State Laws for Administering Presidential Elections: Recommendations and Considerations for Reform

Rule of Law Clinic
Fordham University School of Law

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July 2024
Executive Summary

States are critical administrators of United States presidential elections. To enhance the democratic integrity of presidential elections, the Fordham Law School Rule of Law Clinic recommends the following reforms related to state laws for presidential elections:

1. Update state laws to reflect the reforms in the Electoral Count Reform Act (ECRA), the federal law passed in 2022 that updated the procedures for casting, certifying, and counting electoral votes.
   a. Update state law to include the requirement that the certificate of ascertainment must be issued no later than six days before the meeting of the electors. The certificate of ascertainment identifies a state’s appointed electors for president and vice president.
   b. Provide for the inclusion of a “security feature” on the certificate of ascertainment.
   c. Designate “the executive of the state” who will issue the certificate of ascertainment. The ECRA makes governors the default officials to perform this duty.
   d. Update the date of the meeting of the electors to the Tuesday after the second Wednesday in December.

2. Provide remedies to prevent or mitigate abuses by local and state election officials, where such officials’ improper delay or refusal to certify votes could interfere with certification of a state’s electoral votes.

3. Consider how to implement the ECRA’s force majeure provision, which provides for extensions of time for voters to cast their ballots in response to events that disrupt presidential elections, such as natural or human-caused disasters.
   a. Identify considerations to guide election administrators’ determination of whether a force majeure event exists. These considerations should include the nature of the event, the magnitude of the disruption, and past precedent.
   b. Authorize governors to declare the existence of a force majeure event that merits an extension of voting, and allow local officials to petition the governor to take this action.

4. Ensure that there are mechanisms to prevent faithless and fake electors. A faithless elector is an elector who does not vote for the candidate they have been appointed to support. A fake elector is a person who falsely represents themselves as an elector.
   a. To prevent faithless electors, require that electors pledge to cast their ballots for the popular vote winners in their states and provide for (1) the removal of
faithless electors; (2) the cancellation of faithless votes; and (3) the replacement of faithless electors.

i. Consider additional measures, specifically (1) monetary fines, (2) prohibition on future service, and (3) criminal penalties for faithless electors.

ii. Provide for contingences that allow “faithless” electors in the event of candidate death.

iii. Consider statutory or constitutional reforms to prevent legislatures from directing electors to cast ballots in contravention of the state’s popular vote.

b. To prevent fake electors, adopt criminal or civil penalties and add specificity to the procedures for elector meetings. Updated procedures should designate the exact location and time of the elector meeting and specify a state official who must be present for, or preside over, the meeting.

5. Implement Ranked Choice Voting (RCV) to prevent third-party and independent presidential candidates from unduly impacting elections by siphoning votes from major party candidates. This policy would make the presidential election system more compatible with third-party and independent candidacies.

a. Adopt Instant Runoff Voting, a variation of RCV.

b. Ensure RCV ballots include at least five ranking options and, ideally, a ranking option for each candidate listed on the ballot, where feasible.

c. Ensure RCV results are promptly communicated to the electorate:

i. Release preliminary results of all rounds on election night;

ii. Continually release tallies at regular and frequent intervals;

iii. Count ballots with write-in candidates first;

iv. Publish the full ballot record online for the public to access;

v. Use visual media to communicate election results; and

vi. Clearly and proactively communicate election procedures and results prior to and during an election.

d. Invest in risk-limiting audit implementation but continue to use traditional audits pending implementation of risk-limiting audits.

e. Utilize educational and awareness campaigns to decrease voter confusion over RCV.

f. If a state adopts RCV, it should ensure its election access and education infrastructure is responsive to third-party and independent candidates by:

i. Establishing universal ballot access requirements, and

ii. Providing voter education pamphlets on candidates, voting deadlines and requirements, and RCV procedures.

6. Plan for compliance with the National Popular Vote Interstate Compact (NPVIC) in the event that it becomes effective. The NPVIC is an agreement among states to allocate their electoral votes to the winner of the national popular vote if states with collectively 270 electoral votes or more join the NPVIC.

a. States that are members of the NPVIC should ensure that their elector laws include provisions that do not bind electors to vote for the winner of the state’s popular vote if that candidate differs from the winner of the national popular vote.
# Table of Contents

INTRODUCTION ........................................................................................................................................... 1

I. IMPLEMENTING THE ECRA’S TECHNICAL REQUIREMENTS .............................................................. 2  
   A. What deadlines does the ECRA change? ......................................................................................... 3  
      1. The Deadline to Certify the Election is No Longer Optional ............................................. 3  
      2. Date the Electors Meet ........................................................................................................... 4  
   B. Security Feature Requirements for the Certificate of Ascertainment ........................................ 5  
   C. Who is the Executive of the State? ................................................................................................. 6  
   D. All Laws Must be in Place Before Election Day ......................................................................... 6  

II. PREVENTING ABUSES BY STATE ELECTION OFFICIALS............................................................... 6  
   A. Objections Based on Lawful Certification .................................................................................... 6  
   B. Preventing and Remediary Abuses of Power ............................................................................. 8  

III. ELECTION DISRUPTIONS & THE ECRA’S FORCE MAJEURE PROVISION ............................... 9  
   A. Qualification as a Force Majeure Event ....................................................................................... 10  
      1. Nature of the Event ................................................................................................................. 10  
      2. Magnitude of the Disruption ................................................................................................. 11  
      3. Past Precedent ....................................................................................................................... 12  
   B. Declaring a Decision-Maker ........................................................................................................ 12  

IV. PREVENTING FAITHLESS & FAKE ELECTORS .............................................................................. 13  
   A. Implementing Procedures and Penalties to Prevent Faithless and Fake Electors ....................... 14  
      1. Faithless Elector Procedures and Penalties .......................................................................... 14  
      2. Situations Warranting Flexibility for Faithless Electors ...................................................... 16  
      3. Fake Electors Penalties ......................................................................................................... 19  
      4. Elector Meeting Laws and Fake Electors .............................................................................. 21  
      5. Elector Transparency and Accountability ............................................................................ 22  
   B. Limiting the Scope of State Legislatures’ Ability to Misdirect Electors ....................................... 23  

V. RANKED CHOICE VOTING, THIRD-PARTIES, & INDEPENDENT CANDIDATES ..................... 25  
   A. Ranked Choice Voting .................................................................................................................. 26  
      1. Benefits and Drawbacks .......................................................................................................... 26  
      2. Types of Ranked Choice Voting ............................................................................................. 27  
      3. Implementing Ranked Choice Voting ...................................................................................... 29  
   B. Third-Party & Independent Candidates .................................................................................... 34  
      1. Ballot Access ........................................................................................................................... 34
2. Voter Awareness .................................................................................................................. 36

VI. THE NATIONAL POPULAR VOTE INTERSTATE COMPACT ............................................ 37
   A. Compliance with ECRA Deadlines ................................................................................ 37
   B. Ensuring State Elector Laws Are Compatible with a National Popular Vote Requirement ........................................................................................................... 37
   C. The NPVIC & Ranked Choice Voting ......................................................................... 38

CONCLUSION ....................................................................................................................... 39
Introduction

The United States’ system of shared power over presidential elections provides states with a vital role. The U.S. Constitution gives states the authority to determine the “Manner” of choosing presidential electors who cast states’ votes for president and vice president in the Electoral College. Every state has allowed voters to select presidential and vice presidential electors on Election Day. Federal law sets the date of Election Day and the date for the meeting of the Electoral College, when the electors cast their votes. Additionally, federal law creates some requirements for the certification of states’ election results. But most other details and procedures are left to the states.

There are currently a range of emergent challenges that states must confront as they administer presidential elections. Prompted by efforts to subvert the outcome of the 2020 presidential election, Congress updated the federal law that creates procedures for casting and counting electoral votes. Several changes in the Electoral Count Reform Act (ECRA), which Congress passed in 2022, require states to update their own laws, such as to reflect new timelines for certifying election outcomes and revised certification procedures. Additionally, the ECRA establishes a new process for states to extend the time for voters to cast their ballots if a natural or human-caused event disrupts a presidential election. The ECRA allows states determine what constitutes such a “force majeure” event and how extensions of voting time should be provided.

States must also consider how to prevent misconduct by the individuals involved in the mechanics of presidential elections. The decentralized system of election administration that states employ involves many officials at the local and state levels. Some of these individuals, such as members of county election boards, must certify elections results—a responsibility some officials considered neglecting during the 2020 election. It is essential for states to implement safeguards to protect against election administrators elevating their own preferences over those of voters.

Similarly, states should consider how to prevent presidential electors from abusing their positions. The 2016 presidential election saw a historic number of “faithless electors” who declined to cast their electoral votes consistent with the will of voters in their states. In 2020, “fake electors” purported to cast electoral votes, despite being unauthorized to do so.

States should also consider implementing alternative voting methods and other reforms to account for the presence of third-party and independent candidates in presidential elections. States’ use of plurality voting in presidential elections allows third-party and independent candidates to have a “disrupter” or “spoiler” effect, in which they impact elections' outcomes by siphoning votes from major party candidates. Ranked-choice voting, which aims to identify the candidate preferred by the most voters, could prevent this phenomenon—and make the system more compatible with third-party and independent candidacies.

Finally, states should prepare for the potential implementation of the National Popular Vote Interstate Compact (NPVIC), which would change the way that many states allocate their electoral votes. The NPVIC is an agreement among states to allocate their electoral votes to the winner of the national popular vote, regardless of the popular vote outcome in their own states. The compact would come into effect if states collectively holding 270 or more
electoral votes signed on. Currently, eighteen jurisdictions accounting for 209 electoral votes have joined the compact. States should consider how implementation of the NPVIC would impact election administration, especially by ensuring that it would comply with the ECRA’s requirements, preventing faithless elector laws from barring electors from casting votes consistent with the national popular vote, and anticipating challenges that would arise from using ranked-choice voting.

The integrity of the electoral process is necessary for the functioning of our democracy, and states are critical to ensuring it. This Report provides key recommendations and considerations for states to confront the challenges involved in administering presidential elections.

Part I provides recommendations for states to implement the ECRA’s technical requirements. This is an urgent recommendation given the ECRA’s requirement that election laws be in place prior to Election Day. States must conform their laws to the ECRA’s new deadlines and requirements for certifying the election’s outcome. Part II discusses how to prevent potential abuses of power by state and local election officials that would undermine a state’s electoral certification. Part III considers how states should implement the ECRA procedure for extending voting time due to a force majeure event, including both natural disasters and human-caused emergencies. Part IV provides recommendations for states seeking to prevent faithless and fake electors. Part V discusses ranked choice voting (RCV), providing recommendations for states implementing RCV before addressing considerations for third-party and independent candidates in a RCV election. Part VI provides considerations for states if the National Popular Vote Interstate Compact (NPVIC) is ratified.

I. Implementing the ECRA’s Technical Requirements

The ECRA was enacted in 2022 in response to election subversion attempts during the 2020 election that sought to exploit vulnerabilities in the Electoral Count Act, the law that the ECRA replaced. The ECRA is a federal law that governs the certification of presidential election results and the casting of electoral votes in the states as well as the counting of electoral votes during the joint session of Congress on January 6.

The ECRA introduces several new technical requirements for the electoral process that states must consider. Part I.A analyzes the changes in deadlines and dates, such as the date the electors meet. Part I.B discusses the new requirement that states add a “security feature” to their certificates of ascertainment, which identify the electors they are appointing. Part I.C considers the term “executive of the state,” the official the ECRA requires to certify states’ election outcomes. Finally, Part I.D focuses on the requirement that all laws pertaining to the election be in place before Election Day.
A. What deadlines does the ECRA change?

1. The Deadline to Certify the Election is No Longer Optional

<table>
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<tr>
<th>Recommendation</th>
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<tr>
<td>Update state statutes to reflect the ECRA requirement that states issue the certificate of ascertainment no later than six days before the meeting of the electors. States should create additional internal deadlines to ensure the certificate is issued on time.</td>
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Before the ECRA’s enactment, the ECA provided a “safe harbor” date for states to certify the results of the presidential election. If a state voluntarily met the deadline, then Congress was required to treat its determination as “conclusive” when counting electoral votes. Under the ECRA, the deadline is no longer optional; states must certify their results by six days before the Electoral College meeting to comply with federal law. This means that each state’s vote count and certification must be completed within 36 days after Election Day, which includes any proceedings for resolving provisional or challenged ballots, audits, recounts, and litigation. To meet this requirement, states should set internal deadlines prior to the federal deadline to ensure compliance. The Election Reformers Network, in a 2023 report, recommended the following internal deadlines for states:

<table>
<thead>
<tr>
<th>Days Since Election</th>
<th>2024 Dates</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>0</td>
<td>Tuesday, November 5</td>
<td>Election Day</td>
</tr>
<tr>
<td>7</td>
<td>Tuesday, November 12</td>
<td>Default deadline for county (or other local) canvass</td>
</tr>
<tr>
<td>14</td>
<td>Tuesday, November 19</td>
<td>Extended deadline for county (or other local) canvass</td>
</tr>
<tr>
<td>21</td>
<td>Tuesday, November 26</td>
<td>Default deadline for statewide canvass</td>
</tr>
<tr>
<td>31</td>
<td>Friday, December 6</td>
<td>Extended deadline for statewide canvass</td>
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<tr>
<td>36</td>
<td>Wednesday, December 11</td>
<td>Deadline for state executive to issue and transmit certificate of ascertainment</td>
</tr>
<tr>
<td>42</td>
<td>Tuesday, December 17</td>
<td>Meeting of electors</td>
</tr>
</tbody>
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1 ELECTION REFORMERS NETWORK, HELPING STATES COMPLY WITH THE ELECTORAL COUNT REFORM ACT 8–9 (2023).
2 Id. at 9.
3 Id.
4 Id. at 11.
2. Date the Electors Meet

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<tr>
<th>Recommendation</th>
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<tr>
<td>States must update their laws to reflect the ECRA’s new meeting date for electors to cast their votes: the first Tuesday after the second Wednesday in December.</td>
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<th>Consideration</th>
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<tr>
<td>States should consider updating their laws to provide for the electors to meet “on the date appointed by Congress” to avoid future confusion over the date of the meeting.</td>
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The ECRA changes the date of the electors’ meeting to the first Tuesday after the second Wednesday in December, but many state laws still include the previous meeting date: the first Monday after the second Wednesday in December.¹² Twelve states have changed the date to Tuesday as of this Report’s release in mid-2024: California, Colorado, Connecticut, Hawaii, Indiana, Kansas, Maryland, Michigan, North Carolina, North Dakota, Oregon, and South Carolina.⁶ Many states do not specify a day.⁷ Instead, these states’ laws provide that the date is whenever Congress has prescribed.⁸ The U.S. Constitution provides for Congress to determine a uniform date for the electors’ meeting.⁹ Accordingly, states must update their laws to comply with the meeting date set by Congress in the ECRA. If a state’s electoral votes were cast on a different date than the one provided by federal law, those votes might face objections during Congress’ counting of electoral votes.¹⁰ In addition to correctly specifying the meeting time, states should identify a meeting place for electors while including language that accounts for emergency contingencies. This is another important measure for avoiding objections during the congressional vote count.¹¹

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² See infra Parts IV.A.4.

References:


⁸ The date Congress prescribed would now be set by the ECRA.


B. Security Feature Requirements for the Certificate of Ascertainment

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<td>State statutes must include language providing for a security feature on the certificate of ascertainment.</td>
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<tr>
<th>Consideration</th>
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<td>States should consider whether to keep the security feature confidential. Keeping the feature confidential but publicly designating who determines the feature is likely the best solution.</td>
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The ECRA requires that each state’s certificate of ascertainment include a security feature determined by the state. The certificate of ascertainment is an official document that identifies a state’s appointed electors for president and vice president. The ECRA does not provide any guidance on what the security feature should be. Indiana, Michigan, Nebraska, North Carolina, Oregon, South Carolina, and Wisconsin have laws requiring the inclusion of a security feature, but the format of the security feature is confidential. In Indiana and Oregon, the secretary of state determines the security feature. In Michigan and Nebraska, the security feature is determined by the governor. The other states that provide for a security feature do not explicitly designate an official to determine the security feature. A proposed bill in New York would make the security feature an embossment of the state seal.

Keeping the security feature confidential promotes a secure certification process in which the electoral votes are certified by the proper official and the correct electoral votes are counted. If the security feature were public, it would be easier for bad actors to mimic and copy it, a tactic used by the fake electors in the 2020 election. Alternatively, making the security feature public allows for transparency, which could help instill public confidence in the electoral process.

States might consider designating an official to confidentially determine the characteristics of the security feature. This could strike a balance between protecting the security of the certificate, while also providing some transparency. Assumably, the security feature will become public after Congress receives the electors’ votes. However, keeping the features confidential up to this point would allow Congress to more easily determine the legitimacy of any competing certificates submitted to it. States may want to change the security feature for each election to maintain confidentiality.

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12 ECRA § 104(a) (codified at 3 U.S.C. § 5(b)).
13 Id.
14 Nat’l Conf. of St. Leg., supra note 6.
15 Ind. Code §3-10-4-6.5 (2023); 2024 Or. Laws 4019.
17 See S.B. 8464 (2024). The New York Legislature passed this bill, but the governor has not yet signed it.
C. Who is the Executive of the State?

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<th>Consideration</th>
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<tbody>
<tr>
<td>Each state should determine whether the “executive of the state” who certifies the state’s elections results is governor or another state official.</td>
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The ECA required certification of election results by the “executive” of each state, but it did not define who the executive was. The ECRA says the state executive who must certify the state’s appointment of electors is the governor unless state law enacted before Election Day designates a different official to perform the duty.\(^{19}\) If a state uses a different official, such as the secretary of state, but does not explicitly provide for it by law, the state’s electoral votes could face objections during the congressional vote count.\(^{20}\) Accordingly, states must ensure clarity in any laws designating someone other than the governor as the “executive.”

D. All Laws Must be in Place Before Election Day

The ECRA states that the laws for an election must be in place before Election Day.\(^{21}\) It is imperative that the states work to implement these changes before Election Day. Any changes made after Election Day will not apply until the next election cycle.

II. Preventing Abuses by State Election Officials

State and local election officials hold substantial power over the election process. These officials have historically discharged their responsibilities faithfully, but states can further fortify their election policies against potential abuses by state and local officials. Where officials refuse to certify, delay certification, or decline to include certain ballots in a canvass, states have power to ensure swift resolution of those issues. Without proper redress, rogue officials could thwart a state’s certification timeline or undermine voter confidence in the process. This Part discusses potential abuses by state election officials that could interfere with a state’s lawful certification of electoral votes. Then, this Part provides recommendations for states to avoid or mitigate abuses of power by state and local election officials.

A. Objections Based on Lawful Certification

The ECRA provides two grounds for objecting to electoral votes: either a state’s electoral votes “were not lawfully certified under a certificate of ascertainment” or “[t]he vote of one or more electors has not been regularly given.”\(^{22}\) This section focuses on the first ground, as objections over votes not regularly given refer to votes not cast pursuant to law, a harm remedied by ensuring compliance with voting and certificate issuance discussed in Part I.

Lawful certification refers to the state’s certification process, so objectionable conduct would arise between Election Day and six days before the electors meet.\(^{23}\) The state certification

\(^{19}\) ECRA § 104(a) (codified at 3 U.S.C. § 5(b)(3)).  
\(^{20}\) Muller, supra note 10, at 1539–40.  
\(^{21}\) ECRA § 102 (codified at 3 U.S.C. § 1).  
\(^{23}\) See Muller, supra note 10, at 1532.
process proceeds in three steps. After voters cast their ballots, local jurisdictions are the first to count ballots and resolve any issues over ballot validity.24 Once this canvass is complete, local officials “certify,” or confirm the completeness and accuracy of the results.”25 Those local certifications are then sent to statewide canvass officials, who in turn certify the statewide canvass.26 Finally, the state executive completes the certificate of ascertainment awarding electors based on the canvassing result.27 If a state certifies its electoral votes at least six days before the elector meeting, a requirement under the ECRA, then those votes are valid.28

Because bad actors may seek to undermine the certification process, states should focus on the three main areas that those actors might exploit. First, local or state officials may “explicit[ly] vote[] to refuse to certify results.”29 This occurred in Wayne County, Michigan during the 2020 presidential election, where members of the canvassing board initially refused to vote to certify the election, then voted to certify, and then sought to rescind their certification votes.30 While the Wayne County certification ultimately went to the state board, these events evidenced the potential for future attempts to stonewall certification efforts. Second, officials may “vote to delay the [certification] process while local officials investigate[] unsupported allegations of fraud.”31 In Esmeralda County, Nevada during the 2022 Primary Election, local officials decided to delay the certification vote pending a recount by hand in order to investigate unsubstantiated allegations of voting process irregularities.32 The recount was completed with just hours to spare, but a similar action in a larger county could make it difficult to meet the ECRA’s new deadlines. Third, officials may “refus[e] to include specific types of ballots in the certification process.”33 In Pennsylvania during the 2022 primary election, three county election boards refused to certify the results by excluding undated mail-in ballots received before the election deadline.34 The refusals occurred in late June, but it was not until August 25 that the counties ultimately complied with a court order to include the ballots—a delay of approximately two months.35

These methods for interfering with a state’s lawful certification demonstrate that bad actors may obstruct certification in order to delay appointing electors and, ultimately, cause a state to run afoul of the ECRA’s timeline. While the ECRA states that the state executive “shall issue a certificate of ascertainment,” it is conceivable for the executive to refuse, delay, or otherwise obstruct certification based on a combination of popular support and allegations

25 Id. at 11.
26 Id.
27 Id. at 11–12.
28 Muller, supra note 10, at 1533.
29 Miller & Wilder, supra note 24, at 14.
30 See id. at 15–16.
31 Id. at 14.
32 Id. at 19.
33 Id. at 14.
34 Id. at 20.
35 Id. at 20, 22.
of voting improprieties.\textsuperscript{36} Alternatively, a state executive could “attempt[] to certify fraudulent results.”\textsuperscript{37} In either event, the state’s certification process could be undermined.

\textbf{B. Preventing and Remediying Abuses of Power}

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\hline
\textbf{Recommendations} \\
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States should protect against potential abuses during the election certification process by:
\begin{itemize}
  \item Issuing a writ of mandamus
  \item Clarifying that state officials have limited discretion
  \item Providing for an alternate official to certify the results
  \item Creating a statutory remedy, such as criminal penalties, for violations
  \item Creating a cause of action for officials, candidates, and voters to sue obstructionist officials
  \item Implementing a reporting channel for electors to report improper influence attempts
\end{itemize}
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To protect against these events, states should ensure effective mechanisms and remedies exist to expedite resolution of any dispute. First, where officials attempt to subvert an election, courts should issue a writ of mandamus compelling those officials to carry out their non-discretionary duties.\textsuperscript{38} Second, states should clarify, as the ECRA does, that election officials have limited discretion in performing their duties while also providing clear, statutory directives for performing those duties.\textsuperscript{39} States can effect this change with simple wording changes, such as stating that an official “shall do X.” Third, where an official refuses to perform their duties, states should provide for another election official to step in and perform the ministerial duties.\textsuperscript{40} Fourth, states should “create a statutory remedy specific to the election context,” such as criminalizing an official’s abdication of their counting or certifying duties.\textsuperscript{41} Fifth, states should consider whether to create a cause of action for “state official[s], candidate[s], or voter[s]” to sue an official who refuses to perform their duties.\textsuperscript{42}

Lastly, it is conceivable, especially in light of increased threats and hostility toward election personnel, that electors might be pressured to subvert election results. To mitigate this risk, states should consider providing protection or a confidential reporting channel for electors to submit incidents or encounters that could constitute duress, bribery, corruption, or other improper influences.

\textsuperscript{36} See, e.g., id. at 35.
\textsuperscript{37} Id.
\textsuperscript{38} See generally Derek T. Muller, \textit{Election Subversion and the Writ of Mandamus}, 65 WM. & MARY L. REV. 327 (2023) (advocating for the writ of mandamus as a mechanism to reduce instances of election subversion and identifying additional affirmative steps that states should take to strengthen the writ).
\textsuperscript{39} See id. at 381.
\textsuperscript{40} See id. at 385 (“State courts should expressly have the power to direct ‘another person appointed by the court’ to carry out ministerial obligations in mandamus cases.”).
\textsuperscript{41} Miller & Wilder, supra note 24, at 48.
\textsuperscript{42} Id.
III. Election Disruptions & the ECRA’s Force Majeure Provision

An important reform in Electoral Count Reform Act aimed at ensuring security and stability for future presidential elections is its repeal of the Electoral Count Act’s “failed election” provision. The “failed election” provision allowed state legislatures to decide on the “manner” of appointing presidential electors if their state’s election “failed to make a choice on the day prescribed by law.” This provision was designed to account for states that required candidates to win a majority of the statewide vote to win the election. It also could have been applied in case of emergencies, such as natural disasters, that would delay and disrupt elections.

While the “failed election” provision was primarily an inactive provision, it came to the fore in 2020 when election subversion efforts attempted to use the provision to have certain state legislatures ignore the states’ popular votes and appoint electors for the losing candidate. Since what constituted a “failed election” was not thoroughly defined in the statute, the provision was vulnerable to misuse. When drafting the Electoral Count Reform Act soon after the 2020 election, Congress decided to remove the “failed election” provision and replace it with a newly refined provision.

The ECRA’s force majeure provision allows for modification of the voting period “as necessitated by force majeure events that are extraordinary and catastrophic.” The “force majeure” term is a concept borrowed from contract law, and it “connotes a large-scale event caused by either nature (e.g., floods, hurricanes) or people (e.g., riots, terrorism) that is either difficult or impossible to control.” This new provision does not allow state legislatures to select electors under any circumstances. And the only remedy for an event that disrupts the administration of an election is an extension of time for voting. While this reform helped to close a potentially exploitative loophole in the law, it left unanswered questions about exactly when and how it should be used. Accordingly, individual states must now elaborate on the procedures for using the provision.

For the force majeure provision to accomplish its goal of providing avenues for responding to emergencies while preventing abuses by state legislatures and bad actors, states should empower their governors to use the provision to extend the time for voting when necessary. The governor will be able to consult with local officials and take their advice and recommendations. This Part begins by discussing what qualifies as a force majeure event.

45 See id.
47 See id.
48 See ECRA § 102(b)(1) (codified at 3 U.S.C. § 21(1)).
49 Id.
50 17 AM. JUR. 2D Contracts § 647.
52 See ECRA § 102 (codified at 3 U.S.C. § 21(1)).
This Part then discusses why the governor is the best official to implement voting extensions.

A. Qualification as a Force Majeure Event

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<th>Recommendation</th>
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<tr>
<td>Instead of strictly defining what constitutes a “force majeure” event, states should identify considerations to guide decision-makers on whether an event qualifies, including (1) the nature of the event; (2) the magnitude of the disruption; and (3) past precedent.</td>
</tr>
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</table>

Similar to the lack of a definition of “failed election” in the ECA, the ECRA does not define a force majeure event besides detailing that the event must be “extraordinary and catastrophic.” Instead, the law leaves it to states to decipher the term. Strictly defining in law what constitute a force majeure event is unwise because doing so might reduce flexibility to respond to unforeseen emergencies. However, states should identify considerations to guide officials who are empowered to implement the force majeure provision. Those considerations should include (1) the nature of the event that might demand an extension of voting, specifically whether the event is natural or human-caused; (2) the magnitude of the disruption, specifically whether the number of voters impacted by the event justifies the resulting delay in reporting election results; and (3) past precedent, specifically how past emergencies impacted elections and how officials responded.

1. Nature of the Event

Natural and human-caused events each raise unique considerations for election administrators faced with potentially using the force majeure provision. Common examples of natural disasters are hurricanes, tornadoes, and flooding. Shortly before the 2012 presidential election, Hurricane Sandy made landfall in New York, New Jersey, and several other states. While the storm did not take place on Election Day, its effects spilled over into the coming days and weeks, which interfered with voters’ ability to cast ballots and the smooth operation of polling stations. The election administration response to these events lacked specific guidance and seemed to even lack clear legal authorization in some instances. The challenges of running an election amid Hurricane Sandy’s aftermath emphasize that the impact of a large-scale weather event can linger for days or even weeks. Accordingly, election administrators should prepare to use necessary measures, including the force majeure provision, both during natural disasters and in their potentially long aftermath.

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54 Id.
55 17 AM. JUR. 2D Contracts § 647.
57 Id.
Alongside natural disruptions are human-caused disruptions. On the day of the September 11, 2001, terrorist attacks, a primary election was taking place in New York City. The attack on the city created major hurdles to administering the election, justifying the delay of the primary. The suddenness of events like terrorist attacks causes unexpected panic that can make responding to election disruptions especially challenging. Additionally, due to their human-caused nature, these events may involve more political mischief and mistrust than natural disasters. Bad actors might aim to dissuade voters from entering polling sites or to manipulate the election’s timeline. This could be done through planned attacks at polling locations and through threats of violence against those who attempt to vote in order to keep turnout low among disfavored groups. Election administrators must consider how to handle the challenges posed by such coordinated efforts. Extensions of voting time might be necessary for voters to safely participate in elections in these situations.

2. Magnitude of the Disruption

Another important factor to balance is whether it is best to have the most voters possible or the timeliest results. This is the back and forth that could dominate decisions around extensions of voting time. While it might facilitate the highest number of votes to give extensions to any areas affected by an election disruption event, it is possible that the number of votes gathered in that period could be so minimal that it was not worth delaying the release of the results. Timeliness of elections and election results are important for many reasons, including ensuring security and allowing enough time for potential recounts and litigation before the ECRA deadlines. At the same time, exactly when the number of votes reaches a point of being “enough” or “worth it” is unclear and can vary from locality to locality.

Having a specific number of voters or percentage of a population affected as a cutoff to decide on giving an extension might seem like a fair procedure, but unfortunately it presents practical challenges. For one, it is possible that using strict numerical limits would not perfectly capture nuances of an election disruption’s impact. There can be a sizable difference between many people slightly affected and a few people heavily affected. Furthermore, gathering the required quantitative data by the time a decision has to be made might be challenging. Many of these events, especially those that are human-caused, are unanticipated and happen on the day of the election. Accurate statistics may not be available until several days after the event. Furthermore, there might be continuing effects after the initial event that affect increasing numbers of voters.

60 See id.
A value determination is at the core of all of these decisions. There is a continuous push to have more and more voices heard in elections across the United States, and, therefore, it is possible that the decision-maker will lean towards attempting to make the voter count as high as possible. At the same time, legitimacy during presidential elections is continuously questioned by various political actors, meaning timely and secure elections are prioritized now more than ever.

3. Past Precedent

Reviewing past instances where emergencies disrupted elections can provide insight on whether voting extensions are needed. Upon analyzing and assessing past instances, it is also possible to see the mistakes that were made and adjust accordingly. The decision-maker’s determination on enacting the force majeure provision should not be bound by past precedent, but merely advised by it because, in many situations, past precedent may be rare and quick action will be needed. Allowing the decision-maker to be flexible allows the decision-maker to correct past mistakes and ensure that the appropriate response is executed in a potentially unique situation.

B. Declaring a Decision-Maker

<table>
<thead>
<tr>
<th>Recommendation</th>
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<tr>
<td>States should empower their governors to use the ECRA’s force majeure provision to extend voting time when necessitated by a natural or human-caused election disruption. Additionally, states should allow local officials to formally petition the governor to extend voting time in their regions.</td>
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States should empower their governors to decide whether to extend voting time, and local officials should be allowed to formally petition the governor to take that action. State law can determine the authority to enact the force majeure provision as it is not clear in the ECRA where the decision-making power lies or should lie. The governor is a preferable choice for the decision-maker, compared to local officials, because the office holds more authority and has access to a wider scope of knowledge. The governor is positioned to consider the needs of the entire state and is not solely focused on only one region. Authorizing a central figure like the governor to make decisions would promote uniformity, benefit of the state as a whole, and support fair and equal treatment of voters. However, the governor could lack specific knowledge of each region. Accordingly, force majeure procedures should provide ways to incorporate input from local officials.

When Florida was affected by a large storm during the 2022 midterm elections, the governor relied heavily on reports from local election officials to determine which districts needed assistance.


66 See ECRA § 102 (codified at 3 U.S.C. § 21(1)).
should receive extended voting periods. Drawing on local officials’ assessments of the implications of an election disruption would create a better monitoring system for deciding when to enact the *force majeure* provision. Local officials should have the ability to petition the governor for voting extensions in their regions. Additionally, to mitigate any controversy surrounding the governor’s decision-making, there should also be an expedited judicial review process of the governor’s decision.

IV. Preventing Faithless & Fake Electors

This Part addresses the issues of faithless and fake electors in states’ electoral processes, advancing recommendations and considerations for states to prevent faithless and fake electors from having an inordinate impact on the outcomes of presidential elections.

Faithless electors are those who are lawfully appointed to cast electoral ballots for the presidential and vice-presidential candidates selected by their states’ voters but who choose to vote for another candidate instead. Thus, faithless electors can direct electoral votes to candidates who were not the winners of a state’s popular vote. Fake electors are distinct in that they are individuals coordinating as a slate of “electors” who falsely purport to be the state’s valid slate of electors; fake electors take steps to attempt to submit their ballots to Congress in place of legitimate ballots, despite being unauthorized to do so. Faithless and fake electors can pose threats to the democratic nature of presidential elections, potentially resulting in electoral outcomes that contradict the will of voters. The presence of faithless and fake electors has yet to influence the outcome of any presidential election in the nation’s history. However, they have featured more prominently in recent elections. The potential for faithless and fake electors to influence future elections is real and should be addressed by the states.

The recommendations and considerations for states described in this Part provide methods for states to limit the potential influence of faithless and fake electors in future presidential elections. This Part first addresses procedures and penalties to prevent faithless electors and describes limited circumstances in which to allow “faithless” electors. This Part then discusses ways to deter fake electors, including creating penalties and adding specificity to elector meeting laws. Then, this Part addresses measures to enhance elector transparency and accountability before discussing steps to minimize the ability of state legislatures to misdirect electors.

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69 Id.
70 See What is the Law on Faithless Electors, LIBR. OF CONG. (Jan. 11, 2023), https://ask.loc.gov/law/faq/331082.
71 See id. Nebraska and Maine allocate a portion of their electoral votes to the winners of individual congressional districts. In those states, faithless electors can direct electoral votes to candidates who are not the winners of a congressional district’s popular vote. See id.
A. Implementing Procedures and Penalties to Prevent Faithless and Fake Electors

1. Faithless Elector Procedures and Penalties

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<th>Recommendations</th>
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<td>States seeking to prevent faithless electors from affecting election outcomes should adopt laws that ensure:</td>
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<td>1. Electors pledge to vote for their appointing party’s candidate;</td>
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<td>2. Removal of faithless electors from their elector appointment;</td>
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<td>3. Cancellation of faithless electors’ ballots; and</td>
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<td>4. Replacement of faithless electors with alternate electors who will vote faithfully.</td>
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<tr>
<th>Considerations</th>
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<tr>
<td>States that wish to further disincentivize faithless electors may consider adopting additional penalties beyond elector removal and ballot replacement. Potential additional penalties include:</td>
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<td>1. Monetary fines;</td>
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<td>2. Prohibition on serving as a future elector; and</td>
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<td>3. Criminal penalties.</td>
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Election has always been a part of the United States’ presidential elections, and the swift development of the American political party system after the Constitution’s adoption quickly led to the now commonplace practice that electors cast votes for the nominee of the political party that appointed them, provided that the party’s candidate won the state’s popular vote. Since 1796, “electors have overwhelmingly voted for their parties’ nominees” and are expected to continue to do so today. In the history of the nation’s elections, there have been 90 “faithless” electoral votes, accounting for a small portion of the 23,507 electoral votes that have been cast across all presidential elections. Only three electoral votes have been cast for a candidate outside the party that appointed the faithless elector; one of these three votes was cast in the 1796 election and the other two were cast in the 2016 election. Sixty-three of the “faithless” votes “were due to the death of the party’s nominee,” while the remaining faithless votes were cast for a different candidate of the appointing

76 *Id.* In 1796, the faithless elector voted for “Democratic-Republican Thomas Jefferson instead of Federalist John Adams.” *Id.* In 2016, one faithless electoral vote was cast by a Democratic elector for John Kasich, a Republican, but Kasich was not the Republican Party’s nominee. *See id.* Additionally, in 2016, a Democratic elector cast a vote for Colin Powell, who was, at different times, both a Republican and Democrat, but Powell was also not the Republican Party’s nominee. *See id.; Azi Paybarah, Colin Powell Says He ‘Can No Longer Call Himself a Republican’, N.Y. TIMES (Jan. 11, 2021), [https://www.nytimes.com/2021/10/18/us/colin-powell-gop.html](https://www.nytimes.com/2021/10/18/us/colin-powell-gop.html).
party, and a small number of other votes were cast in error or abstention. Notably, none of the 90 total instances of faithless electoral votes influenced the outcome of an election.

However, in 2016 alone, there were ten faithless electors, including eight Democratic electors and two Republican electors. In the 2000 presidential election, “just two defections among George W. Bush’s electors . . . would have prevented him from receiving an Electoral College majority.” The relative rarity of faithless electors does not eliminate the possibility of more widespread faithless votes in future elections, nor does it eliminate the possibility that faithless electors could sway the final electoral count contrary to voters’ will. Therefore, states should implement laws, when desired, to limit the faithless electors’ impact.

In states that do not have provisions preventing faithless electors, the actions of faithless electors are entirely legal. Some states have provisions aimed at preventing faithless electors that only require the electors take a pledge to be faithful in their votes, but many such provisions do not provide recourse for a faithless vote, making it possible to cast votes inconsistent with their pledges. However, states are fully equipped to entirely eliminate faithless electoral votes if they so choose.

Following the instances of faithless electors in the 2016 presidential election, the U.S. Supreme Court ruled on whether states’ penalties against faithless electors were constitutional. In Chiafalo v. Washington, the Court unanimously determined that state laws requiring pledges from the electors to vote for their nominating party’s candidate, requiring the replacement of a faithless elector’s ballot, and imposing penalties against faithless electors were all permissible. Normatively, the Court’s decision in Chiafalo also affirmed the now long-established practice and expectation that electors vote for the candidate of their political party who won the state’s popular vote.

At the time of the Chiafalo decision, in 2020, 15 states had laws that imposed some form of “sanction” on faithless electors who deviated from their pledge. Of these 15 states, nearly all had a provision to remove the faithless elector and replace them with an alternate elector, while only “a few states impose[d] a monetary fine” and a smaller number of states imposed criminal penalties against faithless electors. As of 2024, ten states, including some of the 15 states that had sanctions in 2020, have enacted the Uniform Faithful Presidential Electors Act, which was drafted by the National Conference of Commissioners on State Legislatures.

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77 FAIRVote, supra note 75.
78 Id.
79 Rogan, supra note 74.
80 Id.
81 See Eckl, supra note 73, at 1930–31. In 2020, there were 18 states that did not require pledges from electors to be faithful. See id.
82 See id.
84 Id.
85 FAIRVote, supra note 75.
86 See generally Chiafalo, 591 U.S. at 578.
87 Id. at 585.
88 Id. See also KRISTIN SULLIVAN, STATE FAITHLESS ELECTOR LAWS (Jan. 11, 2021) (published by the Connecticut Office of Legislative Research).
on Uniform State Laws. This Act requires “electors to pledge to vote for a candidate and to be replaced if they do not vote as pledged.” However, a majority of states do not have any sanctions in place that prevent the submission of a ballot from a faithless elector.

States seeking to prevent faithless electors should ensure that their laws have, at minimum, the same components as the Uniform Faithful Presidential Electors Act, whether or not enacted with the same language as the Act, to ensure that faithless electors are removed and replaced. Having such a law in place is important to align the electoral process with the will of a state’s voters. Each state may have different procedures for the replacement of faithless electors, but states should ensure that they at least have a contingent group of alternate electors who can reasonably be expected to vote faithfully, while also ensuring that state law subjects alternate electors to the same pledge and replacement standards as the original electors.

States that are interested in further sanctions against faithless electors, either punitively or to serve as dissuasion for future faithless electors, can consider other penalties, including monetary fines, prohibition on future elector service, and criminal penalties, among others. These additional penalties provide a more personal disincentive for electors considering deviating from their pledges and make a state’s position clear to the electors: “electors are not free agents; they are to vote for the candidate whom the State’s voters have chosen.”

2. Situations Warranting Flexibility for Faithless Electors

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<tr>
<td>If states have penalties and procedures to prevent faithless electors, they should adopt contingency provisions that allow electors to be “faithless” when the candidate for whom they would otherwise be required to vote dies after Election Day and before the elector meeting date.</td>
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90 FairVote, supra note 75.
91 See Sullivan, supra note 88.
93 States that impose monetary fines include: California, North Carolina, and Oklahoma. Sullivan, supra note 88.
94 A number of states remove faithless electors and consider them effectively resigned and bar them from future elector service. See id.
95 States that provide for criminal penalties include: California, New Mexico, Oklahoma, and South Carolina. Id.
Considerations

| States that adopt laws allowing electors to be “faithless” in the event of an elected candidate’s death should consider providing electors with the discretion to cast ballots for candidates of the same political party as the deceased candidate. |
| Congress, rather than the states, should consider creating standard procedures to recognize a candidate’s incapacity under the U.S. Constitution’s 20th Amendment. |

Faithless electors inherently act in an undemocratic manner by casting their ballots in contravention of a state populace’s will. However, there are potential extraordinary circumstances where the ability of a state’s electors to be “faithless” could be beneficial.

Perhaps the most compelling circumstance where faithless votes may be appropriate is the death or incapacitation of a presidential or vice-presidential candidate in the period between Election Day and the day in mid-December when electors meet to cast their ballots. This situation would leave electors with the unenviable task of determining whether to be “faithful” and vote for a deceased or incapacitated candidate who cannot physically assume office or to be “faithless” by voting for a candidate who can take office.

Another potential situation where some have suggested that faithless votes might be acceptable is a national emergency that substantially alters the needs of the country in the period between Election Day and the elector meeting date. In such a situation, the leadership needs of the country may be altered by a natural disaster, terror attack, political emergency, or any other significant event to the extent that the well-being of the country would benefit from the leadership of a presidential candidate other than the candidate who voters elected. However, most voters presumably make their selections for president knowing that the role of the president would be instrumental in responding to any potential future catastrophes, so the voters’ will still holds significant weight in contrast to a situation of candidate death or incapacitation. As such, this Report does not suggest providing electors discretion in the case of a national emergency.

There is value in providing for a presidential candidate’s death or incapacitation after Election Day with a law that unbinds electors from the deceased or incapacitated candidate. Such a provision is especially important in states that sanction and penalize faithless electors; electors should not be so strictly bound to a candidate who can no longer take office. The Supreme Court was careful to note in Chiafalo that its ruling should not “be taken to permit the States to bind electors to a deceased candidate.” Furthermore, in the case of candidate death, electors may not even be constitutionally permitted to vote for a deceased candidate, given that the 12th Amendment requires electors “name in their ballots

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98 See generally id.
99 See id. at 8.
100 Chiafalo, 591 U.S. at 596 n.8 (2020).
the person voted for as President, and . . . Vice-President.”\(^\text{101}\) Whether a deceased candidate is a “person” within the meaning of the amendment is unclear. States should be sure to implement a candidate death or incapacitation contingency prior to Election Day to comply with the ECRA. However, the implementation of such a contingency raises two questions.

First, incapacitation, as opposed to death, raises a series of threshold questions: What level of incapacitation should free the electors from being bound to vote for a candidate? What if the candidate is only temporarily incapacitated? What if the future of the candidate’s incapacitation is uncertain? Who should decide whether incapacitation has occurred? It appears that there is no clear answer that can fully anticipate the appropriate threshold that should be prescribed in state law, given the wide variety of possible incapacitation circumstances that may arise.

Second, an elected candidate’s death or incapacitation raises the question of who the electors should cast their ballots for as an alternative. Should the electors cast their ballots for the vice-presidential candidate of the same party? What if both the presidential and vice-presidential candidates are deceased or incapacitated? Similar to the previous questions surrounding the death contingency, it is difficult to anticipate every possible situation and prospectively have appropriate provisions in place.

Accordingly, states should afford electors some level of discretion regarding to whom they direct their votes in case of candidate incapacity or death. Such discretion may be narrowed by the states by requiring electors to still vote for individuals from the same political party as the deceased or incapacitated candidate. This party limitation would, generally, allow the political parties to provide guidance in a situation that would likely cause a great deal of confusion. However, states would have to provide an exception for independent candidates who earn electoral votes as it would not necessarily be clear who qualifies as an alternative candidate from the same party.

In the case of incapacitation, however, states would necessarily have to determine the threshold of incapacity, or establish a procedure to determine incapacity, in order to allow the electors to utilize their discretion. Implementing this threshold could be difficult in practice as states may struggle to adequately define what level of incapacity triggers elector discretion. Additionally, applying the threshold may be difficult; the decision would likely need to be assigned to a state official, and it is not immediately clear who should assume this important role.

An alternative to states regulating electors in the event of candidate incapacitation is federal intervention on the procedures to determine incapacitation. Congress may provide procedures for handling incapacitation under the U.S. Constitution’s 20th Amendment, which allows Congress to address succession scenarios involving the president-elect and vice president-elect. Because candidates do not become president-elect and vice president-elect until after they receive a majority of electoral votes, electors would need to vote for potentially incapacitated candidates, and then a congressionally-created procedure for

\(^{101}\) U.S. CONST. amend. XII (emphasis added). See also Joel K. Goldstein, Akhil Reed Amar and Presidential Continuity, 47 Hous. L. Rev. 67, 76 (2010) (raising the potential issue of whether a decedent qualifies as a “person” in the context of the 12th Amendment).
determining incapacity could be used. Congress action has the added benefit of creating a uniform system of procedures across the country that avoids a patchwork, state-by-state analysis of what constitutes incapacity.

3. Fake Electors Penalties

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<td>States that do not already have adequate penalties in place for fake electors should adopt some level of criminal or civil penalties.</td>
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The 2020 presidential election saw the first significant attempt to utilize fake electors. In 2020, fake electors attempted to cast votes in seven states: Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin. These fake electors attempted to submit ballots for then-President Trump, who lost in these states. Much of the guidance behind these actions was seemingly propagated by Kenneth Chesebro, an attorney supporting Trump’s reelection campaign.

While Congress did not count any of the fake electors’ votes in the 2020 election, the potential for electoral chaos caused by fake electors is substantial. If fake electors’ ballots make it to the congressional electoral count on January 6, it could create confusion and be problematic for finalizing the electoral process, especially if legitimate electoral votes receive objections in Congress and fake electoral votes are given some semblance of legitimacy. Additionally, even if fake electors’ ballots do not make it to the electoral count, the simple act of the fake electors meeting under false pretenses and purporting to cast legitimate votes has the potential to create public confusion and severe distrust in the electoral process.

Accordingly, states should have penalties to dissuade potential fake electors. Following the 2020 fake elector schemes, criminal charges have been brought against the fake electors in

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102 See U.S. CONST. amend. XX; John Rogan, Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day, 90 FORDHAM L. REV. 583, 603–04 (2021) (discussing why Congress might have this authority under the 20th Amendment).
103 Sullivan, supra note 72.
105 Id.; Sullivan, supra note 72.
107 Sullivan, supra note 72; see supra Part I.
Arizona,\textsuperscript{109} Georgia,\textsuperscript{110} Michigan,\textsuperscript{111} Nevada,\textsuperscript{112} and Wisconsin.\textsuperscript{113} These criminal cases have, for the most part, centered on forgery, conspiracy, and election interference crimes, rather than a fake elector-specific criminal law.\textsuperscript{114} In Wisconsin, fake electors faced a civil lawsuit that ultimately reached a settlement.\textsuperscript{115} However, fake electors in Pennsylvania\textsuperscript{116} and New Mexico\textsuperscript{117} were not criminally charged, because the fake electors in those states did not purport to be valid slates of electors; rather, they said in the documents they used that their votes would only be valid if existing legal challenges to the election results were resolved in Trump’s favor.\textsuperscript{118}

In some instances, states may find their existing laws sufficient to penalize future fake elector schemes, but there is a problematic gap in many states’ laws, as evidenced by the nuanced cases in Pennsylvania and New Mexico. The situations in these states show the limits of relying on criminal laws that are not fake elector-specific; New Mexico’s attorney general has called for the state legislature to adopt new laws that would allow charges in another situation that mirrors the 2020 fake elector scheme in the state.\textsuperscript{119} Accordingly, some states would benefit from adopting new laws that ensure consequences for those engaged in future fake elector schemes. For example, Colorado passed a bill in 2024 that specifically applies certain existing election law crimes, such as forgery and perjury, to fake elector schemes.\textsuperscript{120} Such penalties could be imposed through criminal or civil statutes. This Report does not take a position on the appropriate content of potential criminal or civil laws that specifically address fake electors, recognizing that each state will have individual preferences and requirements.


\textsuperscript{111} \textit{Backgrounder: Michigan’s ’Fake Electors’ Charges, Explained}, \textit{States United Democracy Ctr.} (Nov. 6, 2023), https://statesuniteddemocracy.org/resources/michigan-fake-electors/.


\textsuperscript{114} See generally supra notes 110–112.


\textsuperscript{116} Leingang, supra note 104.

\textsuperscript{117} Susan Montoya Bryan & Morgan Lee, \textit{New Mexico Attorney General Says Fake GOP Electors Can’t Be Prosecuted, Recommends Changes}, \textit{Associated Press} (Jan. 5, 2024, 8:08 PM), https://apnews.com/article/new-mexico-fake-electors-9ec6f35313c6bfbe8f1ace65e8d5b323c.

\textsuperscript{118} See id.

\textsuperscript{119} See id.

4. Elector Meeting Laws and Fake Electors

**Recommendations**

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<tr>
<th>States should add specificity to the requirements of elector meetings and voting procedures to limit the possible emergence of fake electors. Specific requirements should include:</th>
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<td>1. Designating the exact meeting location in statute, such as one chamber of the state legislature in the state’s capitol building;</td>
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<td>2. Designating the exact time of the meeting; and</td>
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<tr>
<td>3. Designating a specific state official who must be present for, or preside over, the elector meeting.</td>
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States should also ensure that the specific elector meeting requirements include contingencies in the event that the specific meeting location, time, and/or state official are unavailable due to an emergency. Contingency provisions could often reflect a state’s emergency statutes to ensure a state’s existing emergency response decision-making protocols are utilized to prevent inconsistencies and confusion.

Beyond having adequate penalties to disincentivize fake electors, states can also take steps to thwart fake electors’ efforts to seek legitimacy. During the 2020 elector meetings, slates of fake electors capitalized on ambiguity in state statutes that set the requirements for elector meetings. In Wisconsin, fake electors met inside the state capitol building to cast their ballots and followed procedures to comply with the elector meeting law. This was made possible by non-specific elector meeting laws in a number of states, designating, for instance, that the electors simply meet at the “state capital” on the date of the Electoral College meeting. Such non-specific language in state statutes can allow fake electors to loosely interpret, and purport to meet, the elector meeting requirements by, for example, simply meeting in the capital city of the state. The potential for fake electors to exploit ambiguous statutes is significant, and states should take action to add specificity to their elector meeting laws to ensure that only one, proper slate of electors can meet.

Some elements of the electors’ meeting requirements, such as the date, are federally prescribed, but states can add specificity to their elector meeting statutes if they have not already. Specificity regarding the meeting location, meeting time, and presiding or present state officials would benefit states in administering elections. Adding this specificity to elector meeting statutes will make it far more difficult for a slate of fake electors to purport to have submitted valid ballots, given that they will be unable to comply with the statutory

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122 See id.

123 See WIS. STAT. § 7.75 (1979).

meeting requirements. Moreover, clarity on meeting location will help to avoid a situation where legitimate electors cast their votes in the wrong place, which would be grounds for an objection in Congress to the state’s electoral votes under the ECRA.

A potential issue with increasing the specificity of the meeting location in statutes is that it could make that location a target. If bad actors wanted to stop the meeting of electors, they would have the necessary information. States would also likely need to include emergency provisions. A change in location could be needed to respond to threats, a state of emergency, or other force majeure events. This raises the question of whether a change in location must also be made public. States should thoroughly consider how to address contingency and safety concerns when adding specificity to elector meeting laws.

5. Elector Transparency and Accountability

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<td>States seeking to make the electoral process more visible to the public as a way to bolster elector accountability should consider implementing the following measures during, and prior to, Election Day:</td>
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<td>- Placing the names of each political party’s slate of electors on the ballot, or at polling sites, with the name of the parties’ presidential and vice-presidential candidates; and</td>
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<tr>
<td>- Sharing information in ballots and at polling locations that provides educational information on the electoral process.</td>
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While procedures and penalties to prevent and dissuade faithless and fake electors are important, states can utilize other strategies before Election Day to increase accountability for electors.

Confusion about the electoral process among significant portions of the public demands more transparency and education. When voters do not understand the complex Electoral College system, it is easier for the public to distrust the system as pockets of disruption crop up, such as in the form of faithless and fake electors. Improving education among voters about the processes and safeguards inherent in the Electoral College, and recent legislation like the ECRA, would help the public develop more trust in the system. States interested in improving transparency, understanding, and accountability surrounding the electoral process could provide educational information at polling places and add information to ballots.

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125 Elector meeting locations provided by some states’ more specific statutes include the office of the secretary of state, the governor’s office, and one of the chambers of the legislature. New Jersey lists multiple options, such as the Senate House at Trenton, another building in the State House Complex at Trenton, or the War Memorial at Trenton. N.J. REV. STAT. § 19:36-1 (2023).

126 See Muller, supra note 10, at 1538.

States could place the names of the electors for each candidate at polling sites or on the ballot provided to voters.\(^{128}\) While rare, some states already include the names of electors on the ballot.\(^{129}\) If voters can see the names of electors when voting, it may hold the electors more accountable to the public to cast their votes faithfully. Additionally, it may make it easier for the public to determine the identities of their state’s legitimate, as opposed to fake, electors.

A potential downside to including the names of electors on the ballots is that it could clutter the ballot, especially in elections involving races for multiple offices and ballot measures, making it more difficult for voters to fully participate in the election. Another potential issue is that it could jeopardize the safety and security of the electors if bad actors seek to intimidate or threaten electors in some way, although, in some cases, electors are already public figures.\(^ {130}\) Given the potential benefits and drawbacks that may arise from including electors’ names on the ballot, states should carefully consider whether to do so.

**B. Limiting the Scope of State Legislatures’ Ability to Misdirect Electors**

<table>
<thead>
<tr>
<th>Consideration</th>
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<tbody>
<tr>
<td>States should consider statutory or constitutional reforms to prevent their legislatures, and future legislatures, from directing electors to cast ballots in contravention of the state’s popular vote. The absence of such laws will require that the fate of electors’ ballots rest on the good faith of future state legislatures. Taking preventative action through constitutional amendments would make such measures more difficult to reverse by future legislatures.</td>
</tr>
</tbody>
</table>

This Part has focused on faithless and fake electors in the context of rogue electors attempting to sway a presidential election. However, there is a potentially equally troubling source for election interference: state legislatures.\(^ {131}\)

The *Chiafalo* decision empowered state legislatures to direct electors.\(^ {132}\) State legislatures could potentially use this power to instruct electors to vote for a presidential candidate of their choosing, regardless of which candidate won the popular vote in the state.\(^ {133}\) Such direction could be carried out by passing a law wherein “[t]he default would be that electors vote as the people voted . . . [b]ut the law would reserve to the legislature the power to direct

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\(^{128}\) Thank you for this idea to John D. Feerick, Norris Professor of Law, Fordham University School of Law.


\(^{132}\) Id.

\(^{133}\) Id.
electors to vote differently if it so chooses.” Such a provision would need to be enacted prior to Election Day to be effective. The scholars warning about this possibility emphasize that “there are no [current] protections against a state legislature simply ordering” electors to vote how it decides.

To prevent a state legislature from directing electors contrary to the will of voters, states should consider taking preemptive legislative action. This can take the form of “cement[ing] the requirement that electors are to follow the people’s will” in state law or state constitutions. Making the change via state constitutional amendment has potential upside in that it is much more difficult to repeal by future legislatures due to the procedural requirements of the amendment processes in most states. Another potential benefit of a state constitutional amendment is that it can be more democratically representative; nearly all states require voter approval for constitutional amendments. Requiring electors to follow the popular vote, in many states, would necessarily involve state legislatures limiting their own power, and such a limitation may be unrealistic. However, states that allow constitutional amendments by ballot initiative could utilize that avenue to limit the power of the legislature, but this option is only available in a minority of states.

Limitations on legislatures’ authority to appoint electors are probably constitutional. The Electors Clause in Article II, Section 1 of the U.S. Constitution provides, “Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors.” Moore v. Harper, while addressing the Constitution’s Elections Clause rather than the Electors Clause, provides a useful analogy. In Moore, the U.S. Supreme Court “rejected the idea that the independent state legislature theory gives state legislatures broad power over federal elections, without any role for state courts in supervising the exercise of that power.” Thus, while state legislatures do have a role in regulating and administrating federal elections, it is not an absolute power, and other sources of law may regulate as well. Therefore, a state constitutional amendment, which may need approval by more than just the legislature, can likely be enacted to dictate how legislatures handle elector appointment. Additionally, a statute that prohibits the legislature from misdirecting electors is likely constitutional because the legislature would still be actively determining the “manner” for appointing electors through the creation and passage of the statute.

While state statutory or constitutional reform to prevent the misdirection of electors is not a guaranteed fix to the possible threat arising out of Chiafalo, it is still an option that states

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134 Id.
135 Id.
136 Id.
137 See John Dinan, Constitutional Amendment Process in the 50 States, STATE CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states; see, e.g., N.Y. CONST. art. XIX, § 1.
138 See Dinan, supra note 137.
139 U.S. CONST. art. II, § 1, cl. 2.
140 600 U.S. 1 (2023).
141 See generally id.
should consider. It would both ensure that electors reflect the will of the people in the near term and build the public’s trust in the electoral system by affirming voters’ power.

V. Ranked Choice Voting, Third-Parties, & Independent Candidates

In the days following the 2016 presidential election, various commentators pointed to third-party candidates’ role in helping to elect Donald Trump over Hillary Clinton. In 2020, voters returned to deciding between the two major-party nominees, as votes for third-party candidates fell from their 2016 high of nearly 6% to only 2% in 2020. As the 2024 election nears, voters are once again voicing their distaste for the current system, with a recent poll finding that 63% of adults agree that a third major party is needed.

Yet, desire for a third-party or independent candidate has rarely translated into substantial numbers of votes. Rather, the two-party dominance in elections has earned third-party and independent candidates descriptors such as “spoilers” or “disruptors,” and inspired claims that voting for one of these candidates results in a “wasted vote.” In contrast, those who support third-party and independent candidacies argue that such candidates play a crucial role in promoting democratic governance, providing the electorate with options amidst increasing polarization. Despite the benefits touted by supporters of such candidates, few third-party or independent candidates have come close to being elected president—even when they have captured significant vote shares. For example, third-party candidates placed second in the 1860 and 1912 Elections, while independent Ross Perot finished third with 18.9% of the popular vote in 1992.

Given the valid perspectives of both supporters and detractors of third-party and independent candidates, this Report recommends that states adopt ranked choice voting (RCV) as a compromise that permits voters greater choice while avoiding the conflicts that third-party and independent candidates pose to the winner-take-all system, namely, becoming a spoiler or disruptor in a predominately two-party race.

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148 See id. at 1000, 1003–04.
150 See generally Bendert et al., supra note 146.
Part IV.A discusses RCV, its benefits and drawbacks, variations of RCV, and best practices for implementation. Part IV.B discusses ballot access and voter awareness concerns that states should consider in order to realize the full range of RCV’s benefits.

A. Ranked Choice Voting

RCV is a voting method where voters rank each candidate on the ballot based on their preferences. If no candidate receives greater than 50% of the vote, the system leads to an instant run-off where the candidate receiving the fewest number of votes is eliminated from the running. Votes are then reallocated until at least one candidate receives greater than 50% of the vote.

Six states and the U.S. Virgin Islands have used RCV for presidential primaries,151 while Alaska and Maine will use RCV for the presidential general election for the first time in 2024.152

1. Benefits and Drawbacks

RCV offers numerous benefits over the prevailing plurality “winner-take-all” system. First, it eliminates the disruptor effect where third-party and independent candidates disrupt or spoil the chances of a major party candidate by siphoning away votes. For example, the 2000 presidential election saw George W. Bush win a plurality of the vote in Florida with a 537-vote margin over Al Gore, with Ralph Nader winning 97,488 votes as a Green Party candidate.153 Had Florida used RCV, it is highly likely that Gore would have prevailed.154 Under RCV, the disruptor effect would be “eliminated if most voters . . . rank[ed] more than one candidate on their ballot,” and third-parties could see more viable campaigns without voters being wary of “wasting their votes.”155

Additionally, RCV has been said to result in more civil campaigning, with candidates focusing on their own platforms when there is no clearly identified, singular opponent to campaign against.156 RCV is also compatible with the “winner-take-all” system and aligns with the one-person, one-vote principle.157 Lastly, and importantly, RCV offers voters more options, a benefit that enhances the democratic election process.

However, RCV has been criticized as confusing for voters. While a voter may still choose to only select one candidate, there have been instances where voters rank multiple candidates

152 See ME. REV. STAT. ANN. tit. 21-A, § 1, sub. 27-C (2021); ALASKA ELEC. CODE § 15.15.350(c) (2021).
153 See Foley, supra note 147, at 1006.
154 See id. at 1013–14.
155 Bendert et al., supra note 146, at 350–51 (emphasis in original).
156 But see Jesse Clark, The Effect of Ranked-Choice Voting in Maine, MIT ELEC. DATA & SCI. LAB (Mar. 18, 2021).
157 See id. at 351–56. While the U.S. Supreme Court has not yet ruled directly on RCV’s legality, it is unlikely that the Court would strike down the method broadly. See generally Richard H. Pildes & G. Michael Parsons, The Legality of Ranked-Choice Voting, 109 CALIF. L. REV. 1773 (2021); see also Jones v. Sec. of State, 239 A.3d 628 (Me. 2020), cert. denied, 2020 WL 13853320 (2020).
as the same numerical preference or rank fewer candidates due to confusion. Additionally, some believe that a vote might not count if a voter only ranks a candidate that is eliminated from the ballot. While a single, ranked-choice ballot vote for an eliminated candidate is the same as a vote for a losing candidate, voter confusion may arise from a candidate being “eliminated” and thus not appearing on successive tabulations. And, especially given RCV’s relative newness, there are valid concerns over delays in tabulating votes and how vote totals should be announced.

There is also the possibility that a RCV election between three similarly popular candidates would lead to a contingent election in which no candidate receives an electoral majority. In that event, the House of Representatives would be called to elect the president. The last contingent presidential election occurred in 1825, when John Quincy Adams defeated Andrew Jackson and was alleged to have made a “corrupt bargain” to appoint the Speaker of the House to be secretary of state in exchange for his support in the election. Thus, RCV may need to be implemented alongside third-party and independent candidate reforms, discussed infra, to avoid increasing the likelihood of contingent elections.

2. Types of Ranked Choice Voting

<table>
<thead>
<tr>
<th>Recommendation</th>
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<tbody>
<tr>
<td>States should adopt Instant Runoff Voting instead of Total Vote Runoff because IRV is more easily understood by voters and avoids the greater complexity of tabulating TVR results, a key concern given election certification timelines. Additionally, the theoretical Condorcet advantages (identifying the candidate who would win in head-to-head match-ups with all other candidates) of TVR over IRV have not been shown to be sufficiently statistically significant to warrant use at this stage of RCV adoption.</td>
</tr>
</tbody>
</table>

There are two main variations of RCV, which differ only slightly in how they determine which candidate is eliminated. The most common RCV method is Instant Runoff Voting (IRV). In IRV where no candidate receives a majority of votes, the candidate receiving the fewest number of first choice votes is eliminated, and those ballots are attributed to the voter’s second place preference (if any). This continues until a candidate receives a majority of votes. For example, imagine a race where Candidates A, B, and C receive 45%, 35%, and 20% of first choice votes, respectively. Since no candidate received over 50% of first choice votes, the contest would proceed to an instant runoff. Candidate C would be eliminated, and ballots ranking Candidate C as the first option would have their second choice counted as their vote. If over 5% of Candidate C voters preferred Candidate A over Candidate B, then

158 See Lonna Rae Atkeson, Eli McKnown-Dawson, Jack Santucci & Kyle L. Saunders, The Impact of Voter Confusion in Ranked Choice Voting, SOC. SCI. Q. (Mar. 19, 2024) (indicating that “[s]ixteen percent of voters reported having felt very or somewhat confused” and that “Hispanic voters were more likely to be confused than white voters”).
159 See, e.g., Jones v. Sec. of St., 239 A.3d 628 (Me. 2020), cert. denied, 2020 WL 13853320 (2020); but see Pildes & Parsons, supra note 157.
160 See U.S. CONST. amend. XII.
161 See Foley, supra note 147, at 997–98. The 12th Amendment’s contingent election provision was also invoked to select Vice President Richard Mentor Johnson in the 1836 election.
Candidate A would win. However, if all of the Candidate C voters preferred Candidate B over Candidate A, then Candidate B would win.

An alternative to IRV is Total Vote Runoff (TVR), where the candidate receiving the fewest number of total votes is eliminated. An alternative to IRV is Total Vote Runoff (TVR), where the candidate receiving the fewest number of total votes is eliminated. The total vote is the number of higher preferences given to a candidate over others. This process is repeated until a candidate obtains a majority of votes. For example, in the following race between Candidates A, B, and C, the given percentage indicates the number of ballots returned with that specific ranking:

<table>
<thead>
<tr>
<th>% of Ballots w/ Configuration</th>
<th>1st Place</th>
<th>2nd Place</th>
<th>3rd Place</th>
</tr>
</thead>
<tbody>
<tr>
<td>25%</td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>15%</td>
<td>A</td>
<td>C</td>
<td>B</td>
</tr>
<tr>
<td>35%</td>
<td>B</td>
<td>A</td>
<td>C</td>
</tr>
<tr>
<td>25%</td>
<td>C</td>
<td>B</td>
<td>A</td>
</tr>
</tbody>
</table>

Since no candidate received a majority of first-choice preferences, a TVR system would then calculate voter preferences between each of the three candidates. As a first-choice preference indicates a voter would select that candidate over the other two, the first-choice preference is multiplied by two to reflect that preference. For example, Candidate A who prevails in both an A v. B and A v. C matchup would have those ballots multiplied by two. The second-choice preference is multiplied by 1 given Candidate A would win, for example, in an A v. C but not an A v. B matchup:

<table>
<thead>
<tr>
<th>Candidate</th>
<th>1st Place</th>
<th>2nd Place</th>
<th>Total Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ballots (P1)</td>
<td>Votes (2*P1)</td>
<td>Ballots (P2)</td>
<td>Votes (1*P2)</td>
</tr>
<tr>
<td>A</td>
<td>40</td>
<td>80</td>
<td>35</td>
</tr>
<tr>
<td>B</td>
<td>35</td>
<td>70</td>
<td>50</td>
</tr>
<tr>
<td>C</td>
<td>25</td>
<td>50</td>
<td>15</td>
</tr>
</tbody>
</table>

Here, Candidate C would be eliminated since C had the fewest number of total votes. After this elimination, Candidate B would receive 85% of first-place votes and prevail over Candidate A.

TVR may have the benefit of electing the candidate “whom the majority of voters most prefer.” Moreover, TVR may reduce the likelihood of electing an extremist candidate with a strong base but who is not the majority-preferred candidate. For example, in the above scenario, Candidate A may have a strong base resulting in 40% of first-choice preferences. However, between A and B, a majority of voters would prefer Candidate B. Despite these

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162 See Edward B. Foley, Total Vote Runoff: A Majority-Maximizing Form of Ranked Choice Voting, 21 U. N.H. L. REV. 323, 343 (2023). Professor Foley argues that TVR is preferrable to a round-robin election, where voters choose between candidates: (1) A v. B; (2) A v. C; (3) B v. C. Id. at 339–43.
163 Id. at 343 n.48.
164 This TVR hypothetical model is drawn from Professor Foley's work. See id. at 344–45.
165 Id. at 364.
166 Id. at 363.
mathematically accurate benefits, IRV is generally easier to explain to the electorate than the weighting system used in TVR and, in practice, leads to the most preferred candidate being elected.167

3. Implementing Ranked Choice Voting

States implementing RCV should consider ballot design, how to release and report election results, and how to conduct post-election audits and recounts. Moreover, states must design education campaigns to ensure voters are equipped to effectively cast a ranked-choice ballot.

i. Ballot Design

<table>
<thead>
<tr>
<th>Recommendations</th>
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<tbody>
<tr>
<td>• States should include at least five ranking options and ideally should have a ranking option for each candidate listed on the ballot where feasible.168</td>
</tr>
<tr>
<td>• States should use a “fill in the oval” grid ballot design over column ballots, connecting arrows, and numerical rankings.</td>
</tr>
</tbody>
</table>

States should consider designing ballots to reduce the number of inactive ballots or disqualifying errors. Ballots may become inactive, which is when they are counted in the first round but not in the final round, due to four causes: voluntary abstention from ranking all candidates; full ranking of candidates, all of whom are eliminated; overvoting by ranking two candidates the same; and skipped rankings.169 Disqualifying errors arise from incorrectly marking selections or overvoting.170

States should design ballots that reflect consideration of the number of candidates appearing and the vote indication method. For the number of candidates, states will need to include all qualifying candidates on the ballot. However, they may provide only a set number of ranking options, such as preferences one through five in a race between six candidates. Yet, rank-limited contests produce a higher rate of inactive ballots.171 Thus, ballots should include at least five and ideally an equal number of ranking options to candidates. For vote indication method, the most used versions are filling in ovals, connecting arrows, and numerical rankings in blank boxes.172

Research has found that

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167 Both IRV and TVR tend to elect the Condorcet winner (the candidate that voters prefer in a simulated, head-to-head matchup between all candidates) in practice. See Foley, supra note 147, at 344–46 (arguing that TVR “elect[s] a Condorcet winner when a regular instant runoff does not). Cj. Nicholas O. Stephanopoulos, Finding Condorcet, WASH. & LEE L. REV. at 3 (forthcoming) (finding that, “[i]n practice . . . IRV operates as if it were a Condorcet-consistent method”). But see Nathan Atkinson & Scott C. Ganz, Robust Electoral Competition: Rethinking Electoral Systems to Encourage Representative Outcomes, Univ. of Wisconsin Legal Studies Research Paper No. 1798 at 38–40 (Feb. 15, 2024) (arguing that a Condorcet system, such as a round-robin method, is better than IRV).

168 See id. at 9.

169 See RANKED CHOICE VOTING RES. CTR., BALLOT USAGE ANALYSIS AND DESIGN RECOMMENDATIONS FOR RANKED CHOICE VOTING BALLOTS 2 (Aug. 2022). Skipped rankings only result in ballots becoming inactive in some jurisdictions.

170 See id. at 6–8.

171 Id. at 1.

172 See id. at 9–10.
“filling in the oval” leads to the fewest issues. Moreover, states should use grid ballots instead of column ballots to maximize space utilization.

### ii. Releasing and Reporting Election Results

<table>
<thead>
<tr>
<th>Recommendations</th>
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<tbody>
<tr>
<td>When releasing and reporting RCV results, states should:</td>
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<tr>
<td>• Release preliminary results of all rounds on Election Night</td>
</tr>
<tr>
<td>• Begin counting mail-in ballots prior to Election Day</td>
</tr>
<tr>
<td>• Release preliminary tallies continually at regular and frequent intervals</td>
</tr>
<tr>
<td>• Count ballots with write-in candidates first</td>
</tr>
<tr>
<td>• Publish the full ballot record</td>
</tr>
<tr>
<td>• Use visual media to track the election results</td>
</tr>
<tr>
<td>• Clearly communicate election procedures and results in a timely manner</td>
</tr>
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</table>

News organizations have become the de facto reporters of results on Election Night, continuously updating tallies and proffering predictions based on piecemeal data. For a single-winner, plurality vote structure, this practice is understandable as only the number of first place votes count. However, RCV in a non-majority winner election may lead to greater complexity. To ensure voter confidence in election results, states should amend their election practices, both on Election Night and in the ensuing days, to provide updated tallies during the canvass. Drawing on the Ranked Choice Voting Resource Center’s recommendations, this Report recommends that states adopt the following practices for releasing election results. These recommendations are applicable to elections generally, but states must pay more attention to the timing and planning considerations for presidential elections given the ECRA’s stricter deadlines and the greater burdens imposed during a national contest.

First, states should release a preliminary RCV tally on election night. Tallies should reflect ranked-choice preferences from all rounds, not just the first-choice results, as subsequent tabulations may produce a winner different from the initial candidate. Thus, voters would be able to follow the relative rankings of all candidates pending a full report of the vote. Moreover, results should include a disclosure that the results are preliminary and the elimination order is subject to change. One way states can get a head start on tallying votes is by counting mail-in ballots prior to Election Day. This would allow election

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173 Id. at 10.  
174 Id. at 9–10.  
175 For additional recommendations and case studies on reporting RCV election results, see EQUAL DEMOCRACY PROJECT & RANKED CHOICE VOTING RES. CTR., REPORTING THE RESULTS OF RANKED-CHOICE VOTING ELECTIONS: SUCCESSES AND PITFALLS ACROSS FORTY-FOUR RCV JURISDICTIONS (2022).  
176 RANKED CHOICE VOTING RES. CTR., BEST PRACTICES FOR RELEASING RCV ELECTION RESULTS 2–3 (Dec. 2022).  
177 Id. at 3.  
officials to focus on the new, incoming ballots while also permitting greater time to address any irregularities on mail-in ballots.

Second, preliminary tallies should be continually released at specified, frequent intervals. For example, tallies released in the five consecutive days following an election, and then at a two- or three-day interval, would keep the electorate properly informed. These tallies should also be verified before publication to avoid charges of election fraud. Third, ballots with write-in candidates should be “counted in one batch in the first round.” Since elimination is based upon candidates receiving the fewest votes, ballots containing write-in candidates are most likely to be attributed to other candidates.

Fourth, states should publish the full ballot record indicating the ranking order on each ballot. Publication may be done based on preliminary records or alongside the certified results, but publishing these records will promote transparency, credibility, and legitimacy in the election results. Fifth, states should investigate and implement methods to create visual depictions of RCV results. Such visual media should be accompanied by a simple guide for viewers to understand the information presented. Sixth, states should strive to “[c]learly communicate expectations, timelines, and results” ahead of Election Day. States can do this by creating a resource page on local and state election websites, television public service announcements, and other mediums that states have historically used to communicate voting information.

### iii. Post-Election Audits

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<tbody>
<tr>
<td>States should invest in risk limiting audit implementation and ensure sufficient access to cast-vote records, audit tools, and ballot manifests in order to begin piloting the system. However, states without existing RLA infrastructure should continue to use traditional audits.</td>
</tr>
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</table>

Under the ECRA’s required timeline, states must be efficient in ensuring election results are accurate and reported with a high degree of confidence. As the days immediately following the 2020 presidential election demonstrate, concerns over voting irregularities are best addressed by conducting audits that quickly investigate allegations and correct any deficiencies. In the event that a recount is requested, states must have in place clear guidance to mitigate the greater complexity inherent in ranked-choice ballots.

There are two main types of post-election audits: traditional and risk-limiting. A traditional audit is typically conducted by hand, but may be conducted electronically, and focuses on a fixed percentage of voting districts or machines to “compare the paper record to the results

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180 Id. at 4.
181 Id.
182 Id.
183 Id.
184 Id. See H.B. 974, 2023-2024 Regular Sess., § 4 (Ga. 2024) (requiring the secretary of state to upload scanned ballots to a state website).
186 Id. at 6.
produced by the voting system.”187 A risk-limiting audit (RLA) checks a sample of ballots against election results to meet a “pre-established confidence level in the election.”188 RLAs are more efficient than traditional audits and are compatible with single-winner RCV.189 However, RLA requires greater expertise, software, and access to information to be effective, whereas states are likely more comfortable with traditional audits. Therefore, states should prepare to adopt RLAs but continue to use traditional audits while the new method is implemented.

iv. Post-Election Recounts

In a closely contested presidential RCV election, it is likely that a candidate will request a recount, or that the margin of victory will be slim enough in a jurisdiction to require one. States must consider what existing law in their jurisdiction requires and clarify procedures for a recount well ahead of an election.

First, states must determine when a recount must be conducted. This determination must state the RCV margin of victory using a clear formula, so candidates and election officials know when a recount must be conducted or may be requested.190 The formula must also include a directive of whether to include inactive or exhausted ballots in the tabulation.191 Additionally, states should clarify who may request a recount and at what times. The ECRA imposes new deadlines on states to certify election results,192 so states should adopt a clear threshold for who may request a recount and how soon they must do so. For example, Maine only “permits the three candidates with the most votes at the end of the second-to-last round” to request one, while Utah requires officials to “check each round of counting . . . to determine whether a recount is required.”193

Second, states must clarify how a recount is conducted: manually or electronically. An electronic recount is preferable in light of timing and accuracy concerns, especially where the data is continually audited, but states that mandate a recount by hand must plan to ensure compliance with ECRA deadlines. Additionally, states should outline which rounds will be recounted, whether only the final round or round-by-round. To ensure successful recounts during a presidential election, states should plan ahead by clearly outlining recount procedures as well as training election officials on interpreting RCV ballots and timelines for recounts to be initiated and completed.

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189 See id.
190 See CHRIS HUGHES & RYAN KIRBY, RANKED CHOICE VOTING RES. CTR., RECOUNTS OF RANKED-CHOICE VOTING ELECTIONS 1 (2022).
191 Id. at 26.
192 See supra Part I.
193 Id. at 27.
v. **Voter Education**

<table>
<thead>
<tr>
<th>Recommendations</th>
</tr>
</thead>
</table>
| Education campaigns should follow these general strategies:  
  - Advance distribution of educational materials  
  - Use of plain language  
  - Repeated, consistent messaging across voting materials  
  - Clear communication on RCV’s implementation timeline  
  - Use of visual materials, such as mock videos of ballot markings  
  - Interactive practice materials  
  - Qualified translations of materials |

Voter education is essential to effectively implementing RCV given concerns over voter confusion. By providing educational support, states can greatly reduce both voters ranking more than one candidate with the same preference and voters selecting the same candidate more than once. States should also look to jurisdictions that have already implemented RCV for guidance on education campaigns.

vi. **Constitutional and Statutory Language**

<table>
<thead>
<tr>
<th>Considerations</th>
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<tbody>
<tr>
<td>States should consider changing constitutional or statutory language calling for a “plurality” winner to a “majority” winner, but such changes may not be necessary based on Alaska’s interpretation of the terms and common understanding of RCV.</td>
</tr>
</tbody>
</table>

States must determine whether their constitutions require that electors be awarded to the candidate winning a “majority of votes cast” or just a “plurality.” In a majority winner system, RCV would not face any obstacles as it would only lead to a second tabulation if no candidate receives a majority of votes. However, a plurality requirement will likely lead to litigation seeking to declare the candidate who received a plurality, but not majority, the winner in a RCV election and enjoin or reverse a second tabulation. This occurred in Maine,

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195 See supra notes 158–159 and accompanying text.

196 See Bendert et al., supra note 146, at 352.

where its supreme court issued an advisory opinion declaring RCV unconstitutional for state
general elections based on Maine’s constitutional plurality provision.\(^{198}\)

### B. Third-Party & Independent Candidates

The U.S. Constitution empowers states to regulate the time, place, and manner of federal
elections\(^{199}\) and appoint presidential electors.\(^{200}\) Through this power, states are best
positioned to afford third-party and independent candidates equitable structural support to
seek election to the presidency. However, this Report takes the position that reforming the
election system to recognize third-party and independent candidates as viable alternatives,
and not spoilers or disruptors, first requires adopting a RCV method.\(^{201}\) Solely addressing
the issues identified below in the absence of RCV would continue the problems of
“unrepresentative partisanship, lack of choice, the need for ‘strategic voting,’ and low
turnout” inherent in the existing single-choice plurality system.\(^{202}\) Thus, states
implementing RCV, which may lead to greater third-party and independent candidate
representation, should ensure that their laws do not infringe on those candidates’ right to
ballot access while also providing information to voters about such candidates to ensure an
informed electorate.

#### 1. Ballot Access

<table>
<thead>
<tr>
<th>Recommendations</th>
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<tbody>
<tr>
<td>States should revise their rules to ensure fairness to third-party and independent candidates in the following ways:</td>
</tr>
<tr>
<td>• Require a universally applicable threshold for all candidates, dependent on the state’s population</td>
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<tr>
<td>• Remove unreasonably early signature deadlines</td>
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<td>• Clarify deadline and signature requirements for force majeure contingencies</td>
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<td>• Eliminate geographical requirements</td>
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Ballot access refers to the state-level requirements for gaining entry on the ballot.
Regulating access aligns with state interests in ensuring serious candidates are put forward,
“promoting election integrity, limiting voter confusion, preventing fraudulent candidacies, . . . and supporting finality.”\(^{203}\) For the major parties—Democratic and
Republican—ballot access requirements based on demonstrated public support are typically

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\(^{198}\) See Opinion of the Justices, 162 A.3d 188 (2017); but see Kohlhass v. State, 518 P.3d 1095, 1120–21
(2022) (disagreeing with the Maine decision and finding the state’s constitutional language declaring the
candidate receiving the “greatest number of votes” as winner was compatible with RCV). See also Pildes &
Parsons, supra note 157, at Parts III.A–B (contending that both “majority” and “plurality” provisions are
constitutional).

\(^{199}\) U.S. Const. art. I, § 4, cl. 1.

\(^{200}\) U.S. Const. art. II, § 1, cl. 2.

\(^{201}\) See generally Bendert et al., supra note 146.

\(^{202}\) See Rob Richie, Patrick Hynds, Stevie DeGroff, David O’Brien & Jeremy Seitz-Brown, Toward a More
Perfect Union: Integrating Ranked Choice Voting with the National Popular Vote Interstate Compact, 15

\(^{203}\) Election Law Program, State Regulation of Candidacies and Candidate Ballot Access, in Election
automatically satisfied because states permit candidates nominated by a “major” or “established” party to be on the general election ballot. States typically define those parties as ones having received a certain percentage of votes in a previous statewide or presidential election or who have a certain number of registered voters, typically at a numerical threshold that guarantees qualification. For third-parties and independents, however, states require that they demonstrate sufficient support to qualify. To demonstrate sufficient support, candidates must collect a specified number of signatures based on a percentage of voters against a specific metric—such as votes cast in a recent election or the number of registered voters—or a set number of registered voters. Moreover, third-party and independent candidates may have to submit a petition to qualify for the general election ballot well ahead of the election, whereas major parties automatically qualify.

These requirements support a state’s various interests, noted above, but also result in a patchwork of statutory requirements that make it difficult for third-party and independent candidates to get on the ballot. In light of major party efforts to strategically promote or counter third-parties and independents, states should revise their ballot access requirements to apply universally to all candidates irrespective of party identification or independent status.

First, states should require a threshold of signatures, such as 1,000 to 5,000, from registered voters to qualify for the ballot, depending on the number of voters within a state. States currently diverge on ballot access requirements for most third-party and independent candidates. For example, independent candidates in Arkansas need to file a petition of 5,000 electors to get on the general election ballot, while Missouri requires 10,000 signatures. For political parties, New York only recognizes those “whose candidate for governor at the last preceding election received at least 2% of the total votes cast, or 130,000 votes, whichever is greater, and at least 2% of total votes . . . for president, or 130,000 [votes], whichever is greater,” while South Carolina recognizes a political party that files a petition with at least 10,000 signatures of registered electors. Given these discrepancies that can lead to inconsistent ballot access, thresholds should be adopted based on each state’s historical experience with qualifying candidacies so that the ballot does not become overly crowded while lowering the possibly unattainable threshold for

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204 See generally NAT’L ASS’N OF SECRETARIES OF STATE, STATE LAWS REGARDING PRESIDENTIAL BALLOT ACCESS FOR THE GENERAL ELECTION (2020) (summarizing state level requirements for ballot access in general elections for president) [hereinafter NASS Report].

205 See id.

206 See ELM Chapter 2, supra note 203, at 27.

207 See id. at 27–28; see generally NASS Report, supra note 204.

208 See NASS Report, supra note 204, at 11–12 (noting that, in 2020, Indiana automatically qualified major party candidates for the general election ballot, while for independent and some minor party candidates, Indiana imposed a deadline of July 15 to petition for ballot access).


210 NASS Report, supra note 204, at 4.

211 Id. at 19.

212 Id. at 24.

213 Id. at 30.
minor candidates. For example, Alaska may require only 1,000 signatures, whereas California could set its threshold at 5,000 for all seeking ballot access. This would also eliminate the fluid threshold of signatures based on a recent election, providing uniformity and certainty as candidates and parties plan for electoral runs.214

Second, states should eliminate unreasonably early deadlines for collecting signatures. For example, South Dakota requires new parties to file by the last Tuesday in March215 (over 200 days before the election) and New Hampshire requires independents to file “between the first Wednesday in June and the Friday of the following week,” or approximately 150 days before the election. To avoid these extremely early deadlines, states should set deadlines that permit candidates to enter the race at a reasonable date that avoids “limit[ing] competition for incumbents or require[s] early decision making from prospective candidates,”216 such as in late July or early August. Moreover, states should enact or clarify deadline and signature requirements in the event of force majeure contingencies, such as natural or human-caused disasters.217 Third, states should eliminate geographical requirements for signatures.218 In light of universal threshold requirements, the geographical requirement imposes an additional, needless burden on qualifying.

2. Voter Awareness

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<td>States should provide voter education pamphlets about candidates, voting deadlines and requirements, and RCV procedures.</td>
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Amid the deluge of political advertising and campaign material disseminated in the days before the general election, voters at the polls may confuse candidate names or policy positions when asked to rank their preferences. A voter is unlikely to lack such recall when deciding between major party candidates, but the risk of confusion increases as the list of third-parties and independents gets longer.

To address this possibility, states should provide voter information pamphlets containing each candidate, their picture, and a limited description of that candidate’s views, to be submitted by the candidate and not subsequently edited. It would be best practice for a state to mail these pamphlets to all registered voters ahead of Election Day. However, states should at least have such pamphlets available at polling sites for voters to consult at the time of casting their votes. These pamphlets should also include the location of polling sites and

214 Another alternative or a compliment to lower signature thresholds was recently passed in Georgia, which would “grant access to Georgia’s ballot to any political party that has qualified for the presidential ballot in at least 20 states or territories.” Georgia Lawmakers Pass New Election Rules That Could Impact 2024 Presidential Contest, NPR (Mar. 29, 2024, 2:05 AM), https://www.npr.org/2024/03/29/1241573064/georgia-lawmakers-pass-new-election-rules-that-could-impact-2024-presidential-co.

215 See NASS Report, supra note 204, at 19.

216 Derek T. Muller, Ballot Access, in OXFORD HANDBOOK OF AMERICAN ELECTION LAW 5 (forthcoming).

217 See supra Part III.

218 Louisiana requires that nominating petitions for potential presidential candidates have “five thousand [signatures], not less than five hundred of which shall be from each of the congressional districts.” LA. ELEC. CODE § 18:465(C)(1) (2014).
voter registration information, if mailed in advance, as well as a summary of how to fill out a ranked choice ballot.

VI. The National Popular Vote Interstate Compact

The National Popular Vote Interstate Compact (NPVIC) is an agreement between states to award their electors to the winner of the national popular vote.\(^{219}\) So far, 18 jurisdictions have enacted laws to join the NPVIC, accounting for 209 electoral votes.\(^{220}\) If states accounting for an additional 61 electoral votes join, the NPVIC will take effect. In light of this possibility, this Report addresses considerations for states to ensure compatibility between the NPVIC and the ECRA, state elector laws, and RCV.

A. Compliance with ECRA Deadlines

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<td>States that join the National Popular Vote Interstate Compact must ensure they are still in compliance with the deadlines set by the ECRA.</td>
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The NPVIC must comply with the ECRA deadlines to be properly enacted. The NPVIC seeks to ensure that the presidential candidate who wins the most popular votes nationwide is elected president.\(^{221}\) The ECRA requires the certificate of ascertainment to be issued no later than six days before the time fixed for the meeting of the electors.\(^{222}\) The NPVIC could impair states’ ability to meet this deadline because states must wait for the nationwide votes to be counted. Under the NPVIC, the states’ electors do not necessarily vote for the winner of the popular vote in their state but for the candidate with the most votes nationwide. It is not clear how the official national popular vote winner will be tabulated. It could be the media, a government agency, or alternative method. If there is a delay or recount of votes in one or only a few states, there could be a delay in identifying the winner of the national popular vote. The NPVIC would need to be adapted to ensure it is compliant with the ECRA deadlines.

B. Ensuring State Elector Laws Are Compatible with a National Popular Vote Requirement

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<td>States that are members of the NPVIC, or plan to become members, should ensure that their elector laws include provisions that do not bind their electors to vote for the winner of the state’s popular vote if that candidate differs from the winner of the national popular vote.</td>
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\(^{220}\) Id.; David Sharp, Maine Joins Compact to Elect the President by Popular Vote but It Won’t Come into Play This November, Associated Press (Apr. 15, 2024, 5:59 PM), https://apnews.com/article/maine-national-popular-vote-compact-2a345dce0d7e3937c348575752383a11.

\(^{221}\) Nat’l Conf. of State Legislatures, supra note 219.

\(^{222}\) ECRA § 104(a) (codified at 3 U.S.C. § 5(a)(1)).
States’ adoption of the NPVIC poses some potential conflicts with state elector laws. Faithless elector laws that require electors to vote for the candidate who wins a state’s popular vote could conflict with state laws requiring that electoral votes be cast for the winner of the national popular vote. To avoid this potential conflict, states that have enacted, or will enact, the NPVIC and have faithless elector laws should change the obligations of the electors in the event the NPVIC’s requirements are active.

New York State’s faithless electors law is an example of how states can successfully avoid future elector issues in the event that the NPVIC becomes effective. The statute notes that the requirements to cast electoral votes for the state’s elected candidate “shall [not] be interpreted as modifying or repealing . . . the agreement among the states to elect the president by national popular vote.”

C. The NPVIC & Ranked Choice Voting

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<td>States should consider establishing an Interstate RCV Compact to avoid problems that might arise from using RCV in conjunction with the NPVIC.</td>
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Problems may arise for states using RCV if the NPVIC were to take effect. One issue is that, under the NPVIC, a state that only reported its first-choice totals would make RCV unworkable. A second issue could arise if a third-party or independent candidate did not qualify in some states but did in others, leading to skewed tabulations that do not reflect the general consensus surrounding that candidate and perhaps undermining voter confidence in the system.

Two possible solutions exist. First, Congress could pass a law “establish[ing] uniform standards for a national RCV presidential ranked choice ballot that would be used to determine the national popular vote winner.” The likelihood of passing such a law seems slim, but it would provide the greatest uniformity for such an election. A second solution is to establish an “Interstate RCV Compact” whereby member states would create uniform requirements for running a RCV election. Under the RCV Compact, states would tally RCV ballots to determine who wins their state and share the total results with other compacting states. Once the results were shared, an (ideally independent) governing election agency would conduct the RCV tabulation process and eliminate the least preferred candidate until a candidate obtains a majority. The compacting states would then award their electoral votes to that candidate. While NPVIC ratification may not come to fruition in the immediate future, states should keep this possibility in mind when implementing RCV for presidential elections.

223 N.Y. ELEC. LAW § 12-106 (McKinney 2023).
224 See Richie et al., supra note 202, at 159.
225 Id. at 146.
226 Id. at 177–80. For model draft language, see id. at 207.
227 Id. at 178.
228 Id.
229 Id.
Conclusion

The 2020 election demonstrated the potential harm within the ambiguities of the ECA and led to much needed reform through the ECRA. While states must ensure their laws comply with the ECRA ahead of Election Day, they should also look to other areas to proactively update laws. States should also reform statutory language governing election disruptions and force majeure events, and implement adequate penalties for fake and faithless electors. States should adopt RCV and establish universal requirements for third-party and independent candidates. Lastly, states should plan ahead to ensure their laws and infrastructure are suitable should the NPVIC be ratified. States that undertake these efforts will better position themselves to be efficient and democratic administrators of presidential elections.