

# What Private Foundations Can Do in a Contested Election

## What are contested elections?

States have different and specific legal definitions for this, but generally a contested election is when an election for any office hangs in the balance over a ballot count dispute. The process for resolving these disputes is often complicated, subject to a variety of laws, and tends to result in litigation before state and federal courts.

## Should we expect contested elections this year?

It's still 2020, right? Yes, we should probably expect contested elections at the local, state, and federal level, but nothing is certain. Given close races, more mailed-in ballots than normal, long lines at the polls, voter suppression tactics, and evidence-free rhetoric of election fraud by some prominent voices, nonprofits should be prepared for election administrators to take longer than normal before declaring winners, and for some races to be contested.

## Are private foundations able to participate in post-election advocacy when a winner hasn't been called?

Yes, but it's important how they frame their advocacy. No 501(c)(3) — including private foundations — can support or oppose candidates at any time, and although the IRS hasn't specifically held that candidates remain candidates until a winner is declared, it's likely the prohibition continues through post-election contests. But, just like before the election, there are opportunities for nonpartisan advocacy after the election. See Bolder Advocacy's [Keeping Nonpartisan During Election Season](#) for more.

## If a foundation can't support or oppose a candidate in a contested election, what's left for them to do?

It turns out, there's plenty for private foundations to do. Because they are able to fund and encourage and educate the public about voting in a nonpartisan way, they are also able to fund or advocate for the proper administration of post-Election Day processes. That can take many forms, as we'll cover below, but as long as the foundation frames its work to ensure all votes legally cast are counted, and that the processes of the state and federal government follow the law, it's probably in the clear. We say probably, because the IRS has not specifically addressed the issue.

## If a private foundation demands election officials to continue counting ballots in a contested election, and one of the candidates calls for the same thing, does that mean the foundation is improperly supporting that candidate?

Not necessarily. It's legally permissible for a private foundation to make these demands itself, or fund a public charity to do it. The key is having a nonpartisan purpose for the demand. 501(c)(3)s and partisan groups, candidates, or parties may be advocating for the same procedures in an election contest, but can have different motivations for the requests. If a 501(c)(3)'s reason is nonpartisan — for instance, trying to protect all voters' rights by ensuring all legally cast ballots are counted — it probably does not matter that one of the candidates makes the same demand because they believe it will help them win.

For example, in the 2000 presidential election narrow margins in Florida led to litigation and appeals to the Supreme Court. The Brennan Center, a 501(c)(3) public charity, submitted a friend-of-the-court brief in *Bush v. Gore* arguing that Florida should continue counting ballots as a matter of proper election administration and protecting the rights of voters. While the Brennan Center argued for the same thing as the Gore campaign, its work was still nonpartisan because the arguments were centered on voters' fundamental constitutional rights and not the partisan interests of the campaign. This is a high-profile example of how partisan and nonpartisan interests can legally coexist.

## What can other types of nonprofits like 501(c)(4) social welfare groups and 501(c)(5) labor organizations do in a contested election?

These organizations can do everything 501(c)(3)s can do, plus they can take it a step further and advocate for a particular candidate to win. However, federal tax law limits the amount of partisan work they can do to less than half of their overall activity. See page 15 of Bolder Advocacy's [The Connection](#) for more discussion on this limit. Private foundations cannot fund partisan work by these organizations, but can may be able to give grants for nonpartisan post-election work using expenditure responsibility grants with a clause strictly prohibiting support or opposition of candidates with private foundation funds. See [page 19 of Bolder Advocacy's Investing in Change](#) for more, and be sure to consult with counsel.

## What kinds of advocacy are available to 501(c)(3)s in a contested election?

A lot depends on the nature of the contest, and where things stand after the election. Generally, foundations can fund or engage in:

- **Administrative advocacy**, including advocacy around secretary of state certifications of the winners, and the process of counting of ballots.
- **Ballot chasing and curing**. If a voter submits a ballot that fails to meet requirements under state law (i.e. stray marks, wrong envelopes, their signature doesn't match the one on file, etc.),

nonprofits can contact those voters and help them fix the problem within the time limits set by state law.

- **Litigation**, including requests for emergency injunctive relief on and after Election Day, and submitting friend-of-the-court briefs before state and federal appellate courts.
- **Protests and other public gatherings**, demanding proper administration of all ballot counts and fidelity to election procedures under the law.
- **Direct advocacy** to members of legislative bodies or governors when they are making decisions that are critical to the disposition of an election. This includes calls for oversight, or weighing in on a state legislature's efforts to directly submit a slate of presidential electors in the event of perceived voting irregularities or a natural disaster. Some of this activity — for instance, demanding emergency legislation to be passed to aid in avoiding an election-related dispute — may be lobbying, so private foundations need to be mindful to avoid potential excise taxes for earmarking grants for or engaging in that work. This is why specific project or general support grants are particularly useful. [See page 13 of Bolder Advocacy's Investing in Change](#) for more

Remember, private foundations cannot fund or advocate in any of these ways if the purpose is to support or oppose a particular candidate.

## Are things more complicated if the presidential election is contested?

It can be. Presidential elections are really a series of 51 independent elections, all with different systems, for electors that determine the president through the Electoral College. Each of those can result in a contested election, like we saw in 2000 in Florida. But there are other potential areas for conflict including competing slates of electors from a single state. And if no candidate achieves a majority of electoral votes, the decision falls to the new Congress in a process called a [contingent election](#). Are these likely? Historically, no. But private foundations can play a role in these unusual circumstances based on the same rules outlined above.



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