

FAQS ON STATE IMPLEMENTATION OF THE ELECTORAL COUNT REFORM ACT (ECRA)

What is the Electoral Count Reform Act (ECRA)? The ECRA is the 2022 law crafted by a bipartisan group of senators to update the Electoral Count Act (ECA) of 1887. The 2020 election and its aftermath highlighted the problems with the ECA, the antiquated law that governed the casting and counting of electoral votes for President. The ECRA provides much needed clarity on the process for casting and counting electoral votes, and eliminates the most concerning weaknesses of the old law.

What did the ECRA do? The ECRA updated the ECA in several important ways, including:

- Setting a firm deadline for the states' executive officials to certify the appointment of electors. In 2024, state executive officials must certify by December 11, 2024.
- Clarifying that the governor is the "default" executive official tasked with certifying the appointment of electors by issuing the certificate of ascertainment. States may grant that duty to another state executive if they do so by law in advance of the election.
- Replacing the ECA's problematic "failed election" provision, which was improperly used in 2020 to suggest that legislatures could appoint electors themselves if they declared an election "failed." The ECRA makes clear that electors must be appointed pursuant to rules in place on Election Day, meaning that state legislatures cannot change those rules after-the-fact regardless of how the election proceeds. If there is an "extraordinary and catastrophic circumstance" (such as a natural disaster) that necessitates a modification to the voting period, states may extend the period of voting beyond Election Day but must do so according to preexisting law and may not supersede or nullify the popular vote.
- Creating an expedited pathway in federal court for legal challenges to the executive's certification without displacing existing state and federal causes of action around an election.
- Moving the day the electors meet one day later. In 2024, the electors will meet on December 17.
- Specifying that the Vice President's role in overseeing the counting of electoral votes is only "ministerial."
- Raising the threshold for congressional objections to one-fifth of each chamber.

What changes did the ECRA make to the state certification timeline? Each state establishes its own election laws and procedures for certifying election results. The ECRA, however, did make two changes to the certification timeline for presidential elections:

- First, the ECRA moved the date for the meeting of presidential electors one day later (from the first *Monday* after the second Wednesday in December to the first *Tuesday* after the second Wednesday). In other words, there will be one additional day between Election Day and the day the electors meet. For 2024, the electors will meet on December 17.
- Second, for the first time, the ECRA sets a hard deadline for a designated state official to certify the winner of the state's presidential election. Under the new law, a certificate must be issued no later than six days before the electors meet. For 2024, that date will be December 11.

What do states need to do to comply with the new ECRA rules in 2024? As states prepare for the 2024 election under the new ECRA, they should confirm their laws and procedures comply with the revisions to federal law.¹ Specifically, states should:

- *Align dates.* States should review their post-election processes to ensure they will complete all canvassing, contest, and recount procedures before the December 11 certification deadline. The ECRA also moved the date on which the electors meet by one day, so states should be prepared for their electors to meet on December 17.
- *Specify a Certifying Official.* The ECRA requires a state executive to issue a certificate of ascertainment. It presumes that this executive is the governor unless the law of the state provides otherwise. If an executive other than the governor is charged with issuing the certificate of ascertainment, the state should make that clear as a matter of law well in advance of the election.
- *Confirm proper procedures for preparation and transmission of the certificate of ascertainment.* A certificate of ascertainment is a document issued by a designated state official in each state naming the state's slate of electors. The ECRA establishes several requirements for the certificate of ascertainment; it must be signed by the executive, contain the results of the canvass of the presidential election, bear the State's seal, and include at least one security feature determined by the state.

What happens if a state does not amend its laws to specifically align with the ECRA? Federal law overrides state law, so if a state does not make needed updates to its laws to align with the ECRA, it will fall to state and local officials to ensure that the ECRA's requirements are met. This will likely involve the state's chief elections officer

¹ For a detailed overview of steps states should take to comply with the ECRA, the following report from Election Reformers Network provides further information: *Helping States Comply with the Electoral Count Reform Act*, Election Reformers Network (August 2023), available at <https://www.electionreformers.org/articles/helping-states-comply-with-the-electoral-count-reform-act>.

issuing guidance setting deadlines for local election officials. It will also require the attention of courts prepared to move on an expedited basis to meet the ECRA deadline. While these institutions should be able to meet the deadlines without a statutory mandate, as they almost always have historically, state legislation is preferred to provide clarity for elections officials working to complete post-election procedures in time to meet the ECRA deadline.

What if a governor or other designated state official misses the certification deadline or certifies the wrong winner? The ECRA requires the governor to issue a certificate of ascertainment six days before the meeting of electors. In 2024, that means the governor must issue the certificate of ascertainment by December 11. In the event the governor does not issue a certificate of ascertainment by the certification deadline, or issues a certificate identifying the losing candidate as the winner, the legitimate winning candidate will almost certainly file an action in state and/or federal court requiring the governor to issue a proper certificate of ascertainment. The ECRA creates an expedited procedure for federal courts to hear claims brought by presidential candidates with respect to the issuance or transmission of the certificate of ascertainment. Under this procedure, a special three-judge court would initially hear the case, and the U.S. Supreme Court would hear any appeal. The court would then have until the day before the electors' meeting date (i.e., five days after the certification deadline) to order the governor to issue a certificate of ascertainment.

What is the role of state courts under the ECRA? The ECRA is clear that it does not “preempt or displace” any existing cause of action in state courts. As a result, presidential candidates will be able to file election contests or seek recounts as permitted by state law and/or file lawsuits in state court to require election officials to comply with the law. Voters can also pursue any state court litigation that would be appropriate.

What is the role of the federal courts under the ECRA? The ECRA gives federal courts a clear and expedited role in ensuring that states send lawful certifications of election results to Congress. The previous law did not explicitly provide any role for federal courts to resolve disputes about states' appointment of electors. Under the ECRA, presidential candidates can bring a claim in federal court with respect to the issuance or transmission of the certificate of ascertainment. Such claims will be heard by a three-judge court composed of two circuit judges and one district judge.

The ECRA allows for direct appeal to the Supreme Court via petition for writ of certiorari. If the Supreme Court decides to hear the case, it must do so on an expedited basis in order to resolve any claims before the electors meet. The ECRA specifies that a certificate of ascertainment issued as the result of a court order is binding on Congress when it counts electoral votes.

The new law was crafted to address concerns about governors or other state officials “going rogue” and purporting to certify appointments of electors that do not reflect the outcome of the election. The provisions above, combined with others, help ensure that only one lawful slate of electors in each state is presented to Congress to count.

What happens under the ECRA if a natural disaster or other catastrophe interrupts the election? The ECRA gives states the power to modify their period of voting for president and vice president when necessitated by “force majeure events that are extraordinary and catastrophic.” This means a state can extend voting after election day as the result of, for example, a natural disaster, as long as it does so pursuant to a law enacted before election day. This provision replaced the problematic “failed election” provision of the old law that was improperly cited to suggest that legislatures could appoint electors by other means if they declared an election “failed.”

Can a state legislature override the results of the popular vote? The ECRA does not allow state legislatures to “change the rules of the game” and step in and appoint electors themselves after election day. The ECRA makes clear that a certificate of ascertainment must be issued by the state executive. Unless state law clearly provides otherwise, that executive is the governor. Additionally, under the ECRA, the governor must issue the certificate pursuant to the laws of the state enacted prior to election day, thus preventing state legislators from undermining the will of the voters after election day.

