

## ELECTION SUBVERSION AND THE WRIT OF MANDAMUS

DEREK T. MULLER\*

### ABSTRACT

*Election subversion threatens democratic self-governance. Recently, we have seen election officials try to manipulate the rules after an election, defy accepted legal procedures for dispute resolution, and try to delay results or hand an election to a losing candidate. Such actions, if successful, would render the right to vote illusory. These threats call for a response. But rather than recommend the development of novel tools to address the problem, this Article argues that a readily available mechanism is at hand for courts to address election subversion: the writ of mandamus. This Article is the first comprehensive piece to situate the writ of mandamus within contemporary election law disputes.*

*This Article traces the history and application of the writ of mandamus in election disputes and posits that it is uniquely situated to help courts prevent election subversion. Federal and state laws delineate clear and mandatory responsibilities for election officials after votes have been cast in an election. Congress's recently-enacted Electoral Count Reform Act strengthens the legal obligations placed upon election officials in presidential elections in particular. Courts*

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*can order state election officials to certify election results and to transmit those results to victorious candidates or the appropriate branch of government. If election officials refuse, courts can proceed to alternative mechanisms of enforcing the judgment, including expeditiously directing another actor to perform the appropriate election administration tasks. Mandamus is particularly valuable—more valuable than ordinary injunctive relief—because of the original jurisdiction in many state supreme courts to handle these disputes, which avoids the delay of a layered appellate process. This Article demonstrates the value of the existing remedy of mandamus to avoid election subversion. It then suggests ways that states strengthen the law around mandamus to ensure that election administration occurs in a timely and effective manner.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 330

I. THE WRIT OF MANDAMUS . . . . . 334

    A. *The Origins of Mandamus* . . . . . 334

    B. *Early American Use of Mandamus*. . . . . 337

    C. *Contemporary Doctrine* . . . . . 340

II. MANDAMUS IN ELECTION DISPUTES. . . . . 344

    A. *Certifying Petitions* . . . . . 345

    B. *Canvassing Votes*. . . . . 346

    C. *Certifying Winners*. . . . . 347

    D. *Availability and Timing of Relief*. . . . . 348

III. DEFYING MANDAMUS . . . . . 349

    A. *Judicial Mechanisms to Ensure Compliance with Mandamus* . . . . . 350

    B. *Limitations on Discretion for Election Officials*. . . . . 353

IV. LEGAL DUTIES CREATED BY CONGRESS. . . . . 356

    A. *Federal Obligations in Congressional Elections*. . . . . 357

    B. *Federal Obligations in Presidential Elections* . . . . . 359

V. THE UNIQUE STRENGTHS OF MANDAMUS. . . . . 365

    A. *Original Jurisdiction in State Supreme Courts*. . . . . 366

    B. *Streamlined Hearings and Legal Elements* . . . . . 369

VI. THE POTENTIAL LIMITATIONS OF MANDAMUS. . . . . 374

    A. *Potential Limitations Against the Governor*. . . . . 374

    B. *Potential Incentives for Grandstanding* . . . . . 376

    C. *Restricted to Discretionary Acts* . . . . . 377

    D. *Dependent on Reliable State Courts* . . . . . 378

VII. STRENGTHENING MANDAMUS . . . . . 380

    A. *Reducing Election Officials’ Discretion*. . . . . 381

    B. *Directing Another Official to Perform Ministerial Tasks* . . . . . 382

    C. *Ensuring State Supreme Courts’ Original Jurisdiction* . . . . . 386

CONCLUSION . . . . . 387

## INTRODUCTION

Extraordinary events marked the 2020 election in the United States. A global pandemic required adaptation of our election infrastructure, which meant late-breaking changes to election administration.<sup>1</sup> A sharp uptick in mail-in voting created challenges for postal delivery and for how states processed ballots.<sup>2</sup> And at the end, conspiracy theories sowed by public officials fueled a riot at the United States Capitol during the typically mundane counting of presidential electoral votes.<sup>3</sup>

Losing candidates have cast doubt on the certified results of elections in recent years, including in presidential elections. But 2020 saw that doubt rise to new heights and pervade ensuing political campaigns. Political candidates who would hold supervisory authority over elections have suggested they would have rejected 2020 election results, an implicit pledge that they may use—and abuse—their offices to undermine future election results.<sup>4</sup>

It is unsurprising, then, that “election subversion” is a matter of great concern. Election subversion is, in the words of Professor Lisa Marshall Manheim, a term used frequently but “rarely [is it] defined.”<sup>5</sup> Professor Richard L. Hasen describes election subversion as a form of “sabotage by election officials, leading to an election

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1. Drew Desilver, *Turnout Soared in 2020 as Nearly Two-thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/short-reads/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/> [<https://perma.cc/2PY8-TQYA>].

2. See Richard H. Pildes, *Election Law in an Age of Distrust*, 74 STAN. L. REV. ONLINE 100, 107 (2022).

3. See Dan Balz, Scott Clement & Emily Guskin, *Republicans and Democrats Divided Over Jan. 6 Insurrection and Trump’s Culpability, Post-UMD Poll Finds*, WASH. POST (Jan. 1, 2022, 6:00 PM), <https://www.washingtonpost.com/politics/2022/01/01/post-poll-january-6/> [<https://perma.cc/84S9-HF89>].

4. See, e.g., Emma Hurt, *Trump-backed Perdue Says He Wouldn’t Have Certified Georgia 2020 Results*, AXIOS (Dec. 8, 2021), <https://www.axios.com/2021/12/08/david-perdue-georgia-2020-election-certification> [<https://perma.cc/5KJV-G5ES>] (quoting Georgia Secretary of State candidate and former Senator David Perdue on the 2020 election, “and I wouldn’t have signed it until those things had been investigated, and that’s all we were asking for”); Kari Lake (@KariLake), TWITTER (Apr. 3, 2022, 3:32 PM), <https://twitter.com/KariLake/status/1510701861371666433> [<https://perma.cc/X5WQ-Y2Y8>] (“Decertify Wisconsin now. And Arizona!”).

5. Lisa Marshall Manheim, *Election Law and Election Subversion*, 132 YALE L.J.F. 312, 322 (2022).

loser being declared the election winner.”<sup>6</sup> Professor Manheim defines it as “the exploitation of a breakdown in the rule of law to install a candidate into elected office.”<sup>7</sup> Professor Rick Pildes identifies the risks in the states of partisan manipulation of vote totals or the refusal to certify election results as potential “election subversion.”<sup>8</sup> These definitions focus on four hallmarks: (1) post-election actions (2) by election officials (3) to defy the accepted legal procedures for resolving election disputes (4) to benefit the candidate who lost (by overturning the results and making that candidate the winner, or by refusing to acknowledge the winning candidate).<sup>9</sup>

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

7. Manheim, *supra* note 5, at 322.

8. Richard Pildes, *Election Subversion and Electoral Count Act Reform*, JUST SECURITY (Feb. 2, 2022), <https://www.justsecurity.org/80059/election-subversion-and-electoral-count-act-reform/> [<https://perma.cc/WQP7-EXV4>].

9. See Franita Tolson, *Parchment Rights*, 135 HARV. L. REV. F. 525, 536 (2022) (expressing concern over “manipulation” of election rules “on the back end” that render voting rights a “mere parchment barrier”). Others have used the term “election subversion” more broadly to include actions that more generally undermine confidence in elections. See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1347-49 (identifying “power-shifting laws” that increase partisanship in election administration, “sham audits or investigations” that “destabilize and undermine faith in elections,” or laws that “harass and intimidate officials” as the “new election subversion”); Will Wilder, Derek Tisler & Wendy R. Weiser, *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. (Nov. 8, 2021), <https://www.brennancenter.org/our-work/research-reports/election-sabotage-scheme-and-how-congress-can-stop-it> [<https://perma.cc/56PE-FWVX>] (including partisan gerrymandering, laws that “restrict access to voting,” and other rules among the acts identified as “election subversion”); Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 368-70 (2021) (identifying the hamstringing of election officials, increased partisanship in election administration, and domestic terrorism as “election subversion”). And election officials in particular can abuse their offices before the election by engaging in unlawful activities (admittedly, sometimes in the midst of good faith disagreements) that circumvent legislative preferences. See, e.g., Derek T. Muller, *Nonjudicial Solutions to Partisan Gerrymandering*, 62 HOWARD L.J. 791, 807-08 (2019) (explaining how the newly-elected Democratic Secretary of State in Michigan attempted to enter a consent decree with plaintiffs challenging a Republican legislative gerrymander to effectively nullify the legislature’s map, which was ultimately rejected by a federal court); *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1, 2-3 (Iowa 2020) (describing how Iowa county election officials disregarded state law and mailed out absentee ballot forms with pre-filled information, which state courts serially rejected as exceeding their authority); *Promote the Vote 2022 v. Bd. of State Canvassers*, 979 N.W.2d 188, 188 (Mich. 2022) (mem.) (holding that Michigan board of canvassers had no statutory authorization to refuse to certify a ballot initiative on its

This Article focuses on this particular risk: some election administrator or board of elections may refuse to certify the results of an election—or, worse, attempt to certify some alternative results apart from the results that go through the ordinary canvassing and recount process. Professor Rebecca Green acknowledges that “those determined to undermine public confidence in U.S. elections have a bottomless pit of options and multiple ways to hide their identity and/or subvert detection.”<sup>10</sup> Subversion may take any number of forms. But there are discrete legal mechanisms to address the different types of potential election subversion.

The increased threat of election subversion remains of recent vintage, but the concern of election officials who ignore, defy, or contest legal obligations is not. Election officials occasionally have refused to perform their statutory obligations.<sup>11</sup> The judiciary, however, is not powerless in such scenarios. The writ of mandamus has been used in a wide variety of contexts to compel election officials to do their job.<sup>12</sup> This Article identifies the important place that the writ of mandamus has as a remedy to prevent election subversion.

This Article opens with a descriptive account of mandamus. Mandamus remains underexplored as a particular mechanism for resolving election disputes, and this Article offers an examination of mandamus. It walks through the salient features of mandamus and its application in the states in election disputes. This discourse helps position mandamus as a routine and preexisting remedy available to resist certain kinds of election subversion.

This Article then identifies the unique value mandamus offers in reducing, and preventing, election subversion. Mandamus is widely available in election disputes and offers a remedy even in cases where election officials are stubborn and recalcitrant.<sup>13</sup> Congress also has the power to place a duty on election officials to certify

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substance). The legislature itself may choose to engage in the counting of ballots or other conduct that could rise to the level of election subversion. See EDWARD B. FOLEY, *BALLOT BATTLES* 259-67 (2016) (describing the “Bloody Eighth,” a 1985 episode in which Congress recounted the ballots in a contested Indiana election with charges that partisans were “manipulating the ballot-counting rules midstream to achieve the desired result”).

10. Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. 289, 350 (2022).

11. See *infra* Part VI.B.

12. See *infra* Part II.

13. See *infra* note 143 and accompanying text.

election results in both congressional and presidential elections.<sup>14</sup> That duty can be enforced in state courts to ensure the timely, accurate transmission of election results to Congress. And that federal duty obviates concerns about the separation of powers inside state government—concerns that state courts may have if they are asked to order the governor how to behave.

Mandamus has its limitations—it, like any legal remedy, cannot solve every problem. But mandamus is preferable to any other remedy in the right circumstances. Mandamus does not extend to officials' discretionary acts, but discretion includes judgment—the principal concern of election subversion arises in cases where there is no judgment, and the result is (or should be) obvious. State mandamus can be coupled with simple directives from Congress to ensure that state election officials, including governors, have federal obligations, which empowers state courts to direct state officials to comply with ministerial tasks in election administration. While mandamus can look like a narrower remedy than injunctive relief, state court jurisdictional statutes make mandamus a much more powerful tool for speedy relief.<sup>15</sup> Mandamus may create a risk by incentivizing election officials to drag their feet and grandstand, but the alternative—the absence of judicial relief—is worse.

But mandamus can be strengthened. First, mandamus can be used more broadly if it is joined with legislation that reduces election officials' discretion. That tradeoff comes with its own costs, but it certainly reduces the risk of subversion. Second, the remedies for recalcitrant election officials who defy mandamus can extend beyond contempt. A less intrusive and more expeditious enforcement mechanism would be to allow some other official to certify election results or fulfill other ministerial legal obligations. Many states have such a rule, and in other states that mechanism could be made explicit. Third, states can add more expedited legal avenues for mandamus, including assurance of original jurisdiction in state supreme courts, to provide timely and effective relief. Rather than expanding original jurisdiction in injunctive cases, which would sweep in many other cases that may be undesirable to include in state supreme court original jurisdiction, mandamus

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14. See *infra* Part IV.

15. See *infra* Part V.

provides a narrow pathway for addressing election subversion. While mandamus cannot stop all election subversion, it is a reliable and traditional tool that can be readily implemented to address present and future concerns to ensure integrity in election administration.

## I. THE WRIT OF MANDAMUS

### A. *The Origins of Mandamus*

Simply put, mandamus is a court order to a lower court or to a government officer “to perform mandatory or purely ministerial duties correctly.”<sup>16</sup> The writ of mandamus traces back to the Magna Carta and its expression of the legal principle, “to no one will we sell, to no one deny or delay right or justice.”<sup>17</sup>

Mandamus was a “high prerogative writ” from the King’s Bench,<sup>18</sup> which meant mandamus arose in law, not in equity. But mandamus sounds very much like an equitable remedy. Mandamus relief was only available when no other legal remedy existed,<sup>19</sup> a condition like equity’s condition that a legal remedy must be inadequate. The writ focused on public rights, public officials, and public affairs, not on the vindication of private violations of common law.<sup>20</sup>

In its earliest days, the writ took the form of a letter from the sovereign power ordering the recipient to fulfill a particular duty, and no appeal was allowed.<sup>21</sup> Early examples of writs that looked

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16. *Mandamus*, BLACK’S LAW DICTIONARY (8th ed. 2004).

17. THOMAS TAPPING, *THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS, AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND* 56 (Philadelphia, T. & J.W. Johnson 1853) (referencing the Magna Carta phrase in its original Latin: “nulli negabimus aut differemus justitiam vel rectum”).

18. *Id.* at 58.

19. *Id.* at 62.

20. *Id.* at 64. See James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1525-26 n.39 (2001). Some early American uses of the writ sought to compel a party to respect the private rights of another for the interest of justice, peace, and order, but by the late nineteenth century, mandamus was limited to cases involving public matters. S. S. MERRILL, *LAW OF MANDAMUS* 16-17 (Chicago, T. H. Flood & Co. 1892).

21. TAPPING, *supra* note 17, at 57; FORREST G. FERRIS & FORREST G. FERRIS, JR., *THE LAW OF EXTRAORDINARY LEGAL REMEDIES: HABEAS CORPUS, QUO WARRANTO, CERTIORARI, MANDAMUS, AND PROHIBITION* §§ 187, 192, 256 (1926).



like mandamus can be found in the fourteenth century, and written decisions invoking the “writ of mandamus” arose in the early seventeenth century.<sup>22</sup> But mandamus remained rare until Lord Mansfield established the writ with a comprehensive theory of its scope and application in the eighteenth century.<sup>23</sup> The King’s Bench was the protector of public rights. If someone had a public right—at common law, by statute or act of parliament, or from the King’s charter—and no other legal remedy existed, the bench should grant mandamus.<sup>24</sup> “Obsolete or inconvenient” relief also meant that no legal remedy existed and the court could grant a writ of mandamus.<sup>25</sup>

William Blackstone described the writ of mandamus as “most extensively remedial [in] nature.”<sup>26</sup> “[I]t issues in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling [its] performance.”<sup>27</sup> In the late eighteenth century, Blackstone identified the breadth of mandamus’s power:

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22. See TAPPING, *supra* note 17, at 56; FERRIS & FERRIS, *supra* note 21, at § 187. Its origins remain murky. James Bagg’s Case, 11 Co. 93b, 77 Eng. Rep. 1271 (KB 1615), remains the traditional origin of mandamus. Historian Edith G. Henderson forcefully argues that scholars and lawyers “have [not] been able to find any cases of mandamus or restitution in the reports or judicial records before 1606.” EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 46-49 (1963). In contrast, Thomas Tapping’s treatise on mandamus insists that “it is not true that the writ was first used so lately as the reign of James I, in a case called Bagg’s,” but that writs of mandamus predating this case were simply not entered into the record or may not have used the label. TAPPING, *supra* note 17, at 56. Henderson characterizes these pre-1606 decisions as “writs of privilege” that bear “close resemblance” to mandamus, HENDERSON, *supra* note 22, at 53, or “are fairly plausible taken in isolation, as ancestors of mandamus,” *id.* at 67-68. See also Kevin Costello, *Mandamus and Borough Political Life, 1615 to 1780*, 42 J. LEGAL HIST. 171, 172-73 (2021) (describing the earlier cases as “writs of restitution”); S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 50 (1951) (describing a 1573 case of mandamus “substantially similar” to the modern writ); JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES § 2 (Chicago, Callaghan & Co. 3d ed. 1896).

23. See HENDERSON, *supra* note 22, at 140-41 (citing *Rex v. Barker*, 3 Burr. 1265 (1762)); see also MERRILL, *supra* note 20, at 16.

24. TAPPING, *supra* note 17, at 62-64.

25. *Id.* at 71; see also 2 THOMAS CARL SPELLING, A TREATISE ON INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1375 (2d rev. ed. 1901) (noting that alternative remedies must be “fully commensurate with the necessities and rights of the party under all the circumstances of the particular case”).

26. 3 WILLIAM BLACKSTONE, COMMENTARIES 110 (1769).

27. *Id.*

A *mandamus* therefore lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature whether spiritual or temporal; to academical degrees; to the use of a meetinghouse, etc.: it lies for the production, inspection, or delivery, of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely.<sup>28</sup>

As originally conceived, *mandamus* applied only to ministerial acts.<sup>29</sup> It could not be used to order an official to exercise a discretionary power.<sup>30</sup> But limited exceptions began to develop. If an official exercised discretionary power to cause “manifest injustice,” a court could issue *mandamus* to order the proper exercise of that power.<sup>31</sup> And by the nineteenth century, *mandamus* at times could extend to acts that might not be deemed purely ministerial in nature.<sup>32</sup>

*Mandamus* formally operated in two forms. One was an “alternative” writ of *mandamus*, which directed a party to show cause why the court should not command the party to obey or (in the “alternative”) the party could perform the act in dispute.<sup>33</sup> The other was the peremptory writ, which was much more powerful.<sup>34</sup> A court issued the peremptory writ when there were no material issues of fact and the right to judgment was clear on the record presented to the court.<sup>35</sup> The respondent may not even have the opportunity to respond if the record demonstrated that a clear right was being violated.<sup>36</sup> Typically, a party needed to seek an alternative writ before a peremptory writ, unless he could demonstrate a clear record and exceptional circumstances.<sup>37</sup>

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28. *Id.*

29. TAPPING, *supra* note 17, at 63.

30. *Id.* at 65.

31. *Id.* at 66.

32. *Id.* at 64-65.

33. FERRIS & FERRIS, *supra* note 21, § 241.

34. *See id.* § 242.

35. *Id.*

36. *Id.*

37. *Id.*

The remedy of mandamus ordered an official to carry out his duty that he failed to fulfill, rather than impose a new duty on any official.<sup>38</sup> “Its principal office is not to inquire and investigate, but to command and execute.”<sup>39</sup> It was designed to be an “immediate and efficacious remedy.”<sup>40</sup> And like so many elements of Anglo-American law, what began in England was brought to the United States.

### *B. Early American Use of Mandamus*

First-year law students are likely to bump into the writ of mandamus early in their legal education in *Marbury v. Madison*.<sup>41</sup> Of course, *Marbury* is famous for the proposition that “an act of the legislature, repugnant to the constitution, is void.”<sup>42</sup> But the opinion offers extensive thoughts on the nature of mandamus in the United States.

Congress enacted the Senate Judiciary Act of 1789 to establish the jurisdiction and the members of the federal judiciary. The Act “devised a judicial organization which, with all its imperfections, served the country substantially unchanged for nearly a century.”<sup>43</sup> Among other things, Section 13 of the Act allowed for “writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”<sup>44</sup>

In the last days of John Adams’s presidential administration, the president nominated William Marbury (among others) as a justice of the peace in the District of Columbia, and the Senate approved the nomination.<sup>45</sup> The commission was signed and sealed, but it was never delivered.<sup>46</sup> Marbury sued Secretary of State James Madison

38. MERRILL, *supra* note 20, at 54.

39. *Id.* at 73.

40. TAPPING, *supra* note 17, at 67.

41. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803).

42. *Id.* at 177.

43. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 4 (1928).

44. 1 Stat. 73, 80-81 (1789).

45. *Marbury*, 5 U.S. (1 Cranch) at 154-55, 157.

46. *Id.* at 155. There is dramatic and colorful history surrounding the controversy as told elsewhere. See, e.g., William A. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3-5; Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199, 206-16 (2013).

in the Supreme Court of the United States, seeking mandamus.<sup>47</sup> Marbury asked the Court to direct Madison to deliver the commission.<sup>48</sup>

Chief Justice John Marshall opined that Marbury's commission vested once it was signed by the President and sealed by the Secretary of State.<sup>49</sup> The failure to deliver the commission was "violative of a vested legal right."<sup>50</sup> Marshall then analyzed whether there was a judicial remedy for this violation. Some acts, which Marshall described as "political," belong "to the executive department alone," and "the injured individual has no remedy."<sup>51</sup> Political, or discretionary, acts reside in the judgment of the executive.<sup>52</sup> But ministerial acts—those acts lacking any executive discretion—may have a judicial remedy.<sup>53</sup> Marshall noted, "[b]ut where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured[] has a right to resort to the laws of his country for a remedy."<sup>54</sup> Marshall favorably cited Blackstone's *Commentaries* for these propositions of mandamus.<sup>55</sup> And in Marbury's case, the failure to deliver the commission "[was] a plain violation of that right, for which the laws of his country afford him a remedy."<sup>56</sup>

Marshall acknowledged that issuing a writ against the head of a department (here, the Secretary of State) put the Court in a "delicate" position.<sup>57</sup> Heads of departments were in an "intimate political relation" with the President of the United States, and the Court "disclaim[ed] all pretensions" to any power of issuing mandamus against the president or heads of departments in the exercise

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47. *Marbury*, 5 U.S. (1 Cranch) at 137-38.

48. *Id.*

49. *Id.* at 162.

50. *Id.*

51. *Id.* at 164, 166.

52. *Id.* at 164. See Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1938-39 (2015).

53. See John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 481 (2017); Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1071-72 (2016).

54. *Marbury*, 5 U.S. (1 Cranch) at 166.

55. *Id.* at 168-69.

56. *Id.* at 168.

57. *Id.* at 169.

of discretionary functions.<sup>58</sup> Marshall also favorably cited the earlier writ of mandamus filed against the Secretary of War after Congress enacted a statute in 1793 relating to the secretary's power.<sup>59</sup> Mandamus here would be appropriate.

But the more famous holding of *Marbury* came next in the Court's analysis. The Court concluded that Section 13 of the Senate Judiciary Act of 1789 was best construed as purporting to place jurisdiction for issuing writs of mandamus in the original jurisdiction of the Supreme Court.<sup>60</sup> That, Marshall concluded, exceeded Congress's authority.<sup>61</sup> Article III of the Constitution enumerated the exclusive categories of the Supreme Court's original jurisdiction, and Congress erred in trying to expand the Court's jurisdiction via statute to include mandamus.<sup>62</sup> In the end, *Marbury* lost. After Marshall explained that *Marbury* was entitled to a remedy for this ministerial act, he then concluded that *Marbury* had sought relief in the wrong court.<sup>63</sup>

58. *Id.* at 169-70.

59. *Id.* at 171-72.

60. *Id.* at 175-76.

61. *Id.* at 176.

62. *Id.* at 175-78.

63. The Court's interpretation of Section 13 created unique challenges for litigants seeking mandamus against federal officers in the appropriate venue in the lower federal courts. *See, e.g.,* McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505-06 (1813); McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 604-05 (1821); Kendall v. United States, 37 U.S. (12 Pet.) 524, 618 (1838). For a brief examination of that history, see HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1180-87 (1st ed. 1953); *see also* Pfander, *supra* note 20, at 1592-98.

Additionally, Federal Rule of Civil Procedure 81(b) today expressly provides, "[t]he writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules." FED. R. CIV. P. 81(b). This change in the rules, however, appears to have changed little practice in the federal courts. For instance, the All Writs Act, 28 U.S.C. § 1651(a), has been construed to permit federal courts to issue writs of mandamus in aid of the jurisdiction of the federal courts. *See, e.g.,* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382-83 (1953). Actions "in the nature of mandamus" may be brought against officers or agencies of the United States. *See* 28 U.S.C. § 1361; *see also* Illinois v. Ferriero, 60 F.4th 704, 709 (D.C. Cir. 2023) ("Mandamus is a 'drastic' remedy, only available in 'extraordinary situations,' and thus 'is hardly ever granted[.]'" (quoting *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc)); *see also* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 308-10 (1967). Likewise, mandamus has been widely used in federal court in patent cases. *See* J. Jonas Anderson, Paul R. Gugliuzza & Jason A. Rantanen, *Extraordinary Writ or Ordinary Remedy? Mandamus at the Federal Circuit*, 100 WASH. U. L. REV. 327, 332-33 (2022). Mandamus has even been identified as a

*Marbury* is an early and major expression of the American judiciary embracing mandamus. State courts likewise have approved of mandamus in a variety of contexts. And state courts at times must issue writs of mandamus in election disputes.

### C. Contemporary Doctrine

State courts recognize mandamus as an appropriate form of relief in contemporary cases. Mandamus has several common features and conditions, although the specific contours can vary from state to state.<sup>64</sup> These elements closely resemble the early common law and the framing of the writ in *Marbury*.<sup>65</sup> At a high enough level of generality, there are five parts to mandamus.

First, the writ of mandamus may be issued to individuals tasked with enforcing public rights or obligations, usually public officials.<sup>66</sup> Mandamus cannot be brought against private individuals.<sup>67</sup>

Second, there must be a clear legal duty that the public official must perform. This duty is often framed as a “ministerial” obligation, or a mandatory responsibility, in contrast to a “discretionary” act.<sup>68</sup> Courts often style this inquiry as whether the party seeking mandamus has a “clear legal right” to relief.<sup>69</sup> It is the flip side of the clear legal duty. If the duty is discretionary, then the plaintiff

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remedy available in voting cases in federal court. *See State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828, 833-34 (S.D. Ohio 2008) (acknowledging that “a federal court may issue a writ of mandamus ordering a state official to enforce rights protected by federal law” before concluding the election official reasonably interpreted a provision of the state election code and denied “the extraordinary remedy of mandamus”). The focus of this Article, however, is the use of the writ of mandamus in state courts.

64. *See, e.g.*, Charles W. “Rocky” Rhodes, *Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus*, 29 ST. MARY’S L.J. 525, 533-34, 586-87 (1998) (harmonizing the Supreme Court of Texas’s jurisprudence on the standards for the writ of mandamus).

65. *See Marbury*, 5 U.S. (1 Cranch) at 147-48, 150, 153.

66. *See, e.g.*, LA. CODE CIV. P. ANN. art. 3863 (2023); OHIO REV. CODE ANN. § 2731.01 (LexisNexis 1953); *Kelley v. Kelley*, 175 P.3d 400, 403 n.5 (Okla. 2007); *Chamber of Com. of Greater Waterbury, Inc. v. Murphy*, 427 A.2d 866, 870-71 (Conn. 1980); *Bengson v. City of Kewanee*, 43 N.E.2d 951, 954 (Ill. 1942).

67. Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLAL. REV. 530, 559 (2016); *see also Bengson*, 43 N.E.2d at 954.

68. *See Bray, supra* note 67, at 559.

69. *Carson Reclamation Dist. v. Vigil*, 246 P. 907, 908 (N.M. 1926).

has not shown a “clear legal right” to the remedy.<sup>70</sup> For this reason, courts sometimes treat “clear legal duty” and “clear legal right” as distinct elements but conflate their analysis.<sup>71</sup>

“Clear” obligations are not superficially obvious obligations, but those obligations lacking any discretion. That is, a “clear” legal duty may well take a court some time and analysis to identify. In *Marbury*, for instance, the Supreme Court engaged in a lengthy legal analysis before it concluded that Marbury had a “right” to his commission once the commission had been signed and sealed.<sup>72</sup>

Mandamus is not typically available to establish a legal right, but only to enforce an established right.<sup>73</sup> A novel judicial determination creating the right is left for other judicial proceedings.<sup>74</sup> Likewise, if facts are in dispute, an appellate court may not exercise jurisdiction over the case because the obligations are not “clear” and instead leave the matter for trial court resolution.<sup>75</sup>

Some states occasionally recognize that in extreme cases, mandamus will issue for discretionary acts. Nevada, for instance, recognizes, “[m]andamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.”<sup>76</sup> But these remain limited exceptions, and cases that require a court to examine the facts may face challenges in expedited review.<sup>77</sup>

70. See, e.g., *id.*; *Light v. Bd. of Educ. of Lebanon*, 364 A.2d 229, 231 (Conn. 1975); *Burley v. N.D. Dept. of Transp.*, 603 N.W.2d 490, 492 (N.D. 1999).

71. See, e.g., *State ex rel. Stark Cnty. Bd. of Elections v. Stark Cnty. Bd. of Comm’rs*, 177 N.E.3d 232, 235-36 (Ohio 2021) (per curiam) (labeling “clear legal right” and “clear legal duty” as two separate elements, then treating them as a single issue).

72. *Marbury*, 5 U.S. (1 Cranch) at 154-62.

73. See *Willimon v. City of Greenville*, 132 S.E.2d 169, 170-71 (S.C. 1963); *Wilson v. Pa. Bd. of Prob. & Parole*, 942 A.2d 270, 272 (Pa. Commw. Ct. 2008).

74. See, e.g., *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 MD 2022, at 26-27 (Pa. Commw. Ct. Aug. 19, 2022) (refusing to issue mandamus when the court had granted “preliminary relief” of the interaction between a federal law and a state law regarding the canvassing of ballots, because the legal judgment “could change pending final resolution of the legal issue”).

75. See, e.g., *Mendoza v. Eighth Ct. of Appeals*, 917 S.W.2d 787, 788-90 (Tex. 1996) (per curiam).

76. *Round Hill Gen. Improvement Dist. v. Newman*, 637 P.2d 534, 536 (Nev. 1981) (citation omitted).

77. See *infra* Part V.A (describing narrowness of original jurisdiction in state supreme courts).

Third, the public official has refused to act in accordance with this clear legal duty.<sup>78</sup>

Fourth, there is no other adequate remedy.<sup>79</sup> Alternative but “extraordinary” remedies are not “adequate.”<sup>80</sup> The adequacy of other remedies may be specific to the context in which mandamus is sought. In Texas, for instance, adequacy issues commonly arise when mandamus is sought in lieu of an appeal from a lower court decision.<sup>81</sup> In 1997, the Supreme Court of Texas rejected mandamus after a lower court ordered a class certified in a class action lawsuit.<sup>82</sup> The court emphasized that mandamus should be issued “sparingly and deliberately.”<sup>83</sup> Opponents of class certification could follow the ordinary appellate routes of interlocutory appeal of a class certification ruling or appeal after a trial on the merits.<sup>84</sup> While there may be circumstances sufficiently “extraordinary” to justify mandamus, they were not present in this case.<sup>85</sup>

Fifth, the court may decline to issue mandamus in its discretion.<sup>86</sup> The concept of “discretion” is often left to “equitable principles.”<sup>87</sup> A court might identify the circumstances in dispute as “unique” that would needlessly involve the judiciary.<sup>88</sup> Some states recognize that

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78. *Mandamus*, BALLOTPEDIA, <https://ballotpedia.org/Mandamus> [<https://perma.cc/XQ2V-GRXC>].

79. *See, e.g.*, NEV. REV. STAT. § 34.170 (2023).

80. *State ex rel. Stark Cnty. Bd. of Elections v. Stark Cnty. Bd. of Comm'rs*, 177 N.E.3d 232, 236 (Ohio 2021) (per curiam).

81. *See Rhodes*, *supra* note 64, at 547-48, 548 n.134.

82. *Deloitte & Touche, LLP v. Fourteenth Ct. of Appeals*, 951 S.W.2d 394, 395-96, 398 (Tex. 1997).

83. *Id.* at 396.

84. *Id.* at 397. *See Rhodes*, *supra* note 64, at 559-60.

85. *Deloitte*, 951 S.W.2d at 398 (“We do not preclude the possibility that in an interlocutory appeal context we might issue mandamus against a court of appeals for procedural irregularities or for actions taken by a court of appeals so devoid of any basis in law as to be beyond its power.... The facts of this case, however, do not constitute the type of extraordinary situation where mandamus should issue.”).

86. *See Mandamus*, *supra* note 78.

87. *See In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 674, 676 (Tex. 2009) (per curiam); *see also Bray*, *supra* note 67, at 546 n.75.

88. *See, e.g.*, *Brewer v. Burns*, 213 P.3d 671, 679-80 (Ariz. 2009) (declining to issue mandamus in “unique circumstances” where a “good-faith dispute between the political branches” was present, and judicial relief would change the delivery of a bill to the governor by “merely a week” and therefore might “unnecessarily involve[]” the judiciary); *State ex rel. Clark v. City of Seattle*, 242 P. 966, 968 (Wash. 1926) (denying mandamus when the city had insufficient funds available for the expenditure to reconstruct a bridge).



the “public interest” would be “adversely affected” by a grant of mandamus in limited cases.<sup>89</sup> Justice Louis Brandeis summarized the concept in a 1917 case before the Supreme Court of the United States:

Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.<sup>90</sup>

This discretion, however, is sometimes expressed simply as an alternative to the merits. In a 1938 case in Florida, for example, the Florida Supreme Court found no clear right for teachers to be restored to their positions in a public school, but it also found in the alternative that a writ could “cause confusion in the work of the schools to the detriment of the public welfare.”<sup>91</sup> Likewise, a 2010 case in Washington held that a union representing personal health care providers had no right to ensure that items about wage increases appeared in the state budget, but that the ongoing economic difficulties in the state would have counseled against granting relief, anyway.<sup>92</sup>

Beyond these five common elements, the distinction between alternative writs and peremptory writs also remains in many states.<sup>93</sup> An alternative writ orders the official to perform the act or to show cause why she need not perform the act; a peremptory writ is an absolute order to perform the act, with no alternative.<sup>94</sup> A court may

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89. See, e.g., *Bennett v. Bd. of Supervisors of Pearl River Cnty.*, 987 So.2d 984, 985-86 (Miss. 2008).

90. *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-12 (1917).

91. *State ex rel. Carson v. Bateman*, 180 So. 22, 23 (Fla. 1938) (per curiam).

92. *SEIU Healthcare 775NW v. Gregoire*, 229 P.3d 774, 775, 778, 780 (Wash. 2010) (en banc).

93. See, e.g., *Murphy Citizens Advisory Comm. v. Josephine Cnty.*, 934 P.2d 415, 419 (Or. 1997); *Murph v. Prosecuting Att’y*, 223 So. 2d 44, 45 (Fla. 1969) (per curiam); *State ex rel. Krieger v. Bd. of Supervisors of Clay Cnty.*, 105 N.W.2d 721, 724-25 (Neb. 1960).

94. See, e.g., *Young v. Johnson*, 207 A.2d 392, 397 (Me. 1965); Legal Information Institute, *Alternative Writ of Mandate (Mandamus)*, CORNELL L. SCH. (June 2021),

enter judgment on the peremptory writ at any time, *ex parte*, and without a hearing.<sup>95</sup>

Mandamus traces back centuries, and many of its historic salient features remain applicable in the courts today.<sup>96</sup> It offers a simple, straightforward, and expeditious remedy for litigants challenging a public official's refusal to perform a clear legal duty. And mandamus can offer particular value in election disputes.

## II. MANDAMUS IN ELECTION DISPUTES

Mandamus is a powerful and versatile writ. And the writ was readily issued in election cases before the King's Bench.<sup>97</sup> Historian Kevin Costello traces its application as a remedy for an illegal election back to 1626.<sup>98</sup> Indeed, Costello notes that the earliest applications of mandamus were heavily tilted toward election disputes: "In the first two decades of the seventeenth century, over sixty per cent of mandamus applications were in some way election-related."<sup>99</sup> Mandamus could be used to restore a candidate to political office or to settle an election dispute.<sup>100</sup>

In contemporary elections, mandamus can also apply to a variety of circumstances, but with a concededly narrow application: ministerial tasks that election officials must perform under the law.<sup>101</sup> In

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[https://www.law.cornell.edu/wex/alternative\\_writ\\_of\\_mandate\\_\(mandamus\)](https://www.law.cornell.edu/wex/alternative_writ_of_mandate_(mandamus)) [<https://perma.cc/F3WB-ZCJJ>].

95. *See, e.g.*, *State ex rel. Shepherd v. Nebraska Equal Opportunity Comm'n*, 557 N.W.2d 684, 689-90 (Neb. 1997); *Dusman v. Bd. of Dirs. of Chambersburg Area Sch. Dist.*, 113 A.3d 362, 368 (Pa. Commw. Ct. 2015).

96. Audrey Davis, Note, *A Return to the Traditional Use of the Writ of Mandamus*, 24 LEWIS & CLARK L. REV. 1527, 1529, 1543 (2020).

97. *See, e.g.*, 3 BLACKSTONE, *supra* note 26, at \*265.

98. Costello, *supra* note 22, at 185.

99. *Id.* at 186.

100. *Id.* at 171-72.

101. While this Article focuses on mandamus as a remedy against state executive officials, mandamus is widely used in other contexts. Notably, a party may seek mandamus in a higher court against a lower court to compel the court to do something. *See, e.g.*, *Mathews v. Crews*, 132 So. 3d 776, 778 (Fla. 2014) (*per curiam*) ("Although a court may use its mandamus authority to compel a lower court to act in the exercise of its lawful jurisdiction, it cannot direct *how* the lower court should act."); *Rodgers v. State*, 606 S.W.3d 72, 73 (Ark. 2020) ("Mandamus will compel a judge to act when he or she should act, but it will not be used to tell a judge how to decide a judicial question."); *Burnham v. Super. Ct. of California*, 495 U.S. 604, 608 (1990) (describing how appellate court rejected mandamus relief after trial court found personal jurisdiction over defendant).

a sense, mandamus serves as a mechanism for state courts to support the state legislatures' directives to election officials.<sup>102</sup>

Mandamus can be used to direct recalcitrant officials—including election officials—to perform their ministerial duties.<sup>103</sup> Three circumstances illustrate how mandamus works in the contemporary election context: certifying petitions, canvassing votes, and certifying winners.

### A. *Certifying Petitions*

First, the decisions to certify candidate nominations or petitions for ballot access are ministerial acts.<sup>104</sup> In 2004, for instance, the Michigan State Board of Canvassers deadlocked 2-2 on whether to certify an initiative petition proposing an amendment to the state constitution defining the legal recognition of “marriage.”<sup>105</sup> The petitioners had secured enough signatures, but two members of the board believed that the proposed amendment was “unlawful and unconstitutional.”<sup>106</sup> After the board deadlocked, a complaint seeking mandamus was filed in state court.<sup>107</sup> A unanimous per curiam opinion from the Michigan Court of Appeals held that mandamus

102. Cf. Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 195-96 (2023) (endorsing a close relationship between state legislatures and state courts in the enforcement of election law).

103. See, e.g., *State ex rel. Patton v. Houston*, 4 So. 50, 52 (La. 1888) (“No authority is or can be cited exempting public officers charged by law with specific ministerial duties in election matters from the same judicial control which is exercised over all other officers of the state with reference to similar duties.”); *State ex rel. Stark Cnty. Bd. of Elections v. Stark Cnty. Bd. of Comm'rs*, 177 N.E.3d 232, 235-37 (Ohio 2021) (per curiam) (instructing county board of commissioners to purchase new voting machines after the board had voted to approve the acquisition of the voting machines but later tried to backtrack on its decision, because the purchase of machines was approved by the board pursuant to state law).

104. See, e.g., *Benavides v. Atkins*, 120 S.W.2d 415, 416-17 (Tex. 1938) (per curiam); *Zellmer v. Smith*, 221 N.W. 220 (Iowa 1928); see also *Florida League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992) (“[O]ur precedent clearly holds that a petition for mandamus is an appropriate method for challenging an allegedly defective proposed amendment to the Constitution.”); Christopher M. Trebilcock & Vincent C. Sallan, *Michigan Election Law Survey*, 67 WAYNE L. REV. 509, 519-22 (2022) (describing circumstances in which there was a ministerial obligation to *remove* a candidate from the ballot but relief was denied due to laches).

105. *Citizens for Prot. of Marriage v. Bd. of State Canvassers*, 688 N.W.2d 538, 540 (Mich. Ct. App. 2004) (per curiam).

106. *Id.*

107. *Id.*

was appropriate.<sup>108</sup> The Board had a “clear legal duty” to certify a petition once it determined there were sufficient signatures.<sup>109</sup> The Board had no authority to review the constitutionality of a proposed initiative; its role was simply ministerial, and the court could instruct the board to certify the amendment.<sup>110</sup>

In 2021, again in Michigan, a ballot petition that would limit the governor’s powers during emergencies secured more than 460,000 valid signatures, based on a Bureau of Elections analysis, when the petition needed only some 340,000 signatures.<sup>111</sup> The board deadlocked 2-2 on whether to investigate the petition’s signatures.<sup>112</sup> The petition’s circulators sought a writ of mandamus in the Michigan Supreme Court.<sup>113</sup> The court concluded that once the Board rejected (by a tie vote) the investigation of the signatures, the Board had a “clear legal duty to certify the petition.”<sup>114</sup> Accordingly, it ordered the Board to certify the petition.<sup>115</sup> And the Board did so.<sup>116</sup>

### *B. Canvassing Votes*

Second, the canvass of votes is a ministerial act.<sup>117</sup> In Colorado, the outcome of a closely-contested city council election turned on whether 47 “irregular” ballots were proper write-in votes or were improper and should be excluded in the tally.<sup>118</sup> After the counting judges sent the totals to the canvassing board, the board could not agree to certify a total number of ballots because it disagreed about counting those irregular ballots.<sup>119</sup> In a mandamus proceeding, the

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108. *Id.* at 543.

109. *Id.* at 541-42.

110. *Id.*

111. Craig Mauger, *Unlock Michigan Proposal Heads to State Legislature After Year of Clashes*, DETROIT NEWS (July 13, 2021, 6:31 PM), <https://www.detroitnews.com/story/news/politics/2021/07/13/unlock-michigan-proposal-heads-legislature-after-year-clashes/7948355002/> [<https://perma.cc/JZZ8-RSZX>].

112. *Id.*

113. *Unlock Mich. v. Bd. of State Canvassers*, 961 N.W.2d 211, 211 (Mich. 2021) (mem.).

114. *Id.*

115. *Id.*

116. Mauger, *supra* note 111.

117. *See, e.g., State ex rel. Walker v. Harrington*, 27 A.2d 67, 76-78 (Del. 1942); *see also* FERRIS & FERRIS, *supra* note 21, § 294; HALSEY H. MOSES, *THE LAW OF MANDAMUS* 90-91 (Albany, William Gould, 1866).

118. *Goff v. Kimbrel*, 849 P.2d 914, 915 (Colo. App. 1993).

119. *Id.*

Colorado Court of Appeals noted, “[c]anvassing returns of ballots already counted by election officials is a ministerial duty of a canvassing board.”<sup>120</sup> “It is not within the province of a canvassing board to investigate questions concerning irregularities, frauds, and illegal votes in the ballot box, since any such complaints are properly raised in an election contest case.”<sup>121</sup> The counting judges submitted results to the canvassing board, and “absent a clerical mistake,” the canvassing board had a ministerial duty to report the results.<sup>122</sup> Questions of the disputed ballots were left to an election contest court to resolve, not for the canvassing board.<sup>123</sup>

### C. Certifying Winners

Finally, certifying the winner of an election is ministerial.<sup>124</sup> To cite one example: the Supreme Court of Ohio in 1983 concluded that candidate Arthur Lambros was not a resident of Brook Park and therefore ineligible to run for the city’s office of law director.<sup>125</sup> The state court ordered him off the ballot, but a federal court later issued a temporary restraining order to keep Lambros’s name on the ballot.<sup>126</sup> After the election, Secretary of State Sherrod Brown instructed the Cuyahoga County Board of Elections to count votes for Lambros, despite the Ohio Supreme Court’s decision that Lambros was ineligible for the office.<sup>127</sup> Lambros’s challenger, David Williamson, sued Brown and the Board for a writ of mandamus to compel them to count votes cast only for Williamson.<sup>128</sup>

A majority of the Supreme Court of Ohio agreed with Williamson; Ohio law gave a “clear legal duty” to count only ballots cast for

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120. *Id.* at 916.

121. *Id.* at 917.

122. *Id.*

123. *Id.* at 915-17.

124. *See, e.g.,* *State ex rel. Watson v. Pigg*, 46 N.E.2d 232, 236 (Ind. 1943); *Reed v. State ex rel. Davis*, 174 So. 498, 499-500 (Ala. 1937); *see also* FERRIS & FERRIS, *supra* note 21, § 295; MOSES, *supra* note 117, at 91.

125. *State ex rel. Spangler v. Bd. of Elections*, 455 N.E.2d 1009, 1010-11 (Ohio 1983) (per curiam).

126. *State ex rel. Williamson v. Cuyahoga Cnty. Bd. of Elections*, 464 N.E.2d 138, 139 (Ohio 1984).

127. *Id.*

128. *Id.* at 139-40.

candidates who were eligible before the election.<sup>129</sup> It also concluded that Williamson was entitled to be declared “duly elected,” as he was the candidate who received the “largest number of votes.”<sup>130</sup>

#### *D. Availability and Timing of Relief*

These three examples—certifying petitions, canvassing votes, and certifying winners—are admittedly oversimplified. Whether there is a “clear legal duty” turns on a state’s laws. And where election officials have discretion, mandamus is inappropriate.<sup>131</sup>

State law identifies which parties may seek mandamus. For instance, the Secretary of State may seek mandamus against a local election official for failing to certify results and then transmit those certified results to the secretary.<sup>132</sup> A candidate may seek mandamus if he purports to be the winning candidate and the official has failed to issue a certificate of elections.<sup>133</sup> An organization attempting to put an initiative on the ballot may seek mandamus if election officials fail to certify the petitions.<sup>134</sup> In short, the context of the election officials’ activity may affect who might seek the writ.

The timing of filing for a writ of mandamus can also affect its availability. States have extensive rules for canvassing, recounting, auditing, and contesting elections. Sometimes mandamus cannot be brought against an executive official precisely because that process is playing out elsewhere and the executive is not yet obligated to act. Consider *Franken v. Pawlenty*, a 2009 Senate election dispute in Minnesota.<sup>135</sup> Al Franken sought a signed certificate of election from Governor Tim Pawlenty after the contested Minnesota Senate election of 2008.<sup>136</sup> The State Canvassing Board concluded

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129. *Id.* at 140.

130. *Id.* at 141.

131. *See, e.g.*, *Broward Cnty. Canvassing Bd. v. Hogan*, 607 So. 2d 508, 510 (Fla. Dist. Ct. App. 1992) (per curiam) (“The statute clearly leaves the decision whether or not to hold a manual recount of the votes as a matter to be decided within the discretion of the canvassing board.”); *State ex rel. Richardson v. Baldry*, 56 S.W.2d 67, 70 (Mo. 1932) (denying mandamus when “respondents, in rejecting the trustees’ proffered votes, were not acting in a purely ministerial capacity”); *see also infra* Part VI.C.

132. *See infra* note 155 and accompanying text.

133. *See infra* note 135 and accompanying text; *infra* note 213 and accompanying text.

134. *See supra* note 104 and accompanying text.

135. 762 N.W.2d 558 (Minn. 2009) (per curiam).

136. *Id.* at 560.

that Franken had received 225 votes more than his opponent, Norm Coleman.<sup>137</sup> While Coleman’s election contest was pending in Minnesota state court, Franken filed a separate action for mandamus to compel Pawlenty to declare Franken the winner and issue the certificate of election.<sup>138</sup> But the court refused to issue such an order.<sup>139</sup> The process in Minnesota was still playing out under state law, and the governor had no legal duty to deliver a certificate while the election contest was pending.<sup>140</sup> Governor Pawlenty ultimately issued the certificate of election, hours after the election contest before the Minnesota Supreme Court concluded.<sup>141</sup> Mandamus was simply unavailable while the pre-existing legal process played out.

By the end of the canvass, recount, audit, and contest, however, the results are in. There is a winning candidate and a losing candidate. The decision to “certify” an election becomes a ministerial act. And if an election official opts to refuse to certify the result—or to certify some other result—the ideal remedy is mandamus.

### III. DEFYING MANDAMUS

Mandamus is a court order that directs an election official to do something. What happens if an election official still refuses and defies mandamus?

At common law, two remedies were readily available. First, the court could order the attachment of property to compel the offending officer to comply.<sup>142</sup> Second, the court could use its contempt power to compel a recalcitrant official to comply.<sup>143</sup> Courts today draw on these traditional remedies and have at least four mechanisms to compel performance: fines, imprisonment, replacing the official, or substituting another official to perform the act.<sup>144</sup> The first two trace

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137. *Id.*

138. *Id.*

139. *Id.* at 570.

140. *Id.* at 561, 566.

141. *See In re Contest of Gen. Election Held on Nov. 4, 2008 for Purpose of Electing a U.S. Senator from St. of Minn.*, 767 N.W.2d 453, 457 (Minn. 2009) (per curiam); 155 Cong. Rec. S7168 (daily ed. July 7, 2009).

142. *See* 2 SPELLING, *supra* note 25, §§ 1704-05.

143. TAPPING, *supra* note 17, at 456-57; HIGH, *supra* note 22, at 517-18; 2 SPELLING, *supra* note 25, §§ 1704-05.

144. *See infra* notes 158-72 and accompanying text.

back to the court's contempt power, but the last two are newer developments. A recent dispute in Otero County, New Mexico illustrates the pressure that comes to bear upon election officials facing mandamus.

*A. Judicial Mechanisms to Ensure Compliance with Mandamus*

The Otero County Commission met as the Canvassing Board on June 13, 2022, to certify its election results, and its members expressed “concerns” about the primary election at its meeting.<sup>145</sup> Election precincts submitted results to the county, and the county’s task was to tabulate the votes and submit them to the Secretary of State.<sup>146</sup> The commissioners expressed concerns that ranged across a variety of topics: the voting machines were unreliable, commissioners received emails from people “super concerned” about the election, there were fears of “ghost voters” (deceased voters who cast ballots), “and so on.”<sup>147</sup> New Mexico has a statutory process for a recount, among other avenues to contest the outcome of an election, but the Board opted not to wait for any other legal process to play out.<sup>148</sup> The Board had “until June 17 to certify the results, but at the [June 13] meeting the Board unanimously refused to certify the results.”<sup>149</sup>

At the meeting, the possibility was raised that a court might issue a writ of mandamus, which would force the commission to certify the results.<sup>150</sup> One commissioner joked: “And so then what? They’re going to send us to the pokey?”<sup>151</sup> “You’d be in contempt,” an

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145. Morgan Lee, *GOP Commission Refuses to Certify New Mexico Primary Results Over Distrust of Voting Machines*, PBS: NEWS HOUR (June 14, 2022, 9:08 PM), <https://www.pbs.org/newshour/politics/gop-commission-refuses-to-certify-new-mexico-primary-results-over-distrust-of-voting-machines> [<https://perma.cc/VA79-VJNV>].

146. N.M. STAT. ANN. § 1-13-16 (West 2023).

147. Derek Muller, *New Mexico Secretary of State Seeks Mandamus Against County Commission That Refused to Certify Primary Election Results*, ELECTION L. BLOG (June 15, 2022, 5:56 AM), <https://electionlawblog.org/?p=129945> [<https://perma.cc/EX5H-KAYV>].

148. *Id.*

149. *Id.*

150. Otero County, *Otero County Special Meeting June 13, 2022*, YOUTUBE (June 13, 2022), <https://www.youtube.com/watch?t=2273&v=Gv9KECp4khg&feature=youtu.be> [<https://perma.cc/ZZQ7-WWUS>].

151. *Id.*



attorney remarked.<sup>152</sup> “And that’s how we get controlled from the top down,” another commissioner, Couy Griffin, remarked.<sup>153</sup> (Griffin is infamous in his own right. The “Cowboys for Trump” co-founder was found guilty of entering a restricted area at the Capitol on January 6, 2021.<sup>154</sup>)

On June 14, the New Mexico Secretary of State filed a mandamus action in the state supreme court.<sup>155</sup> Existing New Mexico law allows district courts to issue mandamus against canvassing boards to certify election results.<sup>156</sup> But the Secretary of State opted to file directly in the supreme court.<sup>157</sup> Two justices recused themselves, presumably because they appeared on the primary ballot.<sup>158</sup> And on June 15, just one day later—and without holding a hearing—the Court granted the petition for writ of mandamus to compel the Otero County Commission to certify the election results by June 17.<sup>159</sup>

The Board met again on June 17.<sup>160</sup> A range of legal consequences confronted the commissioners as they weighed whether to comply with or defy the writ of mandamus.

First, New Mexico authorizes \$250 in fines for any official who disobeys.<sup>161</sup> This penalty was enacted in 1884, and it appears not to

152. *Id.*

153. *Id.*

154. Allison Mollenkamp, ‘Cowboys for Trump’ Leader is Given a Mixed Verdict in His Jan. 6 Capitol Riot Trial, NPR (Mar. 22, 2022, 3:14 PM), <https://www.npr.org/2022/03/22/1088057064/cowboys-for-trump-leader-is-given-a-mixed-verdict-in-his-jan-6-capitol-riot-trial> [<https://perma.cc/6QWE-H7DC>].

155. Emergency Verified Petition for Writ of Mandamus to Compel Certification of Election Results, *Oliver v. Otero Cnty. Comm’n*, No. S-1-SC-39426 (N.M. June 14, 2022), <https://www.sos.nm.gov/wp-content/uploads/2022/06/2022-06-14-EMERGENCY-SC-Writ-of-Mandamus-Compelling-the-Certification-of-Election-Results-2.pdf> [<https://perma.cc/BZ49-2DTN>].

156. N.M. STAT. ANN. § 1-13-12 (West 2019).

157. See N.M. CONST. art. VI, § 3 (“The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions.”).

158. Dan Boyd, *NM Supreme Court Orders Otero County Commission to Certify Election Results*, ALBUQUERQUE J. (June 15, 2022, 10:09 PM), <https://www.abqjournal.com/2508726/nm-supreme-court-orders-otero-county-commission-to-certify-election-results.html> [<https://perma.cc/7YSB-Q99M>].

159. Writ of Mandamus, *Oliver v. Otero Cnty. Comm’n*, No. S-1-SC-39426 (N.M. June 15, 2022), <https://www.democracymocket.com/wp-content/uploads/2022/06/2022-06-15-order.pdf> [<https://perma.cc/65EU-Q6XK>].

160. Otero County, *Otero County Emergency Meeting June 17, 2022*, YOUTUBE (June 17, 2022), <https://www.youtube.com/watch?v=nnV-CAElSzi> [<https://perma.cc/ZZ2R-MHEP>].

161. N.M. STAT. ANN. § 44-2-13 (1978).

have been updated since then.<sup>162</sup> It is a relatively mild inducement, all things considered. Second, officials may be imprisoned until they comply.<sup>163</sup> This penalty is a much stronger inducement to comply, but a recalcitrant official may be willing to risk a few days' imprisonment to delay certification past a significant deadline.<sup>164</sup>

Third, officials who refuse to follow through can be removed from office and replaced.<sup>165</sup> This penalty was particularly potent in New Mexico. Members of the county commission also serve as members of the canvassing board.<sup>166</sup> Truly recalcitrant officials might hold out for removal from a stand-alone canvassing board. But the county commission in New Mexico affects broad policymaking throughout the year.<sup>167</sup> This potential penalty moved two of the commissioners to support certification.<sup>168</sup> They lamented the fact that if they refused to certify, they would no longer be able to serve the people of

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162. *Id.* (See Credits and Legislative History).

163. *See Delgado v. Chavez*, 140 U.S. 586, 587 (1891).

164. *See infra* notes 171-72, 302-03 and accompanying text.

165. N.M. STAT. ANN. § 10-4-2. Here, it is worth identifying the possible applicability of the writ of quo warranto. Quo warranto is available to expel an individual who is wrongfully holding public office. *See, e.g.*, Fla. House of Representatives v. Crist, 999 So. 2d 601, 607 (Fla. 2008); *Spykerman v. Levy*, 421 A.2d 641, 649 (Pa. 1980); *State ex rel. Burnquist v. Village of North Pole*, 6 N.W.2d 458, 460-61 (Minn. 1942); *McGuire v. Demuro*, 121 A. 739, 739-40 (N.J. 1923). This challenge typically arises if the individual is not qualified to hold office or as a challenge to whether the individual was actually elected; but in some jurisdictions, it can be used to remove an individual who has forfeited his office by misconduct. *See, e.g.*, *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28, 29-30 (Mo. Ct. App. 2008); *State ex rel. Watkins v. Fiorenzo*, 643 N.E.2d 521, 521-22 (Ohio 1994) (per curiam); *State ex rel. Martinez v. Padilla*, 612 P.2d 223, 225-26 (N.M. 1980).

But quo warranto is not an appropriate challenge until the purported usurper has entered into office or exercised some authority under that office. *See, e.g.*, *League of Women Voters v. Scott*, 232 So. 3d 264, 265 (Fla. 2017) (per curiam). This is a reason why a candidate should seek mandamus, not quo warranto, if the election official has engaged in election subversion. That subversion takes place in the post-election period but before anyone has yet taken office. *See, e.g.*, *Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 675-76 (Wis. 1856) (allowing court to examine whether illegal votes had been cast in a quo warranto proceeding challenging a governor who had taken office); FOLEY, *supra* note 9, at 94-97 (describing important role of state court in removing an incumbent governor from office in a quo warranto action).

166. N.M. STAT. ANN. § 1-13-1(A) (1978).

167. *See* N.M. STAT. ANN. § 4-57-1 (1978) (empowering the county commission to appoint a planning commission); *id.* § 47-5-3 (requiring the county commission to approve plats of subdivided land before such land may be offered for sale to the public).

168. *See* Annie Gowen, *New Mexico County Certifies Election Results, Bowing to Court Order*, WASH. POST (June 17, 2022, 7:43 PM), <https://www.washingtonpost.com/politics/2022/06/17/new-mexico-county-weighs-defying-order-certify-election-results/> [https://perma.cc/2S37-X7RR].

their county—and, worse, they would be replaced by successors selected by a governor from a different political party.<sup>169</sup> (Griffin still voted against certification, stating, “My vote to remain a no isn’t based on any evidence, it’s not based on any facts, it’s only based on my gut feeling and my own intuition, and that’s all I need.”<sup>170</sup>)

Fourth, New Mexico has a rule of civil procedure analogous to Federal Rule of Civil Procedure 70.<sup>171</sup> Rule 70 offers “varied and effective remedies” to ensure compliance with a judgment.<sup>172</sup> If a judgment directs a party

to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.<sup>173</sup>

At the end of the day, a court can simply find someone else to complete the task.

In short, mandamus worked. Swift judicial action was available because no facts were in dispute.<sup>174</sup> The potential penalties were sufficient to induce compliance.<sup>175</sup> Noncompliance would have been both costly and futile.

### *B. Limitations on Discretion for Election Officials*

The Otero County Commission saga raises its own unique questions. First, what if election officials actually have legitimate concerns about the election? Here, it is worth emphasizing that different actors have different responsibilities for exploring different concerns in our election systems. Some pre-election decisions, such as voting machine vendor contracts, cannot be revisited after

169. Otero County, *supra* note 160.

170. Gowen, *supra* note 168.

171. Compare N.M. R. CIV. P. DIST. CTS. 1-070, with FED. R. CIV. P. 70.

172. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 304 (1939); see also *Neebars, Inc. v. Long Bar Grinding, Inc.*, 438 F.2d 47, 48 (9th Cir. 1971) (*per curiam*) (“A court has, and should have, wide latitude in making a determination of whether there has been contemptuous defiance of its own orders.”).

173. N.M. R. CIV. P. DIST. CT. 1-070.

174. See *supra* notes 155-59 and accompanying text.

175. See *supra* notes 161, 165 and accompanying text.

the election.<sup>176</sup> Pre-election logic and accuracy testing of voting machines faces public scrutiny.<sup>177</sup> State officials, not county officials, direct recounts in New Mexico.<sup>178</sup> The local canvassers from each precinct do their due diligence to verify the substantive vote totals.<sup>179</sup> In short, not every government official has the opportunity to revisit every election decision.

If the canvassing board's responsibilities are merely ministerial, why have the county commissioners involved at all? For one, their responsibilities are not always ministerial. Earlier, this Article identified some practices subject to mandamus as "oversimplified."<sup>180</sup> Sometimes, the Board may need to resolve defective returns or recheck results in the presence of a district judge.<sup>181</sup> That is, at times, commissioners—or any election official—may have substantive or discretionary duties. For instance, if there are 155 precincts and the Board received returns from only 154 precincts, it would want to pause the process and find the results from the last precinct.<sup>182</sup> Likewise, if the totals reflect zero votes cast in one precinct, or if the totals reflect a million votes cast in one precinct, officials should halt the process to determine what went wrong.<sup>183</sup> Discretion may exist in the appropriate, limited context.<sup>184</sup>

Educating the public and election officials about these different roles and responsibilities is not easy. Skepticism over elections abounds.<sup>185</sup> But certification is only one small part of an election.<sup>186</sup> Each election official plays a different role in the election.<sup>187</sup> These roles begin years before Election Day, as officials enter contracts with vendors for voting machines or ballot paper.<sup>188</sup> Officials are constantly registering voters and removing ineligible voters from

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176. See N.M. STAT. ANN. § 1-9-17.1 (1978).

177. See *id.* § 1-9-7.5(E).

178. See *id.* § 1-14-14.

179. See *id.* § 1-14-18.

180. See *supra* note 131 and accompanying text.

181. See N.M. STAT. ANN. §§ 1-13-5(A), 1-13-9 (1978).

182. See, e.g., *id.* § 1-13-2.

183. See, e.g., *id.* § 1-13-5.

184. See, e.g., *id.*

185. See, e.g., Gowen, *supra* note 168.

186. See *id.*

187. See, e.g., N.M. STAT. ANN. § 1-13-1 (West 2023).

188. See, e.g., *id.* § 1-9-17.1.

the rolls.<sup>189</sup> As the election approaches, officials design and print ballots, test voting equipment, and hire and train poll workers.<sup>190</sup> Each day of early voting, workers process voters and ballots.<sup>191</sup> On election night, tabulation occurs simultaneously across thousands of jurisdictions.<sup>192</sup> Those results are aggregated and passed along for the canvass.<sup>193</sup> The canvass takes time to complete, as might any audit, recount, or contest.<sup>194</sup> Each official plays a small role—or sometimes a large role or several roles—in this process.<sup>195</sup>

Certifying an election is something like an automotive worker at the end of an assembly line, affixing windshield wiper blades to a vehicle. That worker might be able to stop the assembly line if the car has only three tires or if the doors are missing. But the worker is not permitted to stop the assembly line to investigate whether the inmost parts of the engine were fitted together to that worker's satisfaction. Other workers are responsible for other stages in the process. There are other checks in the process—other managers and other supervisors tasked with those responsibilities; workers must know their roles and what responsibilities reside with someone else.

In Otero County, however, the Board simply wanted to revisit earlier decisions, where the responsibility for those decisions resided in other officials.<sup>196</sup> The Board did not attempt to exercise any of its limited discretionary authority.<sup>197</sup> Instead, the members of the Board wanted to revisit the decisions others had made at other stages, which was not their responsibility.<sup>198</sup>

States may have different statutory mechanisms to ensure tasks are performed in situations like Otero County without judicial review. For instance, the law could escalate a county board's defiance

189. *See, e.g., id.* §§ 1-4-5, 1-4-25.

190. *See, e.g., id.* § 1-11-6.1.

191. *See, e.g., id.* § 1-6-23.

192. *See, e.g., id.* § 1-12-70.

193. *See, e.g., id.* § 1-13-4.

194. *See, e.g., id.*

195. *See, e.g., id.* § 1-13-1.

196. *See Gowen, supra* note 168.

197. It would be possible, of course, to let a district court judge “certify” the results, but that would include taking on these other tasks, which may involve exercises of discretion. And there are some downsides in moving the execution of the law to the judiciary. *See infra* Part VII.B.

198. *See Gowen, supra* note 168.

to a state board or to the Secretary of State.<sup>199</sup> The prospect of jailing a state executive official for contempt of a judicial order is not exactly what a state judiciary wants—more limited interventions, if available, seem preferable except in the most extreme cases.<sup>200</sup> But if needed, the judiciary has effective tools at its disposal to ensure compliance. Part VII below will suggest some ways that states can ensure mandamus remains an effective tool within their legal systems to head off election subversion. But first, this Article will examine how Congress can play a role in creating obligations for election officials in federal elections.

#### IV. LEGAL DUTIES CREATED BY CONGRESS

Most mandamus actions relating to elections come from state elections in matters arising under state law. Most elections are for state offices, local offices, or ballot initiatives, and, accordingly, one would expect to see such cases arise most frequently.

That said, mandamus in federal elections is important even if less frequent. A uniform federal obligation in federal elections can streamline legal review with a single national standard for courts to enforce.<sup>201</sup> It can strengthen confidence in outcomes of congressional and presidential elections.<sup>202</sup> And there is a “uniquely important national interest” in how each state administers its presidential election, as what happens in one state “has an impact beyond its own borders.”<sup>203</sup> But while the availability of mandamus

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199. *See, e.g.*, MICH. COMP. LAWS § 168.822(2) (2023) (“If the board of county canvassers fails to certify the results of any election for any officer or proposition by the fourteenth day after the election as provided, the board of county canvassers shall immediately deliver to the secretary of the board of state canvassers all records and other information pertaining to the election. The board of state canvassers shall meet immediately and make the necessary determinations and certify the results within the 10 days immediately following the receipt of the records from the board of county canvassers.”).

200. *See infra* Part VII.B.

201. *Cf.* Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 562 (2021) (proposing that resolving election disputes at higher levels reduces the incentive to litigate and increases consistency).

202. *See id.*

203. *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983). Nevertheless, the mere fact that what happens in one state can affect the ultimate outcome of the presidential election, which affects all states, is not sufficient to establish standing for states to compel other states to obey election rules. *See Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.).

in federal elections may be important, there are additional complexities regarding federal elections and the federal courts. This Part explores congressionally created ministerial obligations in federal elections, both congressional elections and presidential elections. If Congress can create the duty, then the state courts can be empowered to enforce it.

### *A. Federal Obligations in Congressional Elections*

Under the Elections Clause of the Constitution, “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.”<sup>204</sup> Thus, Congress has the power to make or alter the regulations pertaining to congressional elections. Congress’s power is broad and may supersede any inconsistent state law.<sup>205</sup> Each house of Congress also has the power to be “the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>206</sup> These constitutional provisions offer Congress flexibility in determining how it wants to involve itself in congressional elections.

In 1866, Congress enacted a statute regulating Senate elections.<sup>207</sup> As a part of that law, Congress required the following:

That it shall be the duty of the governor of the State from which any senator shall have been chosen as aforesaid to certify his election, under the seal of the State, to the President of the senate of the United States, which certificate shall be countersigned by the secretary of state of the State.<sup>208</sup>

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204. U.S. CONST. art. I, § 4, cl. 1.

205. See *Ex parte Siebold*, 100 U.S. 371, 392 (1879); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 7-8 (2013); *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

206. U.S. CONST. art. I, § 5, cl. 1.

207. See *generally* Act of July 25, 1866, Ch. 245, 14 Stat. 243. There is no parallel provision for House elections—it appears Congress was responding to unique concerns of the disputes that arose in state legislatures when they elected Senators before ratification of the Seventeenth Amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 1672 (1866).

208. 14 Stat. 243.

The language has been amended slightly to where it stands today: “It shall be the duty of the executive of the State from which any Senator has been chosen to certify his election, under the seal of the State, to the President of the Senate of the United States,”<sup>209</sup> and “[t]he certificate ... shall be countersigned by the secretary of state of the State.”<sup>210</sup>

Here, Congress created a federal duty and placed the responsibility to carry out that duty on state executives.<sup>211</sup> Congress generally lacks the power to compel state executive officials to enforce federal law.<sup>212</sup> Federal elections, however, are different. The Supreme Court has recognized that state election officials owe a responsibility to the United States and to congressional directives in the context of federal elections, which suggests that Congress has the authority under the Elections Clause to compel state executives to act.<sup>213</sup>

That congressionally-created duty becomes judicially enforceable. Consider the Franken-Coleman dispute again. In 2009, the Minnesota Supreme Court accepted a petition from Al Franken alleging that Governor Tim Pawlenty was obligated under this federal statute (among other things) to issue Franken a certificate of election.<sup>214</sup> The federally-created responsibility was enforceable in a state court proceeding against the governor, even though, as mentioned earlier, mandamus was inappropriate while the election contest was pending.<sup>215</sup>

Also in 2009, the Supreme Court of Illinois considered a mandamus action from Roland Burris, who had been appointed by

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209. 2 U.S.C. § 1a.

210. *Id.* § 1b.

211. *See, e.g.*, *Phillips v. Rockefeller*, 321 F. Supp. 516, 521 (S.D.N.Y. 1970) (describing the federally-created obligation of certifying the results), *aff'd*, 435 F.2d 976 (2d Cir. 1970) (declining to reach the question of whether state officials were acting under color of federal or state law).

212. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 932-34 (2020).

213. *See, e.g.*, *Ex parte Siebold*, 100 U.S. 371, 387 (1879); *Branch v. Smith*, 538 U.S. 254, 280 (2003) (Scalia, J.) (plurality opinion). The matter, however, has been the subject of some scholarly debate. *Compare* Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 237-38, *with* Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 553-54 (2001). For a summary of the debate, see Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. ONLINE 79, 101-03 (2016).

214. *Franken v. Pawlenty*, 762 N.W.2d 558, 559-60 (Minn. 2009) (*per curiam*).

215. *Id.* at 570.



Governor Rod Blagojevich to a Senate seat vacated by President-Elect Barack Obama.<sup>216</sup> Burris sued Secretary of State Jesse White to secure his signature on Burris’s certificate of appointment.<sup>217</sup> The court rejected the claim because this federal duty was inapplicable in an instance where a Senate vacancy was filled by *appointment* rather than *election*.<sup>218</sup> While Burris lost the claim, the court acknowledged that the Governor or the Secretary of State did have ministerial obligations under both federal and state law—but obligations that would only arise in a different context.<sup>219</sup>

These federal obligations appear to be rarely litigated. And why should they be? Once the state processes of canvass, recount, audit, and contest have finished, state officials promptly sign a certificate of election for the winning candidate.<sup>220</sup> The rare breakdown in the system, however, may mean that a winning candidate must sue to enforce these federal obligations.

And if Congress can place an obligation on the state executive, it is a corollary that state legislatures can place an obligation on state executives in the administration of federal elections. The state power and the congressional power to regulate the “manner” of holding elections are largely symmetrical.<sup>221</sup>

### *B. Federal Obligations in Presidential Elections*

In presidential elections, the issue of resolving disputes in the states and transmitting reliable certified results to Congress is one of great importance.<sup>222</sup> Indeed, ascertaining which authority from

216. *Burris v. White*, 901 N.E.2d 895, 896 (Ill. 2009).

217. *Id.* at 897.

218. *Id.* at 900.

219. *Id.* at 900-01.

220. *Election Results, Canvass, and Certification*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/election-officials/election-results-canvass-and-certification> [https://perma.cc/XR8V-VVCM].

221. See *Smiley v. Holm*, 286 U.S. 355, 366 (1932) (“The phrase ‘such regulations’ plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections.”); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831-32 (1995).

222. Portions of this argument are drawn from testimony given before the United States Senate Rules and Administration Committee. *The Electoral Count Act: The Need for Reform: Hearing before the S. Rules and Administrative Comm.*, 117th Cong. 2 (Aug. 3, 2022) (statement of Derek Muller).

the state has the power to certify election results was at the heart of controversies in the election of 1872<sup>223</sup> and of 1876.<sup>224</sup> Lawmakers and the public are acutely aware of the doubt cast over the 2020 presidential election and threats from election officials to subvert future presidential election results.<sup>225</sup> A presidential election is the highest profile election, and it is deeply decentralized and dependent on the actions of all the states working alongside each other in a highly compressed timeframe. Special attention to how Congress can create federal obligations in presidential elections is particularly warranted.

Congress has fewer enumerated constitutional powers in presidential elections than it has in congressional elections. Congress lacks the express authority to “judge” the qualifications, elections, and returns of presidential elections.<sup>226</sup> Unlike the Elections Clause, which expressly empowers Congress to “make or alter” the rules for congressional elections, the Constitution provides no express power for Congress to regulate the “manner” of holding presidential elections under the Presidential Electors Clause.<sup>227</sup> The Supreme Court has at times suggested that Congress’s power over presidential elections is coextensive with its power over congressional elections,<sup>228</sup> and Congress has often regulated the two types of elections together.<sup>229</sup> And Congress, of course, can regulate the manner of holding presidential elections under other constitutional

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223. See Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529, 1547-48 (2021).

224. See WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876*, 99-100 (2004); see generally FOLEY, *supra* note 9, at 117-49.

225. See, e.g., *Election Subversion Threats: 2024 Battleground States*, VOTING RTS. LAB (Feb. 21, 2022), <https://votingrightslab.org/election-subversion-threats-2024-battleground-states/> [<https://perma.cc/G8GT-ZNH6>].

226. U.S. GEN. ACCT. OFF., GAO-01-470, *THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 2* (2001).

227. Note, “*As the Legislature Has Prescribed*”: *Removing Presidential Elections from the Anderson-Burdick Framework*, 135 HARV. L. REV. 1082, 1089-91 (2022). Compare U.S. CONST. art. II, § 1, cl. 2 (empowering the state to appoint, “in such Manner as the Legislature thereof may direct, a Number of Electors”), with U.S. CONST. art. I, § 4 cl. 1.

228. See *Burroughs & Cannon v. United States*, 290 U.S. 534, 544-46 (1934); *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (“It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.”).

229. See, e.g., 52 U.S.C. § 20502(2) (defining “Federal office” for regulating voter registration as including both presidential and congressional elections, per 52 U.S.C. § 30101(3)).

provisions, such as when it is enforcing the Fifteenth Amendment’s guarantee that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>230</sup> Accordingly, federal rules that generally regulate the manner of holding presidential elections may tread on less sure constitutional footing.<sup>231</sup>

But Congress has other enumerated powers in presidential elections. First, it may “determine the Time of [choosing] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”<sup>232</sup> Second, under both the original Article II and in language re-enacted in the Twelfth Amendment, the electors in the states for president and vice president submit their certificates of election to the “seat of the government.”<sup>233</sup> Then, “[t]he President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted.”<sup>234</sup> Finally, “[t]he Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>235</sup> The Time of Choosing Clause, the Counting Clause, and the Sweeping Clause provide the constitutional authority for Congress to impose obligations on state executives in the administration of federal elections.

The Time of Choosing Clause empowers Congress to fix the date of holding a presidential election.<sup>236</sup> In conjunction with the Necessary and Proper Clause, it empowers Congress to specify that the rules for choosing electors must also be in place by that date, and that Congress can require conclusion of the canvass and any contests by a certain date.<sup>237</sup> A firm ending date ensures that states

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230. U.S. CONST. amend. XV, § 1. *See generally* Voting Rights Act, 52 U.S.C. § 10101.

231. *See generally* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 35-36 n.2 (2013) (Thomas, J., dissenting).

232. U.S. CONST. art. II, § 1, cl. 4.

233. *See id.* amend. XII.

234. *Id.* art. II, § 1, cl. 3, *superseded by* U.S. CONST. amend. XII.

235. *Id.* art. I, § 8, cl. 18.

236. *Id.* art. II, § 1, cl. 4.

237. *United States v. Classic*, 313 U.S. 299, 320 (1941).

send the certificates of ascertainment of appointment of electors in a timely fashion.

The original public meaning of the Counting Clause provides unusually strong support for this scope of congressional authority. Congress proposed the Twelfth Amendment in 1803, and it was ratified in 1804.<sup>238</sup> The heart of the Amendment required presidential electors to vote for a president and a vice president on separate ballots, as opposed to listing two preferred presidential candidates at once.<sup>239</sup> But the Amendment also restated the Counting Clause, which had been a part of the original Constitution.<sup>240</sup> By 1804, it was accepted that Congress counted electoral votes in the joint session.<sup>241</sup> In a 1792 law, Congress had instructed state executives to certify presidential election results and transmit certificates of election to electors<sup>242</sup> and set some rules for Congress to be in session for the counting of votes.<sup>243</sup> That obligation—executives “shall” certify and transmit election results—drew a rebuke from Governor John Hancock of Massachusetts:

that Government applies itself to the People of the United States in their natural individual capacity, and cannot exert any force upon, or by any means control the officers of the State Governments as such: Therefore when an Act of Congress uses compulsory words with regard to any Act to be done by the Supreme Executive of this Commonwealth I shall not feel myself obliged

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238. See *Speech in Favor of the Twelfth Amendment, 1803*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/speech-favor-twelfth-amendment-1803> [https://perma.cc/VN7A-SQVZ].

239. U.S. CONST. amend. XII.

240. Compare *id.* amend. XII, with U.S. CONST. art. II, § 1, cl. 3.

241. See, e.g., 6 ANNALS OF CONG. 1538-40, 1542-45 (1849) (describing the joint committee of the House of Representatives and the Senate on the mode for examining votes, including the appointment of tellers from each chamber, followed by the acts of the tellers who “examined and ascertained the number of votes”).

242. Act of Mar. 1, 1792, Ch. 8, 1 Stat. § 3 (“That the executive authority of each state shall cause three lists of the name of the electors of such state to be made and certified and to be delivered to the electors.”).

243. *Id.* § 5 (“That Congress shall be in session ... and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared, agreeably to the constitution.”).

to obey them, because I am not, in my official capacity, amenable to that government.<sup>244</sup>

In contrast, even Senator Charles Pinckney, who expressed great skepticism over Congress’s management of the counting of electoral votes, approved of this exercise of authority.<sup>245</sup>

Upon ratification of the Twelfth Amendment in 1804, Congress enacted an updated statute to handle the transmission of electoral results from the states.<sup>246</sup> Congress’s behavior, both before and leading up to the Twelfth Amendment, provides unusually specific context that strengthens this understanding of the scope of Congress’s power. And Congress has continued to require executive certification of state presidential election results ever since. Indeed, the Electoral Count Act of 1887 placed similar obligations on the executive.<sup>247</sup> A state’s executive has a “duty” to send to Congress the ascertainment of appointment of presidential electors, including the names of the electors who received votes and their vote totals.<sup>248</sup> The executive also must send copies of the certificate to the winning presidential electors.<sup>249</sup>

Ordinarily, Congress relies on each state’s ordinary processes to get election results to Congress. After the election, the state finalizes the canvass of the votes, and it may audit or recount results to secure a more accurate figure.<sup>250</sup> There may even be an election contest filed in state court.<sup>251</sup> But by the end, a canvassing board or

244. *Hearing Before the S. and H. of Rep.* (Mass. Nov. 12, 1792) (statement of John Hancock).

245. 10 ANNALS OF CONG. 126-28 (1851) (“Congress ha[s] no right to pass the bill before you, or to legislate at all further on the subject[] than they have done by the act of 1792.”); *id.* at 136 (“[W]ill not our citizens be inclined to suppose that the act of 1792 was a proper one, and that there was more probability of its provisions being in a temperate and unbiased conformity to the Constitution, than any act which could be passed at this time?”).

246. An Act supplementary to the act intituled [sic] Act of Mar. 26, 1804, Ch. 50, 1 Stat. § 3 (1904) (“[T]he executive authority of such state shall cause six lists of the names of the electors for the state, to be made and certified, and to be delivered to the said electors.”).

247. 3 U.S.C. § 5.

248. *Id.*

249. *Id.*

250. See *State Election Canvassing Timeframes and Recount Thresholds*, NAT’L ASS’N SEC’YS STATE (Sept. 2022), <https://www.nass.org/node/2455> [<https://perma.cc/4TS9-JEVD>].

251. See, e.g., Marc Levy, *Pennsylvania High Court Rejects Lawsuit Challenging Election*, AP NEWS (Nov. 28, 2020), <https://apnews.com/article/election-2020-joe-biden-legislature-pennsylvania-lawsuits-8cb524364fe641a3fca635a2a5a925ef> [<https://perma.cc/T3YM-47LM>].

some election authority certifies the results.<sup>252</sup> That goes on to the executive, who sends certificates of election to the presidential electors who won their offices.<sup>253</sup> The executive also sends the certificates to Congress to identify the results in the state, including the winners.<sup>254</sup> After that, the electors meet, vote, and the electors send their own certificates to Congress.<sup>255</sup>

This process is complicated. It has several different stages, which may vary from state to state. And it may break down. Ideally, Congress gets one certificate of ascertainment of the winner of the state's popular votes, followed by one set of returns from the electors of the state. That has been the outcome in every election from 1876 to 2020 (with one exception, Hawaii in 1960).<sup>256</sup>

After a series of recent abuses of filing objections to certified election results, Congress enacted the Electoral Count Reform Act in 2022 to make objections more difficult.<sup>257</sup> The Electoral Count Reform Act raises the threshold for objections in Congress, requires certificates of ascertainment of appointment of electors to be submitted by the governor by a certain date, treats certificates as binding in Congress, and gives priority to certificates required to be issued or revised by judicial relief.<sup>258</sup>

If Congress is constraining itself by making it more difficult to object to—and to reject—the electoral votes from the states, Congress also needs to ensure that it has the most reliable results from the states. The tradeoff for giving Congress less discretion in examining presidential election results is a need for greater confidence in those results from the states.<sup>259</sup> One of the more daunting

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252. See *Election Results, Canvass, and Certification*, *supra* note 220.

253. *What Is Election Certification?*, ELECTION ASSISTANCE COMM'N (Feb. 2022), [https://www.eac.gov/sites/default/files/electionofficials/postelection/Guide\\_to\\_Election\\_Certification\\_EAC.pdf](https://www.eac.gov/sites/default/files/electionofficials/postelection/Guide_to_Election_Certification_EAC.pdf) [<https://perma.cc/T58G-TPTK>].

254. *Id.*

255. *Id.*

256. See Herb Jackson, *What Happens When a State Can't Decide on Its Electors*, ROLL CALL (Oct. 26, 2020, 10:30 AM), <https://rollcall.com/2020/10/26/we-the-people-what-happens-when-a-state-cant-decide-on-its-electors/> [<https://perma.cc/2F38-8ABQ>].

257. See Muller, *supra* note 223, at 1542-44.

258. Congress included the Electoral Count Reform and President Transition Improvement Act in its omnibus appropriations bill in Consolidated Appropriations Act, 2023. Pub. L. No. 117-328, Division P, 136 Stat. 4459 (2022).

259. See, e.g., Colin Jones, Robert M. Stein, Lonna Atkeson, M.V. Hood III & Mason Reece, *Measuring Election Confidence in 2020*, MIT ELECTION DATA & SCI. LAB (Nov. 16, 2021),

aspects of Electoral Count Act reform is securing finality from the states.

The Electoral Count Reform Act requires states to finalize the results of their elections at least six days before electors meet.<sup>260</sup> It provides that the certificate with the state executive's signature is the presumptively appropriate certificate to count.<sup>261</sup> And what if state executives fail to sign a certificate of election or transmit results to Congress? The Act created a clear legal duty on the executive.<sup>262</sup> That legal duty can be readily enforceable in mandamus proceedings in state court.<sup>263</sup>

## V. THE UNIQUE STRENGTHS OF MANDAMUS

State courts can enforce the duties placed upon election officials, whether those duties arise from state law or federal law. But this lengthy discussion about mandamus raises a separate question: what benefit does mandamus offer over ordinary injunctive relief? Older treatises note differences in the two remedies' issuing authorities, proper subject, and purpose.<sup>264</sup> But more recently, courts may use terms like mandamus and mandatory injunctions interchangeably.<sup>265</sup> And mandamus often works in a narrower set of circumstances than injunctive relief, which suggests it might be *less* valuable than injunctive relief. For instance, a writ of mandamus can only be brought against a public official, while there is no such limitation for injunctive relief.<sup>266</sup> And courts sometimes emphasize

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<https://electionlab.mit.edu/articles/measuring-election-confidence-2020> [<https://perma.cc/Z9NG-SRP5>].

260. 3 U.S.C. §§ 5-6.

261. *Id.* §§ 5, 6, 15.

262. *Id.* § 6.

263. Importantly, the Electoral Count Reform Act creates no new federal cause of action. *Id.* § 13 (providing that if a state executive fails to deliver a certificate of election results to the federal government, the default solution is to demand the certificate from a district judge). The most common forum to resolve state election disputes will likely remain state court.

264. See Kenneth Culp Davis, *Mandatory Relief From Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585, 589 (1955) (summarizing an 1836 treatise by Justice Joseph Story explaining the difference between mandamus and mandatory injunctive relief).

265. See, e.g., *McCarthy v. Watt*, 89 F. Supp. 841, 842 (D. Mass. 1950) ("A mandatory injunction is in effect equivalent to a writ of mandamus and should be governed by like considerations."); *Noem v. Haaland*, 542 F. Supp. 3d 898, 906 (D.S.D. 2021) ("The State seeks what is considered a mandatory preliminary injunction, akin to a writ of mandamus.").

266. See, e.g., *McNulty v. Nat'l Mediation Bd.*, 18 F. Supp. 494, 504 (N.D.N.Y. 1936) ("A

that while an injunction can be used to either prevent action or compel it, mandamus can only be used to compel action.<sup>267</sup>

But mandamus can offer some decided advantages to injunctive relief in many states: original jurisdiction in state supreme courts, and the evidence needed to succeed on the merits. In short-fuse election litigation, these differences make mandamus uniquely valuable over other remedies, including injunctive relief.

### A. *Original Jurisdiction in State Supreme Courts*

State law routinely grants state supreme courts original jurisdiction in mandamus.<sup>268</sup> Indeed, as originally conceived at the Founding, many state supreme courts recognized that the highest court of a state must have the power to issue the writ of mandamus.<sup>269</sup> If mandamus originated from the high power of the King's Bench at common law, then the "supreme" courts in each state would hold

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mandatory injunction is like a mandamus in all essential respects, though the latter is directed to a public officer to compel him to perform an administrative act as to which he has no discretion.").

267. *See, e.g.*, *Smoker v. Bolin*, 333 P.2d 977, 978 (Ariz. 1958) ("It has been held many times that the term 'mandamus' applies *only* to a proceeding brought to compel the performance of an act, and not to one to restrain action; mandamus is not a substitute for a negative injunction.") (citations omitted).

268. Some state constitutions grant original jurisdiction in mandamus to the state supreme court. *See, e.g.*, CAL. CONST. art. VI, § 10 ("The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."); FLA. CONST. art. V, § 3(b) ("The supreme court ... [m]ay issue writs of mandamus and quo warranto to state officers and state agencies."); IDAHO CONST. art. V, § 9; ILL. CONST. art. VI, § 4(a); KAN. CONST. art. 3, § 3; NEB. CONST. art. V, § 2; N.M. CONST. art. VI, § 3; OHIO CONST. art. IV, § 2(B)(1); OR. CONST. art. VII, § 2; VA. CONST. art. VI, § 1; WASH. CONST. art. IV, § 4; W.VA. CONST. art. VIII, § 3; WYO. CONST. art. 5, § 3. Other states accomplish the same result by statute. *See, e.g.*, HAW. REV. STAT. § 602-5(a) (West 2022) ("Except as otherwise provided, the supreme court shall have ... original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law."); ME. REV. STAT. ANN. tit. 14, § 5301 (West 2023) ("The Supreme Judicial Court and the Superior Court shall have and exercise concurrent original jurisdiction in proceedings in habeas corpus, prohibition, error, mandamus, quo warranto and certiorari."); VT. STAT. ANN. tit. 4, § 2(b) (West 2022).

269. Pfander, *supra* note 20, at 1534-35.



similar power.<sup>270</sup> Professor Zachary Clopton has recently catalogued the impressive array of state constitutional provisions that empower state supreme courts to exercise original jurisdiction in mandamus.<sup>271</sup>

In contrast, state supreme courts may be expressly denied original jurisdiction in injunctive cases.<sup>272</sup> Ohio, for instance, expressly deprives the state supreme court of jurisdiction in declaratory judgment or prohibitory injunction cases.<sup>273</sup>

While injunctive relief and mandamus may be functionally interchangeable in many contexts, the unusual privilege given to state supreme courts in mandamus makes it a powerful remedy.<sup>274</sup> There is no need for the potentially lengthy process of filing a claim in a lower court with one or more rounds of appeal in a time-sensitive manner.<sup>275</sup> Consider again the Otero County, New Mexico dispute. The New Mexico Supreme Court received a petition for writ of mandamus, then issued its judgment in twenty-four hours, without additional layers of state court review.<sup>276</sup> Original jurisdiction in state supreme courts allows an expedited final judgment.

Original jurisdiction in the state supreme court is not always guaranteed, even with an express grant of jurisdiction. In Arizona, for instance, original jurisdiction in mandamus for claims against state officers is “highly discretionary.”<sup>277</sup> This deference relates to the fact that courts in mandamus cases exercise discretion over whether to grant relief at all.<sup>278</sup> Relatedly, state supreme courts

270. *Id.*

271. Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 90 U. CHI. L. REV. 1, 17-18 (forthcoming 2023).

272. *See, e.g.*, *Walsh v. R.R. Comm’n*, 107 P.2d 611, 613 (Cal. 1940) (noting that the Supreme Court of California “has no jurisdiction over original applications for declaratory relief or for injunctive relief”).

273. *State ex rel. Ethics First—You Decide Ohio Pol. Action Comm. v. DeWine*, 66 N.E.3d 689, 692-93 (Ohio 2016) (per curiam) (“[I]f a complaint seeks to *prevent* action, then it is injunctive in nature, and the court has no jurisdiction; if it seeks to *compel* action, then the court does have jurisdiction to provide relief in mandamus.”).

274. *Cf.* Clopton, *supra* note 271, at 27-28 (noting that adjudication may be faster but that factfinding in certain cases may be slower if the state supreme court is exercising original jurisdiction in disputes that require factfinding).

275. *See id.* at 37.

276. *See supra* note 159 and accompanying text.

277. *Forty-Seventh Legislature v. Napolitano*, 143 P.3d 1023, 1026 (Ariz. 2006) (en banc); *Brewer v. Burns*, 213 P.3d 671, 674 (Ariz. 2009) (en banc).

278. *See supra* note 86 and accompanying text.

typically do not weigh in for factual disputes that may arise in mandamus cases.<sup>279</sup> Those cases are remanded for district courts to evaluate.<sup>280</sup> Recall how some courts in exceptional cases conclude that mandamus relief may lie for certain “discretionary” acts.<sup>281</sup> Evaluating an egregious abuse of discretion requires factual development and examination.<sup>282</sup> State supreme courts are unlikely to grant original writ of mandamus if the rare dispute over abuse of discretion is presented.<sup>283</sup>

Original jurisdiction allows for expedited review in the state supreme court without the delays that attend appeals.<sup>284</sup> In cases where more factual development is needed and the case must take a slower pace, lower courts can consider either mandamus, injunctive relief, or declaratory relief in the appropriate cases.<sup>285</sup> It is worth noting that mandamus relief may still be available in the lower courts, too. Original jurisdiction is reserved for only the most egregious acts of election officials: those circumstances where it is obvious from the face of the record that the official has violated a

279. *See, e.g., Round Hill Gen. Improvement Dist. v. Newman*, 637 P.2d 534, 536 (Nev. 1981).

280. *See, e.g., id.* (denying petition for writ of mandamus because “disputed factual issues” regarding whether a party “manifestly abused the discretion granted by” statute was left to the trial court).

281. *See supra* notes 86-88 and accompanying text.

282. *See, e.g., Round Hill*, 637 P.2d at 536.

283. *Cf. Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (quoting *Johnson v. Fourth Ct. of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)) (“Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.”).

284. The question of the jurisdiction of the Supreme Court of the United States out of a state supreme court order in mandamus is beyond the scope of this Article. But briefly, the Supreme Court would not have jurisdiction over petitions for certiorari from state supreme courts in the typical state law case. If the state litigation relied exclusively on state law, there would be no federal issue to raise before the Supreme Court. *See* 28 U.S.C. § 1257(a); *see also* *Murdock v. City of Memphis*, 87 U.S. (1 Wall.) 590, 626 (1874). If a party raised a federal issue, such as an argument that the failure to certify an election was tantamount to a violation of due process, the Supreme Court could hear such an issue. *See* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Elections*, 84 U. CHI. L. REV. 655, 731 (2017). In cases where a federally-created duty is at issue, *see supra* Part IV, it may also be possible for the Supreme Court to hear decisions from state supreme courts seeking a state remedy in mandamus, to the extent one could classify the claim as a “right [or] privilege ... specially set up or claimed under ... statutes of ... the United States.” 28 U.S.C. § 1257(a).

285. *See, e.g., Malott v. Summerland Sanitary Dist.*, 270 Cal. Rptr. 3d 76, 81 (Ct. App. 2020) (finding that even a combination of these remedies may be appropriate in certain cases).

clear legal duty.<sup>286</sup> And mandamus is a powerful tool when combined with this unique role of the state supreme court.

### *B. Streamlined Hearings and Legal Elements*

Additionally, in some circumstances, there are more conditions placed upon injunctive relief than mandamus. To win injunctive relief, a moving party today must typically demonstrate an irreparable injury, a likelihood of success on the merits, that the potential injury in the absence of injunction outweighs any harm the injunction might cause other parties, and that an injunction not be injurious to the interest of the public.<sup>287</sup> Mandatory injunctions are “disfavored,” but that legal requirement appears to be a less significant barrier to relief in recent years.<sup>288</sup> Admittedly, it is hard to say that these elements are any more onerous than the requirements of mandamus, which requires proof of a public official violating a clear legal duty. Indeed, the condition of a violation of a clear legal duty can be more difficult to demonstrate than the test for injunctive relief.<sup>289</sup> And judicial relief looks similar under either form of action. Judgment in mandamus directs an official to comply with a legal duty, which looks like the judgment in a mandatory injunction case directing an official to comply with a legal duty.<sup>290</sup>

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286. *In re Nat'l Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022) (explaining that courts usually reserve mandamus relief for particularly egregious failures to act in accordance with a clear legal duty).

287. See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1024-27 (2015).

288. Compare *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) (per curiam) (identifying mandatory injunctions as a “specially disfavored” type of preliminary injunction), with *NAACP v. U.S. Postal Serv.*, 496 F. Supp. 3d 1, 20 (D.D.C. 2020), and *NAACP v. U.S. Postal Serv.*, No. 20-cv-2295, 2020 WL 6441317, at \*1 (D.D.C. Oct. 27, 2020) (issuing injunction and ensuing order detailing the activities the United States Postal Service must perform ahead of the 2020 election without reference to the fact that mandatory injunctions are specially disfavored). In an earlier era, federal district courts recognized that they lacked original jurisdiction over mandamus, see *supra* note 62 and accompanying text, and federal courts were divided over whether they could issue mandatory injunctions that looked like mandamus. See Case Comment, *Mandatory Injunction Jurisdiction: Johnson v. Interstate Power Co.*, 14 STAN. L. REV. 167, 169-70 (1961).

289. See, e.g., *Chapman v. Berks Cnty. Bd. of Elections*, No. 355, 2022 WL 4100998, at \*30 (Pa. Comm. Ct. Aug. 19, 2022) (granting injunctive relief but denying mandamus in dispute over whether absentee or mail-in ballot envelopes needed to include date information), *overruled in part by Ball v. Chapman*, 289 A.3d 1, 22 (Pa. 2023).

290. See Howard W. Brill, *The Citizen's Relief Against Inactive Federal Officials: Case*

But some procedural benefits do attach to mandamus. *First*, courts do not formally consider elements like the balance of the equities or the public interest in mandamus cases.<sup>291</sup> Such factors may seep into the discretionary questions that courts face when deciding whether to issue mandamus.<sup>292</sup> But at an elemental level, mandamus in the right case may be easier to obtain once a party establishes that an official is refusing to perform a clear legal duty, and it may be superior to injunctive relief.

The legal elements for mandamus are much better suited for courts in election disputes than the legal elements for injunctive relief. For one, the balance of the equities in injunctive relief pits one side's hardship against another.<sup>293</sup> In an election dispute, the court is placed in the difficult position of weighing what is effectively a zero-sum balancing between two contesting political opponents. For another, the "public interest" places the court in the unenviable position of appearing to pick which political victor would favor the public interest. No such confrontation arises in mandamus—the relief simply runs to the petitioner once the right has been established.<sup>294</sup>

*Second*, peremptory mandamus can issue without a hearing. Judges have disputed the circumstances in which peremptory mandamus is appropriate without a hearing.<sup>295</sup> But there is no question they have the power to do so.<sup>296</sup> In contrast, in injunctive cases, courts typically distinguish between temporary restraining orders or *ex parte* injunctions that do not require a hearing because they

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*Studies in Mandamus, Actions "In the Nature of Mandamus," and Mandatory Injunctions*, 16 AKRON L. REV. 339, 364-65 (1983) (explaining how the similar results between the two remedies caused courts to describe them interchangeably).

291. See discussion *supra* Part I.C. (describing the usual elements of mandamus).

292. See *supra* notes 86-91 and accompanying text.

293. Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 487 (2010).

294. See Bray, *supra* note 67, at 568.

295. See, e.g., *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854, 860 (Mich. 2022) (mem.) (Zahra, J., dissenting) (calling for oral argument in mandamus action while acknowledging, "I understand my colleagues' desire to decide this question forthwith without the benefit of oral argument, given the very short time that exists between the filing of this action for mandamus and the date the finalized ballot must be forwarded to printers for statewide production").

296. See *supra* note 94 and accompanying text.

last for a limited duration, and permanent injunctions that last indefinitely and ordinarily require a hearing.<sup>297</sup>

In the Otero County dispute, the New Mexico Supreme Court did not hold an evidentiary hearing.<sup>298</sup> It issued an order from the clear facts presented to the Court.<sup>299</sup> A verified complaint by the state and the record of the proceedings before the Board in Otero County clearly demonstrated that the election officials had no dispute of any fact and no basis in law to refuse to perform their duty.<sup>300</sup> Candidly, this case appears to be unusual in that the opposing party was never given the opportunity to file a brief or attend a hearing, much less present evidence.<sup>301</sup> Peremptory mandamus is disfavored in the first instance because alternative mandamus gives the official the opportunity to show cause and explain herself.<sup>302</sup> Issuing *ex parte* peremptory mandamus is a power that a court should exercise only with “great caution” in those places where a great hardship is present.<sup>303</sup> In *Otero County*, New Mexico argued that the Board’s delay threatened statewide certification deadlines fixed by statute elsewhere.<sup>304</sup> Finally, if mandamus is issued against an official who lacked the opportunity for a hearing, that official could request a hearing or reconsideration to ensure that due process is not violated.<sup>305</sup>

In a 2022 dispute in Arizona, the Board of Supervisors of Cochise County delayed certifying the state’s election results.<sup>306</sup> The Secretary of State and a group of voters both filed an action in trial court seeking mandamus.<sup>307</sup> At a hearing, attorneys attempted to call

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297. See, e.g., *Md. Comm’n on Hum. Rels. v. Downey Commc’ns, Inc.*, 678 A.2d 55, 66-67 (Md. Ct. Spec. App. 1996); *Cramer v. Metro. Fed. Sav. & Loan Ass’n*, 192 N.W.2d 50, 51-52 (Mich. Ct. App. 1971) (per curiam).

298. See *supra* note 155 and accompanying text.

299. See *supra* note 155 and accompanying text.

300. See *supra* notes 155-59 and accompanying text.

301. See *supra* notes 155-59 and accompanying text.

302. See *supra* note 94 and accompanying text.

303. See, e.g., *Home Ins. Co. v. Scheffer*, 12 Minn. 382, 384-85 (Minn. 1867); see also *State ex rel. Platte Valley Irr. Dist. v. Cochran*, 297 N.W. 587, 589 (Neb. 1941).

304. See *Emergency Verified Petition for Writ of Mandamus to Compel Certification of Election Results*, *supra* note 155, at 3-4.

305. Cf. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

306. 12 News, *Cochise County Officials Court Hearing About Lawsuit Over Refusal to Certify Election*, YOUTUBE (Dec. 1, 2022), <https://www.youtube.com/watch?v=vdf6c2UsPKa0> [https://perma.cc/UG22-MJW4].

307. *Id.*

witnesses and present evidence.<sup>308</sup> The trial court asked whether that was necessary given the clarity of the existing record.<sup>309</sup> The attorneys, sensing the hints from the judge, opted not to present any new evidence.<sup>310</sup>

*Third*, the standards for staying injunctive relief do not necessarily extend to staying mandamus relief. Consider the so-called “*Purcell* principle.”<sup>311</sup> The Supreme Court’s decision in *Purcell v. Gonzalez* in 2006 warned lower courts to consider the facts “specific to election cases” when facing requests for injunctive relief just before an election.<sup>312</sup> Courts should avoid “voter confusion and consequent incentive to remain away from the polls” when issuing orders that could affect elections, especially conflicting orders.<sup>313</sup> “As an election draws closer, that risk will increase.”<sup>314</sup> Justice Brett Kavanaugh recently opined on *Purcell* in a case in which he supported a stay of a lower court injunction affecting legislative maps weeks ahead of a primary election.<sup>315</sup> He explained that *Purcell* should stand for the proposition that there should be a stay of injunctive relief close in time to an election unless a plaintiff can show “(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.”<sup>316</sup>

*Purcell* has taken on a life of its own in the federal courts, which has garnered its fair share of criticism and commentary.<sup>317</sup> Some

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308. *Id.*

309. *Id.*

310. *Id.*

311. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

312. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

313. *Id.*

314. *Id.* at 5.

315. *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.) (Kavanaugh, J., concurring in grant of application for stays).

316. *Id.* at 881.

317. See, e.g., Stephen I. Vladeck, *Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787, 1794 n.29 (2022); Wilfred U. Codrington III, *Purcell in Pandemic*, 96 N.Y.U. L. REV. 941, 945-49 (2021).

state courts have followed suit.<sup>318</sup> But a couple of jurisdictions have seized on an important limitation of *Purcell*. Supreme courts in Ohio and the Virgin Islands have each concluded that *Purcell* does not apply outside the injunctive context, with Ohio specifically noting that it does not apply in mandamus.<sup>319</sup> These courts, of course, were free to ignore *Purcell* as applied to state law. Instead, they chose to distinguish it. The Supreme Court of Ohio noted that the concerns for injunctive relief and *Purcell* did not map onto the elements for mandamus relief.<sup>320</sup> A clear legal duty, for instance, suggests a stronger case for the plaintiff than a mere “likelihood” of success, and it is a reason to counsel against staying the judgment.<sup>321</sup> Admittedly, the concerns about *Purcell* are about pre-election controversies, not necessarily post-election controversies. But it highlights the fact that some courts have been willing to consider the distinctions between injunctive relief and mandamus in ways that suggest mandamus has an advantage.

*Fourth*, the political question doctrine may not apply to mandamus. Some states conclude that courts lack the power to hear political questions in election disputes in equity—but because mandamus is a legal remedy, no such barrier exists.<sup>322</sup> In Georgia, for instance, there is an extensive body of precedent that “courts of equity will not interfere to protect a purely political right.”<sup>323</sup> But

318. See, e.g., *Moore v. Lee*, 644 S.W.3d 59, 65 (Tenn. 2022); *League of United Latin Am. Citizens v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020) (per curiam); *Jones v. Sec’y of State*, 239 A.3d 628, 631 (Me. 2020) (per curiam).

319. *State ex rel. DeMora v. LaRose*, No. 2022-0661, 2022 WL 2285935, at \*8 (Ohio June 24, 2022) (per curiam); *Bryan v. Fawkes*, 61 V.I. 416, 468 (2014).

320. *DeMora*, 2022 WL 2285935, at \*8. But see *id.* at \*26 (DeWine, J., concurring in part and dissenting in part) (calling the majority’s distinction between injunctive relief and mandamus relief “laughable” in this context because the factors for both forms of relief “align”).

321. Cf. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (mem.) (Kavanaugh, J., concurring) (suggesting *Purcell* is not appropriate if the plaintiff’s claim is “entirely clearcut”).

322. See, e.g., *Fletcher v. Tuttle*, 37 N.E. 683, 688-89 (Ill. 1894) (per curiam) (“Where the established distinctions between equity and common-law jurisdiction are observed, injunction and mandamus are not correlative remedies, in the sense of being applicable to the same subject-matter, the choice of a writ to be resorted to in a particular case to depend upon whether there is an excess of action to be restrained or a defect to be supplied. The two writs properly pertain to entirely different jurisdictions, and to different classes of proceedings, injunction being the proper writ only in cases of equitable cognizance, and mandamus being a common-law writ, and applicable only in cases coming within the appropriate jurisdiction of courts of common law.”).

323. *Bullard v. Culpepper*, 11 S.E.2d 19, 20 (Ga. 1940) (citing *Avery v. Hale*, 145 S.E. 76,

mandamus relief against the actions of public officials, even with “political overtones,” remains available.<sup>324</sup>

In short, mandamus is designed to move quickly. Admittedly, if the case is so clear that mandamus should issue, one may be hard pressed to find a balance of the equities where injunctive relief would be denied. But as a practical matter, the expedited proceedings in state courts with no need for additional fact-finding make mandamus uniquely situated for time-sensitive election disputes.

There is a potential risk in overstating the advantages of mandamus. It could place additional pressure on litigants to seek out mandamus over other forms of relief, encourage state supreme courts to exercise jurisdiction immediately rather than allow “percolation” in the lower courts of factual disputes,<sup>325</sup> and risk basic due process guarantees through orders without hearings. Mandamus may offer promise as much as peril. For this reason, it is important for courts to remain vigilant in protecting mandamus from overreach. Mandamus remains effective as a tool in limited contexts, and perhaps only because it remains appropriately circumscribed.

## VI. THE POTENTIAL LIMITATIONS OF MANDAMUS

Mandamus is not a panacea. Like any remedy, it will have its limitations. But those limitations are hardly fatal to its usefulness. Instead, mandamus applies in a set of election subversion cases and can offer unique value.

### *A. Potential Limitations Against the Governor*

In states, there are potential separation of powers concerns implicated if the state supreme court must order the governor to perform a task. No such issue arises with inferior officers, but

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77 (Ga. 1928)); *Thompson v. Talmadge*, 41 S.E.2d 883, 889-90 (Ga. 1947).

324. *Bibb Cnty. v. Monroe Cnty.*, 755 S.E.2d 760, 765-66 (Ga. 2014) (citing *Owens v. City of Greenville*, 772 S.E.2d 755 (2012)).

325. See *Clopton*, *supra* note 271, at 29-30 (describing how common questions can “percolate” in lower courts when appellate courts do not have original jurisdiction over them); see also Michael Coenen & Seth Davis, *Percolation’s Value*, 73 STAN. L. REV. 363, 416-19 (2021) (admitting some value in lower court autonomy and limiting intervention by the Supreme Court of the United States).



governors are different. Edward J. Myers summarized the conflict in 1905:

The question whether the courts have the power to issue the writ of mandamus against the chief executive of a state to compel the performance of a duty imposed upon him by law, has been answered in two irreconcilable lines of decision—the one being that the Governor is not answerable to the writ to compel the performance of his duty, be it either discretionary or ministerial in its character, the other, that he is liable to the writ to compel the performance of duties purely ministerial in nature.<sup>326</sup>

The conflict does not appear to arise with other constitutional officers—even for executive offices created by the state constitution.<sup>327</sup> That means mandamus is unquestionably available against the Secretary of State or other state or local election officials. The only potential conflict appears if the governor is the party who refuses to act.

But some state judicial decisions have moved in the direction of recognizing that mandamus could be available against the governor for ministerial duties.<sup>328</sup> And this complication of the separation of powers arises only in the context of state or local elections. In federal elections, once Congress has placed an affirmative duty on a state official, the state judiciary's ordinary separation of powers concerns disappear.<sup>329</sup> While there is no affirmative duty to transmit

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326. Edward J. Myers, *Mandamus Against a Governor*, 3 MICH. L. REV. 631, 634 (1905); see also FERRIS & FERRIS, *supra* note 21, § 284 (“There is some conflict of authority as to whether mandamus can issue to compel the governor of a state to perform any part of his official duties.”).

327. See, e.g., *People ex rel. Sutherland v. Governor*, 29 Mich. 320, 321-24 (1874) (Cooley, J.) (acknowledging that the legislature could have given duties to inferior officers instead of the governor, which would not raise the same separation of powers concerns); see also *State ex rel. Patton v. Houston*, 4 So. 50, 52 (La. 1888); *Kuechler v. Wright*, 40 Tex. 600, 613-14 (1874).

328. See, e.g., *Gantenbein v. West*, 144 P. 1171, 1174-75 (Or. 1914) (en banc) (“[T]here is no doubt that the Governor will cheerfully and without question issue the certificate whenever his right to do so is clearly defined by the courts; but there is also no doubt that, in cases of this character, where the duties imposed upon the executive are merely ministerial, mandamus will lie to compel their performance.”); *Martin v. Ingham*, 17 P. 162, 165 (Kan. 1888).

329. See *supra* Part IV.

election results in House elections, duties in Senate and Presidential elections do exist.<sup>330</sup> And as long as most election administration responsibilities remain the responsibility of inferior officers in state and local elections, the circumstances in which a separation of powers problem might arise are few.

### *B. Potential Incentives for Grandstanding*

If election officials simply refuse to certify election results because there is a judicial backstop that would do the job for them, will cases like these incentivize *more* bad behavior and require additional judicial intervention? There is a risk of a kind of moral hazard.<sup>331</sup> The more that mandamus is raised as a tool to be used against recalcitrant election officials, the more enticing it will be for local election officials to ignore their duties. After all, why not simply let the judiciary certify the election or perform those other ministerial duties?

To begin, it may simply be a necessary evil. Mandamus must issue because election responsibilities must be fulfilled. We rely on election officials to follow their responsibilities, and in the rare instances in American history where they have not, the judiciary steps in.

Recent instances of mandamus in election cases do not yet suggest that election officials are entirely abdicating their responsibilities to courts. New Mexico and Arizona officials promptly complied in 2022 after the courts issued their first orders.<sup>332</sup> Election officials instead seem satisfied to refuse to act, wait for a court to direct them to act, and then follow the court order. Courts have not had to carry out consequences for failure to obey court orders. That said, the potential increase in election officials refusing to carry out their responsibilities and awaiting a court order remains a cause for

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330. Congress's power to judge the elections and returns of its own members reduces the concerns that it lacks any mechanisms to resolve election disputes. *See generally* Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015). Presidential elections are much more complicated, and for that reason Congress has crafted rules to coordinate the transmission of election returns across all the states for Congress to count. *See supra* Part IV.B.

331. *See* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238-40 (1996).

332. *See supra* notes 165-70, 306-10 and accompanying text.

concern. But the problem is no different than the risk posed by any invitation of increased judicial involvement.

Nevertheless, there is a different kind of problem at issue: grandstanding. Public officials have made public displays of their refusal to accept election results. There is a risk that grows worse once election officials know that the judiciary is there as some kind of “enemy” to their cause, a body that may try to impose its will on an election. But it is a reason to embrace minimally intrusive solutions when election officials defy mandamus. Rather than mechanisms that may exacerbate grandstanding—like contempt, where an election official can play the martyr by highlighting an arrest—are the best mechanisms try to reach the desired result as quickly and quietly as possible. Relying on mechanisms like Rule 70 allows courts to efficiently resolve election disputes without inviting grandstanding.

### *C. Restricted to Discretionary Acts*

One major limitation for mandamus is that it does not apply to discretionary acts, with rare exceptions.<sup>333</sup> But as this Article opened, mandamus is useful for a particular kind of election problem: election subversion, or post-election actions by election officials that defy the accepted legal procedures for resolving election disputes to benefit the candidate who lost by refusing to certify the winner. It can be useful in other contexts, as described earlier, when it comes to petitioning or ballot access challenges.<sup>334</sup> For the particular concern of election subversion, however, its most important use is for non-discretionary acts. After the canvassing of an election is complete, there is rarely discretion left for election officials. They are expected to certify the results and issue certificates of election consistent with those results. Mandamus is a powerful tool to tie up the loose ends of an election.

Mandamus may not be useful for discretionary acts left to election officials, but that simply means mandamus is not available to provide prompt and expedited relief when discretionary acts are at issue. Challenges to election officials who abuse their discretion go

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333. See *supra* notes 76-77, 277-83 and accompanying text.

334. See *supra* Part II.A.

through the procedures for parties seeking injunctive or declaratory relief. It simply takes more time. And these other tools are more useful in contexts that one might not necessarily label “election subversion,” but other acts of election officials who may drag their feet, attempt to undermine the legislature’s preferred policies, or seek to adversely affect voters’ behavior.<sup>335</sup>

#### *D. Dependent on Reliable State Courts*

Embedded within this discussion is an assumption: state courts are a reliable place to handle these election-related disputes, even in federal elections.<sup>336</sup> It takes very little effort to find historical examples where the federal government has not entrusted the preservation of federal rights, including voting rights, to state courts.<sup>337</sup> But there are at least three reasons to think that, at this moment, state courts are adequate to address the task at hand.

First, relying on state courts offers minimal disruption to the status quo for election litigation generally. Election disputes are contentious, short-fuse affairs. It would be possible to build novel dispute-resolution mechanisms or jurisdictional hooks to change how these election claims are litigated, which might include increased federal judicial involvement.<sup>338</sup> But that increases the

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335. See *supra* note 9 (describing alternative concerns about the conduct of elections officials beyond “election subversion”).

336. See, e.g., Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359, 386-98 (2017).

337. See, e.g., Habeas Corpus Act of 1867, 14 Stat. 385; Jurisdiction and Removal Act of 1875, 18 Stat. 470; see also James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 884-87 (2021) (expressing concern that state legislatures in some places have disempowered state courts in ways that undermine a commitment to a liberal democracy); Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 826, 839-40 (1998).

338. Not all scholars are persuaded that the federal courts are the right place to address voting issues in the first place. See, e.g., Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 636-40 (2023) (expressing distrust of the federal judiciary in the area of election law); Codrington, *supra* note 317, at 980-81; Leah Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1238-39 (2022); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 79-80 (2021); Charquia Wright, *Circuit Circus: Defying SCOTUS and Disenfranchising Black Voters*, 83 OHIO ST. L.J. 601, 603-04, 617 (2022); James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423, 457-60 (2021). Perhaps that is another reason to

uncertainty of how the courts should handle these challenges in the middle of a contentious election dispute. The reality is that there is a lack of political interest in making significant changes.<sup>339</sup> Indeed, the Electoral Count Reform Act succeeded where other election legislation at the federal level failed in part because it relied on stable and existing mechanisms to address challenges in presidential election controversies.<sup>340</sup>

Second, state courts have a modest demonstrated recent track record of success.<sup>341</sup> State courts have ably resolved election challenges in recent years with little backlash or controversy. That may change in another era, of course. And their success has been broadest in precisely the kinds of post-election challenges where the risk of election subversion is greatest. In pre-election controversies, over absentee ballot rules or filing deadlines, state courts often have heated, and sometimes controversial decisions with partisan divides about whether and how to resolve election law controversies.<sup>342</sup> After the election, however, the state courts have been more deferential to established procedures, and they have sought swift conclusions to controversies to bring certainty and to resolve disputes without the same partisan overtures that have plagued some pre-election disputes.<sup>343</sup>

Third, most state court judges are also elected. At first blush, this seems counterintuitive. If state court judges are elected, might not state court judges be inclined to meddle in the political process to

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rely more heavily on state courts.

339. See, e.g., Alex Leary & Eliza Collins, *Biden Endorses Filibuster Rule Changes if Necessary to Pass Voting Legislation*, WALL ST. J. (Jan. 11, 2022, 9:30 PM), <https://www.wsj.com/articles/biden-casts-election-law-votes-as-turning-point-for-nation-in-speech-11641897003> [<https://perma.cc/M5TR-U56J>]; see also Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 173-74 (2019) (identifying Congress's "underenforcement" of its power to regulate elections).

340. See *supra* Part IV.B.

341. See Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 275-76, 280-82 (2022); Norman Williams, *Partisan Gerrymandering: The Promise and Limits of State Court Judicial Review*, MARQ. L. REV. (forthcoming) (manuscript at 10); David F. Levi, Amelia Ashton Thorn & John Macy, *2020 Election Litigation: The Courts Held*, 105 JUDICATURE 8, 9 (2021).

342. See, e.g., Amy Gardner & Emma Brown, *Republicans Sue to Disqualify Thousands of Mail Ballots in Swing States*, WASH. POST (Nov. 7, 2022, 3:38 PM), <https://www.washingtonpost.com/elections/2022/11/07/gop-sues-reject-mail-ballots/> [<https://perma.cc/7E4Z-G9WM>].

343. See *supra* Part III.A.

advantage themselves?<sup>344</sup> For one, state court judges recuse when their own elections are in dispute, as some justices did in the Otero County, New Mexico dispute.<sup>345</sup> Admittedly, more meaningful recusal rules could provide greater clarity to avoid such an obvious risk of a conflict of interest.<sup>346</sup> But state court judges are also acutely aware of how election administration could affect future elections, including their own.<sup>347</sup> And the last thing judges desire, I would suggest, is a process where election officials could subvert the outcome of a future election by interfering with the results. It may well be that the election of judges is a benefit for their role in issuing mandamus in post-election disputes, as elected judges could easily envision the consequences in their own elections if they failed to enforce ministerial duties of officials in other elections.

## VII. STRENGTHENING MANDAMUS

Mandamus is a readily available remedy that can be used to reduce the risk of election subversion, and it can be a device for litigants to go to court and reverse subversive acts. But mandamus can be strengthened. These proposals to strengthen mandamus do not focus on mandamus itself—as mentioned, mandamus needs to remain confined to extraordinary circumstance to ensure it remains an effective remedy.<sup>348</sup> Instead, these proposals focus on the attendant circumstances around mandamus. Mandamus will lie against public officials engaged in ministerial acts, so reducing election officials' discretion makes mandamus more readily available. If officials defy mandamus, courts should be empowered with minimally intrusive mechanisms to resolve disputes expeditiously. And state supreme courts should remain available forums for

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344. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 321-23 (2008).

345. *See supra* Part III.A.

346. *See, e.g.*, Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEG. & PUB. POL'Y 631, 652-56 (2015); Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 733-36 (2013); James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, 46 JUDGES J. 17, 17, 19, 22-23 (2007).

347. *Cf.* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 985-86 (2001) (describing complexity of state court judges responding to popular will and the drive to decide cases on law and facts instead).

348. *See supra* note 322 and accompanying text.

original jurisdiction over mandamus in election law disputes where there is no need for factual development and where time is of the essence.

### *A. Reducing Election Officials' Discretion*

Restricting discretion in elections can offer significant advantages quite apart from any concerns about mandamus. It can avoid equal protection concerns that arise if an election is administered in a way that treats similarly situated voters differently.<sup>349</sup> It can reduce litigation if election rules are increasingly uniform and applied consistently across a state.<sup>350</sup>

Laws enacted in some states after the 2020 election reduce election officials' discretion.<sup>351</sup> In part, the legislation responded to election officials who exercised discretion during the novel coronavirus pandemic in ways that legislatures disfavored, and the legislatures sought to reduce such discretion in future election administration. Reducing discretion more generally is a tool to prevent election subversion.<sup>352</sup> If election officials are given less discretion and more guidance from the statutory code, it becomes easier for courts to compel compliance.

For instance, Georgia's SB 202, enacted in 2021, limited the discretion that the State Election Board may have when it comes to adopting "emergency rules or regulations,"<sup>353</sup> as such rules must be made "in strict and exact compliance with the provisions of this chapter."<sup>354</sup> Iowa's SF 413, enacted in 2021, expressly provided that the "county commissioner of elections does not possess home rule powers with respect to the exercise of powers or duties related to the conduct of elections prescribed by statute or rule, or guidance issued" under the Iowa code,<sup>355</sup> and "[t]he state commissioner of

349. See Michael T. Morley, *Bush v. Gore's Uniformity Principle and the Equal Protection Right to Vote*, 28 GEO. MASON L. REV. 229, 261-84 (2020).

350. See Muller, *supra* note 201, at 576-78.

351. See *infra* notes 353-60 and accompanying text.

352. Cf. Pildes, *supra* note 2, at 114 (suggesting that voting in person offers election officials less discretion than the rules relating to absentee or mail-in voting, which can reduce the risk of election subversion).

353. GA. CODE ANN. § 21-2-35(a) (2021).

354. *Id.* § 21-2-35(b).

355. IOWA CODE § 47.2(1).

elections may issue guidance that is not subject to the rulemaking process to clarify election laws and rules,” which would control the decisions of county officials to limit discretion.<sup>356</sup> Michigan’s Ballot Proposal 2 was approved by voters in 2022.<sup>357</sup> It qualified that the board of canvassers has a “ministerial, clerical, nondiscretionary duty” to certify election results under enumerated circumstances.<sup>358</sup> Colorado’s SB 22-153, enacted in 2022, required local election officials to follow secretary of state guidance.<sup>359</sup> If county officials fail to certify election results, the Secretary of State may proceed to certify the results.<sup>360</sup> Each of these decisions to enumerate the duties of election officials and reduce their discretion ensures that it is easier to seek compliance through mandamus.

### *B. Directing Another Official to Perform Ministerial Tasks*

Enforcing mandamus is as crucial as the availability of the writ. But that can be easier said than done. Earlier, this Article identified ways to induce compliance with a court order. This Article posits that the most minimally-intrusive and effective mechanisms should be available in states.

New York’s “Stolen Senate of 1891” offers a warning for over-reliance on the ordinary contempt power of the courts.<sup>361</sup> Through a series of partisan and subversive maneuvers, Democrats who ran the canvassing boards threatened to undermine the outcomes of three seats in the state senate that the Republicans appeared to have won.<sup>362</sup> Flipping these seats would ensure Democratic control of the state senate (they already had control of the assembly and the governorship).<sup>363</sup> Republicans sought mandamus against the

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356. *Id.* § 47.1(1).

357. Clara Hendrickson, *Proposal 2: Voting Rights Proposal Approved in Michigan*, DET. FREE PRESS (Nov. 11, 2022, 1:58 AM), <https://www.freep.com/story/news/politics/elections/2022/11/09/proposal-2-michigan-results-election-2022/69599504007/> [<https://perma.cc/E3MJ-AHNW>].

358. Amber Ainsworth, *Proposal 2: Read the Full Proposed Changes to Michigan Voting Laws*, FOX 2 DET. (Oct. 31, 2022), <https://www.fox2detroit.com/news/proposal-2-read-the-full-proposed-changes-to-michigan-voting-laws> [<https://perma.cc/YL3G-CTH6>].

359. COLO. REV. STAT. § 1-13-114(1) (2022).

360. *Id.* § 1-10-104(3).

361. See FOLEY, *supra* note 9, at 179-90.

362. *Id.* at 179-81.

363. *Id.* at 180.



canvassing boards.<sup>364</sup> In two challenges, Republicans lost.<sup>365</sup> They won in the third, where a trial court granted the writ and the highest court affirmed.<sup>366</sup> But the canvassing board defied mandamus. It ignored the order of the court and certified the Democratic results, which it was not supposed to certify.<sup>367</sup> The board successfully subverted the election. Members of the board then faced fines totaling \$831.28, which was upheld in 1894—three years after the subversion took place.<sup>368</sup> As the New York Court of Appeals summarized it, “[w]hat constitutes the contempt here is that the defendants, knowing of the order for the issuance of a peremptory writ of mandamus, have done the very thing which the issuance of the writ was intended to absolutely prevent, and have thus contemned and defeated the will of the court.”<sup>369</sup> But the subversion was effective because the mechanism to enforce mandamus was not. A mechanism more effective than contempt is desirable.

Every state appears to have some mechanism to allow courts to direct another official to perform a ministerial task. Most states model their rules off Federal Rule of Civil Procedure 70.<sup>370</sup> Rule 70 arose from Federal Rules of Equity 7, 8, and 9.<sup>371</sup> Those rules permitted a writ of attachment, a writ of sequestration, a writ of assistance, or a writ of execution to compel obedience to a decree.<sup>372</sup> Rule 70 streamlined these diverse writs into a single mechanism for enforcing judgments of the court, including empowering the court to enforce a judgment “to perform any other specific act” to be done “by another person appointed by the court.”<sup>373</sup> Note that these equitable

364. *Id.* at 181.

365. *People ex rel. Sherwood v. State Bd. of Canvassers*, 29 N.E. 345, 349-50 (N.Y. 1891); *People ex rel. Nichols v. Bd. of Cnty. Canvassers of Onodaga*, 29 N.E. 327, 336, 339 (N.Y. 1891).

366. *People ex rel. Daley v. Bd. of St. Canvassers*, 29 N.E. 355, 358 (N.Y. 1891).

367. FOLEY, *supra* note 9, at 187-88.

368. *People ex rel. Platt v. Rice*, 39 N.E. 88, 90-91, 93 (N.Y. 1894).

369. *Id.* at 91.

370. *See* FED. R. CIV. P. 70.

371. FED. R. EQUITY 7, 8, 9 (1912).

372. *Id.*

373. FED. R. CIV. P. 70. The original rule stated, “by some other person appointed by the court,” which was amended in the 2007 restyling to read, “by another person appointed by the court.” *Compare Rules of Civil Procedure for the United States District Courts: Hearing on S.J. Res. 281 Before a Subcomm. of the Comm. on the Judiciary*, 75th Cong. 23-24 (1938) (describing unifying “rules for law and equity”), with FED. R. CIV. P. 70. *See also* Dobie, *supra* note 172, at 304-05 (identifying “several varied and effective remedies”).

remedies may not have direct application to mandamus, traditionally a legal remedy. But the Federal Rules of Civil Procedure apply to both legal and equitable cases, and the mechanism here would be available for mandamus relief.<sup>374</sup>

Most states have language identical to Rule 70, or language very close to it.<sup>375</sup> A few states have similar rules that empower courts to take any appropriate steps.<sup>376</sup> And several others—including Connecticut, Michigan, Nebraska, New Hampshire, New York, Virginia, and Wisconsin—do not appear to have any such mechanism beyond the ordinary contempt power.<sup>377</sup>

The contempt power is broad, and it remains an inherent power of the courts to enforce judgments.<sup>378</sup> That power, however, may

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374. See FED. R. CIV. P. 70.

375. See, e.g., ARIZ. R. CIV. P. 70; FLA. R. CIV. P. 1.570(C)(3); MINN. R. CIV. P. 70; N.C. GEN. STAT. ANN. 1A-1, 70; OHIO CIV. R. 70; VT. R. CIV. P. 70; WASH. SUPER. CT. CIV. R. 70.

376. CAL. CIV. PRO. CODE § 717.010 (West 1983) (“A judgment not otherwise enforceable pursuant to this title may be enforced by personally serving a certified copy of the judgment on the person required to obey it and invoking the power of the court to punish for contempt.”); *id.* § 1097 (“In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.”); CIV. P. CODE GA. 254.1 (“When delivering a decision ordering the defendant to take specific action that is not related to the transfer of property or money, the court may indicate in the same decision that if the defendant fails to comply with the decision within the set time limits, the plaintiff may take the above action with the defendant reimbursing necessary costs.”); KAN. STAT. ANN. § 60-803 (West 2022) (“Disobedience of any judgment in mandamus may, in addition to other appropriate remedies or damages be punished as for contempt.”); OR. REV. ST. ANN. § 34.140(2) (West 2022) (“Obedience to the writ may be enforced in such manner as the court or judge thereof shall direct.”)

377. See, e.g., MICH. CT. R., 2.621(F) (for injunctions) (“The court may punish for contempt a person who violates the restraining provision of an order or subpoena or, if the person is not the judgment debtor, may enter judgment against the person in the amount of the unpaid portion of the judgment and costs allowed by law or these rules or in the amount of the value of the property transferred, whichever is less.”); N.H. SUPER. CT. R. CIV. 52(b) (“Attachments for contempt may be issued by the court at any time upon evidence of the violation of any injunction or other order, or for neglect of witnesses to give evidence upon subpoena, and commitment may be made thereon. Parties may be arrested upon order of court and required to give bonds for appearance and to abide the order of court in any case where it shall be deemed necessary.”); VA. CODE ANN. § 8.01-652 (West 2022) (“Service of a copy of the order awarding the writ [of mandamus] shall be equivalent to service of the writ, and obedience to the writ or order may be enforced by process of contempt.”). See also CONN. PRACTICE BOOK § 17-19; NEB. REV. STAT. ANN. § 25-1072 (West 2022) (for injunctions); N.Y. C.P.L.R. 5104 (MCKINNEY 2022); OKLA. STAT. ANN. tit. xii, § 12-1462 (West 2022); WIS. STAT. ANN. § 806.01 (West 2022); *Carney v. CNH Health & Welfare Plan*, 740 N.W.2d 625, 632-35 (Wis. 2007).

378. See *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874) (“The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in

include mechanisms other than fines or imprisonment to compel compliance—including the inherent authority to take whatever steps are necessary to ensure compliance.<sup>379</sup> Some states’ mandamus statutes may have individual empowerment mechanisms, too, to ensure that courts have the power to compel compliance.<sup>380</sup>

State law could be easily and readily updated to ensure that a version of Rule 70 exists. State courts should expressly have the power to direct “another person appointed by the court” to carry out ministerial obligations in mandamus cases.<sup>381</sup> Principal election administration responsibility remains with election officials. This relief is the least intrusive form of ensuring compliance. It does not require incarcerating election officials or a great public battle with grandstanding election officials. And in time-sensitive election disputes, it allows for a speedy resolution of the matter, too.

Courts retain the discretion to decide what individual to appoint to carry out the task.<sup>382</sup> Different contexts may counsel in favor of appointing different individuals. For instance, if an election board is divided and fails to certify election results consistent with its

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judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.”)

379. *See, e.g., In re Interest of Krystal P.*, 557 N.W.2d 26, 29 (Neb. 1996) (“We first note that [the relevant statute] is a codification of the common law of contempt and does not supplant a court’s inherent contempt powers. The fact that [the statute] does not list attorney fees as punishment that a court of record may impose in a contempt proceeding does not necessarily prohibit the court from awarding attorney fees under certain circumstances.”) (citations omitted); *Runco v. Francis*, No. 2013-131838, 2015 WL 3796060, at \*8 (Mich. Ct. App. June 18, 2015) (per curiam) (“In any event, a circuit court is empowered to enforce its decrees and effectuate its judgment in a divorce action. Plaintiff has not established any basis for collaterally attacking the enforcement action taken in his divorce case.”) (citations omitted); *see also Tomasso-Addeo v. Addeo*, No. A-5039-15T1, 2018 WL 1056330, at \*1 (N.J. Super. Ct. App. Div. Feb. 27, 2018) (per curiam) (noting that trial court entered an order requiring party to close on refinancing home within two months, or else a judgment would be entered against him in the amount of opposing party’s share of the mortgage and opposing party would be granted “a limited power of attorney to sell the house”); *Scahill v. Stockton*, No. I2017002647, 2021 WL 2604565, at \*5-7 (N.Y. Sup. Ct. Apr. 22, 2021) (granting limited power of attorney to woman whose former husband failed to comply with divorce agreement to complete sale of home).

380. *See, e.g., GA. CODE ANN. § 9-6-21*, 22 (West 2022); *WIS. STAT. ANN. § 783* (West 2022).

381. *FED. R. CIV. P. 70*.

382. *See Election Administration at State and Local Levels*, NAT’L CONF. STATE LEGIS. (NOV. 1, 2022), <https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels> [<https://perma.cc/QX7S-7GBL>].

clear legal duty, a court may appoint the dissenting members of the board to act on behalf of the entire board. If a local official refuses to comply with a directive, the court can appoint the county official or the state official who supervises that local official or who would receive the certified results at the end of the day. And if it is an officer holding statewide office, the court should seek a comparable state officer—a governor, lieutenant governor, secretary of state, attorney general, or other officer may step into the shoes of the other.

Admittedly, courts could just as easily appoint a clerk of the court to complete the ministerial task. But there is a public-facing advantage to having the process look as close as possible to how it ordinarily operates. Rather than the perception that the court is usurping the ordinary election process and taking the task of election administration upon itself, the process will look like any other certification. True, the certification is happening at the behest of a court. But this level of disruption of the process seems unavoidable once election officials refuse to perform their clear legal duties.<sup>383</sup>

### *C. Ensuring State Supreme Courts' Original Jurisdiction*

State supreme courts often have original jurisdiction in mandamus cases.<sup>384</sup> But if states desire the most expedited avenues for review of election subversion, they should guarantee that state supreme courts have original jurisdiction in mandamus cases. This jurisdiction can be both original and discretionary, which allows state supreme courts to decline to exercise jurisdiction and allow trial courts the first opportunity to resolve disputes, when appropriate.<sup>385</sup> But unambiguous jurisdiction granted to state supreme courts can avoid time-consuming appeals and, crucially, the subversive effects from public officials' delays.<sup>386</sup> Additionally, state courts should articulate clear rules about when they would decline to exercise discretionary jurisdiction. State supreme courts have expressed concern over cases that require factual development, cases with any potential discretion left for election officials, or cases

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383. See *supra* Part VI.B.

384. See Pfander, *supra* note 20, at 1532-35.

385. See, e.g., Clopton, *supra* note 271, at 5, 36.

386. See *id.*

where an opposing party has not been given an opportunity to be heard.<sup>387</sup> Clear rules like these ensure that at least some time-sensitive election litigation would have a straightforward path before the state supreme court.

Returning to Colorado's election bill enacted in 2022, the state sought to expedite legal review of election controversies.<sup>388</sup> But its mechanisms are clumsy. The Secretary of State can now seek to enforce the election code through injunctive action filed in district court.<sup>389</sup> Colorado updated the law to say that the district court must move quickly, that appeals to the Colorado Supreme Court must happen within three days, and the Colorado Supreme Court "shall expedite scheduling."<sup>390</sup> All well and good, but one wonders if the problem is really the slowness of the judiciary in this context. The greater problem is likely recalcitrant election officials, and parties simply need access to swift judicial mechanisms rather than instructions to the judiciary to move swiftly.

#### CONCLUSION

Efforts to subvert elections have been rare, and one hopes they will remain rare in the future. Even in rare cases, however, the law must be ready to ensure that elections are administered appropriately. This Article emphasizes that, for the most part, the law is ready. The writ of mandamus is an established mechanism to ensure that executive officials do not subvert election results. Courts and legislatures should note how mandamus can be used appropriately, ensure that they have defined its contours adequately, and apply it consistently in election law cases in the years to come.

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387. *See supra* notes 81-94, 274-81 and accompanying text.

388. *See* COLO. REV. STAT. ANN. § 1-1-107 (West 2022).

389. *Id.* § 1-1-107(d).

390. *Id.*