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Legal Support for Local Election Officials

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Legal Support for Local Election Officials

Rebecca Green*

Abstract

Local election officials (“LEOs”) face enormous pressure. They must administer elections when a wide swath of the American public has grown mistrustful of their work; they increasingly face ominous personal attacks and threats; they cope with chronic underfunding of elections; and they must navigate frequent changes in the law governing elections. Lawyers provide a critical avenue of support for local election officials. They provide guidance on how to implement legislative mandates and judicial orders; they anticipate and prevent disputes from arising; and they represent election officials when they or their offices are sued—a more common occurrence today than ever. Although lawyers are crucial to ensuring election officials (and thus elections) can function, legal support for election officials is seldom discussed. Do election officials have adequate access to competent legal counsel? Are lawyers guiding and representing local election officials knowledgeable about how elections work and the laws that govern them? How does the increasingly tricky political terrain complicate LEO access to legal support? This Essay aims to start this conversation and spur study of how lawyers support local election officials in their work. The premise of this Essay is that competent LEO legal support is critical to ensuring reliable, free, and fair elections.

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INTRODUCTION

Local election officials (“LEOs”) face increasing pressure. Public scrutiny of their work has skyrocketed.¹ Since 2020, local election officials have been flooded with open records requests.² Political actors routinely rally observers to scrutinize their work

1. One indicator of increased public scrutiny is the high volume of public records access requests election officials are fielding. *See e.g.*, Jane C. Timm, *Amateur Fraud Hunters Bury Election Officials in Public Records Requests*, NBC NEWS (Feb. 12, 2022), <https://perma.cc/23BH-YQVT> (last updated Mar. 26, 2023) (noting that “county and city-level administrators . . . in Pennsylvania, Michigan, Florida, Arizona and Virginia—report being inundated with time-consuming records requests and inquiries”); Amena H. Saiyid, *Loudoun County Slammed with Unprecedented FOIA Requests for 2020 Election Process*, LOUDOUN TIMES-MIRROR (Sept. 19, 2022), <https://perma.cc/4JZQ-5H3M> (discussing Virginia county being inundated with open records requests—187 separate requests—for access to a wide range of materials related to the 2020 election).

2. *See generally* Rebecca Green, *FOIA-Flooded Elections*, 85 OHIO ST. L.J. 255 (2024) (exploring possible responses to the high volume of public records requests at election offices post-2020).

during all phases of the election process.³ And election officials across the country face threats and harassment—including physical threats—at unprecedented levels.⁴ Litigation involving election officials has exploded.⁵ Election officials at both the state and local level increasingly find themselves the targets of lawsuits relating to their work.⁶ Plaintiffs allege election officials fail to follow legal mandates⁷ or levy accusations that election officials are tampering with ballots or engaging in other criminal conduct.⁸

3. See generally Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467 (2021).

4. See Christina A. Cassidy, *Local Election Workers Have Been Under Siege Since 2020. Now They Face Fentanyl-laced Letters*, ASSOCIATED PRESS, <https://perma.cc/X9KC-EKCW> (last updated Nov. 10, 2023) (discussing how at least five state election offices received threatening mail, including some envelopes containing potentially deadly drugs); Joelle Gross, *Online Hostility Towards Local Election Officials Surged in 2020*, MIT ELECTION DATA + SCIENCE LAB (Feb. 27, 2023), <https://perma.cc/NF2H-UT5L> (describing dramatic rise in online hostility towards election workers).

5. See Miriam Seifter & Adam Sopko, *Election-Litigation Data: 2018, 2020, 2022 State and Federal Court Filings*, STATE DEMOCRACY RSCH. INITIATIVE (Mar. 21, 2023), <https://perma.cc/46QE-DJ8W> (“Our findings suggest that the [rise in] election litigation in 2020 was not a one-off. High levels of litigation persisted in 2022; they did not return to 2018 levels.”). Derek Muller identifies campaign finance changes as an important part of the story of the rise in litigation since 2014. See Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 562–63 (2021) (arguing that “[f]ederal campaign finance law currently privileges donations earmarked for litigation. This gives campaigns incentives to focus on litigation-centric fundraising. Eliminating these incentives would place money raised for litigation on equal footing with money raised for other purposes and compel campaigns to reconsider their resource-allocation strategies”).

6. See Muller, *supra* note 5, at 562 (examining the rise in litigation and attributing some of that increase to increased campaign expenditures on litigation, increased partisanship in state legislatures, and the decline of preclearance under the Voting Rights Act of 1965).

7. See, e.g., Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. REV. 1421, 1427–46 (2022) (describing litigation against LEOs alleging failure to follow statutory mandates when taking steps to accommodate voters during the pandemic).

8. See *id.* at 1428–29 (“Local election administration has been far from unproblematic . . . [S]ome local governments have continued to try to dilute minority votes through the drawing of precinct lines, siting polling places in inconvenient locations, not hiring poll workers of color, or burdening the enforcement of federal voting law protections.” (citations omitted)).

In some states, legislatures have passed laws enabling criminal prosecution of election officials. In 2021, for example, the Texas legislature criminalized LEOs who knowingly “tak[e] any action to obstruct the view of [poll] watcher[s] or distance the watcher[s] from [an] activity or procedure to be observed in a manner that would make observation not reasonably effective.”⁹ In addition to criminal liability, election workers in some states now face steep fines if they fall short in certain aspects of their duties.¹⁰ The Florida legislature, for example, amended the state’s election code in 2021 to impose a \$25,000 fine on LEOs who leave “secure ballot intake station[s] . . . accessible for ballot receipt” outside of early voting hours.¹¹

Making LEOs’ jobs even harder, state legislatures frequently alter election rules.¹² Especially since the 2020 pandemic election, many states have passed new laws and amended old ones governing all aspects of the election process. State legislatures are not alone. Judicial orders also change the election landscape requiring LEOs to understand and implement mandates emanating from courts. Election officials must make these changes, often with little guidance and under the watchful eye of those bent on exposing error.

Election officials are responding to these pressures with admirable fortitude, indeed many are running toward the problem.¹³ Yet increasing pressures election officials face risks

9. TEX. ELEC. CODE ANN. § 33.061 (West 2024).

10. See Anthony Izaguirre, *Election Officials Face Fines, Charges in GOP Voting Laws*, ASSOCIATED PRESS (May 8, 2021), <https://perma.cc/PFB4-JRHQ> (noting that states implemented large fines that could “dissuade people from taking jobs as election workers or make staffers hesitant to help voters”).

11. FLA. STAT. ANN. § 101.69(3) (2024).

12. See *2023 Election Enactments*, NAT’L CONF. OF ST. LEGISLATURES, <https://perma.cc/59E7-NUBH> (last updated Jan. 5, 2024) (providing a summary of changes to election laws in 2023).

13. See JOSHUA FERRER, ET AL., *ELECTION OFFICIAL TURNOVER RATES FROM 2000–2024* 4 (2024), <https://perma.cc/5DV7-ELUE>

The increase in turnover is not as dramatic as may be feared based on previous news headlines and recent reports. We find that turnover has grown from 28% in 2004 to 39% in 2022, [an 11 percentage point] increase. Although significant, the upward trend is slow. Most election officials continue to serve for more than four years and are prepared to successfully administer the 2024 presidential election.

attrition.¹⁴ The resultant loss of institutional knowledge can lead to mistakes and miscalculations by newer staff, further feeding public mistrust of U.S. elections—a classic vicious cycle.

In this fraught environment, assistance of competent legal counsel has never been more crucial. And yet, the topic has received little if any study. While many call for increased funding for elections, such calls fail to acknowledge or even assess the cost of adequate legal representation. No studies examine who supplies legal assistance to local election officials, nor whether those individuals have adequate training in notoriously complex state and federal election law to provide competent counsel. Do lawyers supporting LEOs understand the intricacies inherent in managing elections? Does adequate funding exist to provide LEOs the legal support they require? To what extent do national, state and local political winds impact the provision of legal services to LEOs?

This short Essay begins to explore some of these questions with an eye towards stimulating further study. While it is far too early in assessing the scope of this problem to reach conclusive diagnosis and treatment, the modest hope here is to call attention to an issue that strikes at the core of functioning elections. To this end, Part I examines the ways in which lawyers assist LEOs in their work. Part II discusses three factors impacting effective legal support of LEOs circa 2024: funding shortfalls; a lack of election-specific expertise; and politics. Part III offers preliminary thoughts on shoring up legal support for LEOs amidst these many challenges.

I. THE ROLE OF LAWYERS SUPPORTING LEOs

Before turning to the question of *who* supplies legal support to LEOs, a threshold question is who, for the purposes of this discussion, qualifies as a “local election official.”¹⁵ Local election

14. See Julia Mueller, *Alarms Sound over High Turnover Among Election Workers*, THE HILL (Oct. 14, 2023), <https://perma.cc/EC6X-6MWK> (citing a Brennan Center survey conducted in April 2023 documenting the high rate of election official attrition since 2020).

15. Nomenclatures vary tremendously from state to state. For a description of local election official ecosystems and who populates them, see KATHLEEN HALE ET AL., ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK (2015). See also Richard Briffault, *Election Law Localism and Democracy*, 100 N.C. L. REV. 1421, 1426 (2022) (describing the pivotal role local

ecosystems rely on a variety of actors: (1) temporary workers hired to work on and around election day, (2) those who work year-round either full or part time to administer elections (commonly referred to as clerks or registrars), and (3) individuals or groups holding supervisory authority over elections (e.g., supervisory boards or commissions).¹⁶ The focus of this Essay is legal support for those in the second category: local officials charged with the primary responsibility of administering elections and implementing state and federal election laws.¹⁷

A. *Who Supplies Legal Support to LEOs?*

The question of legal support for LEOs is complicated by the fragmented nature of U.S. elections. Different states have different pathways to supplying LEO legal support. Perhaps the biggest single determinant of who provides legal support to LEOs is the size of the jurisdiction in which they operate.¹⁸ Large cities (especially swing states experiencing greater pressures on election administrators) are more likely to have attorneys on staff who regularly work with LEOs on election matters. As an example, the city of Philadelphia employs a full-time attorney dedicated to supporting both LEOs and Philadelphia's City Commissioners Office (which functions as Philadelphia's board of elections).¹⁹

Smaller jurisdictions, where elections are oftentimes run by part-time clerks (or clerks for whom running elections is only a

election administrators play in administering U.S. democracy and detailing their functions).

16. See HALE ET AL., *supra* note 15, at 38–45.

17. Lines are not clean. Often the same attorney will provide legal support to individuals in each of these categories. At times, as discussed below, LEOs find themselves adverse, e.g., to supervisory boards requiring separate legal support. See *infra* at Part II.C.

18. See HALE ET AL., *supra* note 15, at 39 (noting that “resources and task complexity tend to increase with [a jurisdiction’s] size”).

19. Currently, Alison Stohr serves as Philadelphia's Deputy City Solicitor. Stohr also coordinates with county solicitors around the state on election-related matters.

fraction of their responsibility)²⁰ typically secure legal support from county attorneys. In some states, county and city attorneys are elected; in others, they are appointed.²¹ County attorneys typically work on a wide range of matters (think zoning ordinances, municipal bond issuances, slip-and-falls, and so forth). Some LEOs may turn to private-sector attorneys who work on a contract basis or on retainer as needed. Such arrangements might be sporadic, or they might be regularized. In Florida, for example, LEOs routinely hold on retainer specific attorneys in private practice who have developed elections expertise and provide legal support to numerous LEOs around the state (a practice which can address some of the expertise concerns discussed in Part II.B below).²²

Whether or not state-level attorneys may provide support to LEOs is a complex question warranting further study.²³

20. See Briffault, *supra* note 7, at 1426 (noting that “in many places, particularly small- and medium-sized jurisdictions, running elections is just one of a number of functions for which the [clerk’s] office is responsible”).

21. Arizona’s Constitution, for example, provides for the election of county attorneys. ARIZ. CONST. art. XII § 3. Arizona county attorneys serve four-year terms in office. *Id.* Candidates for county attorney must be a licensed Arizona attorney in good standing. ARIZ. REV. STAT. ANN. § 11-531 (2024). Iowa voters also elect their county attorneys on a partisan basis every four years. See IOWA CODE ANN. § 331.751 (2024). Candidates for County Attorney in Iowa must be registered voters in the county in which they are running for office, in addition to being a licensed Iowa attorney in good standing. *Id.* Nebraska is another state that elects its county attorneys. NEB. REV. STAT. § 23-1201.01 (2024). In other states, county attorneys are appointed. In Virginia, for example, local government bodies appoint county and city attorneys, who report to the local board of supervisors. VA. CODE ANN. § 15.2-1542 (West 2024).

22. Numerous Florida law firms advertise support for election officials in Florida. See e.g., *Election Law & Political Campaigns*, DI PIETRO PARTNERS, <https://perma.cc/C5MU-CLZ5> (last visited May 12, 2024) (outlining the election law & political campaign services providing by Di Pietro Partners); *Election Law*, GARDENER BIST, <https://perma.cc/EFF9-8BWU> (last visited May 12, 2024) (highlighting the services Garnder Bist provides in the area of election law); *Election & Political Law*, STEARNS WEAVER MILLER, <https://perma.cc/A3FF-HXKE> (last visited May 12, 2024) (providing an overview of the range of services provided by Stearns Weaver Miller in the election and political law sector).

23. Justin Weinstein-Tull has flagged this issue in the context of state and local government compliance with federal election laws: “States and local governments frequently come to loggerheads over election administration—and compliance with the federal election statutes specifically—both inside and outside of the courtroom.” See Justin Weinstein-Tull, *Election Law*

Attorneys from state departments of elections or state attorneys general offices can advise LEOs on legal matters, issuing guidance and/or assisting informally.²⁴ In other instances, states have explicit procedures for the provision of state-level legal support for LEOs. In Virginia, for example, LEOs may turn to attorneys at the Virginia Division of Risk Management when they are sued.²⁵

The role of state attorneys general in supporting (or, alternatively, creating legal headaches for) LEOs is yet another under-explored issue. In several high-profile instances, state attorneys general have been adverse to LEOs in lawsuits

Federalism, 114 MICH. L. REV. 747, 771 (2016). Weinstein-Tull notes that “[t]he complicated relationships between state and local governments that the federal election statutes engage occasionally play out in litigation as well.” *Id.* at 773. Weinstein-Tull’s many examples of state-local election litigation and what he calls “liability hot potato”—state and local election officials trying to defer legal responsibility for compliance with federal law—amply demonstrate the complexities of and need for LEO legal support. *See id.* at 767–71 (describing examples of “liability hot potato” from New York, Alabama, California, Vermont, Texas, South Dakota, Louisiana, and Virginia); *see also* ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 3* (2009) (describing “hyperfederalized” election administration and state-local conflicts in election administration).

24. Virginia law, again, provides an example. *See* VA. CODE ANN. § 24.2-104 (West 2024) (allowing local officials to request an investigation into election practices); *see also* Press Release, Office of the Attorney General, Attorney General Platkin Announces Safeguards to Protect the Right to Vote During the 2023 General Election (Oct. 30, 2023), <https://perma.cc/A8SA-3XSK>

In addition to the Voter Protection Initiative, the Division of Law, as it has in previous elections, will make available around the clock a team of dedicated attorneys to advise county elections officials. This aims to facilitate free, fair, and secure elections and swift, unhindered, and equitable access to voting for all eligible individuals, in accordance with New Jersey’s election laws.

25. LEOs in Virginia, including “any [county] electoral board, any of its members, any general registrar, or any employee of or paid deputy to a registrar,” can enroll in the DRM public liability insurance plan. VA. CODE ANN. § 24.2-121 (West 2024). This plan provides officers and employees with counsel when officials are named as a defendant in a “civil action arising out of the performance of [their] official duties.” *Id.* As a matter of statute, the DRM’s public liability insurance plan also includes coverage for “payment of attorney fees and expenses incurred” during litigation. *Id.* § 2.2-1837. Legal support available to LEOs through the DRM is *ex post*, i.e., an LEO may apply for DRM representation only after being named as a defendant. *Id.* § 24.2-121.

challenging LEO actions.²⁶ In other instances, as explored in Part II below, state attorneys general have acted to support LEOs in lawsuits they face.²⁷

More study is needed to understand the complexities of who exactly provides LEO legal support—local attorneys, state-level attorneys, or some combination (not to mention interaction between state and local attorneys supporting LEOs). What is clear is that dispute environments are different state to state depending on regulatory, institutional, political, and even interpersonal realities in each state.

B. *What Do LEO Attorneys Do?*

Having surveyed who supplies LEO legal support, what range of services do attorneys provide LEOs? This discussion hones in on two areas of support: legal assistance related to LEOs' official conduct and support for LEOs in their personal capacity.

1. Support for LEOs in Their Official Capacity

LEOs must often turn to lawyers to help ensure that elections comply with federal and state statutory mandates. Attorneys undertake this mission in three main baskets: (1) advising what law requires; (2) assisting LEOs directly with disputes regarding legal requirements; and (3) providing indirect assistance to LEOs on legal compliance.

Advising. Attorneys help LEOs interpret federal and state statutes and regulations governing their work. They help LEOs apply existing law to new facts or circumstances. Attorneys also help LEOs understand the impacts of litigation affecting their

26. See *e.g.*, *infra* note 103 and accompanying text.

27. See *e.g.*, *supra* note 24 and accompanying text. In some states, especially post-2020, state-level guidance to LEOs has become fraught. In Michigan, for example, plaintiffs brought suit alleging that Secretary of State guidance clarifying procedures for absentee ballot signature verification and curing procedures violated Michigan's Administrative Procedures Act. See *Genetski v. Benson*, No. 20-000216-MM, 2021 WL 1624452, at *3 (Mich. Ct. Cl. Mar. 9, 2021) (demonstrating a successful challenge to Michigan Secretary of State Jocelyn Benson's provision of legal guidance to Michigan LEOs interpreting Michigan law alleging failure to comply with the Michigan Administrative Procedures Act); MICH. COMP. LAWS ANN. § 24.201–24.328 (1969).

work. Lawyers may be called upon to assist LEOs in complying with laws unrelated to elections—for example, contracting with employees, complying with zoning regulations (e.g., for polling place locations), and responding to open records requests. This last category has been particularly daunting as of late given the vast increase in volume of records requests flooding election offices post-2020.²⁸

Dispute Resolution. A second way lawyers assist local election officials is helping LEOs manage disputes, which are arising in many parts of the country with alarming frequency.²⁹ A big part of lawyers' dispute resolution muscle is running interference—preventing disputes from arising in the first place or escalating further. One example comes from Scott County, Iowa where voters elected Kelly Cunningham to serve as County Attorney in 2022.³⁰ In 2023, the Scott County Board of Supervisors moved to reject the results of a recount for a tight school board contest.³¹ A majority believed the procedure was tainted.³² Cunningham pushed back, reminding the Board that regardless of their misgivings, their role in certifying recount results was ministerial only.³³ As this example demonstrates, attorneys can keep local election disputes out of court.³⁴ They can provide cover when political actors lean on election officials to take steps election officials fear are inconsistent with the law.³⁵

When disputes cannot be averted, lawyers represent election officials in litigation. Attorneys representing LEOs may

28. See Green, *FOIA-Flooded Elections*, *supra* note 2.

29. See Seifter & Sopko, *supra* note 5 (noting significant uptick in election litigation and disputes). The rise in election litigation and the causes of this increase are discussed *infra* at Part II.C.

30. See KWQC Staff, *Kelly Cunningham Elected Scott County Attorney*, KWQC (Nov. 9, 2022), <https://perma.cc/E22X-QHS4> (noting Cunningham's electoral victory).

31. See *id.* (detailing procedure of rejection of results).

32. See *id.* (explicating Board argument for rejection).

33. See Ed Tibbets, *Scott County Supervisors Violate the Law in Rejecting Election Recount Report*, IOWA CAP. DISPATCH (Dec. 9, 2023), <https://perma.cc/WH87-Z4RR> (describing Cunningham's challenge to the rejection and detailing County Attorney office's argument that the report should be accepted).

34. See *infra* Part II.

35. See *infra* Part II.

convince courts that LEOs are not the appropriate targets of suits or find other procedural hooks to prevent suits from proceeding. In one example, a group of plaintiffs in Georgia challenged the integrity of elections in Fulton County.³⁶ After years of litigation, the county attorney representing the Fulton County Board of Registration and Elections filed a successful motion for summary judgment in 2023.³⁷ The county attorney successfully argued that local officials had no role in selecting or approving election technology—a state-level process—and should thus be dropped from the suit.³⁸ County attorneys use other procedural tools to dismiss suits against LEOs, for example on grounds of sovereign immunity.³⁹

Indirect Support. A third basket of legal support for LEOs can be understood as “indirect support.”⁴⁰ That is, sometimes lawyers representing voters, local, state, or national organizations may indirectly support local election officials in

36. See *Curling v. Raffensperger*, 702 F. Supp. 3d 1303, 1312 (N.D. Ga. 2023) (describing the case as one that “focuses on whether Georgia’s statewide electronic voting system, as currently designed and implemented, suffers from major cybersecurity deficiencies that unconstitutionally burden Plaintiffs’ First and Fourteenth Amendment rights and capacity to cast effective votes that are accurately counted”).

37. See *id.* at 1382 (granting motion for summary judgment in favor of local official defendants).

38. See *id.* at 1381–82 (concluding that state defendants are responsible for the choice of the technological voting system). In another Georgia example of county attorneys successfully protecting LEOs from suit, the Supreme Court of Georgia upheld dismissal of a consolidated lawsuit against the Columbia and Morgan County Board of Elections. County attorneys successfully argued that plaintiffs had only named individual county employees in their complaint, rather than specifying that they were suing “in the name of [or against] the relevant local governments.” *Lovell v. Raffensperger*, 897 S.E.2d 440, 444 (Ga. 2024) (determining plaintiffs’ failure to exclusively name state actors made their claim subject to dismissal).

39. See *e.g.*, *State v. Tex. Democratic Party*, No. 14-20-00358-CV, 2020 WL 4012247, at *1 (Tex. App. July 16, 2020) (dismissing absentee voting suit during 2020 election in which Travis County Attorney Sherine Thomas successfully nonsuited Travis County Clerk Dana DeBeauvoir); see also Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841 (2017) (describing state and federal governments’ disagreement regarding responsibility of federal election law enforcement).

40. See *Muller*, *supra* note 5 at 566 (describing indirect and external ways by which organizations may have impacts in protecting elections).

ensuring state election law compliance without working directly for or with LEOs.⁴¹ An illustration may be helpful.

In one small county in Colorado in 2023, concerns about the integrity of Dominion voting machines prompted a county commission to vote to remove funding in its budget slated to pay for voting machines.⁴² Yet, the LEO charged with administering elections in the county faced an imminent contractual deadline to payment.⁴³ Under the Help America Vote Act (“HAVA”),⁴⁴ every state has a designated Americans with Disabilities Act (“ADA”)⁴⁵ representative to advocate for the rights of voters with health conditions or impairments.⁴⁶ Colorado’s HAVA ADA representative, an attorney, wrote a letter to the county commissioner explaining the need for the voting system to meet ADA requirements and threatening to sue if the machines were decommissioned.⁴⁷ Thus educated about legal requirements and the implications of their actions, the county commission restored funding to pay for the voting system.⁴⁸ As this example demonstrates, LEOs may receive indirect support from attorneys representing outside interests pressing to ensure compliance with the law.⁴⁹

41. *See id.* (noting the possibility that there has “been an increase in third-party or nonprofit funding for election-related litigation. While entities like the ACLU or the NAACP have long engaged in impact litigation relating to elections, it is unclear how much their efforts have changed in recent years”). I echo Professor Muller’s call for research on the extent to which nonprofits have increased their focus on election-related litigation.

42. Interview with Judd Choate, Dir., Colo. Div. Elections (Apr. 2, 2024) (on file with author).

43. *Id.*

44. Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145.

45. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12212.

46. *See* 52 U.S.C. §§ 21021–21025 (outlining funding and requirements to assure voting access for individuals with disabilities).

47. *See* Interview with Judd Choate, *supra* note 42.

48. *Id.*

49. Of course, outside groups’ forays into election litigation—left-leaning and right-leaning—often involve suing LEOs. Outside groups suing election officials for failure to comply with the law is a feature of a functioning democracy, not a bug. The United States has a long and storied history of groups like the NAACP Legal Defense fund suing election officials on behalf of voters. Yet more recently, the dramatic influx of outside spending to “save democracy” has supercharged election litigation. *See infra* Part II.

2. Support for LEOs in Their Individual Capacity

LEOs increasingly seek legal support for matters that impact them individually.⁵⁰ LEOs may, for example, seek legal assistance in coping with threats and harassment or in defending against criminal allegations.⁵¹ Several nonprofit networks of attorneys have formed to assist LEOs facing lawsuits against them in their personal capacity and represent LEOs experiencing harassment and threats.⁵²

Benjamin Ginsberg and Robert Bauer, two prominent election attorneys (one a Republican and one a Democrat), co-founded the Election Official Legal Defense Network (“EOLDN”) in 2021 to combat “systematic efforts to undermine the ability of [LEOs to] oversee[] the counting and casting of ballots on an independent, nonpartisan basis.”⁵³ EOLDN works to support election officials inundated with threats both violent and legal in nature.⁵⁴ The organization does so by connecting qualified pro bono attorneys with election officials seeking help.⁵⁵ The EOLDN enables LEOs to either fill out a form or contact its twenty-four-hour hotline to be connected with an attorney.⁵⁶

Another example is the Election Protection Hub created by a group called the Public Rights Project.⁵⁷ The Election

50. See Bob Bauer & Benjamin L. Ginsberg, *Election Officials Need Our Legal Help Against Repressive Laws and Personal Threats*, WASH. POST (Sept. 7, 2021), <https://perma.cc/P5E6-HZSF> (identifying increasing need for legal support for election officials based on personal safety).

51. See *id.* (noting election officials are subject to retaliation in the form of violence, threats, or litigation).

52. See *infra* Section I.

53. See Bauer & Ginsberg, *supra* note 50.

54. See *id.*

55. See *Our Mission*, EOLDN, <https://perma.cc/L54X-W88P> (last visited May 22, 2024)

Across the United States, election officials are enduring threats, harassment, intimidation, defamation, and, in some states, exposure to criminal penalties, for simply doing their jobs of administering fair elections. EOLDN stands by, ready to connect election officials in need of qualified pro bono attorneys who can provide advice or assistance.

56. *Id.*

57. *Election Protection Hub*, PUB. RTS. PROJECT, <https://perma.cc/C32S-P4UA> (last visited May 22, 2024).

Protection Hub aims to “provide free legal support to local elections officials.”⁵⁸ Among the goals of the Election Protection Hub are protecting LEOs against in-person and online harassment and pushing back against overly burdensome, harassing, and frivolous Freedom of Information Act filings designed to slow down and hamper election administration.⁵⁹

As the above discussion describes, LEOs turn to a variety of types of lawyers to supply a wide range of legal needs.⁶⁰ The next section turns to pressures threatening effective LEO legal support.

II. PRESSURES IMPACTING EFFECTIVE LEGAL SUPPORT

The U.S. system of elections faces considerable challenges. Concerns about election security, volleys in the Voting Wars, and conspiracy-laden partisan accusations, combine to place tremendous pressure on local election officials.⁶¹ Competent and accessible legal support is a critical component to ensuring local election officials can successfully perform the work of running free and fair elections. This Part outlines particular challenges to ensuring adequate LEO legal support: funding shortfalls; a potential lack of subject matter expertise among lawyers providing support; and a political environment that can complicate LEO access to counsel.

A. Funding

It is widely recognized that election officials must run elections despite inadequate funding.⁶² Those who have studied

58. *Id.*

59. *Id.* As described further below, private funding bans threaten the effectiveness of such efforts, *see infra* Part II.A.

60. *See supra* Part I.B.

61. *See* RICHARD HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* xi (2012) (describing the access versus integrity tug of war).

62. *See* CHARLES STEWART III, *MIT ELECTION DATA + SCIENCE LAB, THE COST OF CONDUCTING ELECTIONS 2–5* (2022), <https://perma.cc/J34N-HXV5> (PDF) (noting “consensus exists within the election administration community that elections are underfunded nationwide”). *See generally* Joshua S. Sellers & Roger Michalski, *Democracy on a Shoestring*, 74 *VAND. L. REV.* 1079, 1084–88 (2021) (describing state election funding basics).

state election funding mechanisms have concluded that elections in the United States are chronically underfunded.⁶³ Local election officials are known for doing more with less.⁶⁴ Election officials must direct what limited funds they have to ensure voting is accessible, reliable, and secure as a first priority.⁶⁵

Generally, U.S. elections are funded by state and local governments (with rare injections from the federal government).⁶⁶ Funding for LEO legal support varies considerably depending on the size of the jurisdiction.⁶⁷ As noted above, large cities—especially where election litigation volumes are high—are more likely to incorporate legal support for LEOs into their budgets.⁶⁸ In smaller jurisdictions, sufficient funds may not be available to supply adequate legal support.⁶⁹ Further study is needed to establish LEO legal support funding streams; the degree to which funding shortfalls inhibit local election officials' access to legal support; and whether, and the extent to

63. Some places more than others. *See id.* (detailing what elections cost states and how funding is universally inadequate); ELECTION INFRASTRUCTURE INITIATIVE, 50 STATES OF NEED: HOW WE CAN FULLY FUND OUR STATE AND LOCAL ELECTION INFRASTRUCTURE 2, 6, <https://perma.cc/Y83N-RK6L> (PDF) (last visited May 23, 2024) (describing funding shortfalls in state and local election administration post-2020).

64. *See* 52 U.S.C. § 20901 (allocating federal payments and appropriations towards improving election administration); *see HAVA Grant Programs*, U.S. ELECTION ASSISTANCE COMM'N (Apr. 16, 2024), <https://perma.cc/AB4V-4EVS> (describing federal election funding under HAVA).

65. *See* STEWART, *supra* note 62, at 6 (explicating and prioritizing various costs of election administration).

66. *See* KAREN L. SHANTON, CONG. RSCH. SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 9 (2019) (explaining states and localities are responsible for most of the costs of conducting federal elections); Rachel Orey et al., *The Path of Federal Election Funding*, BIPARTISAN POL'Y CTR. (June 16, 2022), <https://perma.cc/6BN5-FLHU> ("Congress has appropriated nearly \$5 billion to support state election efforts since 2003. This funding is irregular and unpredictable . . .").

67. *See supra* note 18 and accompanying text (noting funding and resource discrepancies between size of jurisdictions).

68. *See, e.g., supra* notes 19 and accompanying text (describing Philadelphia's full-time city solicitor providing LEO legal support).

69. *See* HALE ET AL., *supra* note 15, at 39 (describing that smaller jurisdictions often will not have access to staff with election law expertise or legal support).

which, the inaccessibility of legal support due to lack of funds contributes to election official attrition.

Funding for LEO legal support can become political. Cutting off access to legal support has been used as a tactic in political fights over election rules. One particularly public example involving a state-level official (not an LEO) is illustrative. In 2021, Katie Hobbs (a Democrat) served as Arizona's Secretary of State in charge of administering the state's elections.⁷⁰ Secretary Hobbs was embroiled in numerous legal fights during her tenure involving fallout from the 2020 election and ongoing legal tensions between her office, the Arizona Attorney General, and the Arizona legislature.⁷¹ In June 2021, the Republican-held Arizona Legislature passed a series of measures taking direct aim at Secretary Hobbs' access to legal support.⁷² First, the new law established the Arizona Attorney General as the "sole authority" to defend Arizona election laws.⁷³ Second, the new statute also barred Arizona's Secretary of State from using public funds to hire outside lawyers and limited the Secretary of State's office from hiring any more than the equivalent of one full-time lawyer.⁷⁴ In this way, legal support for election officials became a political cudgel. Further study is needed to understand whether and the extent to which this dynamic plays out at the local level.

Private funding bans further complicate funding for LEO legal support. In the lead up to the 2020 elections, concerns arose that funding shortages at local election offices threatened states' ability to run safe elections.⁷⁵ The need to find adequate

70. Eric Bradner & David Wright, *Arizona House Passes Legislation That Weakens Secretary of State*, CNN (June 25, 2021), <https://perma.cc/H682-DLQU>.

71. *See id.*

72. *See id.* (describing process by which lawmakers removed the Secretary of State's budgetary resources and election funds and the office's election responsibilities).

73. *Id.*

74. *See id.* (detailing various budgetary and election-related restrictions placed on the Secretary of State by lawmakers).

75. *See CTCL Receives \$250M Contribution to Support Critical Work of Election Officials*, CTR. FOR TECH & CIVIC LIFE (Sept. 1, 2020), <https://perma.cc/C5MH-98AY> [hereinafter *CTCL Financial Contribution*] (noting that local election office funding shortages created by the pandemic caused concern for the administration of safe elections).

space where in-person voters could vote safely, with appropriate social distancing in pandemic conditions, as well as the need to provide cleaning and hygiene supplies would require money that many counties simply did not have.⁷⁶ In addition, state and local election officials raced to accommodate a drastic increase in mail voting, upending state and local election budgets.⁷⁷ Responding to these urgent funding needs, Mark Zuckerberg and his wife Priscilla Chan channeled more than \$250 million to a nonprofit called the Center for Tech and Civic Life, which then made grants to local election offices that applied for assistance.⁷⁸ Grants ranged from five-thousand to nineteen-million dollars (keyed to need and the size of the jurisdiction).⁷⁹

Critics pounced. A *Wall Street Journal* editorial noted, “[s]ome conservatives [saw] this largess . . . as a clever plot to help Democrats win.”⁸⁰ Concern about so-called “private funding” of elections soon translated into private funding bans in twenty-seven states.⁸¹ These statutes, which vary slightly state to state, generally prohibit private funding of activities related to the administration of elections. As an example, Florida’s legislature passed its private funding ban in 2021:

No agency or state or local official responsible for conducting elections, including, but not limited to, a supervisor of elections, may solicit, accept, use, or dispose of any donation in the form of money, grants, property, or personal services from an individual or a nongovernmental entity for the purpose of funding any type of expenses related to election administration, including, but not limited to, voter

76. See *Prohibiting Private Funding of Elections*, NAT’L CONF. OF STATE LEGISLATURES, <https://perma.cc/6S9K-C8ZV> (last updated Apr. 9, 2024) [hereinafter *Private Election Funding*] (recounting that the pandemic created “unexpected expenses related to . . . providing larger in-person voting facilities to accommodate social distancing and sudden demands for more cleaning and hygiene supplies”).

77. See *CTCL Financial Contribution*, *supra* note 75 (blunting the influx of mail voting during the pandemic by offering drive-up voting and repurposing book drops into ballot drop boxes, among other things).

78. See *id.*

79. See *Private Election Funding*, *supra* note 76 (noting the range of grants provided to local election jurisdictions).

80. *Zuckerbucks Shouldn’t Pay for Elections*, THE WALL ST. J. (Jan. 3, 2022), <https://perma.cc/ZLP6-Z6KN>.

81. *Private Election Funding*, *supra* note 76.

education, voter outreach, voter registration programs, or the cost of any litigation related to election administration.⁸²

Private funding bans could have enormous impact on organizations that provide legal assistance to LEOs, like EOLDN and the Election Protection Hub. Does providing pro bono legal support to LEOs to protect them against threats and harassment, for example, trigger state private funding bans? Depending on the wording of the statute, the answer could be yes. Florida's ban, above, explicitly references the donation of personal services which could be read to apply to legal services support.⁸³ North Carolina's 2023 ban directs that the State Board "shall not accept private monetary donations or in-kind contributions, directly or indirectly, for conducting elections or employing individuals on a temporary basis."⁸⁴ Does North Carolina's ban apply to pro bono legal support for local election officials experiencing threats or harassment? Can private organizations help provide funding to local election offices to cope with FOIA flooding in states with private funding bans? Not clear.

Funding pressures on under-resourced local election offices combined with private funding bans are a one-two punch. If one agrees with the premise that legal support is critical both to running accessible and reliable elections and to preventing LEO attrition, funding of legal services for LEOs should be far better understood—and addressed.

B. *Subject Matter Expertise*

Election law is arcane. Questions routinely arise that confound even those well-versed in the state code, either because election statutes are unclear, are silent on the question at hand, were written in the distant past, or because new realities complicate interpretation. Does a state's open records law require public access to Cast Vote Records?⁸⁵ How should

82. FLA. STAT. § 97.0291 (2023).

83. *See id.* (considering that Florida's ban on the use of personal services to fund election-related expenses encompasses legal services support).

84. N.C. GEN. STAT. § 163-22 (2023).

85. *See, e.g.,* AUDIT-USA v. Maricopa Cnty., 525 P.3d 279, 281–82 (Ariz. Ct. App. 2023) (denying access to ballot images and CVRs linked to ballot images under Arizona statute requiring that election officials "ensure that

LEOs respond to mass voter eligibility challenges?⁸⁶ Can LEOs reach out to voters to cure defects in their absentee ballots when the statute is silent?⁸⁷ Despite this statutory complexity, local elections officials are responsible for making sure their work complies with state and federal law.⁸⁸

Why are state election statutes so confusing? States have developed election codes over the centuries without comprehensive reform. Also, state election codes are highly reactive. Over the years, legislatures pass laws to address freak circumstances as they arise—no more butterfly ballots!—in ways that can conflict with or disharmonize existing rules. The result is a mish-mosh of archaic laws and modern attempts to clarify that easily confuse and confound. As one election official described, an attorney with little knowledge of the state election code can identify a responsive statute and believe they have determined a definitive answer to a legal question, only to learn (after a dispute erupts) that other provisions of the code conflict or even contradict what they found.⁸⁹

Some attorneys who represent LEOs have encyclopedic knowledge of state election laws, often because they practice in jurisdictions where election disputes routinely arise; they have learned by doing. Or they may simply have been at it a very long time. Candidates and long-serving state and local election officials can often list off the names of attorneys in their state—

electronic data from and electronic or digital images of ballots are protected from physical and electronic access”).

86. See, e.g., *Majority Forward v. Ben Hill Cnty. Bd. of Elections*, 512 F. Supp. 3d 1354, 1371 (M.D. Ga. 2021) (holding that there was a demonstrated harm to voters who were targeted in a mass eligibility challenge).

87. See, e.g., *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at *10 (Pa. Commw. Ct. Sept. 29, 2022) (resolving whether election officials can proactively assist voters in curing their ballots). During the 2020 election, legal questions about how to conduct safe elections according to state law were complex and led to a surge in litigation. See Briffault, *supra* note 7, at 1433–46 (describing surge in litigation involving LEOs in the lead up to and aftermath of the 2020 election).

88. See Briffault, *supra* note 7, at 1426 (“Fundamental election law decisions—such as registration and voter identification requirements, or authorization of early in-person voting or vote-by-mail—are made by the states, but the actual conduct of elections is handled almost entirely by local governments.”).

89. Interview with Alison Stohr, Deputy City Solic., Phila., Pa. (Apr. 11, 2024) (on file with author).

on both the political left and right—who know how their state’s elections work, what their state’s election code requires, its legislative history, and the ins and outs of their state’s election jurisprudence.⁹⁰ This expertise can go a long way in supporting LEOs in their work (even indirectly). Familiarity with history and practice in state election law often serves as a stabilizer when disputes arise.

But for many county attorneys, particularly in smaller jurisdictions, election law is neither a subject they studied in law school nor a regular part of their job. Elections are sporadic; issues and disputes that arise are often unpredictable and difficult (if not impossible) to prepare for. Busy county attorneys with full plates of non-election-related matters may understandably lack the bandwidth to advise. Knowledge gaps can combine with political headwinds to impede even county attorneys who have a solid grasp of their state’s election code.⁹¹ A county attorney may be wary of providing LEOs advice for fear of providing incorrect information—particularly in charged local, state, and national political environments.

Some LEOs address knowledge gaps and the complexities of their state election codes by pooling resources. In states in which the election administration community communicates effectively, LEOs facing similar legal conundrums can and do share information and seek coordinated advice when questions or disputes arise.⁹² Particularly in states where election disputes have become an everyday reality, coordination has become common practice. Depending on the extent to which a state department of elections is active in supporting LEOs, state-level election attorneys and officials may be involved—formally or informally—in providing information and/or coordinating legal support (though more study is needed to understand these complex dynamics).

One challenge to a coordinated response, however, is that legal questions are increasingly divisive. LEOs within a state may not agree or take conflicting positions. In the complex

90. In the author’s own experience of creating annotated state election codes in Virginia, Florida, and Colorado, state and local election officials easily rattled off the same list of attorney names when asked who in the state was most knowledgeable about their state’s election statutes.

91. See *infra* Part II.C.

92. See Interview with Alison Stohr, *supra* note 89.

political environment in which LEOs operate, legal support can be politically fraught, a situation to which the next section turns.

C. Political Pressures

Political pressures add to the challenge of LEOs securing needed legal services.⁹³ One post-2020 flashpoint provides a salient illustration of this problem: the push for hand counts. Responding to pressures from national leaders and activists questioning the reliability of voting machines, local boards in Arizona and California voted to hand count ballots.⁹⁴ Studies have shown that hand counting ballots delivers less accurate results and is time consuming, resulting in significant delays—delays that could ironically fuel conspiracy theories and cast doubt on election outcomes.⁹⁵ In addition to practical infirmities of hand counting, the practice is often prohibited by state law.⁹⁶ Legal battles over hand counting demonstrate how political pressures complicate LEOs' work and necessitate the assistance of competent legal counsel.

During the 2022 general election, the Cochise County, Arizona Board of Supervisors voted two-to-one to hand count all ballots cast.⁹⁷ County Attorney Brian McIntyre had for weeks advised the Board that ordering a fully manual hand count of

93. See Briffault, *supra* note 7, at 1425 (describing the impact of politics on local election administration and how “local power in election administration is fragile and can be stripped away by hostile state-level forces”).

94. See Caitlin Sievers, *Republicans Try Again to Force ‘Impossible’ Hand Counts of Elections and a Return to Precinct Voting*, ARIZ. MIRROR (Feb. 2, 2023), <https://perma.cc/6T2G-83KZ> (noting that Arizona constituents sought to require “hand counts of election results because of their general mistrust of voting machines”).

95. See, e.g., Stephen Ansolabehere et al., *Learning from Recounts*, 17 ELECTION L.J. 100, 115 (2018) (describing the tedious nature of and increased error rate in hand counting write-in votes during the 2016 presidential election).

96. See, e.g., Act of Oct. 4, 2023, ch. 300, 2023 Cal. Stat. 92 (codified at 2023 CAL. ELEC. CODE §§ 15270.1–15270.3, 19207.5) (prohibiting election officials from performing manual vote counts when certain criteria are met).

97. See Mac Brower, *Arizona County Votes to Conduct Hand Count Audit of All 2022 Ballots*, DEMOCRACY DOCKET (Oct. 24, 2022), <https://perma.cc/73EW-M3Y2> (“The board’s two Republican members voted in favor while the lone Democrat voted against the proposal.”).

ballots violated state law.⁹⁸ But Arizona Attorney General Mark Brnovich (a Republican) issued an informal opinion that the “County [had] discretion to perform an expanded hand count audit of all ballots cast in person . . . along with [all] early ballots.”⁹⁹ Siding with the County Attorney, Democratic Secretary of State Katie Hobbs penned a letter to the Cochise County Board advising that if it proceeded with a full hand count, she would take legal action to ensure compliance with Arizona law.¹⁰⁰ On November 7, 2022, the Arizona Superior Court of Pima County agreed with County Attorney McIntyre and Secretary Hobbs, enjoining the Board from requiring a full hand count audit of the votes cast in the election.¹⁰¹

Undaunted, the Board pressed ahead on the theory that the Court’s order only prohibited the County from conducting a *full* hand count of voted ballots.¹⁰² As it would later explain in court filings, the Board interpreted the order to enable it to direct Election Director Lisa Marra to conduct a hand-count audit “so long as [the Director] did not hand count 100% of election day ballots.”¹⁰³

98. *Id.* (“The decision to approve hand counting comes even after the county lawyer warned it would be illegal and would not defend it in court.”).

99. Letter from Michael S. Catlett, Off. of the Ariz. Att’y Gen. Solic. Gen. Off., to David Gowan, Sen., Ariz. (Oct. 28, 2022), <https://perma.cc/F6RN-BLFG> (PDF).

100. See Letter from Katie Hobbs, Sec’y of State, Ariz., to Cochise Cnty. Bd. of Supervisors 2 (Oct. 19, 2022), <https://perma.cc/4FK6-PPPW> (describing the proposed actions that would be taken in the event of a full hand count).

101. See Bob Christie, *Fight Over Election Tally Threatens Arizona Certification*, ASSOCIATED PRESS (Nov. 15, 2022), <https://perma.cc/6AFU-KAVT> (“The Republicans’ lawsuit, filed late Monday, comes a week after a judge blocked the board from hand-counting all ballots cast during early voting but also gave them space to pursue a wider hand-count.”); Ruling at 3–4, Ariz. All. for Retired Ams. v. Crosby, No. CV202200518 (Ariz. Super. Ct. Nov. 7, 2022), <https://perma.cc/F5CZ-T9JF> (PDF) (“Additionally, because the proposed audit does not comply with clearly stated Arizona law, public policy and the public interest are served by enjoining the unlawful action.”); see *generally* ARIZ. REV. STAT. ANN. § 16-602 (2024).

102. Christie, *supra* note 101 (“After the ruling, Republican board member board [sic] Peggy Judd proposed an expansion of the hand-count to as many as 99% of the Election Day ballots, although that proposal has been slightly trimmed.”).

103. Verified Complaint for a Special Action Requesting: Mandamus Relief Compelling Defendant to Administer the Counting of Votes for the 2022 General Election as Lawfully Commanded, Crosby v. Marra, No. CV202200533, at ¶ 20 (Ariz. Super. Ct. Nov. 14, 2022),

This put Director Marra in a significant bind. The County Board had ordered a hand count of a “high percentage” of ballots, a task she believed violated the Arizona statute.¹⁰⁴ When she resisted on this basis, the Board filed a lawsuit to compel Marra to hand over all voted ballots to the Board.¹⁰⁵ Cochise County Attorney McIntyre stood firm that any expanded hand count of ballots was illegal under Arizona law.¹⁰⁶ The Board turned for its legal representation to Brian Blehm, a private divorce attorney who, at the time, was working with the Valley Law Group (a family law practice).¹⁰⁷

Ultimately, the Board withdrew this lawsuit citing its intent not to disrupt the statewide recount.¹⁰⁸ Nevertheless, the Board’s efforts to pressure Marra did lasting damage: Marra later sued the Board for fostering a hostile workplace environment through its repeated attempts to force her to undertake what she believed to be an illegal act to placate

<https://perma.cc/MKX9-R2Q3>; see ARIZ. REV. STAT. ANN. § 16-602(B) (2024) (describing procedure for ballot hand counting).

104. See Plaintiff’s Verified Complaint, *supra* note 103, at 3 (noting that Marra refused to follow the Board’s commands regarding hand counting ballots).

105. See *id.* (“Marra is an agent of the Board yet is refusing to follow its lawful commands, she alternatively sued [sic] here in her personal capacity.”).

106. See Christie, *supra* note 101 (describing County Attorney Brian McIntyre’s disapproval of the Board’s efforts to complete an expanded hand count).

107. See *Our Attorneys & Paraprofessionals*, THE VALLEY L. GRP., <https://perma.cc/TMG8-75LY> (last visited May 18, 2024) (displaying the lawyers currently associated with the law firm). Note that Bryan Blehm no longer works with The Valley Law Group, but he did file the complaint under its name. Blehm had also been involved with the Cyber Ninjas audit of Maricopa County’s 2020 election results. See Ryan Randazzo, *Controversy in Cochise County: Officials Still Seek Recount, Can’t Agree on How to Pay Legal Bill*, ARIZ. REPUBLIC (Nov. 15, 2022), <https://perma.cc/H62K-9XFF> (“Blehm could not be reached Tuesday. The telephone hold message at The Valley Law Group where he practices stated that the firm handled divorce, family and juvenile cases.”).

108. Democratic Attorney General Kris Mayes later prosecuted members of the board of supervisors, charging them with felony counts of conspiracy and interference with an election officer. See Sasha Hupka, *Cochise County Supervisors Plead Not Guilty to Interfering with 2022 Election*, ARIZ. REPUBLIC (Dec. 21, 2023), <https://perma.cc/4PZ8-8AGK>.

“constituents who believed the election was stolen.”¹⁰⁹ The episode demonstrated the extremely difficult position LEOs face in navigating political pressures on the conduct of elections and the critical role the advice of counsel plays.

A hand count drama that occurred the following year in Shasta County, California provides another example of complex political forces that supercharge LEOs’ need for competent counsel.¹¹⁰ In January 2023, the Shasta County Board of Supervisors voted 3–2 to terminate its contract with Dominion Voting Systems.¹¹¹ The Board did so without an interim plan for counting votes, a move in facial violation of federal law.¹¹²

Shasta County’s chief election official, long-time County Clerk and Registrar of Voters Cathy Darling Allen, voiced deep discomfort with the Board’s actions.¹¹³ Allen sent a letter detailing the additional costs Shasta County would incur as a result of a hand count.¹¹⁴ “[I]f the Board [] opts for a full manual tally,” she wrote, “it must plan to provide at a minimum the \$1,651,209.68 and 1,300 staff members necessary.”¹¹⁵

Overlooking Allen’s concerns, the Board nevertheless voted to proceed with a hand count by a 3–2 margin.¹¹⁶ Then came a letter from California Attorney General Robert Bonta who advised that pressing forward without any electronic accommodations for disabled voters would violate both state and

109. *Ex-Cochise County Official Who Claimed Election Deniers Made Work ‘Toxic’ Gets \$130K Settlement*, ASSOCIATED PRESS (May 31, 2023), <https://perma.cc/2RTJ-F353>.

110. *See Board of Supervisors Vote to Terminate Contract with Dominion Voting Systems*, CNTY. OF SHASTA CAL., <https://perma.cc/3T8V-TC83> (last visited May 14, 2024).

111. *See id.*

112. *See* 52 U.S.C. § 21081(a)(3)(B) (requiring that “[t]he voting system shall . . . satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place”).

113. *See* Letter from Cathy Darling Allen, Cnty. Clerk and Registrar of Voters, to the Shasta County Board of Supervisors (Mar. 27, 2023), <https://perma.cc/R58Q-WV2V> (PDF) (explaining the potential consequences of the Board’s actions).

114. *Id.*

115. *Id.* at 1.

116. *See Board of Supervisors Moves Forward with Pursuit of Fully Manual Ballot Counting*, CNTY. OF SHASTA CAL., <https://perma.cc/64FQ-AUWZ> (last visited Feb. 15, 2024).

federal law.¹¹⁷ To avoid potential litigation, the Board subsequently agreed a few weeks later to contract with a company called Hart InterCivic to supply the Shasta County Elections Department with a limited number of “scanners capable of tabulating votes electronically” for certain voters as a means of complying with federal law.¹¹⁸

The Republican-leaning Shasta County Board of Supervisors found itself no match for the Democrat-heavy state legislature which responded with Assembly Bill 969 in 2023.¹¹⁹ The bill made “hand-counting votes illegal in California elections with more than 1,000 registered voters.”¹²⁰ Directed largely at the Shasta County Board’s actions, this new legislation precluded the county from hand-counting ballots in the upcoming November special election as it had directed.¹²¹

County counsel advised Clerk Allen that the new law applied to Shasta County.¹²² For its part, the Shasta County Board of Supervisors turned to outside counsel.¹²³ In numerous public statements and with no legal support for his assertion, the Board chair professed that the new law did not apply to Shasta County and that even if it did, that the County should

117. See Letter from Jay C. Russell, Deputy Att’y Gen., State of Cal. Dep’t of Just., to Patrick Jones, Bd. Chair, Cnty. of Shasta Bd. of Supervisors (Feb. 27, 2023), <https://perma.cc/7DG8-M5UW> (PDF).

118. See Adam Beam & Christina A. Cassidy, *California Lawmakers Vote to Limit When Local Election Officials Can Count Ballots by Hand*, ASSOCIATED PRESS, <https://perma.cc/8NM8-38WK> (last updated Sept. 8, 2023).

119. See Annelise Pierce, “*This May Be the Case That Changes the Whole Country*”: *Shasta County Board Chair Hopes to Challenge New California Elections Law*, SHASTA SCOUT (Oct. 9, 2023), <https://perma.cc/2ZGD-9N6F>.

120. *Id.*

121. *Id.* (“In less than a month, Shasta County Registrar of Voters, Cathy Darling Allen, will administer the county’s next election. Until last week she was preparing under the assumption that she might have to use a hand-counting process that is now antiquated in California.”).

122. See Mike Mangas & Adam Robinson, *Shasta County Election Chaos: Hand-Counting Ban Sparks Legal Showdown*, KRRCR (Oct. 5, 2023), <https://perma.cc/A96U-4HRH> (last updated Oct. 6, 2023) (quoting Cathy Darling Allen as saying “So we’ve asked county counsel for some input on that [the passing of AB-969], but, as we have done for decades in this office, we will follow the law in administering elections” (alteration in original)).

123. See David Benda, *Legal Battle over Tallying Votes Brews as Shasta County’s November Special Election Looms*, REDDING REC. SEARCHLIGHT (Oct. 12, 2023), <https://perma.cc/5KLC-3EKW> (“Jones said he has contacted ‘several other attorneys’ about the legalities of the new law.”).

ask a judge to stay the law for the upcoming election.¹²⁴ California Secretary of State Shirley Weber sent a letter to both the Board and Allen underscoring that any claims regarding the law's inapplicability to Shasta County were "wholly without merit and [had] no basis in law."¹²⁵

Despite the Board's threats to challenge California's new law or to ignore it entirely, Allen made plans to rely on the Hart InterCivic voting machines when it became clear that voter turnout would exceed expectations.¹²⁶ In the end, Allen administered the election without incident.¹²⁷ According to Joe Kocurek, a Communications Director of the Secretary of State's Office, "[i]t was a rather smoothly run election" and there were "no incidents" of any note beyond "some words exchanged."¹²⁸

Clerk Allen found herself at odds with her local board, complicating her access to legal advice. The episode further demonstrates the need for competent counsel both in determining what rules require and in navigating disputes that arise in heated political environments.

Partisanship is of course the bread and butter of U.S. elections. But structural changes have contributed to a dramatic rise in partisan election litigation.¹²⁹ As Derek Muller documents in his 2021 examination of the rise of U.S. election litigation, changes in campaign finance laws pre-dating the 2020 election have enabled contributions to candidates and

124. *Id.*

125. See Ashley Gardner, *Top CA Elections Official Says Shasta County Claims About AB 969 Are 'Wholly Without Merit'*, KRCR (Oct. 30, 2023), <https://perma.cc/NS4A-5GWN>.

126. See Tyler Van Dyke, *Shasta County Special Election on Tuesday: No Hand Counting Due to Number of Voters, Vote Tabulating Machines Will Tabulate Votes*, KRCR (Nov. 6, 2023), <https://perma.cc/K2AA-KXP4> ("However, for this special election, they will not be hand-counting ballots, as Darling Allen said in the press conference Monday that the number of registered voters far exceeds the less than 5,000 needed to do a hand count in a special election.").

127. See Alan Riquelmy, *Election Observer Says No Major Issues in Shasta County Election*, COURTHOUSE NEWS SERV. (Nov. 17, 2023), <https://perma.cc/6765-RE8V> ("All things considered, the special election in Shasta County this month went off without a hitch.").

128. *Id.*

129. See Muller, *supra* note 5, at 567 (showing that from 2010 to 2020 the number of states with their house, senate, and governor controlled by the same party rose from twenty-five to twenty-six).

parties specifically earmarked to support litigation.¹³⁰ Muller argues these hydraulics have fueled the charged election dispute environment.¹³¹

According to Muller, candidates and political parties used to pick their election litigation battles carefully (given limited funds to challenge election rules) before a 2014 campaign finance law change permitting contributions earmarked specifically for litigation.¹³² Candidates and political parties would carefully assess whether a particular rule was likely to impact their candidates' chances before deciding to invest resources in fighting to change the law in court.¹³³ Now that candidates and campaigns have deep wells of funding for election-related litigation, Muller points out, candidates and campaigns face no downside to challenging virtually any aspect of how elections are run.¹³⁴

Recent history has demonstrated a desirable political side effect of unbounded election litigation spending: ginning up supporter passions.¹³⁵ Further feeding the fire is an enormous post-2020 influx of cash—on both ends of the political spectrum—to groups promising to “save democracy” through litigation efforts.¹³⁶

130. *See id.* at 563–67.

131. *See id.* at 562 (“Additionally, federal campaign finance law currently privileges donations earmarked for litigation. This gives campaigns incentives to focus on litigation-centric fundraising.”).

132. *See id.* at 563 (“In 2014, the combination of a Supreme Court decision and a federal statute yielded a new and powerful earmark for election litigation. Major parties’ litigation expenditures have dramatically increased ever since.”).

133. *Id.* at 566 (“Total legal expenditures in the 2010 cycle were around 1 percent of all expenditures from these six party entities and 0.8 percent in the 2012 cycle. In 2020, they were 3.7 percent of all expenditures.”).

134. *See id.* at 562.

135. *Id.* at 566 (noting Lisa Manheim’s phrase, “campaigning by litigation”).

136. *See, e.g.,* Brenda Wintrobe, *A Group Plans to Challenge Election Boards Nationwide. Maryland’s Is the First.*, THE BALTIMORE BANNER (Mar. 7, 2024), <https://perma.cc/FBT2-KK24> (“The lawsuit [targeting voter roll maintenance and voting machine reliability], filed by Maryland Election Integrity LLC and Missouri-based United Sovereign Americans, is the first of many suits United Sovereign Americans is planning nationwide, according to a spokesperson.”). Derek Muller notes that, in recent years, most outside groups involved in bringing election litigation challenges against how elections are run are “overwhelmingly left-of-center.” *See* Muller, *supra* note 5, at 579.

National and state political pressures, litigation earmarks, and a massive influx of cash for nonprofit litigation efforts are creating litigation minefields for LEOs. Politics has always complicated legal support for LEOs. Partisan attorneys representing candidates and political parties have always pushed for interpretations of state codes that benefit their side.¹³⁷ Recent events have turned up the temperature considerably.

III. PRELIMINARY THOUGHTS TO IMPROVE LEO LEGAL SUPPORT

Far more study of the LEO legal support is required both to assess the extent of need and identify prudent paths forward. That said, several avenues seem advisable.

First, this Essay joins the chorus of those calling for better-funded elections.¹³⁸ The twist added here is to recommend that state and local governments assess LEO legal needs and the cost of providing LEOs competent counsel.¹³⁹ County governments should share information and develop best practices in securing needed legal support for local election offices.¹⁴⁰ For their part, state legislatures should clarify whether private funding bans apply to individuals and groups providing LEO pro bono legal services.¹⁴¹ At the very least, such efforts will help LEOs and attorneys navigate this new terrain. When weighing whether to establish or continue private funding bans, states should consider potential consequences of leaving LEOs to fend for themselves: attrition and loss of institutional knowledge.

Second, states and the federal government should consider ways to stem the flow of election litigation.¹⁴² Clarifying election

137. *See, e.g.*, *Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.*, 58 A.3d 418, 421–23 (Del. 2013) (discussing how a local partisan committee argued for a particular definition of the word “incapacity” under state election statute).

138. *See supra* Part II.A.

139. *See supra* Part I.B.2.

140. *See supra* Part II.B.

141. *See supra* Part II.A.

142. *See supra* Part II.C.

codes is a necessary first step.¹⁴³ States and the federal government might also reconsider ways in which campaign finance rules contribute to a charged election litigation environment. Legislators might also consider ways to address political profiteering and grift—deliberate efforts to sow discord over how elections are run to score small dollar donations.¹⁴⁴ LEOs bear the direct effect of division-mongers.¹⁴⁵ This is no easy task. First Amendment protections are at their height when political speech is burdened. Yet creative solutions are sorely needed to stem the worst abuses.

Training is another important way to improve LEO legal support. County governments, state officials, bar associations, and law schools might consider developing programs for attorneys covering basic election law and election administration topics. As elections increasingly become flashpoints for litigation, the value of a corps of attorneys who understand both how elections work and the legal rules that govern them can help ensure that competent counsel is available and ready when needed. Particularly in states seeing high volumes of election litigation, this is already happening organically.

Even if attorneys who receive such training are never called upon to advise local election officials in their work, lawyers can play an important role in their communities helping a wide array of constituencies understand what the law requires and turning down the temperature when election disputes arise. To this end, election law training for students in law school and programs to place law students in internships and externships in election offices can help develop a pipeline of supportive, informed citizen-lawyers.

Finally, assuming litigation continues to plague the election space, states might consider innovating dispute resolution mechanisms to better manage disputes and prevent escalation. Streamlined administrative hearing processes, mediation channels, and even arbitration mechanisms could be pathways to reduce cost, save time, and relieve pressure on LEOs (and

143. *See supra* Part II.B.

144. *See supra* Part II.C.

145. *See supra* Part II.C.

courts).¹⁴⁶ Mapping how election disputes arise, who interested parties are, and how to establish better mechanisms to resolve disputes before they detonate should be prioritized. Election dispute resolution designers should anticipate complexity; interests and pressure points will shift election to election, with political winds and different individual personalities. Yet the field of dispute system design has a lot to offer.¹⁴⁷ Local and state governments and court systems should consider tapping experts in the dispute resolution field to give careful thought to how election disputes can be resolved most fairly, efficiently, and effectively.

CONCLUSION

It is unfortunate that we have arrived at a moment in U.S. history where greater legal support for LEOs is needed. Perhaps this period of heightened pressure on election officials will be a blip—maybe motivated public officials and civic groups will succeed in tamping down the pressures LEOs face. Until that day, more study is needed to assess LEO legal support needs and whether current avenues (and funding mechanisms) meet those needs. Ensuring local officials responsible for administering U.S. elections have adequate access to competent legal support is a pressing priority. Elections do not run themselves; democracy depends on it.

146. See generally Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO STATE J. ON DISP. RESOL. 325 (2012) (advocating for the increased use of mediation in election administration); Rebecca Green, *Arbitrating Ballot Battles?*, 104 KY. L.J. 699 (2016) (arguing that arbitration might be useful for certain election disputes).

147. See LISA BLOMGREN AMSLER ET AL., *DISPUTE SYSTEM DESIGN, PREVENTING, MANAGING, AND RESOLVING CONFLICT 7* (2020) (exploring the “applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict” rather than haphazardly coping with individual disputes in isolation).