgomery, 495 S.W.3d 686 (Ky. 2016) ("[I]f the fraud, intimidation, bribery, irregularities, and illegalities are such, that the court cannot with reasonable certainty determine who has received a majority of the legal votes, the election should be set aside, and a candidate cannot be declared a victor, unless he can be shown to have received a majority or plurality of the legal votes cast at the election.") (citing Hendrickson v. Coign, 304 Ky. 383, 200 S.W.2d 905, 907 (1947)); Scholl v. Bell, 102 S.W. 248, 256 (Ky. Ct. App. 1907). Note that the test is also sometimes described as "reasonably certainty," which suggests that absolute uncertainty is not always a requirement.

193. *Scholl*, 102 S.W. at 256.

194. *See* Whitley v. Cranford, 119 S.W.3d 28 (Ark. 2003).

195. *See, e.g.*, ARIZ. STAT. § 7-7-106 (2019); TEX. CODE ANN. § 17-1-301.

196. *Voting and Democracy*, *supra* note 188, at 1155-56.

197. Kevin J. Hickey, Accuracy Counts: Illegal Votes in Contested Elections and the Case for Complete Proportionate Deduction, 83 N.Y.U L. REV. 167, 173 (Apr. 2008).

198. Ippolito v. Power, 241 N.E.2d 232, 233-34 (N.Y. 1968).

199. DeMartini v. Power, 262 N.E.2d 857, 857-58 (N.Y. 1970).

total number of illegal votes exceeds the announced winner's margin of victory, even when there is no proof as to which candidate received the illegal votes.[200]

3. Direct Evidence

This approach requires candidates contesting the election to present direct evidence that they are the correct winner.[201] Contestants typically seek to provide evidence through in-court testimony of illegal voters regarding who they cast their ballot for.[202] However, a number of courts have rejected this method, stating the burden is too high.[203]

4. Proportional Deduction

Some courts use proportional deduction to approximate which candidates illegal votes were cast for.[204] This method involves determining in which precinct the illegal votes were cast and subtracting those illegal votes from candidate vote

200. *See* O'Caña v. Salinas, 2019 WL 1414021 (Ct. App. Tex. 2019) ("If the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the court may declare the election void without attempting to determine how individual voters voted.") (using a clear and convincing evidence standard); *but see* Young v. Red Clay Consolidated School District, 159 A.3d 713 (Del. 2017) ("Delaware Supreme Court has observed that "[w]hen illegal ballots have been voted in an election district in such numbers as to affect the result, or at least to make it uncertain, . . . there are cases where justice requires that the entire vote of that election district be rejected in making the count.") (quoting State *ex rel.* Wahl v. Richards, 64 A.2d 400, 406 (Del. 1949)).

201. *See* Noble v. Ada Cnty. Elections Bd. 135 Idaho 495, 503 (2000) (declines to say whether plaintiff needed to prove who the votes were cast for because he did not prove a sufficient number of illegal votes to change the result); ex rel. Wahl v. Richards, 64 A.2d 400, 407 (Del. 1949); Jaycox v. Varnum, 226 P. 285, 289 (Idaho 1924); Brown v. Grzeskowiak, 101 N.E.2d 639, 656 (Ind. 1951); Wilkinson v. McGill, 64 A.2d 266, 274 (Md. 1949); State ex rel. Brogan v. Boehner, 119 N.W.2d 147, 151-53 (Neb. 1963).

202. *Voting and Democracy*, *supra* note 188, at 1159. It is also possible to show for whom the illegal votes were cast by means of direct evidence other than voter testimony (e.g., if a copy existed of the absentee ballot at issue), but the usual means is voter testimony. *Id.* at 1158-59.

203. *Id.* at 1159 (citing *Huggins*, 788 P.2d at 86 ("The practical impact of the [direct evidence] rule, with its virtually impossible burden on the challenger, is to let illegal votes count."); *Young v. Deming,* 9 Utah 204, 212, 33 P. 818, 820–21 (1893); *see also Briscoe v. Between Consol. School Dist.,* 171 Ga. 820, 824, 156 S.E. 654, 656 (1931) ("[I]t would … be dangerous to receive and rely upon the subsequent statement of the voters as to their intentions, after it is ascertained precisely what effect their votes would have upon the result."); *Babnew v. Linneman,* 154 Ariz. 90, 93–94, 740 P.2d 511, 514–15 (App.1987) (same); *See McCavitt v. Registrars of Voters,* 385 Mass. 833, 849, 434 N.E.2d 620, 630–31 (1982).). *See, e.g.*, Taylor v. Pile, 391 P.2d 670, 673 (Colo. 1964) (noting that ballot secrecy is guaranteed by the Colorado Constitution and Colorado statutes).

204. Some state supreme courts have used this method. *See* Andrews v. Powell, 848 N.E.2d 243 (Ct. App. Ill. 2006) (taking into consideration the proportional deduction method, but deciding it is not applicable in this particular scenario); Hammond v. Hickel, 588 P.2d 256, 260 (Alaska 1978); Grounds v. Lawe, 193 P.2d 447, 453 (Ariz. 1948); Choisser v. York, 71 N.E. 940, 941 (Ill. 1904); Parker v. Hughes, 67 P. 637, 640 (Kan. 1902); Ellis ex rel. Reynolds v. May, 58 N.W. 483, 488-89 (Mich. 1894); Heyfron v. Mahony, 24 P. 93, 95-96 (Mont. 1890); Drinkwater v. Nelson,187 N.W. 152, 154 (N.D. 1922); Briggs v. Ghrist, 134 N.W. 321, 322-24 (S.D. 1912); cf. Russell v. McDowell, 23 P. 183, 184 (Cal. 1890) (not broken down by precinct); Moore v. Sharp, 41 S.W. 587, 590 (Tenn. 1897) (allowing proportional deduction when both parties agreed to it).

totals in the same proportion as the candidates' overall vote totals in the precinct in which the illegal vote was cast.[205]Generally, votes should not be added to candidates' totals.[206] A reviewing court overturned a lower court's decision to subtract votes from one candidate's totals and add them to another's.[207]

Courts in some states only permit the use of proportional deduction to confirm that the announced winner actually won,[208] or if the party requesting its use can prove it would be impossible to show for whom the illegal votes were cast with direct evidence. [209]A number of courts have rejected this method, stating elections should not be overturned based on estimates.[210]

205. *Voting and Democracy*, *supra* note 188, 1160 (citing *Hammond*, 588 P.2d at 260). Because the number of illegal votes can be quite large, meaning the total number of combinations of how the illegal votes could be divided between the candidates is also large, the following mathematical formula can be used: Z=d□*s*□*k/sk*. Michael O. Finkelstein & Herbert E. Robbins, *Mathematical Probability in Election Challenges*, 73 COLUM. L. REV. 241, 243 (Feb. 1973). Z represents the probability of reversal, which declines as the number increases. *Id.* d is the winner plurality, s is the number of votes cast for either the candidates, and k is the number of illegal votes cast. *Id*.

206. *Id.*

207. Bradley v. Perrodin, 131 Cal. Rptr. 2d 402 (Ct. App. 2003).

208. *See* Nageak v. Mallott, 426 P.3d 930 (Alaska 2018) (reversing superior court's order proportionately reducing the vote total since the error was not enough to change the result of the election); Fischer v. Stout, 741 P.2d 217, 226 n.15 (Alaska 1987); *Huggins*, 788 P.2d at 86. If the original election results are not confirmed once courts apply proportional deduction, some courts may opt to void the election rather than announce a new winner. *Developments in the Law-Voting and Democracy, supra* note 188, at 1160-61(disagreeing with this approach and refusing to adopt an arbitrary rule).

209. *See* Napier v. Cornett, 68 S.W. 1076, 1077-78 (Ky. 1902); Berg v. Veit, 162 N.W. 522, 523 (Minn. 1917); Potter v. Robbins, 290 S.W. 396, 398-99 (Tenn. 1926) ("It seems obvious that the rule of apportionment of the illegal votes between the candidates in proportion to their total votes in the precinct is a rule of expediency, for the application of which there can be no reason when evidence is available to prove for whom the illegal votes were actually cast. Proof of the ballot cast by the disqualified voter produces a certain result, while the rule of apportionment can, at best, produce only an approximate result.").

210. *See, e.g.*, *Brogan*, 119 N.W.2d at 153 ("We do not believe that courts should adopt and apply arbitrary rules which will determine elections upon the basis of chance. This court will not substitute its judgment for that of the electorate as declared by the proper authorities unless the record shows clearly what the result of the election should be."); *see Voting and Democracy*, *supra* note 188, at 1161-64 (describing concerns with proportional deduction).

VI. CONTEST OUTCOMES

Election contests typically result in one of the four following outcomes:

1) the court upholds the original results;[211]
2) the court overturns the original results and names the contestant the winner;[212]
3) the court voids the election with state statutes determining if a new election is held or if the vacant office is filled by appointment;[213] or
4) the election ends in a tie, which is broken as statutes dictate.[214]

When a contest is successful, courts have options that may or may not be dictated by statute. Two options include declare a new winner or voiding and rerunning the election.

A. New Winner

Before the court may declare the contestant the winner of the election, the contestant must demonstrate that she actually received the most legal votes.[215] If the contestant successfully demonstrates that but for errors and illegal and invalid votes the contestant would have won, then the court generally must declare the contestant the winner.[216]

211. Pruitt v. Office of Lieutenant Governor, 498 P.3d 591 (Alaska 2021); Self v. Mitchell, 327 So.3d 93 (Miss. 2021).

212. Nageak v. Mallott, 426 P.3d 930 (Alaska 2018).

213. Gecy v. Bagwell, 642 S.E.2d 569 (S.C. 2007) (illegal votes from people who no longer lived in the precinct warranted a new election).

214. *In re* 2020 Municipal General Election for Office of Borough Council, 2021 WL 5778558 (N.J. Super. Ct. App. Div. 2021) (remanding for the establishment of a runoff date).

215. *See Nageak*, 426 P.3d at 949.

216. *See* Stebbins v. Gonzales, 5 Cal. Rptr. 2d 88 (Cal. Ct. App. 1992) (requiring the contestant to be declared the winner when the disposition of the illegal votes was known and the true winner—the contestant—was ascertainable); *see also* Forbes v. Bell, 816 S.W.2d 716 (Tenn. 1991) (stating the court will declare the contestant the winner when the contestant overcomes the contestee's margin of victory after identifying each and every illegal or fraudulent ballot).

B. Voiding the Election

Whenever possible, courts generally try to salvage a contested election rather than void it.[217] If a court voids an election, state statutes will control whether the resulting vacancies are filled by a new election or through appointment.[218] Each option has drawbacks, and these drawbacks reinforce most courts' attempts to uphold the original election, if not the original outcome.[219]

The drawbacks of holding a new election include:

- destabilization of the political process that disrupts governance,[220]
- temporary disenfranchisement of voters who cast legitimate and valid votes in the original election,[221]
- advantage for better financed and organized candidates,[222]
- cost of holding a new election,[223]
- second election will likely be decided by a different voter pool,[224] and
- the new election may also suffer irregularities and illegalities.[225]

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217. If the irregularities that obscured the true winner's identity are confined to a limited geographical area or do not involve all seats in a multi-seat election, a court may be able to void the results in the affected area or for the affected positions only. *See* Buoananno v. DiStefamo, 430 A.2d 765 (R.I. 1981); *In re* the 1984 Maple Shade Gen. Election, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985) (election reheld only where numerous irregularities occurred); *In re* the Gen. Election of Nov. 5, 1991 for Off. of Twp. of Maplewood, Essex Cnty., 605 A.2d 1164 (N.J. Super. Ct. Law Div. 1992). *See also* Kirk v. French, 736 A.2d 546 (N.J. Super. Ct. Law Div. 1998) (only the winner of the second school board seat was contested). *But see In re* General Election of Nov. 4, 1975 (No. 2), 71 Pa. D. & C.2d 83 (Pa. Com. Pl. 1975) (calling for county-wide rather than single precinct special election to fill single office whose results were affected by a defective voting machine).

218. *E.g.*, *In re* Moffat, 361 A.2d 74 (N.J. Super. Ct. App. Div. 1976) (state statute required the vacancy resulting from a voided election to be filled by appointment).

219. *See Huggins*, 788 P.2d at 84 (discussing the problems inherent in voiding an election and calling a new one); Alexander v. Davis, 58 S.W.3d 330 (Ark. 2001) ("it is a serious matter to throw out an entire election").

220. Putter v. Montpelier Public School System, 697 A.2d 354 (Vt. 1997) ("[C]ourts have frequently declined to order a new election where the governmental misconduct . . . did not warrant so extraordinary and destabilizing a remedy.") (citing Saxon v. Fielding, 614 F.2d 78, 79–80 (5th Cir. 1980); *Hennings*, 523 F.2d at 864; Hamer v. Ely, 410 F.2d 152, 156 (5th Cir.), *cert. denied*, 396 U.S. 942, 90 S.Ct. 372, 24 L.Ed.2d 243 (1969)).

221. State *ex rel.* Olson v. Bakken, 329 N.W.2d 575 (N.D. 1983) ("The law and equity does not favor disenfranchising voters who have complied with the law when the disenfranchisement occurs merely because of mistake, error, negligence, or misconduct on the part of election officials.") (citing Haggard v. Misko, 164 Neb. 778, 83 N.W.2d 483 (1957)).

222. *Huggins*, 788 P.2d at 84 (discussing the problems inherent in voiding an election and calling a new one).

223. *Id.*

224. *Id.*

225. *Id.*

If a voided election creates a vacancy that is filled through an appointment process, voters who cast legitimate and legal votes in the first election are disenfranchised.[226] In addition, the political views and preferences held by the appointed individual might reflect the political preferences of the person making the appointment rather than those of the electorate.[227]

Despite the potential shortcomings of filling vacancies after a voided election, voiding the election may be an appropriate remedy, especially when the contestant demonstrates that electoral irregularity or illegal or fraudulent votes left the election's true outcome uncertain. In general, courts void elections under the following circumstances:

1) the true winner of the election cannot be ascertained,[228]
2) the election's fairness or integrity is undermined by irregularities or illegalities, regardless of whether they affected the outcome,[229]
3) the original election failed to comply with mandatory prerequisites,[230] or
4) a statutory trigger is satisfied.[231]

If a court voids a contested election when it was possible to identify the true winner, then the subsequent election may be void and its winner does not take office.[232] Instead, the candidate who received the most legal votes in the original election takes office.[233]

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226. *See* Thompson v. Merrill, 505 F.Supp.3d 1239 (M.D. Ala. 2020) ("[It] is fundamentally unfair and constitutionally impermissible for public officials to disenfranchise voters in violation of state law so that they may fill the seats of government through the power of appointment.") (in the felony disenfranchisement context).

227. *But see* 20A M.L.E. State Government § 26 (2021) (the governor must fill the appointment through names submitted to them).

228. *See* Jordan v. Officer, 525 N.E.2d 1067, 1074 (Ill. App. Ct. 1988) (noting that voiding an election is appropriate when serious electoral improprieties occurred and valid votes cannot be distinguished from invalid ones).

229. *See, e.g.*, Bell v. Southwell, 376 F.2d 659, 664 (5th Cir. 1967) (finding a new election was the appropriate remedy in the face of "gross, spectacular, completely indefensible nature of . . . state-imposed, state-enforced" unconstitutional discrimination at the polls).

230. In this instance, the court is not so much voiding the election as announcing that the original election was void from the outset for failure to follow mandatory prerequisites. *See* Robinson v. Ehrler, 691 S.W.2d 200 (Ky. 1985) (finding that a void election is the same as no election and that the original election was void for failure to publish an order calling for it).

231. *See* Harreld v. Banks, 319 So.3d 1094, 1106 (Miss. 2021) ("An election may also be invalidated 'when there has been a 'substantial failure' to comply materially with the applicable statutes and the intent of the voters is impossible to ascertain.'") (citing Boyd v. Tishomingo Cnty. Democratic Exec. Comm., 912 So. 2d 124, 128 (Miss. 2005) (quoting Walker v. Smith, 213 Miss. 255, 57 So. 2d 166, 166-67 (1952))).

232. *Id.*

233. *Id.*

Courts sometimes void a contested election when the election's fairness or integrity is questionable. Courts may not need to establish precise standards before determining an election should be voided for fairness concerns.[234]

The following are some circumstances under which courts voided contested elections because of fairness or integrity concerns:

- extensive voter disenfranchisement occurred, sometimes even though the results would not have changed,[235]
- constitutional violations,[236]
- substantial failures to safeguard the election's integrity,[237]
- prohibited methods used in administering the election,[238] or
- concerns that the election was not free and equal, for example because uniformed police officers and members of the armed forces were present in the polling places.[239]

234. *See* Scholl v. Bell, 102 S.W. 248, 255 (Ky. Ct. App. 1907) ("The language of the Constitution is designedly broad, made so for the purpose of covering and meeting every condition that may arise and every condition that may be invented to prevent the substantially fair and free expression of the will of the people. A combination of two or more of these elements may render an election void, although any one of them, taken alone, might not be, in a particular case, of itself sufficient to have that effect.") (voiding election because numerous irregularities and illegalities left the election's fairness suspect).

235. McNally v. Tollander, 302 N.W.2d 440 (Wisc. 1981) (calling for new election when forty percent of the voters were disenfranchised in an election to decide if the county seat should be relocated; here, overwhelming support for the measure meant it would have passed even if the disenfranchised voters would have all opposed it).

236. Ury v. Santee, 303 F. Supp. 119 (N.D. Ill. 1969) (finding an Equal Protection violation when the defendants failed to provide substantially equal voting facilities, specifically in precincts that should have consisted of no more than 500 voters were drawn for 1539 – 3939 voters each); Marks v. Stinson, 19 F.3d 873, 889 (3rd Cir. 1994) (voiding election appropriate for constitutional violation even though the violation's impact on the election's results is unknown).

237. Ury v. Santee, 303 F. Supp. 119 (N.D. Ill. 1969) (finding an Equal Protection violation when the defendants failed to provide substantially equal voting facilities, specifically in precincts that should have consisted of no more than 500 voters were drawn for 1539 – 3939 voters each); Marks v. Stinson, 19 F.3d 873, 889 (3rd Cir. 1994) (voiding election appropriate for constitutional violation even though the violation's impact on the election's results is unknown).

238. Sims v. Ham, 271 S.E.2d 316 (S.C. 1980) (voiding an election because it was conducted using prohibited full slate voting rules, which make it more difficult for minority candidates to win office). Under full slate voting, the voter must vote for as many candidates as available offices in multi-seat elections or the vote will not be counted for any candidate. Thus, if seven candidates are running for five vacant city council seats, all voters are required to vote for five candidates. If two of the seven candidates are minorities, a minority voter cannot vote for the two candidates only but must also vote for three of the non-minority candidates. Non-minority voters, on the other hand, could vote for all five non-minority candidates and satisfy the full slate voting requirements.

239. Scholl v. Bell, 102 S.W. 248, 259 (Ct. App. Kent. 1907).

Courts are also generally wary of voiding elections if they believe the contestant participated in or benefited from the irregularity or if the contestant would not have challenged the irregularity if the contestant had won.[240]

1. New Election Considerations

When the vacancies created by a voided election are filled by a new election, the court may be able to structure the new election so that its parameters closely match the original election.[241]

2. Appointment Process Considerations

If, after an election is voided, the vacant offices are filled through the appointments process, and more than one office is vacant, then court may need to specify the order in which the offices are filled.[242] For example, following the voiding of an election because of fraud, violence, and intimidation, statutes required the vacant offices to be filled by appointment and the judge gave specific instructions about how those offices were to be filled.[243]

240. *See* Ferguson v. Brick, 652 S.W.2d 1 (Ark. 1983); Maschari v. Tone, 816 N.E.2d 579 (Ohio 2004) (per curiam) (limiting holding to the unique facts of the case).

241. *See* Sperry v. Mohegan Tribe Election Comm., 16 Am. Tribal Law 180 (Council of Elders of the Mohegan Tribe 2020). *In re* the 1984 General Election Office Council Township Maple Shade, County Burlington, 497 A.2d 577 (N.J. Super. Ct. Law Div. 1985). *See also* Buoananno v. DiStefamo, 430 A.2d 765 (R.I. 1981) (limiting new election to those precincts where voting machine failures caused an undercount of some votes cast for one candidate).

242. Scholl v. Bell, 102 S.W. 248, 262-263 (Ky. Ct. App. 1907).

243. *Id.* ("The Governor…must appoint the judge of the county court, all justices of the peace, a mayor… all of the aldermen and councilmen… a judge of the city court, prosecuting attorney for the city court, and the three park commissioners. The judge of the county court…must appoint the county court clerk, county attorney, sheriff, surveyor, county jailer, county superintendent of schools, county treasurer, constables, assessor, and coroner. The mayor…must appoint a city treasurer, city auditor, city tax receiver, and bailiffs of the city court. The judge of the city court…must appoint a clerk of the city court.").

VII. BREAKING TIES

Elections occasionally end in ties. The state constitution or election statutes may specify how ties are broken. Drawing lots[244] and coin tosses[245] are common methods. The state legislature may have exclusive authority to break ties for its seats.[246] If no statutory provisions exist for breaking a tied election, a new election may be necessary.[247]

Even when the tied results themselves are not challenged, the tie-breaking mechanism or process can be challenged. One court upheld a circuit clerk's tie-breaking coin flip, stating it satisfied the statute's requirement for a decision made by lot.[248]

If one of the tied candidates dies before a tie is broken, the court may be able to order a substitute to take the dead candidate's place.[249] One court facing this unusual scenario, specified that if the substitute won, the office would be vacant

244. TEX. ELECTION CODE ANN. § 2.002 (West 2021); 25 PA. STAT. AND CONS. STAT. ANN. § 3168 (West 2022); MISS. CODE ANN. § 23-15-601 (2017) (drawing lots or coin toss); Lambeth v. Levins, 702 P.2d 320, 327 (Kan. 1985) (holding that breaking the tie by lot was constitutional and not a lottery); Dayhoff v. Weaver, 808 A.2d 1002 (Pa. Commw. Ct. 2002) (casting of lots led to candidate winning election).

245. MISS. CODE ANN. § 23-15-601 (2017) (drawing lots or coin toss); IDAHO CODE ANN. § 34-1210 (West 2021); *See* Renshaw v. Dirnbeck, 2017 WL 3362354 (Ill. App. 5th 2017) (citing a coin toss deciding an election in *Pullen v. Mulligan*); Michael J. Pitts, *Heads or Tails? A Modest Proposal for Deciding Close Elections,* 39 Conn. L. Rev. 739, 740 (2006) (citing Woodburn City Council Election Decided by Coin Toss, BOWLING GREEN DAILY NEWS (Nov. 13, 2004), available at http:// www.bgdailynews.com/articles/stories/public/200411/13/0eyv_news.html (detailing how a city council race in Kentucky was decided by a coin flip); Secretary of State of Alaska, *Your Vote Counts* (2005), http:// www.gov.state.ak.us/ltgov/elections/votecnts.htm (detailing how a tied school board election in Alaska was decided by a coin flip)).

246. State constitutions may mirror the federal Constitution by stating that each house judges its own elections and its members' qualifications. *See* OHIO CONST. Art. III § 3. NEV. REV. STAT. ANN. § 293.400 (West 2019); MONT. CODE ANN. § 13-16-504(2021).

247. *See Lambeth,* 702 P.2d at 327 (ordering new election when the original resulted in a tie and state statutes did not provide a means to break it); Landwersiek v. Dunivan, 147 S.W.3d 141 (Mo. Ct. App. 2004 (ordering new election because some voters were disenfranchised and the tied winners could not informally agree on how to break their tie); *In re* 2020 Municipal General Election, 2021 WL 5778558 (Sup. Ct. N.J. 2021) (affirming a trial courts order for a runoff election where there was a tie).

248. Huber v. Reznick, 437 N.E.2d 828 (Ill. App. Ct. 1982).

249. The People v. Deboice, 37 N.E.2d 337 (Ill. 1941) (contestee died after the tie-breaking order was issued, but before the tie was broken); *see* Ferrandino v. Sammut, 185 A.D.3d 992 (App. Div. 2d N.Y. 2020) ("'A vacancy in a designation or nomination caused by declination, where a declination is permitted by [Election Law article 6], or by the death or disqualification of the candidate, or by a tie vote at a primary, may be filled by the making and filing of a certificate, setting forth the fact and cause of the vacancy, the title of the office, the name of the original candidate, if any, and the name and address of the candidate newly designated or nominated.'").

and filled per statute, but if the surviving candidate won, then he would take office.[250]

VIII. APPEALS

Some states send cases directly to final decision makers or do not permit election contests to be appealed.[251] Other states allow contests to be appealed like any other case.[252] Others still mandate specific courts for election contest appeals. For example, election contests that are appealed in Louisiana go to the full *en banc* court of appeals and the losers of that appeal can seek certiorari review at the state supreme court.[253] Some allow parties to appeal contests directly to the state's supreme court.[254]

When appeals are permitted, the scope of that review is usually limited.[255] As with most cases, the court usually defers to the lower court's findings of fact and only reverses on questions of law.[256] Appellate courts generally will not reverse findings of facts by lower court or administrative board's unless those findings were against the "manifest weight of the evidence."[257] Some states explicitly prohibits a court hearing election contest appeals from granting a new trial or a rehearing, but permits it to "correct manifest error to which its attention is

250. *Deboice*, 37 N.E.2d at 337.

251. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/23-1.1a (West 2010) ("The Supreme Court shall have jurisdiction over contests of the results of any [statewide] election . . . and shall retain jurisdiction throughout the course of such election contests."); IOWA CODE ANN. § 58.7 (West 2012) ("The judgment of the committee [of the legislature] pronounced in the final decision on the election [for governor] shall be conclusive."); S.C. CODE ANN. § 7-17-250 (1977) ("Appeals from decisions of the State Board shall be taken directly to the Supreme Court on petition for a writ of certiorari only based on the record of the State Board hearing and shall be granted first priority of consideration by the Court."). The District of Columbia also sends election contests to its highest court, the D.C. Court of Appeals, and prohibits any appeals. D.C. CODE § 1-1001.11(b)(1), (b)(4) (2011).

252. *See, e.g.*, MINN. STAT. ANN. § 209.09.

253. LA. REV. STAT. ANN. § 1409(G), (H) (2012); cf. 2 U.S.C. § 437h (2006) (providing that district courts may certify constitutional questions regarding the Federal Election Campaign Act to the court of appeals sitting en banc).

254. KAN. STAT. ANN. §§ 25-1443, -1450 (2000); MINN. STAT. ANN. §§ 209.045, .09(2), .10(4) (West 2009).

255. Douglas, *supra* note 1, at 43.

256. State *ex rel.* Hanna v. Milburn, 161 N.E.2d 891, 893 (Ohio 1959) ("The test for reversing a decision of a board of elections is not necessarily whether this court agrees or disagrees with such decision, but it is whether the decision of the board of elections is procured by fraud or corruption, or whether there has been a flagrant misinterpretation of a statute or a clear disregard of legal provisions applicable thereto.") (emphasis omitted); Pruitt v. Lieutenant Gov., 498 P.3d 591 (Alaska 2021) ("Whether the conduct of election officials constitutes malconduct and whether that malconduct was sufficient to change the result of an election are questions of law").

257. Douglas, *supra* note 1, at 44.

called."[258] In other states, courts hearing appeals from special election courts, may have more leeway to review the lower court decision.[259]

IX. CONCLUSION

While public policy favors the resolution of election-related problems or concerns prior to elections, doing so may not be possible. One form of post-election relief is an election contest, which investigates whether there were fundamental flaws in the election or its administration. Court may be asked to resolve election contests and ensure the true winner of an election takes office, ether by upholding or voiding election results.

258. LA. REV. STAT. ANN. § 18:1409(I) (West 2012).
259. W. VA. CODE ANN. § 3-7-3 (West 2011).