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Presidential Election Disruptions: Balancing the Rule of Law and Emergency Response

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REPORT

PRESIDENTIAL ELECTION DISRUPTIONS: BALANCING THE RULE OF LAW AND EMERGENCY RESPONSE

*Fordham University School of Law
Rule of Law Clinic**

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EXECUTIVE SUMMARY OF RECOMMENDATIONS

The Rule of Law Clinic recommends the following reforms related to states' implementation of federal law provisions for extending voting time in presidential elections:

1. Voting time extensions in presidential elections should be available when force majeure events are extraordinary and catastrophic and disrupt regular voting, but not for disruptions that are intrinsic to the voting process.
 - As such, states should supplement the recently enacted Electoral Count Reform Act (“ECRA”) by specifying what events do *not* qualify as a force majeure, such as pending litigation.
2. In implementing the ECRA, state legislatures should designate which officials are authorized to trigger an emergency response in a presidential election, creating mechanisms for both state and local officials to initiate the process of extending voting time.
 - Local officials at the county (or similar jurisdiction) level are well-positioned to act as “decision-makers” tasked with determining when it is necessary to extend voting time in a presidential election.

* This Report was researched and written by students in Fordham University School of Law's Rule of Law Clinic under the supervision of Dean Emeritus John D. Feerick and Professor John G. Rogan during the Fall 2022 semester. The Clinic gratefully acknowledges the following individuals for sharing their knowledge and expertise during this Report's development: Robert Bauer, Thomas A. Berry, Jerry H. Goldfeder, Nicole A. Gordon, the Honorable Marcy L. Kahn, the Honorable Jonathan Lippman, and Jesse Wegman.

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- As such, local decision-makers should have the ability to directly petition the governor for voting time extensions in presidential elections.
- Expedited judicial review of the governor’s action (or inaction) at the state trial court level, with direct appeal to the state’s highest court, will mitigate potential abuse of power by the executive.
- In the event of a large-scale disruption to voting that impacts several areas in the state, the governor can decide to extend voting time in a presidential election.
 - When making this unilateral decision, the governor should consult with local officials to the extent feasible under the circumstances.
 - Expedited judicial review of the governor’s action (or inaction) at the state trial court level, with direct appeal to the state’s highest court, will mitigate potential abuse of power by the executive.
- To aid a reviewing court, the state legislature could clearly state the aims of their election emergency framework up front: to provide flexibility for officials to respond to emergencies while ensuring the integrity of an election and, above all, protecting the franchise.

3. State legislatures need not limit how early before Election Day a voting extension may be authorized or how long a voting extension may last because emergencies differ in scope and require tailored responses.

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INTRODUCTION

Emergencies can test the rule of law and the soundness of democratic institutions. This is especially true when emergencies occur around national elections—events premised on structure, predictability, and order, the very opposite of an emergency.¹ Election laws must provide flexibility for government officials to swiftly respond to election disruptions while safeguarding against abuses of power that could undermine the will of voters and threaten the regular transfer of power.

Recent history illustrates the challenges that emergencies can pose to elections as well as the perils of inadequate legal guidance. The September 11, 2001, terrorist attacks happened on a primary election day in New York. Hurricane Sandy struck New Jersey shortly before the 2012 presidential election. Officials in both cases struggled to swiftly respond and at times acted without clear legal authorization.² Other events show how gaps in federal and state law may be exploited to subvert democratic results. The disarray in Florida after the 2000 presidential election³ and false

¹ See generally Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY'S VALUE* 12–17 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

² See generally Jerry H. Goldfeder, *Could Terrorists Derail a Presidential Election?*, 32 *FORDHAM URB. L.J.* 523 (2005); Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 *EMORY L.J.* 545 (2018).

³ See Bruce Ackerman, *Opinion, As Florida Goes...*, *N.Y. TIMES* (Dec. 12, 2000), <https://www.nytimes.com/2000/12/12/opinion/as-florida-goes.html> [<https://perma.cc/4FAE-TZZB>].

fraud allegations following the 2020 presidential election⁴ prompted interest in an obscure federal emergency law, 3 U.S.C. § 2, that might have allowed state legislatures to discard the popular vote.⁵ This law provided that a state legislature may unilaterally determine the manner of appointing its presidential electors if the state “has held an election for the purpose of choosing electors, and has failed to make a choice” on Election Day.⁶ But the law did not define what constituted a “fail[ure] to make a choice,” nor did it explicitly limit this legislative authority.⁷ In theory, state legislatures—working within constitutional and statutory constraints—could have taken the choice away from voters and appointed electors for their preferred candidate after Election Day.⁸

To address this provision’s vulnerabilities and other weaknesses in federal law governing the casting and counting of electoral votes, Congress passed the Electoral Count Reform and Presidential Transition Improvement Act (“ECRA”) in December 2022.⁹ The ECRA nullifies the failed elections clause in the Electoral Count Act (“ECA”), but, recognizing that states need authority to respond to emergencies, the ECRA still allows states to extend the time for voting in the event of certain contingencies.¹⁰

⁴ See Richard H. Pildes, *There’s Still a Loaded Weapon Lying Around in Our Election System*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/opinion/state-legislatures-electors-results.html> [<https://perma.cc/AW3F-96Q8>].

⁵ See *id.*; Ackerman, *supra* note 3.

⁶ 3 U.S.C. § 2, amended by H.R. 2617, Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459, Division P (to be codified at 3 U.S.C.) [hereinafter ECRA Legislation]. Following common usage, this Report refers to the previous sections of the Electoral Count Act and its prior provisions in 3 U.S.C. by the section of codification (e.g., Section 1 refers to 3 U.S.C. § 1).

⁷ *Id.*

⁸ Though it has never been entirely certain that state legislatures have the authority to unilaterally appoint electors under 3 U.S.C. § 2, various constitutional and election law scholars have analyzed the possibility of this scenario. See, e.g., Richard Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022).

⁹ ECRA Legislation (2022). Senators Susan Collins and Joe Manchin introduced the ECRA in July 2022. See S. 4573, 117th Cong. (2022). In September 2022, the U.S. Senate Committee on Rules and Administration amended the ECRA by adopting a bipartisan amendment put forth by Senators Amy Klobuchar and Roy Blunt. See Sonia Montejano et al., *Reforming the Electoral Count Act: A Conversation with Senator Klobuchar’s Policy Director of the U.S. Senate Committee on Rules and Administration*, FORDHAM L. VOTING RTS. & DEMOCRACY F. COMMENT. (Dec. 26, 2022, 1:00 PM), <https://fordhamdemocracyproject.com/2022/12/26/reforming-the-electoral-count-act> [<https://perma.cc/S8HJ-2HTQ>]. Because Division P of the omnibus appropriations legislation generally mirrors the bipartisan manager’s amendment from September 2022, this Report cites the ECRA in that form. S. 4573, 117th Cong. (2022) (as reported by S. Comm. on Rules Admin., Oct. 18, 2022).

¹⁰ S. 4573, § 104.

This Report explores how states should implement this new federal law to respond to emergencies that disrupt presidential elections. Part I presents recent events that illustrate the need for stronger state laws to govern emergencies in presidential elections. Part II overviews the federal legal regime for presidential elections before surveying state laws for responding to election disruptions. Finally, Part III presents recommendations, proposing that states implement a framework that more closely defines the type of emergency that could warrant extending voting time in a presidential election; designates who may trigger such an emergency response, creating mechanisms for both state and local level officials to initiate the process; and provides expedited judicial review.

I. EVENTS ILLUSTRATING THE NEED FOR REFORM

Various historical examples illustrate the institutional and logistical challenges of responding to legitimate emergencies if response mechanisms are not predetermined. Along with presenting some of these examples, Part I analyzes how inadequate election laws have created opportunities for abuse—including after the 2000 and 2020 presidential elections, and in response to Hurricane Ian ahead of the 2022 midterm elections. These examples illustrate the need for strong institutional checks and balances.

A. *Events Requiring the Use of Emergency Powers*

1. September 11, 2001, Terrorist Attacks

The devastating attacks on the World Trade Center happened the morning of September 11, 2001, the same day New York was holding primary elections.¹¹ In the wake of the disaster, a New York Supreme Court Justice, appointed to supervise the New York City elections, halted voting, citing “inherent legal authority.”¹² Shortly thereafter, Governor George Pataki issued an executive order canceling all primaries throughout the state.¹³ Neither the judge nor the governor made their decision pursuant to a statutory or

¹¹ See Adam Nagourney, *AFTER THE ATTACKS: THE ELECTION; Primary Rescheduled for Sept. 25, With Runoff, If Necessary, Set for Oct. 11*, N.Y. TIMES (Sept. 14, 2001), <https://www.nytimes.com/2001/09/14/us/after-attacks-election-primary-rescheduled-for-sept-25-with-runoff-if-necessary.html> [https://perma.cc/WG6W-DRTQ].

¹² See Goldfeder, *supra* note 2, at 103 n.11. The state’s Office of Court Administration appointed New York Supreme Court Justice Steven Fisher weeks prior to the election in efforts after the 2000 presidential election turmoil to build capacity for expeditiously addressing election issues. *Id.*

¹³ See *id.*

constitutional grant of power—New York State law only authorizes county or state boards of elections to postpone elections.¹⁴ Accordingly, whether either official had the legal authority to cancel the primary is unclear,¹⁵ though neither decision was challenged in court. The state legislature rescheduled the election a few days later, but no changes to the election code followed.¹⁶

New York’s failure to implement election reforms after the September 11 events has faced criticism from legal observers.¹⁷ Had a presidential contest instead of a state and local primary been underway, the potential disruption to the transfer of power could have been even more grave. Under the federal legal framework at the time, the state legislature could have used Section 2 of the ECA to declare the election “failed” and appointed its preferred presidential electors—without even considering how to adapt the voting process to meet the circumstances.¹⁸ Foreign terrorism could have been the catalyst for undermining the people’s choice for a new president, causing uncertainty and confusion over the transfer of power.

2. Hurricane Sandy

Hurricane Sandy made landfall in New Jersey one week before the presidential election of November 6, 2012.¹⁹ The hurricane inflicted extensive wind and flood damage, displaced large numbers of residents, caused gas shortages and closed roads,

¹⁴ See N.Y. ELEC. LAW § 3-108 (West 2008).

¹⁵ See *How Do You Cancel an Election?*, SLATE (Sept. 12, 2001, 6:29 PM), <https://slate.com/news-and-politics/2001/09/how-do-you-cancel-an-election.html> [<https://perma.cc/T365-LQKC>]. See also Goldfeder, *supra* note 2, at 104 (discussing uncertainty over whether Justice Fisher had authority to cancel the municipal election via judicial order and whether Governor Pataki had authority to cancel the primary state-wide via executive order, but resolving that the trauma of the attacks likely warded off legal challenges).

¹⁶ See Goldfeder, *supra* note 2, at 104.

¹⁷ See *How Do You Cancel an Election?*, *supra* note 15; Goldfeder, *supra* note 2, at 104–05 (“These scarring events did not sufficiently command the attention of New York public officials to enact more suitable legislation.”).

¹⁸ Beyond the threat of state legislatures abusing Section 2 of the ECA to override the popular will in appointing electors, good-faith efforts to use the provision for emergency response still posed pitfalls. For example, Professor Michael Morley believed that Section 2 should not be used to postpone elections except in “rare circumstances where modifications would be insufficient.” Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. 179, 213 (2020).

¹⁹ See Colleen O’Dea, *How Sandy Spurred Voting Changes*, N.J. SPOTLIGHT NEWS (Oct. 31, 2022), <https://www.njspotlightnews.org/2022/10/superstorm-sandy-changed-nj-voting-elections-officials-scrambled-polling-sites-email-mobile> [<https://perma.cc/LZ4Z-BRJQ>].

and rendered many polling places unusable.²⁰ Governor Chris Christie declared a state of emergency, authorizing heads of executive agencies to “waive, suspend, or modify” any rules that would be “detrimental to public welfare during this emergency.”²¹ Acting partially under this emergency authority, the state’s chief election official, Lieutenant Governor Kim Guadagno, took a series of actions, including: extending the mail-in ballot deadline; ordering election offices to remain open the weekend before Election Day and extend operating hours; waiving residency requirements on polling place locations; and, most controversially, allowing voting by email and fax.²²

While these actions demonstrated adaptability and a strong commitment to maximizing voting opportunities, they simultaneously created a host of logistical and jurisdictional issues.²³ For one, alternative voting methods confused voters. In Hoboken, New Jersey, for example, voters expressed confusion over what contests they could vote in by electronic versus provisional ballots, given discrepancies in each ballot that officials failed to adequately communicate. This confusion reportedly impacted the results of a local rent control referendum.²⁴ Further, last-minute voting modifications—which allowed voters to cast over 50,000 electronically-submitted or faxed ballots—overwhelmed processing systems and side-stepped certain protections for ballot integrity.²⁵ This prompted the Lawyers’ Committee for Civil Rights Under the Law, a nonpartisan civil rights organization, to call the election a “catastrophe.”²⁶ The challenges of administering the election after Hurricane Sandy illustrate the need for states to predetermine processes for emergency response.

B. Events Revealing the Potential for Abuse of Emergency Powers

1. The 2000 Election

The 2000 presidential election did not produce a winner until the U.S. Supreme Court rendered its decision in *Bush v. Gore*²⁷ over

²⁰ See *id.*

²¹ *Id.*

²² See Morley, *supra* note 2, at 565.

²³ See *id.* at 565–70. See also O’Dea, *supra* note 19.

²⁴ See Morley, *supra* note 2, at 569 (“The Appellate Division emphasized that displaced voters had not been informed that provisional ballots in alternate polling locations did not provide an opportunity to vote on Hoboken’s public questions.”).

²⁵ *Id.* at 567–68.

²⁶ See Mitchell Landsberg, *Voting Rights Coalition Describes Problems in N.J., Other States*, L.A. TIMES (Nov. 6, 2012, 12:00 AM), <https://www.latimes.com/politics/la-xpm-2012-nov-06-la-pn-voting-rights-problems-election-day-20121106-story.html> [<https://perma.cc/792N-B828>].

²⁷ 531 U.S. 98 (2000) (per curiam).

a month after Election Day.²⁸ In the interim weeks, disputes over how to count ballots in the determinative state of Florida prompted lawsuits from both candidates. Multiple counties underwent recounts, and after weeks of indeterminacy, the Florida legislature considered other mechanisms to end the chaos, including the ECA’s “failed election” mechanism.²⁹

On December 12, 2000, the Florida House of Representatives passed a concurrent resolution citing the ECA provision as authority for the legislative appointment of electors.³⁰ The theory held that the unresolved ballot disputes, combined with the approaching safe harbor date (the deadline by which a state must certify its electors for Congress to treat the certification as “conclusive” during the electoral vote count)³¹ constituted a failed election. The Florida House “seemed simply to assume that if the state had failed to make a choice, the legislature had the power under the federal statute to appoint electors.”³²

Various legal scholars have argued that this proposition would not have withstood constitutional scrutiny.³³ The idea that a state legislature could determine that it, and not the millions of voters who have already cast their ballots, has the power to decide an election is dubious at best and unconstitutional at worst.³⁴ Yet the circumstances revealed the vulnerabilities of federal statutes at the time and generally illustrated the threat of partisan power-grabbing in moments of uncertainty.

²⁸ See Andrew Glass, *Bush Declared Electoral Victor over Gore, Dec. 12, 2000*, POLITICO (Dec. 12, 2018, 12:06 AM), <https://www.politico.com/story/2018/12/12/scotus-declares-bush-electoral-victor-dec-12-2000-1054202> [<https://perma.cc/ACM7-2QBL>].

²⁹ See Ackerman, *supra* note 3.

³⁰ A state’s electors can be appointed “in such a manner as the legislature of such State may direct” if a state fails to “make a choice” on Election Day. 3 U.S.C. § 2, *amended by* ECRA Legislation § 102.

³¹ See 3 U.S.C. § 5, *amended by* ECRA Legislation § 104. The Constitution requires the count of Electoral College certificates, or electoral votes, to occur before a joint session of Congress. See U.S. CONST. art. II, § 1, cl. 3. Specifically, Section 15 of the ECA provided that the session begins on January 6 in the year after a presidential election. See 3 U.S.C. § 15, *amended by* ECRA Legislation § 104.

³² Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1075 (2021).

³³ See, e.g., *id.*; Edward B. Foley, *As Part of Electoral Count Act Reform, Liberals Should Learn to Love Bush v. Gore*, LAWFARE (Feb. 4, 2022, 10:01 AM), <https://www.lawfareblog.com/part-electoral-count-act-reform-liberals-should-learn-love-bush-v-gore> [<https://perma.cc/6JLZ-CTXV>]. See also *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . .”).

³⁴ See Ackerman, *supra* note 3.

2. The 2020 Election: Voter Fraud Allegations

Following the 2020 presidential election, then-President Donald Trump and his allies launched a campaign to overturn President-elect Joseph Biden's victory, baselessly alleging widespread voter fraud.³⁵ The acting head of the U.S. Department of Justice's ("DOJ") civil division, Jeffrey Clark, spearheaded one strategy, coordinating his efforts with Trump. Assistant Attorney General Clark unsuccessfully sought to persuade top DOJ officials to urge officials in Georgia and other key states—which Biden had won—to address unsubstantiated claims of voting irregularities.³⁶ Specifically, Clark wanted DOJ leaders to send a letter to the Georgia governor, asking him to call a special legislative session in which Georgia lawmakers would determine “whether the *election failed* to make a proper and valid choice between the candidates, such that the General Assembly could take *whatever action is necessary* to ensure that one of the slates of Electors cast on December 14 will be accepted by Congress on January 6,” the date of the electoral count.³⁷ Under Clark's plan, the Georgia legislature would have used Section 2 to declare a “failed election” and appoint their preferred electors.

The election aftermath “revealed longstanding fractures in the foundation of our Nation's system for conducting presidential elections,”³⁸ prompting constitutional scholars to call the “failed election” provision a “loaded weapon lying around in our election system”³⁹ and buoying reform efforts in Congress.

3. Hurricane Ian

In October 2022, weeks before the midterm elections, critics accused Republican Governor Ron DeSantis of Florida of politicizing a natural disaster by exercising emergency response

³⁵ See *Election Fraud Claims from Trump, Allies Became like 'Whac-a-Mole': Barr Testimony*, CBC NEWS (June 13, 2022, 6:59 AM), <https://www.cbc.ca/news/world/jan-6-committee-hearing-mon-1.6486550> [<https://perma.cc/2EEV-LNZ6>].

³⁶ Katherine Faulders & Alexander Mallin, *DOJ Officials Rejected Colleague's Request to Intervene in Georgia's Election Certification: Emails*, ABC NEWS (Aug. 3, 2021, 2:56 PM), <http://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198> [<https://perma.cc/S7BN-XQYF>].

³⁷ See *Read the Unsent Letter by Jeffrey Clark to Georgia Officials*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/interactive/2022/06/23/us/jeffrey-clark-draft-letter.html> [<https://perma.cc/3JCZ-UD9V>].

³⁸ See Pildes, *supra* note 4.

³⁹ *Id.*

powers to favor Republican voters.⁴⁰ After Hurricane Ian pummeled through Florida a month before the election, causing severe destruction and prompting 2.5 million evacuation orders,⁴¹ DeSantis issued an executive order easing voting rules in three solidly Republican counties: Lee, Charlotte, and Sarasota. Voting rights advocates requested similar accommodations for Democratic-leaning areas, like Orange County, but to no avail.⁴² Critics decried DeSantis’s failure to facilitate voting more widely,⁴³ but his administration defended the decision, claiming that it was made “based on the collective feedback of the Supervisors of Elections across the state and at the written requests of the Supervisors of Elections in Charlotte, Lee, and Sarasota counties.”⁴⁴ Whether or not the decision intentionally discriminated against Democrats, it illustrates the importance of instating emergency protocols with checks on executive decision-making.

II. FEDERAL AND STATE LEGAL FRAMEWORK

Election administration in the United States is highly decentralized.⁴⁵ While the federal government plays a supporting role in administering national elections, states and localities share

⁴⁰ See Gloria Oladipo, *Anger as DeSantis Eases Voting Rules in Republican Areas Hit by Hurricane*, THE GUARDIAN (Oct. 14, 2022, 12:44 PM), <https://www.theguardian.com/us-news/2022/oct/14/ron-desantis-florida-hurricane-ian-voting-rules> [https://perma.cc/LKR3-AABR].

⁴¹ See Ian Livingston, *What Made Hurricane Ian So Intense: By the Numbers*, WASH. POST (Oct. 4, 2022, 1:59 PM), <https://www.washingtonpost.com/climate-environment/2022/10/04/hurricane-ian-statistics-deaths-winds-surge> [https://perma.cc/XQ7N-SNTU].

⁴² See Oladipo, *supra* note 40. The Lawyers’ Committee for Civil Rights Under Law, Equal Ground, and the American Civil Liberties Union, among other organizations, emailed Florida officials requesting an emergency order to make voting easier in twenty-four counties considered to be disaster areas. See Email from Lawyers’ Committee for Civil Rights Under Law et al. to Florida Officials, *Hurricane Ian Recovery; Emergency Actions to Ensure Voting Access* (Oct. 11, 2022), <https://www.lawyerscommittee.org/wp-content/uploads/2022/10/Letter-to-FL-DOS-RE-Hurricane-Ian-Voting-Access-2022.10.11.pdf> [https://perma.cc/B2EY-7UBL].

⁴³ See Lori Rozsa, *DeSantis Changes Voting Rules for Some Counties Hit by Ian, Sparking Criticism*, WASH. POST (Oct. 13, 2022, 6:02 PM), <https://www.washingtonpost.com/nation/2022/10/13/desantis-florida-hurricane-voting> [https://perma.cc/PJ4H-3RPG].

⁴⁴ Office of Governor Ron DeSantis, Executive Order 22-234 Emergency Management/Elections—Hurricane Ian (Oct. 12, 2022), https://www.flgov.com/wp-content/uploads/2022/10/SKM_C750i22101216140-1.pdf [https://perma.cc/KF56-S2P7].

⁴⁵ See Goldfeder, *supra* note 2, at 132.

most election administration responsibilities.⁴⁶ Yet these duties at the state and local levels vary between and within states.

Part II provides an overview of the institutional and legal foundation for emergency responses in presidential elections. First, Part II.A describes how the United States elects presidents through the Electoral College and analyzes the constitutional and federal statutory provisions governing the administration of presidential elections, including the context in which they were drafted and how they provide for modifications during emergencies. Part II.B then summarizes the legal landscape governing emergency response to elections at the state level.

A. *How Presidential Elections Work and Institutional History*

Most prominent features of the presidential electoral system are state-driven.⁴⁷ The president and vice president are chosen by electors from each state through the Electoral College.⁴⁸ The Electoral College has always been “a state-driven system,” despite its “function of electing a national leader.”⁴⁹ Article II, Section 1 of the Constitution provides that state legislatures have the authority to appoint “in such Manner as the Legislature thereof may direct, a Number of Electors” to select the president and vice president.⁵⁰ Congress, however, may “determine the Time” of choosing the presidential electors.⁵¹

Following the ratification of the Constitution in 1788, the first national elections took place over a span of two months.⁵² This system remained in place until the Presidential Election Day Act of 1845 set Election Day as a single day “on the Tuesday [] after the

⁴⁶ See Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of Our 59th Presidential Election*, 90 *FORDHAM L. REV.* 335, 339 (2021).

⁴⁷ See R. SAM GARRETT ET AL., *CONG. RSCH. SERV.*, R46455, *COVID-19 AND OTHER ELECTION EMERGENCIES: FREQUENTLY ASKED QUESTIONS AND RECENT POLICY DEVELOPMENTS 1–2* (2020); Goldfeder, *supra* note 2, at 123 (stating that the U.S. Constitution and federal statutes grant states “dominant decision-making authority in presidential elections”).

⁴⁸ The Electoral College assigns a certain number of electors to each state based on their representation in Congress. The total number of House members, plus two senators, is combined to give each state its total number of electors. See *What Is the Electoral College?*, NAT’L ARCHIVES, <https://www.archives.gov/electoral-college/about> [<https://perma.cc/M9WL-PK4M>] (last visited Mar. 31, 2023).

⁴⁹ Goldfeder, *supra* note 2, at 125.

⁵⁰ U.S. CONST. art. II, § 1, cl. 2.

⁵¹ *Id.* art. II, § 1, cl. 4 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”).

⁵² See Morley, *supra* note 18, at 183.

first Monday in November.”⁵³ Congress further exercised its constitutional power to determine the “Time” of choosing electors by enacting the ECA.⁵⁴ The ECA’s origins start with the election of 1876, which took place at the tail end of Reconstruction.⁵⁵ Disputed results in Louisiana, South Carolina, and Florida led both major political parties to send competing slates of electors to Congress.⁵⁶ Congress created a bipartisan commission to determine which slates to count, and Republican Rutherford B. Hayes emerged as the winner. In a historic compromise, Democrats agreed to accept the outcome in exchange for the withdrawal of federal troops from the South, which effectively ended Reconstruction.⁵⁷ This politicking after the 1876 election was a far cry from what the Framers envisioned in constructing the Electoral College.⁵⁸ It revealed systemic flaws that Congress sought to address with the ECA, which became law in 1887.⁵⁹

The ECA provided the framework for casting and counting electoral votes. Section 1 provided that electors are appointed “on the Tuesday next after the Monday in November” (i.e., Election Day).⁶⁰ In effect, this provision mandated that all electors be appointed on the same day.⁶¹ Section 2, referred to as the “failed election” provision, allowed legislatures in states that have “failed to make a choice” on Election Day to determine the “manner” for

⁵³ Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (codified as amended at 3 U.S.C. §§ 1–2 (2018)).

⁵⁴ See ch. 90, 24 Stat. 373 (codified as amended in scattered sections of 3 U.S.C.).

⁵⁵ Held during the Reconstruction era, the election was a contested battle between Republican Rutherford B. Hayes and Democrat Samuel Tilden. See Sheila Blackford, *Disputed Election of 1876*, MILLER CTR., <https://millercenter.org/the-presidency/educational-resources/disputed-election-1876> [<https://perma.cc/2FVH-77DZ>] (last visited Mar. 31, 2023).

⁵⁶ See *id.*

⁵⁷ The bipartisan deal struck to consolidate support for Hayes is known as the Compromise of 1877 or the Wormley Conference. See *Wormley Conference*, BRITANNICA, <https://www.britannica.com/event/Wormley-Conference> [<https://perma.cc/L8E2-RTKT>] (last visited Mar. 31, 2023). But see Charles W. Calhoun, Letter to the Editor, *There Was No Corrupt Bargain in the 1876 Presidential Election*, WASH. POST (Apr. 9, 2023, 4:51 PM), <https://www.washingtonpost.com/opinions/2023/04/09/corrupt-bargain-1876-presidential-election> [<https://perma.cc/C9FV-9B75>].

⁵⁸ The Framers intended for electors to be educated citizens who would decide via deliberation which candidate was best fit for the presidency. See THE FEDERALIST NO. 68 (Alexander Hamilton).

⁵⁹ See Blackford, *supra* note 55.

⁶⁰ 3 U.S.C. § 1, amended by ECRA Legislation § 102. Before the ECRA revised the language, Section 1 said: “The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”

⁶¹ See Levitt, *supra* note 32, at 1076.

appointing their states' electors.⁶² The “manner” of appointment included a range of options, such as another opportunity for voters to cast ballots or the legislature itself appointing electors.⁶³ Section 2 reflects Article II's language, “albeit in the specific context of electoral ‘failure.’”⁶⁴ Its origins trace back to the Presidential Election Day Act of 1845, which similarly stated that “when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.”⁶⁵ Congress added this provision to address differences among state election laws that could prevent the selection of all electors by Election Day,⁶⁶ as well as to provide a solution in cases of natural disasters and emergencies that could prevent voters from reaching the polls on Election Day.⁶⁷

Remarkably, the ECA did not define “failed to make a choice.” Legal experts across the ideological spectrum agreed that the term's vagueness invited “all sorts of state legislative mischief” if state legislatures disliked an electoral outcome.⁶⁸ Indeed, some argued that Section 2 “dangerously empower[ed] state legislatures to choose a new method of appointing their state's electors” erroneously.⁶⁹ For example, a legislature could have claimed that

⁶² 3 U.S.C. § 2, amended by ECRA Legislation § 102.

⁶³ Section 2 had provided an exception to Section 1's timing requirement. Before the ECRA revised the language, Section 2 said: “Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.”

⁶⁴ Levitt, *supra* note 32, at 1072.

⁶⁵ *Id.*

⁶⁶ During legislative debate for the Act, Representatives John Hale of New Hampshire and Samuel Chilton of Virginia raised issues with how the Act presumed only one day to choose electors, in conflict with their states' laws. New Hampshire required a candidate to receive a majority of the vote and Virginia's ballot-counting method required more than one day to complete. *See* Morley, *supra* note 18, at 188.

⁶⁷ *See* CONG. GLOBE, 28th Cong., 2nd Sess. 15 (1844) (statement of Rep. Chilton) (“[A]t times of high water, and of inclement weather, voters were frequently prevented from attending the polls . . . not only in the presidential elections, which had induced the legislature to authorize the continuance of the elections when . . . any considerable number of voters had been prevented from coming to the polls. The case had happened, and would happen again, when all the votes could not be polled. It could not surely be the design of . . . this bill, that those . . . entitled to vote . . . should be deprived of this privilege.”).

⁶⁸ *See, e.g.,* Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, LAWFARE (July 24, 2022, 4:09 PM), <https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act> [<https://perma.cc/JA35-L8LU>].

⁶⁹ Ned Foley, *Why Congress Should Swiftly Enact the Senate's Bipartisan ECA Reform Bill*, ELECTION L. BLOG (July 20, 2022, 11:38 AM), <https://electionlawblog.org/?p=130870> [<https://perma.cc/ZG2K-S6YG>].

its “previous choice to hold a popular vote ha[d] ‘failed’ because of an impossibility to count the popular vote correctly and that therefore . . . it is authorized to . . . directly” appoint electors.⁷⁰ As discussed, Florida lawmakers considered triggering this mechanism after the 2000 presidential election and some allies of President Trump urged state legislatures to use this law to subvert the results of the 2020 election.⁷¹

In 2022, a bipartisan effort that originated in the Senate heeded calls to reform the ECA and resulted in passage of the ECRA as part of omnibus appropriations legislation.⁷² The ECRA strikes Sections 1 and 2 and inserts:

The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.

[Where] ‘election day’ means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting, as necessitated by force majeure events that are extraordinary and catastrophic as provided under laws of the State enacted prior to such day, ‘election day’ shall include the modified period of voting.⁷³

By narrowing the category of applicable events to “force majeure events that are extraordinary and catastrophic” and limiting the available remedy to extending the voting period, the ECRA prevents states from passing new laws to govern the count after Election Day.⁷⁴ The ECRA thus forecloses some potential avenues for election subversion by bad-faith state actors in the wake of emergencies. Nevertheless, states must keep these concerns front and center as they operationalize this new federal framework.

⁷⁰ *Id.*

⁷¹ *See supra* Part I.B (discussing the 2000 and 2020 presidential elections).

⁷² Specifically, Senate Bill 4753, the Electoral Count Reform and Presidential Transition Improvement Act of 2022, was inserted as “Division P” in the Consolidated Appropriations Act of 2023. *See generally* ECRA Legislation.

⁷³ *Id.* § 102.

⁷⁴ *See, e.g., The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules and Admin.*, 117th Cong. 6 (2022) (statement of Bob Bauer, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law).

B. Overview of State Emergency Powers in Presidential Elections

Election emergency laws at the state level vary in breadth and specificity⁷⁵ and are often a patchwork of election-specific emergency powers and general emergency powers.⁷⁶ While most states have some election-specific emergency codes,⁷⁷ only a few have enacted comprehensive laws to adequately address large-scale disruptions.⁷⁸

Relocating or setting up alternate poll locations is the most common emergency election provision among states.⁷⁹ Many, including Arkansas⁸⁰ and Maine,⁸¹ for example, allow local election officials to change polling locations in emergencies.⁸² But only a few states, like California⁸³ and Florida,⁸⁴ require officials to notify voters of these changes. This means voters may never learn that their polling station has changed in time to cast their ballot.⁸⁵ Additionally, some states provide opportunities for voter input in polling relocation matters. For example, Missouri requires voters to petition their local state appellate court for moving polling places in emergencies,⁸⁶ and Pennsylvania allows voters to object to a polling place relocation.⁸⁷

⁷⁵ See Morley, *supra* note 2, at 609; *Election Emergencies*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 1, 2020), <http://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx> [<https://perma.cc/WQ6H-SRT3>].

⁷⁶ See Morley, *supra* note 2, at 609–13; Dakota Foster, *A Lurking Threat: State Emergency Powers in Elections*, LAWFARE (Nov. 2, 2022, 8:31 AM), <https://www.lawfareblog.com/lurking-threat-state-emergency-powers-elections> [<https://perma.cc/PK7L-L8DZ>].

⁷⁷ Arizona, Massachusetts, New Hampshire, Rhode Island, and Wisconsin do not have any election-specific emergency laws. See *Election Emergencies*, *supra* note 75.

⁷⁸ See Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, WASH. & LEE L. REV. (forthcoming 2023) (manuscript at *4), <https://ssrn.com/abstract=3964186> [<https://perma.cc/298L-VX9T>] (“Most current election emergency statutes seem to assume that the emergency at issue will be a natural disaster like a hurricane or earthquake; few are sufficiently broad to address the unique circumstances that pandemics implicate.”). Notably, California, Florida, Oklahoma, and Virginia have the most expansive election-specific emergency statutes. See *Election Emergencies*, *supra* note 75.

⁷⁹ See Morley, *supra* note 2, at 611. Approximately half of states, for example, have laws that allow for relocating poll sites. See *Election Emergencies*, *supra* note 75. Florida, Hawaii, Louisiana, Maryland, South Carolina, and Virginia have laws that allow for both poll relocation and rescheduling elections. *Id.*

⁸⁰ ARK. CODE ANN. § 7-5-101 (West 2019).

⁸¹ ME. REV. STAT. ANN. tit. 21, § 631-A(3) (2018).

⁸² See *Election Emergencies*, *supra* note 75.

⁸³ CAL. ELEC. CODE § 12281(b) (West 2018).

⁸⁴ FLA. STAT. ANN. § 101.71(3) (West 2010).

⁸⁵ KAN. STAT. ANN. § 25-2701(d)(1) (West 2019). Kansas goes so far as to explicitly allow county officials to change a polling place without notice. *Id.*

⁸⁶ MO. ANN. REV. STAT. § 115.024 (West 2006).

⁸⁷ 25 PA. CONS. STAT. § 2726 (West 2006).

Fourteen states allow mechanisms other than poll site changes to facilitate the franchise in emergencies, such as providing absentee ballots, or mandating local election boards to preemptively adopt emergency plans.⁸⁸ Notably, twelve states allow for a delay or postponement of presidential elections.⁸⁹ These states take different approaches. For example, Florida,⁹⁰ Hawaii,⁹¹ and Idaho⁹² allow local election boards to change the election date, while South Dakota allows the local election board to extend voting hours.⁹³ New York has a unique provision that allows a county or state board of elections to authorize “an additional day” of voting for a specific jurisdiction, but only if an emergency results in less than 25 percent voter turnout.⁹⁴ Oregon, which utilizes vote by mail, allows the secretary of state to extend the time for voters to return ballots.⁹⁵ Several other states authorize the governor to delay or reschedule an election due to an emergency.⁹⁶

Still, some states lack election-specific emergency statutes, relying instead on general emergency statutes.⁹⁷ Typically, governors possess maximum executive powers to declare states of emergency and issue executive orders, suspend statutes, and modify regulations.⁹⁸ Governors thus may exercise significant control over elections during a state of emergency.⁹⁹ Beyond these general powers, a few states also specifically grant governors election-related authorities.¹⁰⁰

⁸⁸ See *Election Emergencies*, *supra* note 75.

⁸⁹ See *id.*

⁹⁰ FLA. STAT. ANN. § 101.733 (West 2018).

⁹¹ HAW. REV. STAT. ANN. § 11-92.3 (West 2021).

⁹² IDAHO CODE ANN. § 34-106(1)(c) (West 2022).

⁹³ S.D. CODIFIED LAWS § 12-2-4 (2014).

⁹⁴ N.Y. ELEC. LAW § 3-1081(1) (McKinney 2014). If a county or state board of election authorizes an additional day, it must be (1) conducted within twenty days of the original election and (2) all in-person voting. *Id.* § 3-108(2), (4).

⁹⁵ ORE. REV. STAT. ANN. § 254.471 (West 2010).

⁹⁶ See, e.g., FLA. STAT. ANN. § 101.733; 10 ILL. COMP. STAT. ANN. 5/20-25 (West 2015); LA. REV. STAT. ANN. § 18:401.1 (West 2018).

⁹⁷ See Morley, *supra* note 2, at 609. Importantly, most general state emergency statutes do not actually define “emergency.” See Foster, *supra* note 76 (noting that if state emergency statutes do define “emergency,” it is in “such general terms that almost any incident could qualify as an emergency.”).

⁹⁸ See *Election Emergencies*, *supra* note 75; Foster, *supra* note 76 (“For example, Idaho offers a prototypical statute of general executive emergency powers. The state’s governor can both suspend laws that would ‘prevent, hinder, or delay necessary action in coping with the emergency’ and issue orders with the ‘force and effect of law.’”).

⁹⁹ See *Election Emergencies*, *supra* note 75; Andrew Vazquez, *Abusing Emergency Powers: How the Supreme Court Degraded Voting Rights Protections During the COVID-19 Pandemic and Opened the Door for Abuse of State Power*, 48 FORDHAM URB. L.J. 967, 991 (2021).

¹⁰⁰ See *Election Emergencies*, *supra* note 75.

The various approaches that states and localities take in handling election emergencies illustrate a clear lack of uniformity. A streamlined approach for responding to emergencies under the new ECRA framework might reduce voter confusion and increase public confidence in elections.

III. RECOMMENDATION

An inherent tension exists between elections and emergencies.¹⁰¹ While complex and, at times, disorderly,¹⁰² elections aspire towards predictability and regularity in democratic transfers of power.¹⁰³ This is especially true in presidential elections because the Constitution mandates a new contest every four years.¹⁰⁴ Thus, the regulated nature of election administration diverges from the chaos and unpredictability of emergencies. Further, while casting ballots embodies our Nation's democratic tenet of one-person, one-vote,¹⁰⁵ emergencies prioritize fast and efficient decision-making that, by nature, will exclude some voices and are therefore "less egalitarian."¹⁰⁶ Even so, American elections have occurred amid devastating natural disasters,¹⁰⁷ public health crises like the COVID-19 pandemic,¹⁰⁸ and even the Civil War,¹⁰⁹ a

¹⁰¹ See Foster, *supra* note 76.

¹⁰² See, e.g., Ashley Brown, *Harris County Officials Vow to Sort Out 2022 Election Day Issues*, HOUS. PUB. MEDIA (Nov. 10, 2022, 8:00 AM), <https://www.houstonpublicmedia.org/articles/news/politics/elections/2022/11/10/437181/officials-say-they-will-sort-out-election-day-issues-after-several-delays> [<https://perma.cc/22EF-7E45>] (describing mundane polling site issues like polling sites opening late, machine malfunctions, and even some polling sites running out of ballots).

¹⁰³ See generally Przeworski, *supra* note 1.

¹⁰⁴ U.S. CONST. art. II, § 1, cl. 2 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years . . ."). This sets the United States apart from other countries with more flexible presidential election calendars. See Michael Caudell-Feagan & Charles Stewart, *Now Is the Time to Prepare for the Next Election Emergency*, PEW RSCH. CTR. (June 21, 2021), <https://www.pewtrusts.org/en/trust/archive/spring-2021/now-is-the-time-to-prepare-for-the-next-election-emergency> [<https://perma.cc/JRC6-VYM5>] (noting that more than half of countries that hold elections rescheduled their elections during the COVID-19 pandemic).

¹⁰⁵ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

¹⁰⁶ See Foster, *supra* note 76.

¹⁰⁷ See *supra* Part I.

¹⁰⁸ See *Elections During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/elections-during-covid-19-50-state-resources> [<https://perma.cc/T4UL-W3E4>] (last visited Mar. 31, 2023).

¹⁰⁹ See, e.g., Nina Strohlic, *How Mail-in Voting Began on Civil War Battlefields*, NAT'L GEOGRAPHIC (Nov. 4, 2022), <https://www.nationalgeographic.com/history/article/how-mail-in-voting-began-on-civil-war-battlefields> [<https://perma.cc/WB3F-HQAF>].

testament to the critical importance of regular elections for the continuity of democracy.¹¹⁰

In light of these realities, Part III offers recommendations for state implementation of federal provisions for voting time extensions in presidential elections under the ECRA. These recommendations aim to create a more robust approach for state and local officials to respond to emergencies while protecting against abuse. Though modifications other than voting time extensions—such as changes to polling sites and mechanisms for casting a ballot—are permissible under federal law, Part III focuses particularly on prolonging the voting period as permitted under the ECRA.

A. *What is an Emergency?*

Because emergencies pose unique challenges, each differing in scope and effect, many states have opted for ambiguity over precision in codifying election emergency statutes.¹¹¹ On the one hand, this ambiguity allows flexibility for state officials to respond to the unexpected.¹¹² On the other, too much vagueness can lead to the types of chaotic scenarios and opportunities for abuse spotlighted in Part I. But what constitutes an emergency of enough magnitude to affect the administration of a presidential election in the first place? The question requires some ad hoc discretion for officials facing any given catastrophe. At the state-level, however, what constitutes an emergency is generally for the governor alone to decide.¹¹³ Still, within the confines of the federal legal framework, a state legislature should ex-ante decide how much discretion to allocate. Providing a clearer definition than what currently exists under federal law would benefit emergency election laws in critical ways.

With the ECRA's enactment, a qualifying emergency—where an extension of voting is allowed—is limited to a “*force majeure event[] that [is] extraordinary and catastrophic* as provided under laws of the State enacted prior to such day.”¹¹⁴ Compared to Section 2 of the ECA, which did not provide any requisites for what could trigger a “failed election,” this provision is

¹¹⁰ See generally Przeworski, *supra* note 1.

¹¹¹ See Foster, *supra* note 76.

¹¹² See *id.*

¹¹³ See Dakota Foster, *On the Precipice: Democracy, Disaster, and the State Emergency Powers That Govern Elections in Crises*, 13 J. NAT'L SEC. L. & POL'Y 141, 157 (2022) (“In forty-three states, only the governor may declare a state of emergency; in the remaining seven (Nevada, Oklahoma, Missouri, Alabama, North Carolina, West Virginia, New Hampshire), the legislature holds this power too.”).

¹¹⁴ S. 4573, 117th Cong. § 102 (2022) (emphasis added).

more explicit and restrictive,¹¹⁵ a welcome improvement to the federal framework.¹¹⁶ The term “force majeure,” is used synonymously with “act of God” in other areas of law, such as contract and international law, and connotes a large-scale event caused by either nature (e.g., floods, hurricanes) or people (e.g., riots, terrorism) that is either difficult or impossible to control.¹¹⁷ In other words, the use of “force majeure” in the ECRA implies that an event *external* to the voting process is required to modify the voting period.¹¹⁸

The additional qualifiers “extraordinary” and “catastrophic” underscore the scale and significance of the type of event that Congress envisions as significant enough to modify a presidential election. Although no law can protect against all mischief,¹¹⁹ the updated language better shields the voting process from election officials, politicians, and other actors who could abuse the emergency provision to interrupt regular voting for partisan or personal gain.¹²⁰ An added benefit to this language is that judges are well-accustomed to the term “force majeure” from other areas of law and can draw on their experience to apply the term in the election context.¹²¹ Thus, the language makes clear that only physical disasters, not, for example, allegations of voter fraud, can justify an extension of the voting period.¹²²

¹¹⁵ As extra protection against bad-faith disruption of regular elections, the sole remedy available in case of such an emergency would be extending voting time, not alternate methods of choosing a state’s electors. *See id.*

¹¹⁶ *See The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules and Admin.*, 117th Cong. 2 (2022) (statement of Norman L. Eisen, Former U.S. Ambassador to the Czech Republic); Bobby Miller, *Now That Trump Is Running, Get Electoral Count Act Reform Done*, NAT’L REV. (Nov. 16, 2022, 4:14 PM), <https://www.nationalreview.com/corner/now-that-trump-is-running-get-electoral-count-act-reform-done> [<https://perma.cc/Z2Q8-F3ZZ>]; Norman Eisen et al., *Democracy on the Ballot—Election Denial and the Electoral Count Act*, BROOKINGS INST. (Nov. 1, 2022), www.brookings.edu/blog/fixgov/2022/11/01/election-denial-and-the-electoral-count-act [<https://perma.cc/SQ95-786S>].

¹¹⁷ *See Force Majeure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹⁸ *See S. 4573*, § 102, 117th Cong. (2022).

¹¹⁹ Video Interview with Judge Jonathan Lippman, Of Couns., Latham & Watkins LLP (Nov. 17, 2022).

¹²⁰ *See, e.g., The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules and Admin.*, 117th Cong. 6 (2022) (statement of Bob Bauer, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law).

¹²¹ Video Interview with Judge Jonathan Lippman, *supra* note 119.

¹²² *See Thomas A. Berry, Two Years After January 6, Electoral Count Act Reform Is Now Law*, FORDHAM L. VOTING RTS. & DEMOCRACY F. COMMENT. (Jan. 6, 2023, 4:00 PM), <https://fordhamdemocracyproject.com/2023/01/06/two-years-after-january-6-electoral-count-act-reform-is-now-law> [<https://perma.cc/2BHP-48DB>].

In implementing the ECRA, states should consider elaborating on the “force majeure” standard. Specifically, states should provide clear rules for what qualifies as a “force majeure” event—not by more narrowly defining the term, but rather by specifying what types of scenarios do *not* qualify. Conjuring up a comprehensive list of all the scenarios that constitute “force majeure” events is a legislative impossibility, but even furnishing examples is inadvisable.¹²³ As a matter of statutory interpretation, listing possible scenarios grave enough to extend voting time may invite creative litigation and prove unhelpful to judicial review.¹²⁴ As a solution, some scholars have suggested that there is value in legislatures at least providing examples of what a qualifying “extraordinary and catastrophic” event is *not*.¹²⁵ For example, states could make clear that pending litigation regarding election administration or the integrity of the vote does not constitute an event capable of extending the vote. This might assist judges in adjudicating future disputes.

Further, given the significant swaths of power and discretion typically allocated to executive decision-makers like governors during emergencies,¹²⁶ state legislatures should consider the inevitability of future legal challenges. To aid a reviewing court, the state legislature could clearly state the aims of their election emergency framework up front: to provide flexibility for officials to respond to emergencies while ensuring the integrity of an election and, above all, protecting the franchise.

¹²³ See, e.g., *The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules and Admin.*, 117th Cong. 6 (2022) (statement of Bob Bauer, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law) (“A line of criticism suggests that this language . . . [gives] rise to the possibility for rogue legislative conduct, and that grounds for extended voting periods should be catalogued in the bill’s text. However, states may proceed to legislate in response to this type of amendment, and their determination as to what is, and is not, extraordinary and catastrophic circumstances may vary.”).

¹²⁴ This principle guided the drafting of the Twenty-Fifth Amendment, for example, among other laws foundational to our country’s democratic foundation and rule of law. See generally VALERIE C. BRANNON, *CONG. RSCH. SERV.*, R45153, *STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS* 21–47 (2022).

¹²⁵ See, e.g., *The Electoral Count Act: The Need for Reform: Hearing Before the S. Comm. on Rules and Admin.*, 117th Cong. 6 (2022) (statement of Bob Bauer, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law) (“That what the state does not allow within the meaning of ‘extraordinary and catastrophic events’ is more important . . . than what it does allow.”).

¹²⁶ See *supra* text accompanying notes 97–100.

B. Who Should Have the Power to Extend an Election and How?

A second consideration for states implementing the ECRA is what official is best suited to trigger an emergency extension of voting in a presidential election. A decision to extend voting time due to a “force majeure” emergency should be as localized as possible to avoid unnecessary disruption to voters casting their ballots. In other words, where a voting extension at the county level would be sufficient to address the effect of a disruption, voting time in the rest of the state should not be extended.¹²⁷ Accordingly, states should create a two-track approach that allows either a local or state official to initiate voting extensions depending on the scale of the emergency. Under the local track, local officials should petition the governor for an extension. All extension decisions by the governor—whether in response to a petition from local officials or by the governor’s own initiative—should be subject to judicial review.

1. Track One: Local Decision-Maker Makes the Determination

a. Decision-Maker

A decision-maker at the local level—meaning an authority at the county level or a statistically equivalent entity consisting of either an elected or appointed individual or board¹²⁸—is well-positioned to trigger an emergency response for two primary

¹²⁷ See generally Morley, *supra* note 2.

¹²⁸ Counties are generally governed through commissions or boards. A minority of counties, however, have “council-administrator structures,” where elected county council members appoint an executive to oversee operations, or “council-elected executive structures,” where an elected council works in tandem with an elected county executive. See RICHARD BRIFFAULT ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT 125 (9th ed. 2022). Historically, counties have been considered a regulatory and service-providing body, but many also have broader responsibilities and have assumed a policy-making role. See *id.* at 11. In the context of the number of voters and the size of a geographic region, though, counties vary dramatically. See KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 1, 16 (2019) (noting that some of the smallest towns have only a few hundred registered voters, and by contrast, the largest jurisdiction, Los Angeles County, has more than 4.7 million voters). Notably, these local election officials in larger jurisdictions play an outsized role: “[A]s of 2004, the local election officials responsible for administering elections in just 4% of jurisdictions covered almost 64% of American voters in the election.” HANNAH FURSTENBERG-BECKMAN ET AL., UNDERSTANDING THE ROLE OF LOCAL ELECTION OFFICIALS: HOW LOCAL AUTONOMY SHAPES U.S. ELECTION ADMINISTRATION, HARV. ASH CTR. 3 (2022), https://ash.harvard.edu/files/ash/files/role_of_local_election_officials.pdf?m=1632410559 [<https://perma.cc/48K3-4GBM>].

reasons. First, as the officials “on the ground” during elections, they understand community needs and can deploy a quick, localized response to changing circumstances affecting voting on Election Day. Relatedly, local officials are closest to voters and, compared to state-level officials, are more accessible to answer voters’ questions and provide guidance, which can build trust in the election process.

While state governments are typically responsible for implementing election rules, localities are generally responsible for conducting elections under those rules, so local officials already play a critical role in the electoral process.¹²⁹ Presidential elections are run by more than ten thousand election administration jurisdictions composed of local officials—such as town clerks, county election boards, local registrars, and even precinct-level volunteers and poll workers.¹³⁰ While the level of government primarily responsible for conducting elections is typically the county,¹³¹ some states in New England and the Midwest allocate these decisions to cities or townships.¹³² Indeed, the United States’ 3,069 counties¹³³ provide critical support to national elections—such as funding and overseeing both poll workers and polling locations.¹³⁴

While local election officials already maintain discretion over important decisions—including the number of polling places, early voting hours, registration list purges, and accepting absentee

¹²⁹ In addition, state and local governments must comply with other federal statutory and constitutional restraints. *See* SHANTON, *supra* note 128, at 1.

¹³⁰ *See Election Administration at State and Local Levels*, NAT’L CONF. OF STATE LEGISLATURES (Nov. 1, 2022), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/FUA3-C9A6>].

¹³¹ *See id.*

¹³² *Id.* Additionally, some states split implementation duties between counties and municipalities. *See* SHANTON, *supra* note 128, at 7.

¹³³ Most states are divided into counties. Some states, however, like Alaska and Louisiana, use the terms “borough” and “parish,” respectively, for their counties. There are principal exceptions, however, including: (1) Virginia, where most of its cities are outside county jurisdiction; (2) Connecticut and Rhode Island, which have counties as territorial units but have no county governments; (3) the cities of Baltimore, Maryland, and St. Louis, Missouri, which are outside of county jurisdictions; and (4) approximately forty cities—including Boston, Honolulu, Philadelphia, and San Francisco—that have city and county governments that are combined. *See* BRIFFAULT ET AL., *supra* note 128, at 11.

¹³⁴ *See* Stacy Nakintu & Jonathan Harris, *New NACO Data Release Highlights the Key Role of Counties in Elections*, NACO (Nov. 2, 2020), <https://www.naco.org/blog/new-naco-data-release-highlights-key-role-counties-elections> [<https://perma.cc/6CUG-JD6G>].

and provisional ballots¹³⁵—the exact nature of roles and titles varies. Elections may be run by a local individual, such as a town or county clerk; a group, like a county board of elections; or a combination of two or more entities.¹³⁶ While twenty-two states have individuals who administer elections at the local level,¹³⁷ ten states have boards of elections.¹³⁸ Additionally, eighteen states divide administration duties between two or more offices,¹³⁹ most commonly by voter registration and the actual administration of elections, which either work with or are close enough to consult county officials.¹⁴⁰ Despite these organizational differences, local officials play a vital role in administering presidential elections such that a local decision-maker at the county level is best positioned to understand the needs of their community and quickly respond to emergencies or changing circumstances. To enhance uniformity of process, state legislatures could provide factors for the decision-maker to consider, such as the imminence of Election Day, the impact of the emergency on any given area, and the election administration system's capability to reasonably adapt to the emergency in time to offer regular Election Day voting, adding legitimacy to the process.

Furthermore, trust in administering elections—especially in the throes of an emergency—is key and local officials have a role in maintaining and growing that trust. In fact, Americans trust their local officials' ability to handle problems at a much higher rate than they trust officials at the state and federal levels.¹⁴¹ As discussed,

¹³⁵ See Joshua Ferrer, *Partisan or Not? Local Election Officials Don't Tilt Elections in Favor of Their Party's Candidates*, THE CONVERSATION (Aug. 1, 2022, 8:27 AM), <https://theconversation.com/partisan-or-not-local-election-officials-dont-tilt-elections-in-favor-of-their-partys-candidates-186695> [<https://perma.cc/SG7M-X8ET>].

¹³⁶ See *Election Administration at State and Local Levels*, *supra* note 130. See also KEVIN JOHNSON, *NEW MODELS FOR KEEPING PARTISANS OUT OF ELECTION ADMINISTRATION*, CARTER CTR. & ELECTION REFORMERS NETWORK 8 (2022), https://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/new-models-keeping-partisans-out-election-admin-013122.pdf [<https://perma.cc/E43Y-4EW5>].

¹³⁷ This single individual is usually elected, but that too varies. Furthermore, some states have individuals who administer elections in the majority of jurisdictions but have election boards that administer elections in larger cities. See *Election Administration at State and Local Levels*, *supra* note 130.

¹³⁸ These boards are typically bipartisan in nature—with appointments either at the state (e.g., Delaware and Maryland) or local level (e.g., New York and Pennsylvania)—or a combination of both (e.g., Kentucky). See *id.*

¹³⁹ See *id.*

¹⁴⁰ When this is the case, this Report contends that the local decision-maker should be the individual or board (or commission) whose primary role is to administer the election.

¹⁴¹ See Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), <https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx> [<https://perma.cc/4T9D-X9NS>]. For election

local decision-makers have the requisite knowledge of their jurisdiction and already play a substantive role in administering federal elections.¹⁴² Their proximity to voters creates a unique opportunity for voters to receive knowledgeable, updated information as a catastrophic situation develops. This interface between government and constituents can increase voters' trust in election administration, which can protect against election misinformation. While there is no guarantee that partisan local decision-makers will administer elections neutrally, a local decision-maker is best positioned to understand their community and respond in emergencies—and the proximity to voters can offer an additional layer of accountability.

Accordingly, states should make each of their county-level governing boards or individual local decision-makers responsible for triggering extensions of voting time through petitions to the governor.

b. Consultation Process

State legislatures should authorize the local decision-maker to directly petition the governor for a voting time extension when an emergency requires.¹⁴³ In election emergencies, state executives (usually governors) exert wide-ranging authority and are uniquely empowered to mobilize an appropriate response to an emergency, including modifying an election period by executive order, coordinating between state agencies and officials, and among affected jurisdictions.¹⁴⁴

At the state level, governors are the most appropriate officials to respond to petitions from local decision-makers. Although secretaries of state are generally tasked with overseeing

officials at the state and local levels, however, voter confidence varies depending on location and party affiliation. *See GW Politics Poll Finds Varying Confidence in State and Local Elections*, GW TODAY (July 28, 2021), <https://gwtoday.gwu.edu/gw-politics-poll-finds-varying-confidence-state-and-local-elections> [https://perma.cc/W8RW-JNH4].

¹⁴² *See* SHANTON, *supra* note 128, at 3–6.

¹⁴³ Many local decision-makers are already able to bring suit, for example, to extend voting. Nonetheless, this Report contends that a more direct, formalized petition to a governor creates a more proper process between the local and state governments, potentially even speeding up the process itself. *See infra* Part III.B.1.c (discussing judicial review).

¹⁴⁴ *See supra* Part II.B (discussing gubernatorial powers in emergencies). In a “state of emergency,” for example, governors are granted “maximum executive power.” *Election Emergencies*, *supra* note 75. The National Conference of State Legislatures, for example, breaks down gubernatorial authority in election emergencies into four general (and overlapping) categories: (1) suspending statutes and regulations; (2) suspending regulatory statutes prescribing the conduct of state business; (3) suspending regulations; and (4) modifying an election directly. *See id.*

elections and may have a greater understanding of the intricacies of election administration,¹⁴⁵ the office has become extraordinarily politicized since the 2020 election.¹⁴⁶ By contrast, governors—though certainly partisan actors—hold the most visible office in each state and are arguably most accountable to voters. Vesting the power to modify elections in a politically affiliated chief elections administrator poses risks of partisan foul play,¹⁴⁷ but a governor is less politically insulated than a secretary of state and therefore a more adequate official to hold this power.

To further check partisanship, when petitioning the governor, the local decision-maker should have direct communication with the governor's office to ensure an equal audience for all areas of the state, regardless of partisan leaning.

c. Judicial Review

If the governor denies the local decision-maker's petition to extend voting time in a presidential election, the local official should have access to expedited judicial review. Judicial review is a necessary check on emergency powers in election law. State courts already play a substantial role in protecting democracy and providing fair and impartial adjudication in election litigation.¹⁴⁸ The 2020 general election—the most litigious in modern history—saw the majority of cases filed in state courts.¹⁴⁹ State courts are

¹⁴⁵ See SHANTON, *supra* note 128, at 12–13 (noting that the position of secretary of state is the chief state election official in thirty-six states).

¹⁴⁶ While secretary of state races are “normally dull affairs” and frequently “buoyed to victory by whichever party wins at the top of the ticket,” that changed after former President Trump “began questioning the integrity of the presidential election.” Christian Paz, *Democrats’ Quietly Effective Strategy for Defeating Election Deniers*, VOX (Nov. 19, 2022, 7:00 AM), <https://www.vox.com/policy-and-politics/23465033/democrats-secretary-of-state-strategy-election-deniers> [<https://perma.cc/P9H3-FANZ>] (noting that voters in the 2022 midterm elections rejected all but one (Indiana) of the candidates aligned with former President Trump’s America First Secretary of State Coalition).

¹⁴⁷ See INTERNATIONAL ELECTION OBSERVATION MISSION, UNITED STATES OF AMERICA - MID-TERM CONGRESSIONAL ELECTIONS, STATEMENT OF PRELIMINARY FINDINGS AND CONCLUSIONS, OSCE OFFICE FOR DEMOCRATIC INSTS. & HUM. RTS. 1 (2022), <https://www.oscepa.org/en/documents/election-observation/election-observation-statements/united-states-of-america/statements-27/4577-2022-mid-term-1/file> [<https://perma.cc/Y7NG-STG6>] (“While International Election Observation Mission interlocutors generally expressed trust in the work of election administrators, the political affiliation of the chief election administrators is at odds with international standards, possibly creates conflicts of interests and may diminish trust in the electoral process.”).

¹⁴⁸ See Ronald M. George, *Why State Courts—and State-Court Elections—Matter*, 137 DAEDALUS 110, 110–11 (2008).

¹⁴⁹ See JACOB KOVACS-GOODMAN, POST-ELECTION LITIGATION ANALYSIS AND SUMMARIES, STANFORD-MIT HEALTHY ELECTIONS PROJECT 1 (2021),

generally more familiar with state law, and, unlike federal courts' limited jurisdiction, are courts of general jurisdiction, meaning they are presumed to have the power to hear almost all types of claims.¹⁵⁰ Additionally, trial courts are well-positioned to lead inquiries into the facts of the case and determine whether officials' course of action is statutorily permissible under the circumstances.¹⁵¹ Given these considerations, state legislatures should provide for expedited judicial review of a governor's decision to accept or decline an extension of voting in an election emergency.

To this end, legislation must first grant standing to the state's identified local decision-maker to challenge a governor's decision to deny a local decision-maker's petition for a voting time extension. Second, the state legislature should recognize the governor as the proper defendant. Third, the state legislature should specify that it will be the duty of state trial courts to advance election-related emergencies on the docket and expedite—to the greatest extent possible—the disposition of any challenges. This Report contends that trial courts are well-positioned to lead inquiries into the facts of the case and determine whether officials' course of action was statutorily permissible under the circumstances. State legislatures can model this provision after the ECRA's expedited judicial review process to protect against abuse in another aspect of the process: the certification of electoral votes.¹⁵² Fourth, the state legislature should provide for a direct appeal to the state's highest court.¹⁵³

Emergency rulings made on an expedited basis can be just as important and impactful as formal opinions.¹⁵⁴ But only a few areas of the law “are as consistently dominated by one crucial date” like Election Day.¹⁵⁵ For an election system to be robust enough to withstand various potential emergencies—simultaneously protecting the right to vote and limiting voter confusion—an expedited and thorough state-court review process is necessary.

https://web.mit.edu/healthyelections/www/sites/default/files/2021-06/Post-Election_Litigation_Analysis.pdf [<https://perma.cc/9FYZ-XLB9>].

¹⁵⁰ See Robert A. Schapiro, *Article II as Interpretive Theory: Bush v. Gore and the Retreat from Erie*, 34 *LOY. U. CHI. L.J.* 89, 105 (2002).

¹⁵¹ See George, *supra* note 148, at 119.

¹⁵² S. 4573, 117th Cong. § 105 (2022).

¹⁵³ See *id.* (providing for a similar appeal process to the U.S. Supreme Court).

¹⁵⁴ Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, *SCOTUSBLOG* (Oct. 23, 2020, 5:28 PM), <https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases> [<https://perma.cc/A9RG-G4R8>].

¹⁵⁵ *Id.*

2. Track Two: Governor Makes the Determination

Nonetheless, because some emergencies may be extensive enough to require a coordinated, sweeping response and because state governments possess plenary power over local government,¹⁵⁶ this Report recommends an additional process beginning with the governor.

a. Decision-Maker

Because governors are generally vested with vast powers in emergencies and hold a more visible office than the secretary of state, this Report recommends that state legislatures designate governors as state-level decision-makers authorized to extend voting in response to wide-scale disruptions. A governor can assess the magnitude of impact on the state as a whole and determine whether a localized, county-level response is adequate or whether the situation calls for large-scale voting time extensions across the entire state or a region thereof. This bird's-eye view can prevent situations like a faulty patchwork of emergency responses that may give rise to equal protection challenges.¹⁵⁷

Nonetheless, the comparative advantages of streamlined executive decision-making in emergencies require checks and balances, particularly in a sphere as fundamental to democracy and committed to egalitarian principles as voting. To start, the governor should consider the same factors that state law requires local decision-makers to consider when modifying voting in an emergency, like the imminence of Election Day, the impact on any given area, and the election administration system's capability to reasonably adapt to the emergency in time to offer regular Election Day voting. Further, a governor should be required to consult with local officials before extending voting time, and their decision should be subject to judicial review.

¹⁵⁶ See *supra* Part I.B; *Election Emergencies*, *supra* note 75.

¹⁵⁷ For example, if a flood affects several counties, but only some local officials in the area determine that the situation is grave enough to trigger voting time extensions, voters in counties that chose not to extend voting might bring an equal protection claim in federal court. A governor is well-positioned to avoid this by assessing the situation holistically, instead of piecemeal. Video Interview with Jerry H. Goldfeder, Adjunct Professor and Dir. of the Voting Rts. & Democracy Project, Fordham U. Sch. of L. (Oct. 21, 2022).

b. Consultation Process

Most state emergency statutes do not define “emergency.”¹⁵⁸ Rather, the vast majority of states give governors broad power to decide whether an emergency is taking place.¹⁵⁹ As discussed in Part III.A, the ECRA’s requirement of a “force majeure event[] that [is] extraordinary and catastrophic” appropriately constrains the decision-maker and prevents them from prolonging elections without legitimate need. Still, additional safeguards are necessary because there are other ways a governor could act discriminately. For example, as overviewed in Part I.B, before the 2022 midterm election day, Republican Florida Governor Ron DeSantis used emergency powers to improve voter access in three Republican counties, while declining to do so in a Democratic-leaning county that experienced historic flooding.¹⁶⁰ DeSantis defended the decision by citing requests from and consultations with officials from the three Republican counties to whom he granted extensions.¹⁶¹

In such a situation, consultation with affected areas might consist of a phone call from the governor’s office to a local decision-maker in an affected jurisdiction to inquire about local voting conditions and possible responses. Mandatory consultations already exist between federal agencies and state and local officials when federal programs affect certain jurisdictions,¹⁶² and these models could be replicated within a state. Accordingly, legislation should require this type of consultation to the extent reasonable under the circumstances when a governor contemplates extending voting time.¹⁶³

Understandably, not all emergencies will allow for county-by-county consultation in the wake of a disaster, especially if such an event occurs on Election Day itself and not in the period

¹⁵⁸ See *supra* note 97 and accompanying text. If “emergency” is defined, however, it is usually in “such general terms that almost any incident could qualify as an emergency. See Foster, *supra* note 76 (“In Connecticut, for example, ‘emergency’ is [broadly] defined . . . [as] a ‘serious disaster, enemy attack, sabotage or other hostile action’ or the possibility thereof constitutes an emergency.” (citing CONN. GEN. STAT. ANN. § 28-1(7) (West 2011))).

¹⁵⁹ See Foster, *supra* note 113, at 160–62.

¹⁶⁰ See Part I.B.3 (discussing Florida Governor DeSantis’s response to Hurricane Ian).

¹⁶¹ See *id.*

¹⁶² See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-20-560, OPPORTUNITIES EXIST TO IMPROVE COORDINATION AND CONSULTATION WITH STATE AND LOCAL GOVERNMENTS 1–4 (2020). In Florida, for example, a state statute requires the governor to consult with the secretary of state before delaying and rescheduling elections. FLA. STAT. ANN. § 101.733 (West 2018).

¹⁶³ Video Interview with Jerry H. Goldfeder, *supra* note 157.

immediately preceding it.¹⁶⁴ Still, by requiring consultation, state law would facilitate judicial review of a governor's course of action.¹⁶⁵

c. Judicial Review

Similar to the recommendations for “Track One,”¹⁶⁶ judicial review must be readily available to protect voters' interests. The state judiciary is a necessary check on a governor's vast emergency powers, and, importantly, state courts are accustomed to hearing controversies in this area.¹⁶⁷ If state law requires the governor to reasonably consult local decision-makers when choosing whether and in what regions to extend the voting period, the courts will have a record to review the propriety of a governor's course of action. If consultation occurs, the governor could more easily defend against allegations of partisanship. If consultation was not reasonable under the circumstances, the burden would be on the governor to prove so.

Therefore, courts can both provide flexibility where a governor lacks the opportunity to assess each county's needs before taking emergency action and check against misuse of executive power in litigation after the fact.

C. When and For How Long Can Election Time Be Extended?

Whenever an election disruption occurs, states should allow voting extensions, at least until the scheduled end of voting on Election Day. Last minute extensions, such as one imposed late on Election Day, might not involve an ideal level of consultation and deliberation. But the ECRA provides meaningful checks against abuse: the “force majeure” standard is tailored to cover genuine emergencies and the only remedy is more time for voters to cast ballots. Furthermore, courts can still review extension decisions made near the end of voting. The low risk of abuse is worth the benefit of helping voters overcome barriers to their participation.¹⁶⁸

The ECRA allows voting time extensions *after* Election Day voting has begun. The relevant language in the statute permits a modification of the voting period “as *necessitated* by force majeure

¹⁶⁴ *Id.*

¹⁶⁵ Indeed, local democracy is “recognized as a prerequisite for ensuring sustainable and equitable economic and social development, promoting good governance and encouraging democratic values.” ELLIOT BULMER, LOCAL DEMOCRACY: INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE CONSTITUTION-BUILDING PRIMER 5 (2d. ed. 2017).

¹⁶⁶ *See supra* Part III.B.1.c.

¹⁶⁷ *See generally* George, *supra* note 148.

¹⁶⁸ *See supra* Part III.B.1.

events that are extraordinary and catastrophic.”¹⁶⁹ Should a force majeure event materialize after polls have opened, officials should do everything possible to preserve votes already cast to avoid asking citizens to vote again, which may impact election results. Additionally, any parts of the state that are *not* impacted and complete Election Day voting on time must not report their results before all voting in the state has stopped. This will blunt the risk of skewing voter behavior in impacted areas.¹⁷⁰

A more complicated question arises when asking whether an election emergency response can be triggered after polls have already closed on Election Day. Such a late extension of voting might be necessary if a force majeure has interrupted voting and where officials failed to trigger an extension before polls closed for some logistical or timing reason. In this hypothetical, the governor could grant an extension a few hours after polls have closed, providing additional voting time the following day, for example.¹⁷¹ The permissibility of this raises an important statutory interpretation question for the ECRA.¹⁷² This Report takes the position that the ECRA does not prevent a retroactive extension of voting after polls close on Election Day.¹⁷³ Specifically, the text defines Election Day as “the Tuesday next after the first Monday in November,” except where a state modifies the period of voting “as necessitated by force majeure events that are extraordinary and catastrophic, as provided under laws of the State enacted before such day, [in which] ‘election day’ shall include the modified period of voting.”¹⁷⁴

If a governor, after polls have closed, determines that extra time is required and grants another day of voting, then the modified period of voting would also be “election day” for purposes of the statute. This does not create a loophole for a bad-faith state legislature to circumvent the ECRA restriction and enact a new law to take the vote away from the people before a “second” election

¹⁶⁹ S. 4573, 117th Cong. § 102 (2022) (emphasis added).

¹⁷⁰ See, e.g., Walter Shapiro, *Is It Right to Report Results Before the Polls Close?*, BRENNAN CTR. FOR JUST. (Oct. 3, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/it-right-report-results-polls-close> [<https://perma.cc/XU3G-3UHH>].

¹⁷¹ Of course, the reasonability of such a decision, including its expediency, will have to be defended before a judge if challenged.

¹⁷² In the context of selecting electors, the Fourteenth Amendment’s Due Process and Equal Protection Clauses would certainly be implicated “in any attempt to replace, after the election had begun, the popular election processes currently authorized by statute with another means.” Levitt, *supra* note 32, at 1072.

¹⁷³ See Pam Karlan, “*The Virtues of the Electoral Count Reform Act*,” ELECTION L. BLOG (Aug. 1, 2022, 7:30 AM), <https://electionlawblog.org/?p=131097> [<https://perma.cc/9V8D-PQ9T>].

¹⁷⁴ S. 4573, § 102 (emphasis added); Karlan, *supra* note 173 (“This requirement embodies a constitutional provision at the heart of the law of democracy: the Due Process Clause.”).

day is held.¹⁷⁵ There would be no “second” election day—any additional days of voting would simply continue being the one “election day.” Anything else would run contrary to the statutory intent, which members of Congress have made clear is, in part, to prevent state legislatures from usurping power if election results disfavor their preferred presidential candidate.¹⁷⁶

Lastly, it is unnecessary and unwise to place a limit on how long officials can extend voting. The ECRA implements a firm deadline for state executives to submit electoral slates¹⁷⁷ and its judicial review mechanisms will sufficiently guard against undue extensions.¹⁷⁸ Simply put, a limit might inhibit officials’ abilities to respond to the varying and unpredictable needs that emergencies can create.¹⁷⁹

CONCLUSION

The right to vote is one of the most fundamental rights afforded to American citizens.¹⁸⁰ Events like weather catastrophes and other natural disasters, terrorist attacks, or widespread technical malfunctions require the availability of quickly triggered response mechanisms to protect the franchise while ensuring safety. Even with welcome reform under the ECRA, states must reassess how they manage emergencies in presidential elections. Indeed, states must preserve the integrity of the electoral process. By implementing emergency laws that provide clear guidance and processes for officials, as well as ample checks on power, a state’s electoral system will more capably withstand emergencies, ultimately bolstering public confidence in the integrity of the election’s results. The two-track system recommended in this Report would provide a proper process for response to an emergency—while simultaneously protecting the voting process from election subversion by bad-faith actors.

¹⁷⁵ See Karlan, *supra* note 173 (arguing that two due process-based values, reliance interest and impartiality, would be implicated by bad-faith state actors).

¹⁷⁶ See *supra* notes 9–10.

¹⁷⁷ S. 4573, § 104 (“Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.”).

¹⁷⁸ See *id.* (providing venue and expedited procedure rules).

¹⁷⁹ See, e.g., Bauer & Goldsmith, *supra* note 68.

¹⁸⁰ See, e.g., *Burdick v. Takushi*, 504 U.S. 428 (1992); *Elrod v. Burns*, 427 U.S. 347 (1976); *Reynolds v. Sims*, 377 U.S. 533 (1964).