



# Preemption of Local Election Administration

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## Overview: Election Law, Election Administration, and Preemption

Much of the current threat to American democracy involves election law, that is, the rules that determine who can vote, voting methods, the process for counting ballots, and legislative district lines. Election law issues are, indeed, extremely important, as the current battles over voter identification requirements (voter ID), voting by people convicted of a felony, mail and early voting, and partisan gerrymandering underscore.

But just as important to the success of our democracy is election administration: the actual registration of voters, distribution and validation of mail-in ballots, operation of Election Day polling places; and tabulation of the results.

In our federal system, election law and election administration are largely in the hands of different levels of government. The Constitution, Congress, and state legislatures control election law. The states, in particular, have primary responsibility for, and, for the most part, decide such issues as the timing of voter registration; the availability of early and mail voting; whether and what voter ID is required; whether a party primary is open and closed; and the boundaries of congressional and state legislative districts.

But elections – including elections for federal and state government – are actually administered by local election officials (LEOs) – officials who are mostly elected or appointed at the local level.<sup>1</sup>

The local role is sometimes controversial. LEOs can be partisan or biased, and the decentralization of election administration can lead to inconsistent practices and interpretations of the same laws within a state,

and to significant wealth-based disparities between communities in the funding for election staff and voting equipment.

But local administration can be a strength. Locally accountable LEOs know the specific needs and concerns of their particular communities, and are well-positioned to work with other local officials, grassroots organizations, and local civil society more broadly to win essential volunteer support and undertake voter education and outreach. Indeed, LEOs played a crucial role in the surprising success of the 2020 election. They addressed the COVID crisis by improving the health and safety of polling places, recruiting tens of thousands of new poll workers, and implementing early and, especially, mail voting for unprecedented millions of voters. Notwithstanding the pandemic, voter turnout surged with little or no security breakdowns.<sup>2</sup>

Ironically, in many states, the central role of LEOs in running an extraordinarily successful election has triggered a backlash. These states have adopted – and continue to consider – new laws that curtail local authority, burden local administrators, and threaten LEOs with civil or criminal penalties or removal from office for doing their jobs.

This white paper examines the emerging practice of state preemption of local election administration. Part I provides a brief summary of what local election administration involves. Part II addresses the wave of state laws and legislative proposals in 2021-22 preempting local election administration. Part III analyzes how current state election administration preemption threatens democracy.

<sup>1</sup> See, e.g., Presidential Comm'n on Election Admin., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 1 (2014) (“[T]he United States runs its elections unlike any other country in the world. Responsibility for elections is entrusted to local officials in approximately 8,000 different jurisdictions”).

<sup>2</sup> See, e.g., Nate Persily & Charles Stewart III, Introduction: The Miracle and Tragedy of the 2020 U.S. Election, in *Stanford-MIT Healthy Elections Project, The Virus and the Vote: Administering the 2020 Election in a Pandemic* 2, 18 (2021) (describing the “historic and heroic administration of the 2020 election”).

Local elections offices handle virtually all aspects of an election that the voters see and experience, as well as many of the behind-the-scenes decisions that make the election possible. More specifically, local elections offices

- maintain, test, and secure voting equipment;
- register voters;
- process absentee ballot applications;
- select and prepare early voting centers and polling places;
- select, operate, and maintain voting machinery;
- design ballots;
- recruit, hire, and train poll workers;
- when voters arrive at the polling place, check names against registration lists and check IDs in states where IDs are required; and
- manage polling places to maintain order and security. This may involve interacting with partisan or ideological “poll watchers” entitled by law to observe the Election Day operation to make sure that their right to observe is respected without interfering with the ability of voters to cast their ballots.

These actions shape the quality of the voting experience and are critical in determining whether people eligible to vote under state law, will actually be able to cast their ballots and have them counted.<sup>3</sup>

After the election is over, local election offices

- tabulate the votes;
- audit vote counts;
- certify the results and report them to a state-level election body; and
- and secure and store voting equipment for the next election.

To be sure, all this is done pursuant to the requirements and against the backdrop of state law, which establishes standards, sets deadlines, determines the equipment, and prescribes the process for counting, canvassing, and reporting results. But in most places, the actual work is done by local officials.<sup>4</sup>

<sup>3</sup> See generally Karen L. Shanton, Cong. Rsch. Serv., R45549, *The State and Local Role in Election Administration Duties and Structures* (2019). See also *Peterson v. Dean*, 777 F.3d 334, 346–47, 349 (6th Cir. 2015) (Tennessee county elections administrators can influence “precinct boundaries, polling stations, and early voting locations”); *Soelter v. King Co.*, 931 F. Supp. 741, 745 (W.D. Wash. 1996), *aff’d*, 132 F.3d 40 (9th Cir. 1997) (county manager of records and elections in state of Washington “makes significant decisions concerning how elections are conducted, where polling places are located, how and in what form information is disseminated to voters and the public at large, and in certain cases whether precincts are combined, united or divided”).

<sup>4</sup> See Shanton, *supra* note 3.

<sup>5</sup> See *Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options*, Nat’l Conf. of St. Legislatures (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/ZPR8-S73G>].



The significance of local election administration may be best seen by examining the process for voting by mail. Voting by mail involves multiple steps. The voter must apply for a mail ballot; the local election office then has to verify that the applicant is eligible for a mail ballot. If the voter is determined to be eligible, the local office must send a ballot to the voter, which the voter must return by the deadline set by state law. The election office must then verify that the ballot comes from an eligible voter. Typically, this involves signature verification, or requiring the voter to sign an affidavit on the ballot’s return envelope, which is then compared with the voter’s signature on file at the elections office. Some states require mail voters to include photocopies of their identification documents or even have the mailed ballot envelope signed by witnesses or notarized. Local officials are responsible for checking at each step and reaching out to voters to correct errors or provide missing information. The local office must process the ballots it receives so that a tabulating machine can read it.<sup>5</sup>

In 2020, many LEOs sought to deal with the huge number of first-time mail voters— who are more likely to make mistakes – by facilitating the process. Many sought to reduce the number of steps involved by sending mail ballot applications, or mail ballots, to voters before receiving requests. In some states, LEOs sought to reduce the significance of voter errors by making it easier to correct errors without obtaining a new ballot or to reduce the likelihood of voter errors in applications by “prefilling” the applications with information on file in the voter registration database.<sup>6</sup>

Many LEOs also sought to make it easier for voters, especially those worried about the reliability of the Postal Service, to return their ballots. In some places that involved sending mobile voting units out into the community to collect ballots. More commonly, LEOs

turned to drop boxes – secure containers in which voters could deposit their ballots directly, without having to use the Postal Service. In many states, drop boxes were a local innovation – initiated at the local level without explicit state authorization. And in many states where drop boxes had been previously used, local officials sought to expand their deployment from a single box at the county elections office to multiple satellite sites in government buildings or secure locations throughout the county.<sup>7</sup>

Local efforts to facilitate mail voting – mailing applications, prefilling routine information, and using mobile voting units and drop boxes – have been a principal, albeit not the only, focus of the current preemptive backlash.

## Part I

# Preemption of Local Election Administration



*Many [voting restriction] measures directly burden mail voting and early voting, impose harsher voter ID requirements, and make faulty voter purges more likely. Beyond these measures aimed at voters, a striking feature of this anti-democratic wave has been the targeting of local election administration specifically.*

2021 witnessed a flood of state legislative action intended to make voting more difficult and the administration of election laws more partisan, and that activity has continued into 2022. Many of these measures directly burden mail voting and early voting, impose harsher voter ID requirements, and make faulty voter purges more likely. Beyond these measures aimed at voters, a striking feature of this anti-democratic wave has been the targeting of local election administration specifically. These anti-local laws have three main elements: (a) denying LEOs authority to take some of the pro-voting actions they took in 2020; (b) making it harder for them to do their jobs generally; and (c) imposing penalties on LEOs who take pro-democratic actions beyond those clearly authorized by state law.<sup>8</sup>

<sup>6</sup> See Richard Briffault, Election Law Localism and Democracy, 100 N.C.L.Rev. 100, 116-18 (2022) (forthcoming)

<sup>7</sup> Id.

<sup>8</sup> Id. at 133-42.

<sup>9</sup> See, e.g., Election Integrity Act of 2021, § 25(a)(1)(C)(ii), 2021 Ga. Laws 14, 38–39 (codified at Ga. Code Ann. § 21-2-381 (2021)); Act of Mar. 8, 2021, § 43(1)(c), 2021 Iowa Acts 22, 31 (codified at Iowa Code § 53.2(1)(c) (2021)).

<sup>10</sup> See, e.g., Election Integrity Act of 2021 § 20, 2021 Ga. Laws at 33–34 (codified at Ga. Code Ann. § 21-2-266 (2021)); Act of Mar. 8, 2021, § 53, 2021 Iowa Acts at 32–33 (codified at Iowa Code § 53.17(1) (2021)); Act of Sept. 7, 2021, §§ 3.04, 3.12–3.13, 2021 Tex. Sess. Law Serv. (West) (codified at Tex. Elec. Code Ann. §§ 43.031, 85.061(a), 85.062 (2021)).

<sup>11</sup> Longoria v. Paxton, \_\_\_ F. Supp.3d \_\_\_, 2022 WL 447573 (W.D. Tex., Feb. 11, 2022).

<sup>12</sup> League of Women Voters of Fla., Inc. v Lee, \_\_\_ F.Supp.3d \_\_\_, 2022 WL 969538 (N.D. Fla., Mar. 31, 2022).

## A. Limits on Local Authority

Multiple states now prohibit local officials from sending mail ballot applications or mail ballots to voters who have not yet requested them.<sup>9</sup> So, too, several states now limit the number, availability, or location of early voting places and drop boxes. Some also bar mobile, drive-through, curbside or 24-hour voting. Florida, Georgia, Iowa, and Texas have been particularly comprehensive in their limitations on local democracy-promoting measures, targeting the very measures used by urban election districts like Fulton County (Atlanta) Georgia and Harris (Houston) County Texas to facilitate voting.<sup>10</sup>

Some of these actions have drawn legal challenges. In February 2022, a federal district court in Texas enjoined on First Amendment grounds, the Texas law that was so broadly written that it prohibited – with criminal penalties – election officials from even communicating with eligible voters about the benefits of voting by mail.<sup>11</sup> So, too, in March 2022, the federal district court for the Northern District of Florida struck down several provisions of Florida’s 2021 election law, including that state’s tight new restrictions on the availability of drop boxes. The court found that the drop box restrictions had been imposed with the unconstitutional purpose of discriminating against Black voters.<sup>12</sup>



number of election day and provisional ballots as soon as the polls close. The counting and tabulating “shall not cease” until all ballots are counted and tabulated; and LEOs must separately report all ballots cast on election day, all ballots cast during early voting, and all absentee ballots returned by the election day deadline.<sup>16</sup> In 2022, the Georgia legislature debated another bill that would require LEOs to account for all election-related documents. Local elections supervisors pointed out that would require them to keep track of hundreds of blank sheets of paper.<sup>17</sup> And, as the notorious problems with the March 2022 Texas primary highlighted, many of the new and complex identification requirements for mail ballots imposed on voters also burden local administrators who have to explain the rules to voters and address increased levels of voter error.<sup>18</sup>

A number of states have also made it easier for partisan poll watchers to challenge voters, provide those poll watchers with new protections, and punish poll workers who try to limit the watchers’ potentially disruptive activities. In Texas, poll watchers must now be allowed “free movement” within a polling place and are “entitled to sit or stand near enough to see and hear activity” at the polling place. They are also now entitled to watch poll closing activities and follow the transfer of election materials to a regional tabulating center.<sup>19</sup>

### **C. Punitive Preemption**

The new election administration preemption has taken a page from the new preemption generally and has authorized the imposition of fines and penalties for the actions of LEOs deemed inconsistent with state law as well as their removal and replacement by state designees. The new Iowa election law provides for fines of up to \$10,000 and suspension of county election commissioners for “technical infractions” of election law, and for referrals to the state attorney general for investigation and prosecution.<sup>20</sup> Kansas has made it a felony for an election official to accept or spend private money to help conduct an election.<sup>21</sup> In Texas, it is now a criminal offense for a poll worker to “obstruct the view of a watcher or distance the watcher from the activity or procedure to be observed in a manner that would make observation not reasonably effective.”<sup>22</sup>

## **B. Burdening Local Election Administration**

At least a dozen states now prohibit LEOs from accepting private donations to help them conduct their elections.<sup>13</sup> Private donations were crucial to the success of the 2020 election. Preparation of COVID-safe polling places, hiring new staff, providing personal protective equipment, and gearing up for the massive shift to mail voting was extremely expensive. Although the federal Coronavirus Aid, Relief, and Economic Security (“CARES” Act) provides some additional election funding, most of that was used in the primary and, in any event, was probably only a fraction of what many elections officials concluded was needed for the general election. A significant part of the gap was closed by \$400 million in grants from the Center for Tech and Civic Life. These grants proved to be a lightning rod for legal challenges, all of which were rejected in court in 2020.<sup>14</sup> However, many states have now passed laws barring the acceptance of private donations, without, however, committing to provide additional state funds. Some of these laws against private donations are so broadly written that some LEOs have expressed concern that they would be unable to accept offers from churches or other private landowners to make space available as polling places.<sup>15</sup>

Some states have imposed onerous new reporting requirements. Under a law passed in 2021 Georgia, for example, now requires the printing of ballots on costly “security paper” to enable ballot authentication, tighter deadlines for key election processes like absentee ballot processing and vote counting, and more requirements to track the types and total numbers of ballots cast. Precinct-level officials must now report the

13 See Miles Parks, Private funding saved the 2020 election. Now, some GOP-led states are banning it, NPR.org, Mar. 31, 2022, <https://www.npr.org/2022/03/31/1088252896/private-funding-saved-the-2020-election-now-some-gop-led-states-are-banning-it>.

14 See Briffault, supra note 6 at 115-16.

15 See Maya King and Nick Corasaniti, Local Election Officials in Georgia Oppose G.O.P. Election Bill, N.Y. Times, Mar. 28, 2022.

16 Election Integrity Act of 2021, codified at Ga. Code Ann. §§ 21-2-229 to -230, § 21-2-372, § 21-2-385 21-2-420 to -421 (2021).

17 See King and Corasaniti, supra note 15.

18 See, e.g., Nick Corasaniti, Ballot Rejections in Texas Spike after New Voting Law, N.Y. Times, Feb. 22, 2022.

19 Act of Sept. 7, 2021, §§ 4.07–09, 2021 Tex. Sess. Law Serv. (West) (codified at Tex. Elec. Code Ann. §§ 33.056, 330.0605, 33.061 (2021)).

20 See Act of Mar. 8, 2021, § 3, 7, 9- 11, 2021 Iowa Acts 22, 31 (codified at Iowa Code §§ 39A.2(1), 39A.4(1)(b), 39A.6-7 (2021)).

21 Kans. Laws. 2021, ch. 96, § 1 (codified at Kans. Stat. Ann. 25-2436 (2021)).

22 See Act of Sep. 7, 2021, supra note 19, at § 4.09 (codified at Tex. Elec. Code Ann. § 33.061 (2021)).

Most ominous of all for the prospect of local pro-democracy initiatives in election administration, the 2021 Georgia law authorizes the State Election Board – which was restructured by the legislature to make it more partisan – to suspend and replace local superintendents of election. This would follow a “performance review” that could be initiated either

by the state board or by a small number of legislators from the affected counties.<sup>23</sup> As if to substantiate the fear that the measure was adopted for partisan reasons, within a few months of the law’s enactment, Republican state officials initiated the new removal process against the county election board of Democratic Fulton County.<sup>24</sup>

## Part III

# Election Administration Preemption as Threat to Democracy

The current wave of state attacks on local election administration is a largely partisan effort driven not by the desire to improve election administration but to give credence to the “big lie” that the 2020 election was marred by fraud. Repeated investigations and judicial decisions determined that no appreciable fraud occurred, but, like zombies, the allegations refuse to die and, instead are being used to justify measures whose real purpose is simply to make it harder to vote. Preemption of local election administration, is, in effect, collateral damage resulting from this anti-democratic campaign.

To be sure, local administration of elections can fail to advance democracy. Local officials may be partisan or biased. They will not always be well-trained, professional, and committed to the even-handed administration of elections. Officials from smaller communities may lack the technological sophistication and resources to deal with pressing issues of cybersecurity on their own. Interlocal inconsistencies in the application of election rules to elections for state or federal office are troubling. There is an important role for states to play in setting standards, training and supporting local offices, and intervening to address local incompetence or misconduct.<sup>25</sup> But the current wave of preemptive measures is about partisanship, not improving administrative fairness or professionalism. Instead, traditional non-partisan administration is being sacrificed to serve partisan ends.

Paradoxically, these preemptive measures, by limiting local authority or prohibiting local actions, highlight the democratic value of local election administration. The 2020 election demonstrated the value of having LEOs embedded in their communities and attentive to local circumstances. Their relationships to other local organizations and institutions facilitated their ability

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to design and implement locally appropriate voting mechanisms. Densely populated urban centers, lightly populated areas, communities with large numbers of elderly people, or localities where working people can’t get to the polls during ordinary business hours all raise different issues with respect to access to the ballot. Local officials are distinctly well-positioned to be aware of these issues and to act. Indeed, local efforts to increase turnout were particularly valuable in reducing the barriers that many voters of color face in getting to the polls. Consequently, the new preemptive voting laws are likely to disproportionately burden communities of color.

Local election officials are the front-line workers in direct contact with the voters and immediately responsible for the successful conduct of elections in their communities. In 2020, they worked to increase access to the vote and helped achieve record turnout in the face of a pandemic. Stripping them of discretion, burdening them with unnecessary requirements, and threatening them with punishments without justification is inconsistent with fair and free elections in which all eligible voters are encouraged to vote. ▴

23 Election Integrity Act of 2021 § 6, 2021 Ga. Laws at 21 (codified at Ga. Code Ann. § 21-2-33.1 (2021)).

24 See Nick Corasaniti, Potential G.O.P. Takeover of Atlanta-Area Election Board Inches Forward, N.Y. Times (Aug. 18, 2021).

25 A good example of proper state oversight of local elections is provided by a New York State Senate Committee. After recounting numerous incidents of egregious errors by local boards of election across the State, the committee’s report presented moderate and well-reasoned recommendations for expanding the state role with respect to local boards, including more standard-setting, training, and the resolution of partisan deadlocks. See Staff of N.Y. State S. Elections Comm., Report and Findings of the New York State Senate Elections Committee 31–32 (2021), [https://www.nysenate.gov/sites/default/files/press-release/attachment/elex1115\\_vfinal.pdf](https://www.nysenate.gov/sites/default/files/press-release/attachment/elex1115_vfinal.pdf) [https://perma.cc/JM7V-D2MD].