



**Statement of Trevor Potter  
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**U.S. House Select Committee to Investigate  
the January 6th Attack on the United States Capitol**

**April 1, 2022**

Thank you for the opportunity to submit testimony before the Select Committee to Investigate the January 6th Attack on the United States Capitol. I am the founder and president of Campaign Legal Center (CLC), a nonpartisan 501(c)(3) organization dedicated to advancing American democracy through law. I am also a Republican former Commissioner and Chair of the Federal Election Commission, and served as General Counsel to John McCain's 2000 and 2008 presidential campaigns and Deputy General Counsel to President George H. W. Bush's 1988 Presidential campaign.

American democracy stands at a perilous crossroads: will it remain a country based on the rule of law and of truth, or fall to hidden manipulation and deception, and will the peaceful struggle to ensure representative self-government prevail over the fight for raw power? This Select Committee's urgent work to investigate the sources of what ails our political process and fueled the unprecedented attack on our Capitol is critical to begin reinforcing America's founding democratic ideals as a nation of integrity and freedom.

I testify before you to emphasize the threat that persistent lies about an allegedly "stolen election" present to our democratic institutions. The fiction that the voting and counting in the 2020 election was in any form illegitimate has been thoroughly debunked in court proceedings across the country, in experts' analyses,

and by the hardworking officials who oversaw the election. Nonetheless, the stolen election lies have persisted, creating a dangerous ecosystem in which contrived emergencies degrade public trust in elections, which is then used to justify changes in policy and law that impose real harms on our voting processes and the people who administer them.

The emerging threats to our democratic processes that I want to address here manifest in four main categories: the increasing number of proposed state bills and enacted laws that cynically limit eligible voters' access to the ballot; the proliferation of ad hoc, partisan reviews of election results; the widening of cracks in our legal framework that can be exploited by rogue actors to usurp the electoral power from the people; and the alarming increase of threats against election officials and the politicization of their roles. These efforts to cast doubt on our electoral system have led to a startling loss of trust in the American political system that will take concerted efforts to restore.

Although these problems are significant, I am confident they are solvable. The public's faith in the truth and in our democracy can overcome these difficult times. The federal government must help the truth prevail by enacting and enforcing laws that shore up our institutions and reduce the dangers imposed by the stolen election lies.

**A. Stolen election lies lead to harmful voting restrictions, improper government practices, and threats to election officials.**

Traditionally, the work of CLC and other voting rights and democracy reform organizations has emphasized combatting restrictions on the freedom to vote and improving voting access—from registration to the casting of ballots to the processing and tabulating stages. This work has taken on renewed importance in the face of the dramatic increase in state legislatures pushing bills that make it more difficult to vote for no good reason. But the nature of our work has also changed significantly since the post-election events that culminated on January 6, 2021. Now, democracy advocates must confront new hazards in the form of election sabotage and the

politization of election administration that, along with pre-election restrictions of the franchise, can damage the integrity of the entire electoral system. Addressing these mounting concerns is critical to advancing democracy and protecting the freedom to vote.

In this section of my testimony, I will briefly overview the stolen election lies that have escalated in recent years, and then will discuss in greater detail how those falsehoods have prompted real harms to voters, our democratic institutions, and the people who make our electoral system work.

The election skeptics cast doubt on time-tested and widely used programs that enable eligible voters to safely, conveniently, and securely exercise their freedom to vote—such as vote by mail, early voting, and accessible drop boxes—and have encouraged new laws that arbitrarily increase the costs of political participation. The falsehoods have led to partisan reviews of ballots and voting systems and have inspired new legislation that makes it easier for politicians to discard the expressed will of their voters. Distressingly, the lies endanger election officials with threats of violence, often forcing hardworking nonpartisan public servants out of their jobs and rousing highly partisan election conspiracists to try and replace them.

### **1. The stolen election lies are groundless and damaging.**

The proximate causes of the new subversive threats to American democracy are the widely dispersed lies that the 2020 presidential election was “stolen”, and that the winner is somehow illegitimate. Leading up to and since the 2020 election cycle, partisan actors have promoted the false narrative that there is widespread voter fraud in American elections and that their preferred candidates lose only because the other side cheated. Propagators of this conspiracy have used their stolen election lies to justify efforts to overturn the results of elections, to make voting harder, and to actually corrupt elections in the future.<sup>1</sup>

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<sup>1</sup> See, e.g., Nick Corasaniti & Reid J. Epstein, *How Republican States Are Expanding Their Power over Elections*, N.Y. Times (June 19, 2021), <https://www.nytimes.com/2021/06/19/us/politics/republican-states.html>; National Task Force on Election Crises, *Undermining Free & Fair Elections: An Update on the Risk of Election Crises*

For example, what started as online misinformation that voters in Arizona were being “forced to use felt-tipped Sharpie pens” that they wrongly believed voting machines would not count inspired the false allegation “that thousands of Trump votes would be thrown out in Arizona” and became part of a slew of election lies about the election results there.<sup>2</sup> This simple lie, quickly demonstrated by nonpartisan election officials to be false, might have been comical if it were not so destructive. But the falsehoods about sharpies and ballots went on to help generate frivolous lawsuits challenging Arizona’s results,<sup>3</sup> and led to armed protesters crowding outside a ballot-counting center calling for vote-counting to stop.<sup>4</sup> The election conspiracies in Arizona further prompted prominent elected officials to submit a falsified slate of alternative presidential electors to Congress contrary to the popular vote in that state, undertake a costly and damaging partisan review of the ballots in the state’s largest county, and propose and enact changes to state election law that reduce voter access and needlessly increase election costs and complexity.<sup>5</sup>

Other stolen election lies arose from partisans exploiting some voters’ misperception that all the eligible ballots would be processed and counted by the end of election day, and that they could expect final results that night. The timeline for when all votes are processed and counted is in part related to the volume of ballots

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Since November 2020 at 3 (July 14, 2021), <https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/60ecbb773b84fb5bce43c7fc/1626127223644/Task+Force+Progress+Report+%28July+2021%29.pdf>; see also States United Democracy Ctr., Protect Democracy, and Law Forward, Democracy Crisis Report Update: New Data and Trends Show the Warning Signs Have Intensified in the Last Two Months (June 10, 2021), [https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II\\_June-10\\_Final\\_v7.pdf](https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II_June-10_Final_v7.pdf); States United Democracy Ctr., Protect Democracy, and Law Forward, A Democracy Crisis in the Making (Apr. 22, 2021), <https://s3.documentcloud.org/documents/20688594/democracy-crisis-report-april-21.pdf>.

<sup>2</sup> *Official Information Regarding the Use of Sharpies in Maricopa County*, Citizens Clean Elections Comm’n, <https://www.azcleanelections.gov/election-security/sharpies> (last accessed Mar. 15, 2022); Rachel Leingang & McKenzie Sadeghi, *Fact check: Arizona election departments confirm Sharpies can be used on ballots*, USA Today (Nov. 5, 2022), <https://www.usatoday.com/story/news/factcheck/2020/11/04/fact-check-sharpiegate-controversy-arizona-false-claim/6164820002/>.

<sup>3</sup> Jim Rutenberg, et al., *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. Times (Jan 31, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

<sup>4</sup> Tony Romm, et al., *Facebook Bans ‘STOP THE STEAL’ Group Trump Allies Were Using to Organize Protests Against Vote Counting*, Wash. Post (Nov. 5, 2020), <https://www.washingtonpost.com/technology/2020/11/05/facebook-trump-protests/>.

<sup>5</sup> See States United Democracy Ctr. April and June Reports, *supra* note 1.

that election officials must accurately canvass. But perceived delays to the timeline are also directly related to whether state law allows election officials to preprocess early returned ballots to be ready to tabulate as soon as polls close.<sup>6</sup> Nearly every state in the country enables its election officials to preprocess valid ballots that are returned before election day by, for example, simply removing the ballot from its envelope, flattening it, and stacking it with other ballots to be ready for tabulation after polls close.<sup>7</sup> With millions of ballots to count, this preparation time adds up; preprocessing reduces the already significant strain on election day. States that limit or prohibit preprocessing—including closely contested states like Pennsylvania, Michigan, and Wisconsin—prolonged the counting process, which stolen election lie believers exploited to sow doubt in the election.<sup>8</sup> During this time, partisans used the delays they created in state law to promote their stolen election lies and pressure their constituents to launch “stop the count” movements that sought to distort election results by not tabulating lawful votes.<sup>9</sup>

The pressure campaign for partisans to subscribe to the stolen election lies has made the issue a national political litmus test for candidates across the country. During the height of the over sixty frivolous litigation contests challenging the 2020 results, former president Trump undertook an unrelenting attack on the election by using his bully pulpit to publicly incite his supporters and to privately seek to coerce

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<sup>6</sup> See, e.g., Derek Tisler, et al., *The Roadmap to the Official Count in an Unprecedented Election*, Brennan Ctr. for Justice (Oct. 26, 2020), <https://www.brennancenter.org/our-work/research-reports/roadmap-official-count-unprecedented-election>; Edward B. Foley & Charles Stewart III, *Explaining the Blue Shift in Election Canvassing*, J. of Pol. Institutions and Pol. Economy (Mar. 1, 2020), <http://dx.doi.org/10.2139/ssrn.3547734>.

<sup>7</sup> See Table 16: *When Absentee/Mail Ballot Processing and Counting Can Begin*, Nat’l Conf. of State Legislatures (Mar. 15, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-16-when-absentee-mail-ballot-processing-and-counting-can-begin.aspx>; Quinn Scanlan, *How battleground states process mail ballots -- and why it may mean delayed results*, ABC News (Oct. 30, 2020), <https://abcnews.go.com/Politics/battleground-states-process-mail-ballots-delayed-results/story?id=73717671>.

<sup>8</sup> See, e.g., Zach Montellaro, *Michigan, Pennsylvania and Wisconsin decided the 2016 election. We'll have to wait on them in 2020.*, Politico (Sept. 15, 2020), <https://www.politico.com/news/2020/09/15/swing-states-election-vote-count-michigan-pennsylvania-wisconsin-414465>; Miles Parks, *In Swing States, Officials Struggle To Process Ballots Early Due To Strict Local Laws*, NPR (Oct. 14, 2020), <https://www.npr.org/2020/10/14/922202497/in-swing-states-laws-add-pressure-prevent-officials-from-processing-ballots-earl>.

<sup>9</sup> See, e.g., Tresa Baldas, et al., *Chaos erupts at TCF Center as Republican vote challengers cry foul in Detroit*, Detroit Free Press (Nov. 4, 2020), <https://www.freep.com/story/news/politics/elections/2020/11/04/tcf-center-challengers-detroit-michigan/6164715002/>; Jim Rutenberg et al., *supra* note 5.

federal and state officials to throw out the popular election.<sup>10</sup> The lies spread online and on partisan media outlets, which were then promoted by hundreds of elected lawmakers who breached the public trust by magnifying the reach of these falsehoods.<sup>11</sup> The rising threat of political violence from these lies prompted the incumbent national security and federal law enforcement apparatus to reassure the public that the 2020 election was “the most secure in American history” with “no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised”<sup>12</sup> and no serious evidence of voter fraud.<sup>13</sup> But the mistrust already sown meant many “true believers” believed these statements too were false. Since then, even some prominent proponents of the stolen election lies have admitted as a defense in court that “[n]o reasonable person would conclude that the statements [challenging the 2020 election] were truly statements of fact.”<sup>14</sup> Nonetheless, the lies have continued, and are still believed by many.

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<sup>10</sup> Karen Yourish & Larry Buchanan, *Since Election Day, a Lot of Tweeting and Not Much Else for Trump*, N.Y. Times, Nov. 24, 2020, <https://www.nytimes.com/interactive/2020/11/24/us/politics/trump-twitter-tweets-election-results.html> (“In total, the president attacked the legitimacy of the election more than 400 times since Election Day, though his claims of fraud have been widely debunked”); Anita Kumar & Gabby Orr, *Inside Trump’s Pressure Campaign to Overturn the Election*, Politico (Dec. 21, 2020), [www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486](http://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486) (“In total, the president talked to at least 31 Republicans, encompassing mostly local and state officials from four critical battleground states he lost — Michigan, Arizona, Georgia and Pennsylvania. The contacts included at least 12 personal phone calls to 11 individuals, and at least four White House meetings with 20 Republican state lawmakers, party leaders and attorneys general, all people he hoped to win over to his side. Trump also spoke by phone about his efforts with numerous House Republicans and at least three current or incoming Senate Republicans.”).

<sup>11</sup> Jacobs Technion-Cornell Institute, VoterFraud2020 Twitter Database, <https://voterfraud2020.io/> (last visited Mar. 21, 2022); Justin Hendrix, *The Big Lie Is a Reality*, Just Security (Feb. 23, 2022), <https://www.justsecurity.org/80324/the-big-lie-is-a-reality/>; Representative Zoe Lofgren, Social Media Review (Jan. 31, 2021), <https://housedocs.house.gov/lofgren/SocialMediaReview8.pdf>.

<sup>12</sup> Cybersecurity and Infrastructure Security Agency, Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees (Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

<sup>13</sup> Adam Goldman & Zolan Kanno-Youngs, *F.B.I. Director Sees No Evidence of National Mail Voting Fraud Effort*, N.Y. Times (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/politics/fbi-director-voter-fraud.html> (quoting FBI director Christopher Wray); Michael Balsamo, *Disputing Trump, Barr says no widespread election fraud*, Associated Press (Dec. 1, 2020), <https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d> (quoting former Attorney General Bill Barr).

<sup>14</sup> Jane C. Timm, *Sidney Powell’s legal defense: ‘Reasonable people’ wouldn’t believe her election fraud claims*, NBC News (Mar. 23, 2021), <https://www.nbcnews.com/politics/donald-trump/sidney-powell-s-legal-defense-reasonable-people-wouldn-t-believe-n1261809> (citing Sidney Powell legal filing in a subsequent defamation case).

Our democratic institutions bent but ultimately held firm under the strain of the post-2020 election chaos that culminated with the January 6 attack on the Capitol and challenges to the electors. But the damage done, and the weaknesses exploited during that time, have laid the groundwork for future attacks against and within our electoral system. The former president has kept the stolen election lies narrative at the forefront,<sup>15</sup> and made a candidate's willingness to accept those falsehoods a salient political criterion in party politics.<sup>16</sup> The fabricated stolen election efforts have shifted political dynamics across the country, with one recent analysis finding that "163 Republicans who have embraced Trump's false claims are running for statewide positions that would give them authority over the administration of elections."<sup>17</sup> And numerous losing candidates for public office since the 2020 election have already harnessed the stolen election lies to cast doubt on their losses and the legitimacy of their opponents, no matter the margin of victory.<sup>18</sup>

These stolen election lies cast a dangerous shadow extending well beyond 2020. Proponents of the lies continue to interrogate election officials and demand they prove a negative—that no distortions affected the elections—as a justification to continue repeating falsehoods about the voting system indefinitely.<sup>19</sup> Researchers studying

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<sup>15</sup> See, e.g., Melissa Block, *The clear and present danger of Trump's enduring 'Big Lie'*, NPR (Dec. 23, 2021), <https://www.npr.org/2021/12/23/1065277246/trump-big-lie-jan-6-election>; Josh Dawsey, *Trump muses on war with Russia and praises Kim Jong Un*, Wash. Post (Mar. 6, 2022), <https://www.washingtonpost.com/nation/2022/03/06/trump-focuses-foreign-policy-speech-gops-top-donors/>.

<sup>16</sup> Calvin Woodward, *Trump's 'Big Lie' imperils Republicans who don't embrace it*, Associated Press (May 9, 2021), <https://apnews.com/article/michael-pence-donald-trump-election-2020-government-and-politics-0c07947f9fd2b9911b3006f0fc128ffd>.

<sup>17</sup> Ashley Parker, et al., *How Republicans became the party of Trump's election lie after Jan. 6*, Wash. Post (Jan. 5, 2022), [https://www.washingtonpost.com/politics/republicans-jan-6-election-lie/2022/01/05/82f4cad4-6cb6-11ec-974b-d1c6de8b26b0\\_story.html](https://www.washingtonpost.com/politics/republicans-jan-6-election-lie/2022/01/05/82f4cad4-6cb6-11ec-974b-d1c6de8b26b0_story.html).

<sup>18</sup> Numerous losing candidates have refused to concede because of trumped up lies about voting fraud. For example, upon losing to Congresswoman Karen Bass of California, challenger Errol Webber echoed President Trump's rhetoric, tweeting, "I will NOT concede. Every LEGAL vote needs to be counted!" In Maryland, candidate Kimberly Klacik cast doubt on the validity of mail-in votes, writing, "I beat my opponent on day of & in-person early voting, along with absentee. However, 97k mail in ballots were found in his favor?" See Teo Armus, *Echoing Trump, Congressional Candidates Refuse to Concede, Make Unproven Fraud Claims*, Wash. Post (Nov. 10, 2020), <https://www.washingtonpost.com/nation/2020/11/10/congress-trump-election-fraud-claim/>; see also John L. Dorman, *A Florida Republican who was defeated by 59 percentage points in a congressional special election won't concede*, Business Insider (Jan. 16, 2022), <https://www.businessinsider.com/florida-republican-mariner-wont-concede-cherfilus-mccormick-house-race-landslide-2022-1>.

<sup>19</sup> Jane Mayer, *The Big Money Behind the Big Lie*, The New Yorker (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie>.

misinformation predict that such manipulations of the truth and the public trust will continue on “for years or even decades.”<sup>20</sup>

## **2. The election falsehoods encourage laws that limit voter access.**

Even before the post-election chaos of 2020, early proponents of stolen election lies derided states that sought to make access to voting easier—during an unprecedented global pandemic—so their citizens could safely make their voices heard without putting their health in jeopardy.<sup>21</sup> The focus of the attack became voting by mail, where eligible registered voters receive a mailed ballot to their home and can return their voted ballot before election day, often by return mail or by dropping it off at a designated location.<sup>22</sup> This type of voting has been available for years in a range of states, with Colorado, Hawaii, Oregon, Washington, and Utah adopting a comprehensive vote by mail system before 2020 but still providing their citizens with alternative opportunities to vote in-person on election day.<sup>23</sup>

Despite the successful practices in these states, numerous studies showing vote by mail is safe and secure, and even many stolen election proponents themselves using that method to cast their own ballot, falsehoods about vote by mail took off in 2020.<sup>24</sup> The lies were deliberate and carefully planned, operating to convince a segment of voters that there would be two elections, one legitimate and comprised only of in-person, election-day voting, and a separate, fraudulent election where vote

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<sup>20</sup> Brian Fung & Rishi Iyengar, *Misinformation Channels Claim Biden Is No Longer President-elect. That’s Not True.*, CNN (Nov. 11, 2020), <https://www.cnn.com/2020/11/10/tech/biden-lost-pennsylvania-fact-check/index.html>.

<sup>21</sup> See, e.g., Miles Parks, *Ignoring FBI And Fellow Republicans, Trump Continues Assault On Mail-In Voting*, NPR (Aug. 28, 2020), <https://www.npr.org/2020/08/28/906676695/ignoring-fbi-and-fellow-republicans-trump-continues-assault-on-mail-in-voting>.

<sup>22</sup> See, e.g., Kimberly Hall, *Vote-By-Mail and Absentee Voting – Secure Alternatives to Cast Your Ballot in 2020*, Campaign Legal Ctr. (Aug. 27, 2020), <https://campaignlegal.org/update/vote-mail-and-absentee-voting-secure-alternatives-cast-your-ballot-2020>.

<sup>23</sup> Since 2020, three other states—California, Nevada, and Vermont—have also moved to a comprehensive vote by mail system. See *Table 18: States With All-Mail Elections*, Nat’l Conf. of State Legislatures (Feb. 3, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-18-states-with-all-mail-elections.aspx>.

<sup>24</sup> Tim Alberta, *A Journey Into the Heart of America’s Voting Paranoia*, Politico Magazine (Oct. 30, 2020), <https://www.politico.com/news/magazine/2020/10/30/voting-mail-election-2020-paranoia-433356>.

by mail ballots were frauds and favored one political party.<sup>25</sup> This highly effective and pernicious disinformation campaign against expanded voting access spread across the American political media ecosystem to mislead Americans that vote by mail is somehow unreliable or manipulable.<sup>26</sup>

In reality, our elections are quite secure, and the actual occurrence of voter fraud is vanishingly rare.<sup>27</sup> The many successes in the administration of the 2020 election and low occurrence of irregularities, even under strained pandemic conditions, only further proves the point.<sup>28</sup>

But the stolen election lies that attacked the innovations ensuring voting was safe and convenient in 2020—and producing record-breaking high turnout for voters of all political persuasions<sup>29</sup>—have continued and materialized in harmful changes in state laws. As Benjamin Ginsberg, a prominent Republican election lawyer, summarized, partisans who support the stolen election lies are “conjuring up charges of fraud to erect barriers to voting for people [the Republican party] fears won’t

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<sup>25</sup> Jonathan Swan & Zachary Basu, *A premeditated lie lit the fire*, Axios (Jan. 16, 2021), <https://www.axios.com/trump-election-premeditated-lie-ebaf4a1f-46bf-4c37-ba0d-3ed5536ef537.html?deepdive=1>.

<sup>26</sup> Yochai Benkler, et al., *Mail-In Voter Fraud: Anatomy of a Disinformation Campaign*, Harvard Berkman Klein Ctr. (Oct. 1, 2020), <https://cyber.harvard.edu/publication/2020/Mail-in-Voter-Fraud-Disinformation-2020>.

<sup>27</sup> See, e.g., Elaine Kamarck and Christine Stenglein, *Low Rates of Fraud in Vote-By-Mail States Show the Benefits Outweigh the Risks*, The Brookings Institution (June 2, 2020), <https://brook.gs/3ct24tJ> (analyzing elections in universal vote-by-mail states—Colorado, Hawaii, Oregon, Utah, and Washington—and discrediting fraud concerns); Wendy R. Weiser, *The False Narrative of Vote-by-Mail Fraud*, Brennan Ctr. for Justice (Apr. 10, 2020), [www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud](http://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud) (studying voter datasets and concluding it is “more likely for an American to be struck by lightning than to commit mail voting fraud”); Richard L. Hasen, *Election Meltdown 128* (2020) (summarizing that “[t]he issue of organized voter fraud has now been put to the test in courts and in social science” and amounts to no more than “a sham perpetuated by people who should know better, advanced for political advantage”).

<sup>28</sup> Nick Corasaniti, et al., *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. Times (Nov. 6, 2021), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html>; Christina A. Cassidy, *Far too little vote fraud to tip election to Trump, AP finds*, Associated Press (Dec. 14, 2021), <https://apnews.com/article/voter-fraud-election-2020-joe-biden-donald-trump-7fcb6f134e528fee8237c7601db3328f>; Jane Mayer, *supra* note 19 (stating, for example, that “data on Arizona, the putative center of the storm, is not exactly alarming: of the millions of votes cast in the state from 2016 to 2020, only nine individuals were convicted of fraud. Each instance involved someone casting a duplicate ballot in another state. There were no recorded cases of identity fraud, ballot stuffing, voting by non-citizens, or other nefarious schemes. The numbers confirm that there is *some* voter fraud, or at least confusion, but not remotely enough to affect election outcomes”).

<sup>29</sup> Drew DeSilver, *Turnout soared in 2020 as nearly two-thirds of eligible U.S. voters cast ballots for president*, Pew Research Ctr. (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/> (collecting turnout sources).

support its candidates.”<sup>30</sup> The falsehoods have inspired a well-funded national movement that exploits the stolen election lies and baseless claims of fraud to make voting needlessly harder; it undermines the basic democratic guarantee that all eligible voters must be empowered to vote and have that vote counted.<sup>31</sup>

At the end of the 2021 state legislative sessions, states across the country had enacted a record-shattering number of new voting restrictions that often derived from the stolen election lies. In total, state legislators proposed 581 new bills that experts say would have made voting more difficult.<sup>32</sup> Lawmakers in 21 states enacted into law 52 of those proposed bills—many of which were omnibus bills containing dozens of new restrictions—to make voting more difficult.<sup>33</sup> This steep increase in new anti-voter laws far exceeded the previous high water mark set with the 19 total voting restrictions enacted in 2011.<sup>34</sup>

Recent laws enacted in Texas and Georgia provide two of the most glaring examples. In those states, lawmakers hastily pushed through two broad election law measures—known as Georgia S.B. 202 and Texas S.B. 1—that dramatically changed the states’ voting processes to make access to the ballot more difficult overall. The legislatures in both states did so by engaging in procedural maneuvering that limited public input, relying on politically motivated outside organizations to draft numerous

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<sup>30</sup> Jeremy W. Peters, *In Restricting Early Voting, the Right Sees a New ‘Center of Gravity’*, N.Y. Times (Mar. 24, 2021), <https://www.nytimes.com/2021/03/19/us/politics/republicans-trump-voting-rights.html/>.

<sup>31</sup> Jane Mayer, *supra* note 19.

<sup>32</sup> These totals from the 2021 legislative sessions are derived from trackers at the Brennan Center for Justice, the Voting Rights Lab, and FiveThirtyEight. *See, e.g.*, Voting Rights Lab, Comprehensive Bill Search, <https://tracker.votingrightslab.org/pending/search> (last accessed Mar. 23, 2022); Kaleigh Rogers, *The Big Lie’s Long Shadow*, FiveThirtyEight (Jan. 12, 2022), <https://fivethirtyeight.com/features/the-big-lie-voting-laws/>; Nathaniel Rakich & Elena Mejia, *Texas’s New Law Is The Climax Of A Record-Shattering Year For Voting Restrictions*, FiveThirtyEight (Sept. 8, 2021), <https://fivethirtyeight.com/features/texas-new-law-is-the-climax-of-a-record-shattering-year-for-voting-restrictions/>; *Voting Laws Roundup: December 2021*, Brennan Ctr. for Justice (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

<sup>33</sup> *See* sources cited *supra* note 32.

<sup>34</sup> Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, Brennan Ctr. for Justice (Oct. 3, 2011), <https://www.brennancenter.org/our-work/research-reports/voting-law-changes-2012/>.

provisions, and at times admitting that the changes were to serve a political calculation rather than bolster a fair voting process.<sup>35</sup>

Among other restrictions, both laws reduce the applicable time periods to request a mail-in ballot, and then add confusing requirements for voters submitting a vote by mail ballot or an application for a ballot to provide additional information that does not correlate with voting eligibility and disrupts voters' settled expectations. So far, the results of the two new laws are that fewer eligible voters, and in particular voters of color, are able to participate in the political process. In Texas this year, provisions of S.B. 1 resulted in election officials disqualifying vote by mail ballots at abnormally high rates during the state's 2022 primary.<sup>36</sup> Roughly 13% of all submitted vote by mail ballots were discarded as a direct result of the new restrictive legal requirements, while experts say that any rejection rate above 2% is cause for concern in a typical election.<sup>37</sup> The result was that 22,898 likely eligible voters in Texas did not have their ballots counted during the primary because of new hurdles S.B. 1 put in place.<sup>38</sup> In Georgia, S.B. 202's changed requirements also led to election officials rejecting 4% of mail-in ballot request forms—up from fewer than 1% before the new law's restrictions were enacted. In a state like Georgia, where the margin of victory is often narrow, such a high number of voter rejections could make the difference in close elections.

Texas' and Georgia's new restrictions are unfortunately not outliers. Florida in 2021 similarly enacted an omnibus restrictive voting law, S.B. 90, that also increased

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<sup>35</sup> See *Exclusive: Documented Obtains Recording of 3 Hour Long Voter Suppression Strategy Session Hosted by ALEC*, Documented (Dec. 6, 2021), <https://documented.net/investigations/exclusive-documented-obtains-recording-of-3-hour-long-voter-suppression-strategy-session-hosted-by-alec>; Aris Folley, *Georgia's GOP House Speaker says vote-by-mail system would be 'devastating to Republicans'*, The Hill (Apr. 4, 2020), <https://thehill.com/homenews/state-watch/490879-georgias-gop-house-speaker-says-vote-by-mail-system-would-be-devastating>; Stephen Fowler and David Armstrong, *16 Years Later, Georgia Lawmakers Flip Views On Absentee Voting*, Georgia Public Broadcasting (Mar. 7, 2021), <https://www.gpb.org/news/2021/03/07/16-years-later-georgia-lawmakers-flip-views-on-absentee-voting>.

<sup>36</sup> Paul J. Weber & Acacia Coronado, *Texas mail ballot rejections soar under new restrictions*, Associated Press (Mar. 16, 2022), <https://apnews.com/article/2022-midterm-elections-elections-texas-voting-only-on-ap-45ba51fe9dd951a0f82015bd6bd9ff41>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

the costs of voting by mail and risks heightened rejections of eligible voters as in Georgia and Texas.<sup>39</sup> Arizona, among several other restrictive laws, enacted H.B. 1485<sup>40</sup> that made the State's permanent early voting list no longer permanent because declining to vote would trigger eligible voters being kicked off the list.<sup>41</sup> Montana enacted numerous new laws—H.B. 176, H.B. 506, and S.B. 169—that in effect make it harder for students and Native voters to participate in the political process.<sup>42</sup> And Iowa enacted S.F. 413, which makes voting more burdensome at nearly every stage of the process by significantly shortening available voting hours and opportunities.<sup>43</sup> All of these bills and others have drawn costly litigation, requiring taxpayers to expend huge sums to defend laws that make it harder for them to vote, and are based on lies about elections rather than any empirical need to disrupt the valid ballot security measures already in place.<sup>44</sup>

The harmful results of the 2021 legislative session are far from the last word about what the stolen election lies have done to reshape voting in America. This year, in 2022, state legislatures across the country are back to work building on the election falsehoods to continue making voting harder for their citizens. As of March 2022, numerous proposed bills that are even more extreme than those presented in 2021 are making their way through States' legislatures.<sup>45</sup>

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<sup>39</sup> Lawrence Mower, *Florida Senate passes law calling for new elections security office under DeSantis control*, Miami Herald (Mar. 6, 2022), <https://www.miamiherald.com/news/politics-government/state-politics/article259083293.html>.

<sup>40</sup> H.B. 1485, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

<sup>41</sup> Ben Giles, *Arizona Republicans Enact Sweeping Changes To State's Early Voting List*, NPR (May 11, 2021), <https://www.npr.org/2021/05/11/995998370/arizona-republicans-enact-sweeping-changes-to-states-early-voting-list>.

<sup>42</sup> Iris Samuels, *Lawsuit argues new Montana law suppresses student vote*, Associated Press (Oct. 12, 2021), <https://apnews.com/article/congress-university-of-montana-montana-helena-voter-registration-1e8774b19ba6faaa2165a96cf9e4e89e>; Kevin Trevelyan, *Advocates Fear Montana's New Ballot Law Could Harm Voters Who Struggle To Be Heard*, NPR (May 25, 2021), <https://www.npr.org/2021/05/25/999904063/advocates-fear-montanas-new-ballot-law-could-harm-voters-who-struggle-to-be-hear>.

<sup>43</sup> Stephen Gruber-Miller, *Gov. Kim Reynolds signs law shortening Iowa's early and Election Day voting*, Des Moines Reg. (Mar. 9, 2021), <https://www.desmoinesregister.com/story/news/politics/2021/03/08/iowa-governor-kim-reynolds-signs-law-shortening-early-voting-closing-polls-earlier-election-day/6869317002/>.

<sup>44</sup> See, e.g., *Voting Rights Litigation Tracker*, Brennan Ctr. for Justice (Mar. 22, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker>.

<sup>45</sup> See e.g., *Voting Laws Roundup: February 2022*, Brennan Ctr. for Justice (Feb. 9, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022>.

For example, Arizona legislators have rushed to introduce over a hundred election bills that would politicize the State’s election administration processes and propose substantial cutbacks to voting options that have historically eased the burdens on Arizona voters.<sup>46</sup> One of the most egregious proposals that Arizona recently enacted into law, H.B. 2492, adds significant new voter registration and voter eligibility requirements that proponents knowingly enacted to violate federal law.<sup>47</sup> Among other extreme provisions, H.B. 2492 feeds off the stolen election lies by demanding that all voters provide costly and at times inaccessible documentary proof of U.S. citizenship and proof of current residence to be eligible to vote; conditioning ability to register on whether a voter submits a state registration form or federal registration form; targeting naturalized U.S. citizens by mandating registrants disclose their place of birth, even though that is immaterial to eligibility; requiring state officials to check voters against inaccurate and stale databases to initiate purging them from the registration rolls, and then subjecting them to potential criminal prosecution; and prohibiting an entire class of eligible registered voters from using vote by mail opportunities and voting in presidential elections at all.<sup>48</sup>

Additionally, a law that recently passed in Florida, S.B. 254, creates a new election crimes “police force”—a measure local election officials deemed a “recipe for disaster” that seeks to placate stolen election lie proponents and invites the harassment of eligible voters.<sup>49</sup> Georgia lawmakers have taken similar steps to advance H.B. 1464, which would, along with other disruptive election law changes,

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<sup>46</sup> Kirk Siegler & Liz Baker, *Arizona Republicans continue pushing voting restrictions, risking backfire*, NPR (Mar. 4, 2022), <https://www.npr.org/2022/03/04/1083501487/arizona-republicans-continue-pushing-voting-restrictions-risking-backfire>.

<sup>47</sup> H.B. 2492, 56th Leg., 1st Reg. Sess. (Ariz. 2022).

<sup>48</sup> Ray Stern, *Arizona requires proof of citizenship for voters, under bill signed by Gov. Ducey*, Arizona Republic (Mar. 29, 2022), <https://www.azcentral.com/story/news/politics/elections/2022/03/30/proof-citizenship-bill-arizona-voters-signed-gov-ducey/7221503001/>; Katya Schwenk, *‘Extreme’ Arizona Elections Bills Inching Closer to Law*, Phoenix New Times (March 30, 2022), <https://www.phoenixnewtimes.com/news/extreme-arizona-elections-bills-inching-closer-to-law-13323436>; Ray Stern, *Would proof-of-citizenship bill really purge 200K voters? Answers mixed*, Arizona Republic (Mar. 29, 2022), <https://www.azcentral.com/story/news/politics/legislature/2022/03/29/arizona-bill-proof-citizenship-voters-legal-issues/7188177001/>.

<sup>49</sup> Gary Fineout, *Legislature gives DeSantis new election police to target voter fraud in Florida*, Politico (Mar. 10, 2022), <https://www.politico.com/news/2022/03/10/desantis-gets-florida-election-police-00015926>.

also create a broad-mandated election investigation task force that nonpartisan election officials oppose.<sup>50</sup> And Idaho legislators have pushed two bills, H.B. 692 and H.B. 693, that reduce voting opportunities and that proponents have explicitly tied to their 2020 stolen election lies.<sup>51</sup> These are among many other examples of state lawmakers continuing to make policy decisions based on myths about the 2020 presidential results, and currying political favor with the proponents of those falsehoods.

Moreover, some key states have continued their unwillingness to make positive changes in state election law that would give voters greater faith in our elections. Most notable are Pennsylvania, Michigan, and Wisconsin, which, as described above, have continued their refusal to implement adequate procedures for election officials to preprocess early received ballots to lessen the overwhelming work on election day, enable quicker results, and reduce the ability of election conspiracists to sow doubt during the post-election day period. Pennsylvania failed to enact legislation that would give election officials more time to process vote by mail ballots.<sup>52</sup> Wisconsin lawmakers have likewise declined to take up a proposal that would allow preprocessing and ease election day burdens.<sup>53</sup> Michigan officials changed the law in late 2020 to permit some larger cities to open ballot envelopes one day before election day, but this slight change was inadequate to allow for proper preprocessing.<sup>54</sup> Following the 2020 election, some Michigan lawmakers wanted to go the opposite

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<sup>50</sup> See, e.g., Jeff Amy, *Georgia Republicans seek further changes to election laws*, Associated Press (Mar. 16, 2022), <https://apnews.com/article/2022-midterm-elections-voting-donald-trump-elections-atlanta-c6484e2653e93bb8885b6273f65c1cab>; Maya King & Nick Corasaniti, *Local Election Officials in Georgia Oppose G.O.P. Election Bill*, N.Y. Times (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/us/politics/georgia-election-bill.html>.

<sup>51</sup> Clark Corbin, *Idaho legislative committee advances to bills making last-minute voting changes*, Idaho Capital Sun (Mar. 2, 2022), <https://idahocapitalsun.com/2022/03/02/idaho-legislative-committee-advances-to-bills-making-last-minute-voting-changes/>.

<sup>52</sup> Stephen Caruso, *Little has changed for Pennsylvania election officials, voters heading into 2022*, Pennsylvania Capital-Star (Mar. 18, 2022), <https://www.penncapital-star.com/civil-rights-social-justice/little-has-changed-for-pennsylvania-election-officials-voters-heading-into-2022/>.

<sup>53</sup> See Shawn Johnson, *Wisconsin bill to allow for early canvass of absentee ballots likely dead*, Wisc. Public Radio (Mar. 8, 2022), <https://www.wpr.org/wisconsin-bill-allow-early-canvass-absentee-ballots-likely-dead>.

<sup>54</sup> Jonathan Oosting, *Clerks: Michigan needs practical election reforms, not partisan posturing*, Bridge Michigan (Mar. 1, 2022), <https://www.bridgemi.com/michigan-government/clerks-michigan-needs-practical-election-reforms-not-partisan-posturing>.

direction and make ballot counting even more difficult. Instead of allowing election officials added time to preprocess ballots, the lawmakers introduced a bill that would have mandated vote-counting stop the day after election day, regardless of whether all ballots were counted.<sup>55</sup> States failing to make necessary and noncontroversial changes to avoid prolonged vote counting risks repeating the same mistakes of the 2020 election that gave room for the stolen election lies to develop.

The choices undertaken by legislators to give credence to stolen election lies by undermining our voting system are deeply misguided. Alternatively, bipartisan groups of lawmakers in some states have rightly taken the lesson of the 2020 election to be that expansions to voter access help all voters and do not benefit one political party over another. Kentucky is an example of productive, bipartisan lawmaking to make voting easier without compromising election security. The state recently enacted legislation to increase voting options and election security (at least as compared to pre-pandemic elections), including an expansion of early voting, an online portal for requesting a mail-in ballot, and a gradual transition to voting systems that guarantee a paper ballot trail.<sup>56</sup> Likewise, Utah's legislature rejected a proposed bill that would have eliminated Utah's comprehensive vote-by-mail system, H.B. 371, because a bipartisan group of lawmakers spurned the baseless claims of fraud and understood that expansions to voting help all citizens.<sup>57</sup> Indeed, in Virginia, which has in recent years enacted many reliable expansions that improve voting access, saw historic high voter turnout in the election of a Republican governor, further disproving the notion that letting more people vote redounds to the advantage of one political party.<sup>58</sup>

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<sup>55</sup> See S.B. 299, 100th Leg., 1st Reg. Sess. (Mich. 2021).

<sup>56</sup> Bruce Schreiner, *Kentucky Governor Signs Bipartisan Early Voting Measure*, Associated Press (Apr. 7, 2021), <https://www.usnews.com/news/politics/articles/2021-04-07/kentucky-governor-signs-bipartisan-early-voting-measure>.

<sup>57</sup> Bryan Schott, *Utah House committee rejects baseless claims of election fraud; soundly defeats bill to end universal vote by mail*, Salt Lake Trib. (Feb. 23, 2022), <https://www.sltrib.com/news/politics/2022/02/23/utah-house-committee/>.

<sup>58</sup> Reid J. Epstein, *The Democratic Turnout Myth Unravels*, N.Y. Times (Nov. 6, 2021), <https://www.nytimes.com/2021/11/04/us/politics/democrats-turnout-virginia.html>.

The last two years of states' efforts to make significant cutbacks to the freedom to vote show that groundless stolen election myths are resulting in real world consequences at voters' expense. Falsely asserting that voting by mail is somehow illegitimate (while often using that mechanism oneself) or that expanding times to vote somehow increases the risk of corruption is not empty rhetoric. Voters carry the burdens of these lies, and in the end they result in bad policy that makes the costs of participating in our democratic process higher for no valid reason.

**3. The election falsehoods encourage partisan ballot reviews and partisan election takeovers that undermine the integrity of the voting system.**

The stolen election lies have also led to problematic new laws and practices that hyper-politicize the administration of elections and reviews of their results. This falls into two main categories: the inception of partisan sham audits that question lawfully certified results, and the attempted partisan usurpation of authority over elections administration that shifts control from designated election officials to political actors. These transformations that arise from the stolen election lies pose a tremendous threat to the proper functioning of, and the people's trust in, our voting system.

**i. Post-election partisan sham “audits” diminish trust in elections.**

True post-election audits, in which a subset of the ballots cast in each county are hand counted to verify the accuracy of the initial reported results, are standard practice in many states across the country.<sup>59</sup> But following the 2020 election, partisan actors in certain states sought to vindicate their falsehoods by undertaking unreliable post-certification reviews of the final results. Unlike standard post-election audits—which include numerous safeguards to ensure reliability and transparency, and

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<sup>59</sup> See *Post-Election Audits*, Nat'l Conf. of State Legislatures (Oct. 25, 2019), <https://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx>.

which serve a valuable role in our democracy—these ad hoc partisan investigations employ unqualified third parties using unreliable techniques to go on fishing expeditions for political fodder. Such sham investigations that build off the stolen election lies threaten to undermine confidence in our election systems.

The most infamous of these efforts, in Maricopa County, Arizona, illustrates the deficiencies and dangers of post-election partisan reviews that operate outside the typical audit framework. Roughly 10,000 votes separated the winner and loser in Arizona’s presidential election results in 2020.<sup>60</sup> A standard post-election audit conducted by a bipartisan group of election officials under state law found no irregularities.<sup>61</sup> But dissatisfied with this outcome, and under pressure from supporters of the stolen election lies, Arizona’s state senate leadership authorized a so-called “forensic audit” of the results only in Maricopa County—Arizona’s largest and most diverse county.<sup>62</sup> The legislature demanded—on threat of criminal prosecution—that Maricopa County officials turn over voter equipment and millions of ballots to a contractor called Cyber Ninjas that had no relevant experience in election work, dubious fundraising sources, unambiguous partisan and financial incentives, and volunteer staff comprised of aggrieved supporters of the losing presidential candidate.<sup>63</sup>

The unprofessional and partisan Cyber Ninjas process ultimately confirmed that the announced winner of Arizona’s presidential election did in fact receive the

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<sup>60</sup> See *Arizona Election Results*, State of Ariz., <https://results.arizona.vote/#!/featured/18/0> (last visited Mar. 19, 2022).

<sup>61</sup> See Jonathan Bydlak, et al., Brennan Ctr. for Justice, *Partisan Election Review Efforts in Five States* 3-4 (July 8, 2021), <https://www.brennancenter.org/sites/default/files/2021-07/Partisan%20Election%20Review%20Efforts%20Across%20the%20United%20States%20in%202021%20-%2007.08.21.pdf>.

<sup>62</sup> See Jonathan Bydlak, et al., *supra* note 62, at 5-6; Bob Christie, *Arizona Senate Releases More Records of 2020 Election Review*, Associated Press (Sept. 1, 2021), <https://apnews.com/article/elections-senate-elections-election-recounts-87a4805f495f9d4cfddf5827429ab105>.

<sup>63</sup> See, e.g., Trey Grayson and Barry C. Burden, Report on the Cyber Ninjas Review of the 2020 Presidential and U.S. Senatorial Elections in Maricopa County, Arizona, States United Democracy Ctr. (June 22, 2021); Stephen Richer, *The Madness of the Maricopa County Election Audit*, National Review (May 27, 2021), <https://www.nationalreview.com/2021/05/the-madness-of-the-maricopa-county-election-audit/>; Dan Zak, *The Mess in Maricopa*, Washington Post (May 21, 2021), <https://www.washingtonpost.com/lifestyle/2021/05/21/arizona-election-audit-trump-maricopa/>.

most votes. But it nevertheless raised several baseless claims about the security of Arizona's elections,<sup>64</sup> which has provided a pretext for Arizona lawmakers to foment skepticism of the results and propose changes in Arizona law that would make voting access harder and election administration more partisan.<sup>65</sup> Despite Maricopa County publishing an exhaustive report thoroughly debunking the conspiracies promoted in the Cyber Ninjas report, polls show that the damage to Arizonans' faith in the integrity of the state's elections was already done just by having the sham review at all.<sup>66</sup> Only 36% of those polled believe that the Cyber Ninjas review proved the fair winner in Maricopa County, and a majority of Republicans still rejected that topline finding, choosing to believe instead that the process found significant fraud to further validate the stolen election lies.<sup>67</sup> The tangible costs go even further, with the Cyber Ninjas process now running up a \$4 million bill to taxpayers to replace compromised election equipment and address numerous legal disputes.<sup>68</sup>

Unfortunately, Arizona's error-prone, costly, and partisan-motivated "investigation" has not been an isolated occurrence.<sup>69</sup> Undeterred by the roundly rejected and wasteful Cyber Ninjas review, other states have followed Arizona's lead to undertake their own partisan election investigations that further damage faith in our voting systems. After the Governor vetoed the Pennsylvania legislature's

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<sup>64</sup> Ben Giles, *The Discredited GOP Election Review in Arizona's Largest County Also Finds Biden Won*, NPR (Sept. 24, 2021), <https://www.npr.org/2021/09/24/1040327483/the-controversial-election-review-in-arizona-confirms-bidens-win>.

<sup>65</sup> Miles Parks, *Experts Call It a 'Clown Show' but Arizona 'Audit' Is a Disinformation Blueprint*, NPR (June 3, 2021), <https://www.npr.org/2021/06/03/1000954549/experts-call-it-a-clown-show-but-arizona-audit-is-a-disinformation-blueprint>.

<sup>66</sup> See Maricopa County Elections Department, *Correcting the Record* (Jan. 2022), <https://recorder.maricopa.gov/justthefacts/pdf/Correcting%20The%20Record%20-%20January%202022%20Report.pdf>.

<sup>67</sup> Erin Snodgrass, *The much-maligned Arizona election audit reinforced doubt about the 2020 election results, according to a new poll*, Business Insider (Nov. 15, 2021), <https://www.businessinsider.com/arizona-election-audit-reinforced-doubt-about-2020-election-results-2021-11>.

<sup>68</sup> Mary Jo Pitzl, *How the price tag of the Arizona Senate's review of the 2020 election grew from \$150K to more than \$4M*, Arizona Republic (Feb. 23, 2022), <https://www.azcentral.com/story/news/politics/arizona/2022/02/23/arizona-audit-cost-to-taxpayers-for-2020-election-review-tops-4-million/6829459001/>.

<sup>69</sup> See *Not an Audit*, States United Action, Fair Fight Action, United to Protect Democracy, <https://notanaudit.com/> (last visited Mar. 31, 2022).

proposed wide-ranging measure to rewrite the state’s election law, including provisions that would enable partisan officials to sabotage elections, lawmakers turned to other methods to further their stolen election lies. In September 2021, state senators in Pennsylvania began what they called a “forensic investigation” of the election that was decided and certified almost a year prior.<sup>70</sup> The investigation launched a sweeping, ad hoc, secretive, and standardless review of ballots, which, among other things, attempted to subpoena the private information of more than nine million registered voters for analysis by a firm with no experience in election law or data analytics.<sup>71</sup> When details of the contract with the audit company were eventually released to the public, more questions than answers remained and it is unclear if the results of the “investigation” due in May 2022 will be released for public scrutiny.<sup>72</sup>

In Texas, just days after the conclusion of the Arizona sham review and hours after a request from the former president, the Texas Secretary of State’s office announced a “full forensic audit” of the 2020 general election in four Texas counties: Collin, Dallas, Harris, and Tarrant.<sup>73</sup> Unsurprisingly, the first batch of results of the review found nothing out of the ordinary.<sup>74</sup> But regardless, the efforts undertaken gave election skeptics more reasons to further their lies about the results—even in a state that the former president won.

Finally, in Wisconsin, a top state lawmaker hired former Wisconsin Supreme Court Justice Michael Gableman to oversee a partisan investigation of the 2020

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<sup>70</sup> Andrew Seidman & Jonathan Lai, *What to know about Pennsylvania Republicans’ investigation of the 2020 election*, *The Phila. Inquirer* (Sept. 29, 2021), <https://www.inquirer.com/politics/pennsylvania/pennsylvania-election-audit-2021-updates-results-20210922.html>.

<sup>71</sup> States United Democracy Ctr. June Report, *supra* note 1.

<sup>72</sup> Sam Dunklau, *Pa. Senate election probe contract doesn’t say if the public will see the results, among other things*, *WITF* (Dec. 9, 2021), <https://www.witf.org/2021/12/07/pa-senate-election-probe-contract-doesnt-say-if-the-public-will-see-the-results-among-other-things/>.

<sup>73</sup> Neelam Bohra, *Texas secretary of state’s office auditing four counties’ 2020 elections months after an official called the statewide process “smooth and secure”*, *The Texas Tribune* (Sept. 23, 2021), <https://www.texastribune.org/2021/09/23/texas-2020-election-audit/>.

<sup>74</sup> Alexa Ura & Allyson Waller, *First part of Texas’ 2020 election audit reveals few issues, echoes findings from review processes already in place*, *The Texas Tribune* (Dec. 31, 2021), <https://www.texastribune.org/2021/12/31/secretary-state-texas-election-audit/>.

election, announcing the selection at his political party's annual convention.<sup>75</sup> Gableman's alleged vow to act as a neutral arbiter with no preconceived conclusions was inconsistent with his previous public and private efforts to spread the stolen election lies.<sup>76</sup> When Gableman released his 136-page report to the General Assembly in February 2022, he embraced fringe election conspiracies and advocated for the decertification of the 2020 election results—a proposal both impossible and unlawful.<sup>77</sup>

While these partisan audits have largely gone unaddressed and seem to be further expanding to other states, the U.S. Department of Justice has published warnings about their harms to our democratic process. In July 2021, the Attorney General released guidance to ensure that states comply with federal law if conducting post-election “audits.”<sup>78</sup> The Attorney General's stated primary concerns with these purported audits are two-fold: the risk to compromising election records, as happened in Arizona, and the threats of voter intimidation, such as those associated with stolen election conspiracists going door-to-door to interrogate voters in North Carolina, Colorado, and elsewhere.<sup>79</sup> Along these lines, the Attorney General sent a letter to

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<sup>75</sup> Shawn Johnson, *Following Warning By Trump, Vos Announces Former Justice Will Lead Assembly GOP Election Probe*, Wisc. Public Radio (June 26, 2021), <https://www.wpr.org/following-warning-trump-vos-announces-former-justice-will-lead-assembly-gop-election-probe>.

<sup>76</sup> Patrick Marley, *Michael Gableman said bureaucrats 'stole our votes' before he was put in charge of reviewing 2020 election*, Milwaukee Journal Sentinel (Jan. 6, 2022), <https://www.jsonline.com/story/news/politics/2021/08/09/michael-gableman-said-election-stolen-before-put-charge-wisconsin-review/5518815001/>; Scott Bauer, *Ex-justice's Wisconsin election probe drags as critics scoff*, Associated Press (Feb. 7, 2022), <https://apnews.com/article/joe-biden-wisconsin-elections-racial-injustice-election-2020-9f9ce4a95e3d21bebb4ef7bd9543146f>.

<sup>77</sup> *GOP investigator suggests Wisconsin Legislature decertify 2020 election results*, WISN (Mar. 1, 2022) <https://www.wisn.com/article/wisconsin-republican-report-suggests-decertifying-2020-election-results/39271268>; Zach Montellaro, *Wisconsin GOP's 2020 report embraces fringe election decertification theory*, Politico (Mar. 1, 2022), [www.politico.com/news/2022/03/01/wisconsin-republicans-embrace-election-decertification-00012793](http://www.politico.com/news/2022/03/01/wisconsin-republicans-embrace-election-decertification-00012793).

<sup>78</sup> U.S. Dep't of Justice, *Justice Department Issues Guidance on Federal Statutes Regarding Voting Methods and Post-Election "Audits"* (July 28, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-guidance-federal-statutes-regarding-voting-methods-and-post>.

<sup>79</sup> See, e.g., Nicholas Riccardi, *Lawsuit seeks to stop group's door-to-door voter fraud hunt*, Associated Press (Mar. 9, 2022), <https://apnews.com/article/voting-rights-2022-midterm-elections-biden-steve-bannon-colorado-63beba2f69226f53ed305457c47a83ea>; Press Release, *Statement Regarding Door-to-Door Canvassers Requesting Voter Information*, North Carolina State Board of Elections (Feb. 18, 2022), <https://www.ncsbe.gov/news/press-releases/2022/02/18/statement-regarding-door-door-canvassers-requesting-voter-information>.

the organizers of the Arizona audit, which lead them to drop a planned canvass of voters under the threat of federal enforcement action.<sup>80</sup>

These partisan-driven, costly, and amateur reviews of elections by lawmakers and inexperienced third parties feed the stolen election narrative. They are at best redundant with the states' existing legitimate audit procedures that are dependable and designed by experts in the field of election administration. More dangerously, the so-called "fraudits" further erode trust in democracy, and the fabricated results can be used as a cover story for partisans' efforts to exert greater control over elections and enact laws that make voting needlessly more difficult.

**ii. Attempts at partisan usurpation of election administration reduce security in elections.**

Among the most concerning responses to the stolen election lies are attempts by partisan actors to interfere with traditionally nonpartisan election administration functions. In the 2021 legislative sessions, state legislators "proposed more than two hundred bills in 41 states that have the potential to allow those legislators to interfere with election administration in one way or another, and at least two dozen bills have already been passed into law."<sup>81</sup> These efforts can be tied directly to the former president's efforts to "pursu[e] a strategy to have Republican-run legislatures in battleground states override results favoring [his opponent], in an unprecedented bid to alter the outcome of the election,"<sup>82</sup> as well as to his pressure campaign on election officials to "find" votes and manufacture his victory.<sup>83</sup>

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<sup>80</sup> Jeremy Duda, *Justice Department raises concerns with audit*, Arizona Mirror (May 5, 2021), <https://www.azmirror.com/2021/05/05/justice-department-raises-concerns-with-audit/>.

<sup>81</sup> See, e.g., sources cited *supra* note 1.

<sup>82</sup> Deanna Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden. Is That Possible?*, The Wall Street Journal (Nov. 21, 2020), <https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695>.

<sup>83</sup> Former president Trump's much-publicized call to Secretary Raffensperger asking him to "find" an additional 11,780 votes and declare Trump the winner of Georgia's presidential election shows the political willingness to corruptly influence election officials to set aside the principles of impartial election administration to achieve partisan aims. See Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, Wash. Post (Jan. 3, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html).

Most alarming were new state proposals that in some cases would have allowed partisan actors to entirely discard the results of popular elections with which they disagreed.<sup>84</sup> For example, a proposed bill in Arizona last year, H.B. 2720, would have provided that “by majority vote at any time before the presidential inauguration [the legislature] may revoke the secretary of state’s issuance or certification of a presidential elector’s certificate of election.”<sup>85</sup> A similar proposal in Missouri, H.B. 1301, would have allowed the state legislature to “retain its authority to name presidential electors in cases of fraud” or if a court or the executive branch were perceived to have interfered in election administration.<sup>86</sup> In Texas, S.B. 7, a bill ultimately replaced by S.B. 1 discussed above, would have granted power to overturn elections to the State’s elected judges.<sup>87</sup> And in Nevada, certain lawmakers sought a state constitutional amendment that would have transferred power to certify the state’s election results from the state supreme court to the state legislature.<sup>88</sup>

These failed efforts are part of a concerning trend of state legislatures responding to the outcome of the 2020 election by trying to consolidate power to themselves at the expense of experienced election officials.<sup>89</sup> Indeed, several less extreme but still problematic proposals in the same vein have become law since 2020.<sup>90</sup>

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<sup>84</sup> See, e.g., Matt Vasilogambros, *Republican Legislators Curb Authority of County, State Election Officials*, Pew Charitable Trusts (July 28, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/28/republican-legislators-curb-authority-of-county-state-election-officials>.

<sup>85</sup> H.B. 2720, 55th Leg., Reg. Sess. (Ariz. 2021). Arizona had two other proposed bills that would have similarly allowed the state legislature to interfere with election results. See States United Democracy Ctr. June Report, *supra* note 1, at 9-10.

<sup>86</sup> H.B. 1301, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

<sup>87</sup> Brennan Ctr. for Justice, *Voting Laws Roundup: December 2021* (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

<sup>88</sup> Assemb. J. Res. 13, 81st Leg., 2021 Reg. Sess. (Nev. 2021).

<sup>89</sup> See Election Crisis Task Force Report, *supra* note 1, at 3.

<sup>90</sup> See Nick Corasaniti, *Voting Rights and the Battle Over Elections: What to Know*, N.Y. Times (Dec. 29, 2021), <https://www.nytimes.com/article/voting-rights-tracker.html>.

For instance, in Arkansas, lawmakers passed a new law, S.B. 643, that authorizes a legislative committee to investigate election complaints and makes it easier to take over county elections without a legitimate justification.<sup>91</sup>

Legislators in Georgia followed suit after proponents of the stolen election lies baselessly accused nonpartisan county election workers of manipulating votes. Part of Georgia’s S.B. 202, enacted during Spring 2021 and described above, grants the State Election Board broad power over county election officials.<sup>92</sup> Specifically, S.B. 202 allows “the State Election Board [to] suspend elected county or municipal superintendents and appoint an individual to serve as the temporary superintendent” in that jurisdiction.<sup>93</sup> Superintendents are considered the “top election officials” of each county, and the Board-appointed superintendent will be able to “exercise all the powers and duties of a superintendent as provided by law,”<sup>94</sup> which includes disqualifying voters, relocating polling sites, and potentially refusing to certify results.<sup>95</sup> Because a party with the majority in both houses of the Georgia General Assembly will control the Board, the broad power granted to the State Election Board

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<sup>91</sup> Sam Levine, *How Trump’s big lie has been weaponized since the Capitol attack*, The Guardian (July 7, 2021), <https://www.theguardian.com/us-news/2021/jul/07/us-capitol-riot-attack-on-democracy>.

<sup>92</sup> Nicholas Reimann, *GOP-Controlled Georgia Board Launches Probe in Possible Takeover of Atlanta Elections from Local Officials*, Forbes (Aug. 18, 2021), <https://www.forbes.com/sites/nicholasreimann/2021/08/18/gop-controlled-georgia-board-launches-probe-in-possible-takeover-of-atlanta-elections-from-local-officials>.

<sup>93</sup> Ga. Code Ann. § 21-2-33.1(f).

<sup>94</sup> Ga. Code Ann. § 21-2-33.1(f).

<sup>95</sup> S.B. 202 did not alter the standards for certifying election results. See, e.g., Ga. Code Ann. § 21-2-33.1(f) (giving Board- appointed superintendents “all the powers and duties of a superintendent as provided by law”). However, there is debate over the circumstances under which a superintendent could refuse to certify results and what the consequences of that refusal would be. The relevant statute provides that a superintendent “shall . . . certif[y]” the results by the Monday following the election after the returns are “found to be correct or corrected.” Id. § 21-2-493(k). As part of this process, “[i]f any error or fraud is discovered, the superintendent shall compute and certify the votes justly.” Id. § 21-2-493(i). Georgia law also does not explicitly provide for what happens if a superintendent declines to certify results: the relevant provision provides only that she “shall” do so. Ga. Code Ann. § 21-2-493(k). When a county refused to certify the results of a recount in 2020, the Secretary of State’s office responded by providing technical support to facilitate the recount process and launching a still-ongoing investigation of the county’s process. Secretary of State’s Office Opens Investigation into Coffee County’s Handling of Recount, Ga. Sec’y Of State, [https://sos.ga.gov/index.php/elections/secretary\\_of\\_states\\_office\\_opens\\_investigation\\_into\\_coffee\\_countys\\_handling\\_of\\_recount](https://sos.ga.gov/index.php/elections/secretary_of_states_office_opens_investigation_into_coffee_countys_handling_of_recount) (last visited Mar. 30, 2022).

correspondingly broadens the Assembly’s power to influence members of the Board on partisan grounds.<sup>96</sup>

S.B. 202 also more directly grants the Georgia General Assembly power over local election officials by allowing individual Georgia representatives to request performance reviews of election officials in their jurisdictions.<sup>97</sup> Upon receiving these requests, the State Election Board is to appoint “an independent performance review board” and then may use the findings of the review board as the basis to remove the official whose performance is in question.<sup>98</sup>

Reviews pursuant to this provision are already underway. The State Election Board appointed a partisan performance review board to investigate the baseless stolen election allegations in Fulton County and potentially take over election administration there, which contains Georgia’s largest concentration of Democratic voters.<sup>99</sup> Despite recently confirming the accuracy of Fulton County’s election results, the State Election Board nonetheless referred the county election officials to the state Attorney General for investigation of the scant incidents of inadvertent and inevitable human errors—moving a step closer to the county officials being replaced by appointed partisans who would administer the next election.<sup>100</sup>

Additionally, in other Georgia counties, nonpartisan election boards that have been in place for years to manage and certify Georgia’s elections are being abruptly

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<sup>96</sup> See, e.g., Ga. Code Ann. § 21-2-33.1(f) (giving Board-appointed superintendents “all the powers and duties of a superintendent as provided by law”); see also States United Democracy Ctr. April Report, *supra* note 1, at 12-14; Nick Corasantini & Reid J. Epstein, *What Does Georgia’s Voting Law Really Do?*, N.Y. Times (Aug. 18, 2021), <https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html>.

<sup>97</sup> Ga. Code Ann. § 21-2-106(a).

<sup>98</sup> *Id.* § 21-2-106(a), (c).

<sup>99</sup> Mark Niese, *Prospect of Georgia election takeover fuels concerns about vote integrity*, The Atlanta Journal-Constitution (Dec. 23, 2021), <https://www.ajc.com/politics/prospect-of-georgia-election-takeover-fuels-concerns-about-vote-integrity/CFMTLFW6TZFH7O4LLNDZ3BY4NE/>; Kristal Dixon, *Exit interview with Georgia’s most high-profile elections director*, Axios (Mar. 23, 2022), <https://www.axios.com/local/atlanta/2022/03/23/exit-interview-georgia-elections-director-richard-barron>; Nick Corasantini, *Potential G.O.P. Takeover of Atlanta-Area Election Board Inches Forward*, N.Y. Times (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/us/politics/georgia-elections-republicans.html>.

<sup>100</sup> Mark Niese, *Investigation blames human error for issues in Fulton election audit*, The Atlanta Journal-Constitution (Mar. 16, 2022), <https://www.ajc.com/politics/investigation-blames-human-error-for-issues-in-fulton-election-audit/QTRKTKJYY5B3BMK2WOHU6AQXVY/>.

dissolved under new Georgia law.<sup>101</sup> This fundamental restructuring of local election administration in Georgia has enabled counties to shift power away from longtime impartial election officials and toward inexperienced partisan actors, who in some instances have explicitly endorsed groundless stolen election claims.<sup>102</sup>

Finally, adding to the Georgia General Assembly's intrusion on election administration functions, S.B. 202 removes the Georgia Secretary of State as the chairperson of the State Election Board, instead calling for the chairperson to be elected by the Georgia General Assembly, with the Secretary of State merely deemed an "ex officio nonvoting member of the board."<sup>103</sup> While the chairperson "shall be nonpartisan,"<sup>104</sup> this new procedures nonetheless open the door for the election of a chairperson who shares the majority of the General Assembly's views regarding the results or legitimacy of any given election. Given the tensions between Georgia's Secretary of State and legislators that arose during the 2020 election—with Republican Secretary of State Brad Raffensperger facing criticism for not supporting the former president and his allies' stolen election lies<sup>105</sup>—legislators could seek out a chairperson whom members believe would follow its party line on any given matter, including whether to certify the results of an election if the winner does not belong to the same party that controls the General Assembly.

Additionally, a new law proposed but recently struck down in Arizona would have also shifted power away from the Arizona Secretary of State, Katie Hobbs, on

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<sup>101</sup> See, e.g., Stephanie McCrummen, *'Gutted': What happened when a Georgia elections office was targeted for takeover by those who claim the 2020 election was a fraud*, Wash. Post (Mar. 14, 2022), <https://www.washingtonpost.com/nation/2022/03/14/georgia-elections-fraud-purge/>; James Oliphant & Nathan Layne, *Georgia Republicans purge Black Democrats from county election boards*, Reuters (Dec. 9, 2021), <https://www.reuters.com/world/us/georgia-republicans-purge-black-democrats-county-election-boards-2021-12-09/>; Nick Corasaniti and Reid J. Epstein, *supra* note 1.

<sup>102</sup> James Oliphant & Nathan Layne, *Georgia Republicans purge Black Democrats from county election boards*, Reuters (Dec. 9, 2021 8:53 PM), <https://www.reuters.com/world/us/georgia-republicans-purge-black-democrats-county-election-boards-2021-12-09/>.

<sup>103</sup> Ga. Code Ann. § 21-2-30(a), (d).

<sup>104</sup> *Id.* § 21-2-30(a.1)(2).

<sup>105</sup> Amy Gardner, *Ga. Secretary of State Says Fellow Republicans Are Pressuring Him to Find Ways to Exclude Ballots*, Wash. Post (Nov. 16, 2020), [https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0\\_story.html](https://www.washingtonpost.com/politics/brad-raffensperger-georgia-vote/2020/11/16/6b6cb2f4-283e-11eb-8fa2-06e7cbb145c0_story.html).

blatantly partisan grounds.<sup>106</sup> The law provided that Arizona’s Attorney General, Mark Brnovich, “has sole authority to direct the defense of state election law or laws being challenged,” thereby permitting him to “intervene on behalf of the state” “in any proceeding in which the validity of a state election law is challenged . . . if [he] determines” that “intervention is appropriate.”<sup>107</sup> Accordingly, the law would have given the Arizona Attorney General, who is Republican, ultimate authority to dictate legal strategy in election law cases in the event that he disagrees with the state’s elected Secretary of State, currently a Democrat.<sup>108</sup> Importantly, this designation of control over litigation was designed to last only through the end of Secretary Hobbs’ term, as the goal of the legislature was “to ensure that the authority given to . . . Brnovich would not transfer to any Democrat who won the next race for attorney general.”<sup>109</sup> Although the Arizona Supreme Court struck down this law on procedural grounds because the legislature improperly passed it in an omnibus budget bill,<sup>110</sup> nothing in the court’s decision prevents the state from reenacting it, and numerous pending proposals in the Arizona legislature would effectively do so.<sup>111</sup>

In Texas, the recently enacted S.B. 1 presents another instance of the legislative usurpation of election officials’ authority. S.B. 1 imposes severe restrictions on how election officials can administer elections and help citizens apply to vote or cast a vote.<sup>112</sup> For example, the Texas law prohibits early voting clerks from any “attempt to solicit a person to complete an application for an early voting

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<sup>106</sup> See Michael Wines, *In Arizona, G.O.P. Lawmakers Strip Power From a Democrat*, N.Y. Times (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/Arizona-Republicans-voting.html>.

<sup>107</sup> S.B. 1819, sec. 33, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

<sup>108</sup> Ben Giles, *Arizona Republicans Strip Some Election Power from Democratic Secretary of State*, NPR (June 30, 2021), <https://www.npr.org/2021/06/30/1011154122/arizona-republicans-strip-some-election-power-from-democratic-secretary-of-state>.

<sup>109</sup> Michael Wines, *In Arizona, G.O.P. Lawmakers Strip Power from a Democrat*, N.Y. Times (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/Arizona-Republicans-voting.html>.

<sup>110</sup> See Jeremy Duda, *Court strikes down bans on mask mandates, critical race theory and more*, Arizona Mirror (Sept. 27, 2021), <https://www.azmirror.com/2021/09/27/court-strikes-down-bans-on-mask-mandates-critical-race-theory-and-more/>.

<sup>111</sup> See, e.g., H.B. 2691, 56th Leg., 1st Reg. Sess. (Ariz. 2022); H.B. 2378, 56th Leg., 1st Reg. Sess. (Ariz. 2022); S.B. 1137, 56th Leg., 1st Reg. Sess. (Ariz. 2022).

<sup>112</sup> Chuck Lindell, *Gov. Greg Abbott Signs SB 1, the GOP Voting Bill, into Law*, Austin Am. Statesman (Sept. 7, 2021), <https://www.statesman.com/story/news/2021/09/07/texas-voting-law-gop-greg-abbott-sb-1/5751333001>.

ballot,”<sup>113</sup> and forbids state or local officials from “distribut[ing] an application form for an early ballot” to someone who did not request the application, or from “us[ing] public funds to facilitate” such distribution by someone else.<sup>114</sup> Finally, the bill uses sweeping language to mandate that public officials “not create, alter, modify, waive, or suspend any election standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by this code.”<sup>115</sup> In effect, S.B. 1 would eliminate election officials’ ability to administer state law in the manner that they believe would, based on their experience and discretion in specific circumstances, ensure that more citizens are able to vote easily and that elections run efficiently within the processes established by the legislature.

New proposals in 2022 continue the trend of state legislators attempting to enact laws that seize power over elections to partisan lawmakers at the expense of experienced election officials. From new bills filed in Wisconsin and Michigan to renewed efforts in Arizona,<sup>116</sup> legislators are pursuing troubling ways to put election administration in the hands of political party patrons rather than trusted election officials.

The changes in state laws that narrow the authority traditionally given to impartial elections experts, or that provide for increased influence over the functions of election administration by the state legislature, risk removing the key guardrails that prevented further democratic crises in 2020. By increasing the partisan influence over traditionally nonpartisan election administration tasks, such as the ministerial responsibility of certifying the final results after the votes have been

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<sup>113</sup> Tex. Elec. Code § 84.0011 (sec. 4.02)

<sup>114</sup> Tex. Elec. Code § 84.0111 (sec. 4.05)

<sup>115</sup> Tex. Elec. Code § 276.017 (sec. 6.03)

<sup>116</sup> See, e.g., Lalee Ibssa & Meg Cunningham, *GOP-controlled legislatures look to overhaul election laws ahead of 2022 midterms*, ABC News (Feb. 10, 2022), <https://abcnews.go.com/Politics/gop-controlled-legislatures-overhaul-election-laws-ahead-2022/story?id=82730052> (Michigan); Michael McDaniel, *Arizona Senate pushes an election bill to create a permanent audit team that could be fielded by Cyber Ninja auditors*, Courthouse News (Feb. 17, 2022), <https://www.courthousenews.com/arizona-senate-pushes-an-election-bill-to-create-a-permanent-audit-team-that-could-be-fielded-by-cyber-ninja-auditors/> (Arizona); Jake Thomas, *Ex-Oath Keeper, 1/6 Protester Lead Push to Change Michigan’s Election Audit Process*, Newsweek (Jan. 20, 2022), <https://www.newsweek.com/ex-oath-keeper-1-6-protester-lead-push-change-michigans-election-audit-process-1671428>.

counted, supporters of the stolen election lies have made usurping the electoral power away from the people easier. Enabling greater partisan manipulation of election administration risks widening cracks in our legal framework and removing the principled election officials who were willing to stand firm for democratic norms rather than submit to raw political objectives during the 2020 election.

**4. The election falsehoods encourage threats against hardworking election officials, the criminalization of their work, and the politicization of their roles.**

Nonpartisan election officials have borne the brunt of some of the worst consequences from the 2020 stolen election lies. These public servants, who work under-appreciated jobs to ensure that our democratic processes properly function and that every vote that should be counted gets counted, have come under tremendous stress throughout the 2020 election cycle and since. Given that the former president recently suggested that because “[t]he vote counter is often more important than the candidate,” and that his supporters “have to get a lot tougher and smarter at the polls,” the forces intimidating election officials are unlikely to subside.<sup>117</sup>

The immense pressure on election officials most alarmingly includes a steep rise in the harassment and threats of violence targeting them.<sup>118</sup> A recent investigation identified hundreds of occurrences of intimidation and harassment against election workers and officials nationwide, but only a handful of arrests of the attackers.<sup>119</sup> Proponents of the stolen election lies directed over one hundred explicit threats of death or violence at more than forty election officials.<sup>120</sup> Nearly eight in ten

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<sup>117</sup> Josh Dawsey, *Trump muses on war with Russia and praises Kim Jong Un*, Wash. Post (Mar. 6, 2022), <https://www.washingtonpost.com/nation/2022/03/06/trump-focuses-foreign-policy-speech-gops-top-donors/>.

<sup>118</sup> See, e.g., Linda So & Jason Szep, *Special Report: Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, Reuters (Sept. 8, 2021), <https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08/>; The Brennan Ctr. for Justice and the Bipartisan Policy Ctr., *Election Officials Under Attack* (June 16, 2021), [https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials\\_v7.pdf](https://www.brennancenter.org/sites/default/files/2021-06/BCJ-129%20ElectionOfficials_v7.pdf).

<sup>119</sup> Linda So & Jason Szep, *supra* note 118.

<sup>120</sup> *Id.*

local election officials feel the physical danger presented in their work has increased recently, and one-sixth report having received explicit threats of violence.<sup>121</sup>

State secretaries of state—who typically serve as their states’ chief election officers—are among those who faced significant threats and intimidation to themselves and their families in the wake of the 2020 election.

In her testimony to the U.S. Senate Committee on Rules and Administration in October 2021, Arizona Secretary of State Katie Hobbs described the threats that she and other election officials have faced in the year since the 2020 election.<sup>122</sup> From the armed groups that amassed outside Secretary Hobbs’ home chanting, “Katie come out and play, we are watching you,” to the orange jumpsuits mailed to intimidate Arizona county supervisors,<sup>123</sup> these once behind-the-scenes election officials are now facing growing threats.<sup>124</sup>

Georgia Secretary of State Brad Raffensperger, who resisted the former president’s claims that the election in Georgia was stolen, also “receiv[ed] death threats almost immediately after Trump’s surprise loss in Georgia,” leading him and his family to go into hiding after his daughter-in-law’s home was broken into and individuals identified as members of the Oath Keepers, an extremist group, were discovered outside his own home.<sup>125</sup>

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<sup>121</sup> See, e.g., Poll of Local Election Officials Finds Safety Fears for Colleagues — and Themselves, Brennan Ctr. for Justice (Mar. 10, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and>; Zach Montellaro, *Local election officials are exhausted, under threat and thinking about quitting*, Politico (Mar. 10, 2022), <https://www.politico.com/news/2022/03/10/election-officials-exhausted-under-threat-00015850>; Press Release, “One in Three Election Officials Report Feeling Unsafe Because of Their Job,” Brennan Ctr. For Justice & Bipartisan Policy Ctr. (June 16, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/one-three-election-officialsreport-feeling-unsafe-because-their-job>.

<sup>122</sup> U.S. Senate Committee on Rules and Administration, *Emerging Threats to Election Administration* (Oct. 26, 2021), <https://www.rules.senate.gov/hearings/emerging-threats-to-election-administration>.

<sup>123</sup> Denelle Confair, *AZ Secretary of State Katie Hobbs Testifies Before U.S. Senate Committee on Emerging Election Threats*, News 4 Tucson (Nov. 1, 2021), [https://www.kvoa.com/news/az-secretary-of-state-katie-hobbs-testifies-before-u-s-senate-committee-on-emerging-election/article\\_0193c76e-3689-11ec-b3c7-1f2864e3a0ae.html](https://www.kvoa.com/news/az-secretary-of-state-katie-hobbs-testifies-before-u-s-senate-committee-on-emerging-election/article_0193c76e-3689-11ec-b3c7-1f2864e3a0ae.html).

<sup>124</sup> Miles Parks, *Death Threats and Conspiracy Theories: Why 2020 Won’t End for Election Officials*, NPR (Aug. 17, 2021), <https://www.npr.org/2021/08/17/1027747378/death-threats-and-conspiracy-theories-why-2020-wont-end-for-election-officials>; Jane Mayer, *supra* note 19.

<sup>125</sup> Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, Reuters (June 11, 2021), <https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/>.

Michigan Secretary of State Jocelyn Benson also faced death threats and harassment following the election.<sup>126</sup> Armed protesters used megaphones to chant election-related conspiracy theories outside of Benson’s home a few weeks after the election while Benson was home with her 4-year-old son.<sup>127</sup>

Colorado Secretary of State Jena Griswold reported to federal officials receiving twenty-two death threats in one week alone in February 2022.<sup>128</sup> One prominent proponent of election conspiracy theories in Colorado claimed that Griswold stole the election and threatened that “if you’re involved in election fraud, then you deserve to hang” because, he said, “sometime the old ways are the best ways.”<sup>129</sup> Long after the 2020 presidential election, these threats suggest that the dangerous trend extends beyond high profile federal elections to even include off-cycle state elections.

Workers in lower- or mid-level positions similarly face threats and intimidation from those angered by the outcome of the election and their misguided stolen election beliefs. For example, some supporters of the election falsehoods seized on a video that spread quickly online of a poll worker placing paper in the trash, believing it proved the vote count had been corrupted.<sup>130</sup> Even though Fulton County quickly fact-checked the claims, showing they were false by comparing the size of the paper thrown away with the size of a ballot, “by the time fact checkers weighed in,

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<sup>126</sup> *Id.*; see also Bill Chappel, *Michigan Secretary of State Says Armed Protesters Descended on Her Home Saturday*, NPR (Dec. 7, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/07/943820889/michigan-secretary-of-state-says-armed-protesters-descended-on-her-home-saturday>

<sup>127</sup> Bill Chappel, *Michigan Secretary of State Says Armed Protesters Descended on Her Home Saturday*, NPR (Dec. 7, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/12/07/943820889/michigan-secretary-of-state-says-armed-protesters-descended-on-her-home-saturday>.

<sup>128</sup> Zach Montellaro, *supra* note 121.

<sup>129</sup> Bente Birkeland, *Facing ongoing threats, Colorado’s Secretary of State says the position needs more security — and other politicians want the same*, Colo. Public Radio (Mar. 2, 2022), [www.cpr.org/2022/03/02/colorado-secretary-of-state-jena-griswold-security-harassment/](http://www.cpr.org/2022/03/02/colorado-secretary-of-state-jena-griswold-security-harassment/).

<sup>130</sup> Dan Glaun, *Threats to Election Officials Piled Up as President Trump Refused to Concede*, PBS News Frontline (Nov. 17, 2020), <https://www.pbs.org/wgbh/frontline/article/threats-to-election-officials-piled-up-as-president-trump-refused-to-concede/>.

the poll worker had already quit and gone into hiding, due to the false accusations against him.”<sup>131</sup>

These threats are unlikely to subside on their own. Indeed, a recent poll shows that nearly 4-in-10 polled Americans who believe the stolen election lies also say that violence may be necessary to “save our country,” in their view.<sup>132</sup>

While the federal government has attempted to step in, those efforts have so far been unable to abate the serious threats and risks of harm to election officials. The Department of Justice held a recent meeting with a bipartisan group of over 1,400 election officials to “discuss mounting and persistent threats to the safety of election officials and workers across the country,” and launched an Election Threats Task Force to monitor and address such threats.<sup>133</sup> And the Department of Homeland Security issued an advisory warning that “[s]ome domestic violent extremists have continued to advocate for violence in response to false or misleading narratives about unsubstantiated election fraud,” and that the “months preceding the upcoming 2022 midterm elections could provide additional opportunities for these extremists and other individuals to call for violence directed at democratic institutions, political candidates, party offices, election events, and election workers.”<sup>134</sup> But from this announced increased attention to the issue, the Department of Justice has revealed only two prosecutions of stolen election extremists who credibly threatened violence against election officials.<sup>135</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> Aaron Blake, *Nearly 4 in 10 Who Say Election Was Stolen From Trump Say Violence Might Be Needed to Save America*, Wash. Post (Nov. 1, 2021), <https://www.washingtonpost.com/politics/2021/11/01/4-10-who-say-election-was-stolen-trump-say-violence-might-be-needed-save-america/>.

<sup>133</sup> Press Release, *Readout of Justice Department Leadership Meeting on Threats to Election Workers*, U.S. Dep’t of Justice Office of Public Affairs (Aug. 26, 2021), <https://www.justice.gov/opa/pr/readout-justice-department-leadership-meeting-threats-election-workers>; Jane C. Timm, *‘We Have to Protect Them’: DOJ Vows Investigations, Prosecutions of Threats to Election Workers*, Wash. Post (June 25, 2021), [https://www.washingtonpost.com/politics/trump-allies-election-oversight/2021/11/28/3933b3ce-4227-11ec-9ea7-3eb2406a2e24\\_story.html](https://www.washingtonpost.com/politics/trump-allies-election-oversight/2021/11/28/3933b3ce-4227-11ec-9ea7-3eb2406a2e24_story.html)

<sup>134</sup> Dep’t of Homeland Security, *Summary of Terrorism Threat to the U.S. Homeland* (Feb. 7, 2022), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-february-07-2022>.

<sup>135</sup> Press Release, *Man Charged for Threatening Nevada State Election Worker*, U.S. Dep’t of Justice Office of Public Affairs (Jan. 27, 2022), <https://www.justice.gov/opa/pr/man-charged-threatening-nevada-state-election-worker>; Press Release, *Texas Man Arrested for Making Election-Related Threats to Government Officials*, U.S.

At the same time that election workers are fielding alarming harassment and intimidation from outside actors, recent changes in state laws since the 2020 election have also created new ways for election work to be subject to formal criminal prosecution. Numerous states—including Texas, Iowa, and North Dakota—have enacted new laws that specifically criminalize activities by election officials, in many cases with the threat of felony prosecutions or with hefty punishments for even “technical infractions” of election law.<sup>136</sup> Some of these new criminal law proposals, such as the recently enacted Arizona H.B. 2492 described above, put election workers in the precarious position to either abandon their duties to register eligible voters pursuant to federal law requirements, or follow those federal duties but face state felony prosecution applying new state criminal laws that target only election officials.<sup>137</sup>

Under these perilous conditions, election workers are leaving their posts at worrying rates, or they are being forced out of their positions for partisan gain. Administering an election during an unprecedented global pandemic is a challenging feat and harrowing experience in itself; many election officials who now face threats of violence after getting through the 2020 election are opting for retirement rather than continue through the 2022 or 2024 election cycles.<sup>138</sup> In one recent study, 30% of polled election officials reported knowing one or more workers who have already left their job at least in part because of a fear for their safety due to the increased

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Dep’t of Justice Office of Public Affairs (Jan. 27, 2022), <https://www.justice.gov/opa/pr/texas-man-arrested-making-election-related-threats-government-officials>.

<sup>136</sup> See, e.g., States United Democracy Ctr. April and June Reports, *supra* note 1.

<sup>137</sup> H.B. 2492, 56th Leg., 1st Reg. Sess. (Ariz. 2022); Ray Stern, *supra* note 48.

<sup>138</sup> Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. Times (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/2020-election-votingofficials.html>.

threats and intimidation.<sup>139</sup> The same poll shows that 20% of the remaining election officials say they are likely to quit before 2024.<sup>140</sup>

Other election officials willing to stick around may not be able to do so because partisan actors are finding new ways to force their removal. In Michigan, after a Republican appointee to the state board of canvassers refused to stop the certification of the state's 2020 election results, partisan lawmakers blocked reappointing him to a subsequent term.<sup>141</sup> Virginia's governor recently replaced the State's top election official, who was widely seen as a nonpartisan consensus choice, with a former top aide to a state senator who while in office praised the January 6 insurrectionists.<sup>142</sup> In Pennsylvania, the state legislature pursued the impeachment of the members of two county election commissions who voted to count timely received vote by mail ballots that lacked a date handwritten by the voter, which has been subject to ongoing litigation.<sup>143</sup> And the former state Supreme Court justice leading the partisan sham review of Wisconsin's elections has pushed to jail city election officials for refusing to participate in the stolen election conspiracy.<sup>144</sup>

While election officials are under attack and offices across the country are experiencing a mass exodus of experienced employees, stolen election lies proponents

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<sup>139</sup> *Poll of Local Election Officials Finds Safety Fears for Colleagues — and Themselves*, Brennan Ctr. for Justice (Mar. 10, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/poll-local-election-officials-finds-safety-fears-colleagues-and>.

<sup>140</sup> *See id.*; see also Miles Parker, *1 in 5 local election officials say they're likely to quit before 2024*, NPR (Mar. 10, 2022), <https://www.npr.org/2022/03/10/1085425464/1-in-5-local-election-officials-say-theyre-likely-to-quit-before-2024>.

<sup>141</sup> Sam Levine, *How Trump's big lie has been weaponized since the Capitol attack*, The Guardian (July 7, 2021), <https://www.theguardian.com/us-news/2021/jul/07/us-capitol-riot-attack-on-democracy>.

<sup>142</sup> Patrick Wilson, *Youngkin names local GOP official, former aide to Chase, as new state elections commissioner*, The Richmond Times-Dispatch (Mar. 20, 2022), [https://richmond.com/news/state-and-regional/youngkin-names-local-gop-official-former-aide-to-chase-as-new-state-elections-commissioner/article\\_2d9ee742-742f-5325-9692-562bd65c37fc.html](https://richmond.com/news/state-and-regional/youngkin-names-local-gop-official-former-aide-to-chase-as-new-state-elections-commissioner/article_2d9ee742-742f-5325-9692-562bd65c37fc.html).

<sup>143</sup> Jonathan Lai, *Pa. Republican Lawmakers Threaten to Impeach Philly Officials for Counting Undated Mail Ballots*, The Phila. Inquirer (May 28, 2021), <https://www.inquirer.com/politics/election/pennsylvania-republican-lawmakers-impeachment-philadelphia-city-commissioners-20210528.html>; States United Democracy Ctr. June Report, *supra* note 1.

<sup>144</sup> Patrick Marley, *Wisconsin Republicans seek to jail more officials as part of their review of the 2020 presidential election*, Milwaukee Journal Sentinel (Feb. 18, 2022), <https://www.jsonline.com/story/news/politics/2022/02/18/wisconsin-republicans-michael-gableman-seeks-jail-officials-2020-presidential-election-review/6853176001/>.

have redoubled their efforts to replace election workers with rogue political actors. There is currently an active, well-funded campaign to recruit partisans to take over election administration roles, making it easier to sabotage future elections.<sup>145</sup> As of January 27, 2022, at least twenty-one candidates who have subscribed to stolen election lies are running for Secretary of States in eighteen states; this means that in 2 out of 3 Secretary of State contests nationwide, one of the leading candidates has publicly supported the conspiracy challenging the 2020 election results.<sup>146</sup> Some the most highly contested Secretary of State races with election skeptics as candidates are in swing states—*e.g.*, Arizona, Wisconsin, Georgia, and Nevada—where a rogue state elections chief could cause significant uncertainty and disruption.<sup>147</sup>

Lower profile election worker positions are also at risk of being coopted for political purposes. Appointees to state and county election positions are becoming more extreme and partisan. In Michigan, for example, political actors have worked in recent months to replace county canvassers with partisans who have embraced the stolen election lies.<sup>148</sup> Similar efforts are underway in Ohio, Iowa, and other states.<sup>149</sup> In a particularly shocking example, one of the attendees at the so-called Stop the Steal rally leading to the January 6 storming of the U.S. Capitol soon returned home

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<sup>145</sup> Amber Phillips, *How Trump-backed secretary of state candidates would change elections in the United States*, Wash. Post (Dec. 1, 2021), <https://www.washingtonpost.com/politics/2021/12/01/how-trump-backed-secretary-state-candidates-would-change-elections-america/>; Lawrence Norden & Derek Tisler, *Addressing Insider Threats in Elections*, Brennan Ctr. for Justice (Dec. 8, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/addressing-insider-threats-elections>

<sup>146</sup> States United Democracy Ctr., *Secretary of State Races in 2022* (Jan 27, 2022), [https://statesuniteddemocracy.org/wp-content/uploads/2022/02/sos\\_deniers.html](https://statesuniteddemocracy.org/wp-content/uploads/2022/02/sos_deniers.html).

<sup>147</sup> Amber Phillips, *How Trump-backed secretary of state candidates would change elections in the United States*, Wash. Post (Dec. 1, 2021), <https://www.washingtonpost.com/politics/2021/12/01/how-trump-backed-secretary-state-candidates-would-change-elections-america/>.

<sup>148</sup> Sam Levine, *Why are Michigan Republicans quietly replacing key election officials?*, The Guardian (Oct. 14, 2021), <https://www.theguardian.com/us-news/2021/oct/14/michigan-republicans-election-officials-fight-to-vote>.

<sup>149</sup> See, *e.g.*, Jake Zuckerman, *Governor appoints former lawmaker to elections board who hyped up 2020 voter fraud claims*, Ohio Capital Journal (Mar. 10, 2022), <https://ohiocapitaljournal.com/2022/03/10/governor-appoints-former-lawmaker-to-elections-board-who-hyped-up-2020-voter-fraud-claims/>; Thomas Beaumont & Anthony Izaguirre, *Iowa flap raises fears of politicized local election offices*, Associated Press (May 30, 2021), <https://apnews.com/article/donald-trump-iowa-local-elections-voting-rights-elections-8ae7926dcd07f4dba7ede49d6fc894d9>.

to Pennsylvania, declared his candidacy to be an election judge, and then won that election.<sup>150</sup>

In sum, election officials since 2020 have faced intense external forces of threats of violence and harassment, and internal forces of being criminalized, fired, or politicized. In this environment, the country's election infrastructure will struggle to maintain nonpartisan and impartial workers who are in it to promote democracy and fair results rather than seeking partisan gain. Election officials are the lifeblood of a properly functioning voting system. Allowing them to be replaced by partisan actors risks severe consequences if and when the next election crisis arises.

**B. The consequences of stolen election lies are depressed public trust in government and the electoral process.**

Since the 2020 presidential election, poll after poll has shown that the events of January 6th and the fallout of the stolen election lies have shaken Americans' belief in our democratic institutions. Generally, Americans' trust in government is at historic lows.<sup>151</sup> People are concerned that the events of January 6th are not just isolated incidents but a sign of increasing political violence, and this has eroded the belief that American democracy is secure.<sup>152</sup> In one January 2022 poll, 64% of Americans believe democracy in the United States is "in crisis and at risk of failing"<sup>153</sup> and only 20% are very confident in the country's ability to conduct an honest

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<sup>150</sup> Charles Homans, *In Bid for Control of Elections, Trump Loyalists Face Few Obstacles*, N.Y. Times (Dec. 15, 2021), <https://www.nytimes.com/2021/12/11/us/politics/trust-in-elections-trump-democracy.html>.

<sup>151</sup> Public Trust in Government: 1958-2021, Pew Research Ctr. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/> (last accessed Mar. 30, 2022).

<sup>152</sup> Anthony Salvanto, Kabir Khanna, Fred Backus, & Jennifer Depinto, *CBS News poll: A year after Jan. 6, violence still seen threatening U.S. democracy, and some say force can be justified*, CBS News (Jan. 2, 2022, 1:01 PM), <https://www.cbsnews.com/news/january-6-opinion-poll-2022/>.

<sup>153</sup> Joel Rose, *6 in 10 Americans say U.S. democracy is in crisis as the 'Big Lie' takes root*, NPR (Jan. 3, 2022), <https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6>.

election.<sup>154</sup> Polled voters see that risk growing, with two-thirds of respondents in one poll saying the country is more at risk of democratic decline than it was a year ago.<sup>155</sup>

This deterioration of voters' confidence in elections and in government crosses party lines. General feelings of pride in American democracy are at all-time lows, hovering above 50% and down considerably from a high of 90% in 2001 and 63% in 2017.<sup>156</sup> While only 30% of polled Democratic voters attest they are confident in the U.S. election system,<sup>157</sup> the falsehood that the 2020 election was stolen from the former president has been disastrous for Republicans' faith in our elections, with only 13% of Republicans who are very confident in the election system and 59% that have little faith.<sup>158</sup> Overall, only 37% of polled Republicans said they are confident the next presidential election will be open and fair.<sup>159</sup> And while 82% of Democrats said they would trust the results of the 2024 presidential election to be accurate if their candidate did not win; only 33% of Republicans reported feeling the same.<sup>160</sup>

Troublingly, voters of both parties doubt that state officials of the other party will agree to accept the results of an election if their party loses.<sup>161</sup> Democrats have become more skeptical, with 67% concerned about the results in Republican states,

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<sup>154</sup> Brittany Shepherd, *Americans' faith in election integrity drops: POLL*, ABC News (Jan. 6, 2022), <https://abcnews.go.com/Politics/americans-faith-election-integrity-drops-poll/story?id=82069876>; Brittany Shepherd, *Majority of Americans think Jan. 6 attack threatened democracy: POLL*, ABC News (Jan. 2, 2022), <https://abcnews.go.com/Politics/majority-americans-jan-attack-threatened-democracy-poll/story?id=81990555>.

<sup>155</sup> Salvanto, *supra* note 152.

<sup>156</sup> Dan Balz, Scott Clement, & Emily Guskin, *Republicans and Democrats divided over Jan. 6 insurrection and Trump's culpability, Post-UMD poll finds*, Wash. Post (Jan. 1, 2022), <https://www.washingtonpost.com/politics/2022/01/01/post-poll-january-6/>.

<sup>157</sup> Shepherd, *supra* note 154.

<sup>158</sup> *Id.*

<sup>159</sup> David Nather, *Axios-Ipsos Poll: Republicans lose trust in elections*, Axios (Nov. 20, 2021), <https://www.axios.com/axios-ipsos-poll-republicans-lose-trust-elections-52410b23-9513-453b-8a37-d140cae2d455.html#deepdive=1>.

<sup>160</sup> PBS News Hour/NPR/Marist Poll, *Nature of the Sample: NPR/PBS NewsHour/Marist Poll of 1,209 National Adults* (Nov. 5, 2021), [https://maristpoll.marist.edu/wp-content/uploads/2021/10/NPR\\_PBS-NewsHour\\_Marist-Poll\\_USA-NOS-and-Tables\\_B\\_202110251104.pdf](https://maristpoll.marist.edu/wp-content/uploads/2021/10/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_B_202110251104.pdf).

<sup>161</sup> Balz, *supra* note 156.

compared to 56% of Republicans about results in Democratic states.<sup>162</sup> Independents share in the skepticism but are more concerned about Republican-controlled states.<sup>163</sup>

Polling conducted after the results of the Arizona Cyber Ninjas review also shows those partisan-motivated “investigations” are especially damaging to the public trust. As noted above, only 36% of those polled believe that the Cyber Ninjas review proved the correct winner of Maricopa County’s presidential votes; a majority of polled Republicans reject the audit’s findings, choosing to believe instead that the process found significant voter fraud when it in fact did not.<sup>164</sup> Additional polling from before and after Arizona’s partisan election investigation found that it did more to reinforce concerns around election fraud than to alleviate them.<sup>165</sup>

The perceived and actual risk of repeated political violence because of disputed election results is also on the rise. Asked if violent action against the government is justified at times, over a third of respondents in one poll agreed, with the strongest support coming from Republicans and independents.<sup>166</sup> This increased acceptance of political violence is significantly higher than past polls over more than two decades.<sup>167</sup> Disturbingly, recent polling shows that Americans now expect violence from supporters of the losing side in an election: while only 2% of respondents say they actively favor violence if their side lost the election, a quarter said it would depend on the circumstances.<sup>168</sup>

Researchers studying political violence are also ringing alarm bells about the increased risks in the United States. For example, Rachel Kleinfeld, senior fellow in the Democracy, Conflict, and Governance Program at the Carnegie Endowment for

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Erin Snodgrass, *The much-maligned Arizona election audit reinforced doubt about the 2020 election results, according to a new poll*, Business Insider (Nov. 15, 2021), <https://www.businessinsider.com/arizona-election-audit-reinforced-doubt-about-2020-election-results-2021-11>.

<sup>165</sup> *Doubt in American System Increases*, Monmouth Univ. Polling Institute (Nov. 15, 2021), [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_111521/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_111521/).

<sup>166</sup> Balz, *supra* note 156.

<sup>167</sup> *Id.*

<sup>168</sup> Salvanto, *supra* note 152.

International Peace and a leading expert on political violence, warns that both the amount and nature of political extremism has worsened in the United States.<sup>169</sup> Kleinfeld's identified factors that elevate the risks of political violence typify our current circumstances: (1) perceived highly competitive contests that could shift the balance of power; (2) stark partisan division based on identity; (3) electoral rules that can be manipulated; and (4) weak institutional constraints on violence that lead perpetrators to believe they will not be held accountable.<sup>170</sup> According to Kleinfeld, ideas that were once considered fringe are now covered on mainstream media outlets, creating a growing audience that is willing to undertake, support, or excuse the use of force for perceived political gain.<sup>171</sup> The people who could be willing to commit political violence are now not just rogue outliers, but sometimes regular Americans who are integrated in social life but nonetheless captured and manipulated by stolen election conspiracies.<sup>172</sup>

Additionally, the election falsehoods have split the Republican Party into fractions of supporters and representatives who believe the conspiracy and those who accept reality.<sup>173</sup> The unwillingness of some partisans to accept the results of the 2020 election now over fifteen months later creates deep rifts in our political associations. Even some leading Republican officials who initially were willing to question aspects of the election without fully committing to the conspiracy now cannot reel in members of their party who are perpetuating the extreme falsities.<sup>174</sup> As the fringe views are given credence, they become more prominent and take on a life of their own that cannot easily be pulled away from the minds of voters and lawmakers once party leadership realizes the deception has gone too far.

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<sup>169</sup> Rachel Kleinfeld, *The Rise of Political Violence in the United States*, *Journal Of Democracy* (Oct. 2021), <https://www.journalofdemocracy.org/articles/the-rise-of-political-violence-in-the-united-states/>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Reid J. Epstein, *Fringe Scheme to Reverse 2020 Election Splits Wisconsin G.O.P.*, *N.Y. Times* (Feb. 19, 2022), <https://www.nytimes.com/2022/02/19/us/politics/wisconsin-election-decertification.html>.

<sup>174</sup> *Id.*; see also Calvin Woodward, *supra* note 16.

In sum, manufactured concerns over stolen elections make large segments of the electorate distrust legitimate results and question the democratic process. Far from empty rhetoric or just politics as usual, these stolen election lies mislead Americans into challenging the rule of law and contesting the peaceful transition of power when their preferred candidates lose. This reduced confidence in elections leads to partisan lawmakers further damaging the system by enacting laws that politicize the process or make voting needlessly more difficult. And the stolen election lies inspire the type of political violence perpetrated on January 6, 2021, which rips at the ties binding our country by denigrating our democratic institutions and ideals.

**C. The federal government must take action to prevent further damage to our election system.**

While the problems stemming from the stolen election lies are significant and pose a serious threat to the proper functioning of our democracy, many of them are solvable through federal legislative and enforcement action. The priorities must be to address increased efforts to raise the burdens of voting, the manipulation of votes and results after election day, and the alarming threats against election officials. Congress can pass new laws that fix weaknesses in our current legal framework where proponents of stolen election lies have sought to exploit gaps for political gain. Many such fixes already exist in specific provisions contained in proposed laws currently before Congress.

First, Congress must enact new laws that will curb the rise of laws that make voting needlessly more difficult based on stolen election lies. As I have described above, new laws and proposed legislation in the last two years have chased the shadow of voter fraud by finding heavy-handed and overbroad news ways to remove eligible voters from the registration rolls and make voter access more difficult.

There are several critical provisions already drafted in legislation before Congress that would make an immediate difference and have had successful bipartisan use in the states. To begin, enacting same-day registration can limit the harmful effects of wrongful registration purges by allowing eligible voters to still

show up to register and vote on election day.<sup>175</sup> Standardizing meaningful early voting in the states will also enable citizens with greater voting inflexibilities (such as rural voters, students, and voters with less access to resources) to still be able to cast their ballot even if they cannot do so on election day.<sup>176</sup> Guaranteeing access to vote by mail—a process that states across the country have tested for years and found is safe, secure, and partisan-neutral<sup>177</sup>—will make sure that any eligible voter who wants to vote is empowered to do so.<sup>178</sup> And requiring that states give their election officials meaningful additional time before election day to preprocess received ballots and prepare them to be tabulated after the polls close will help ensure timely election results.<sup>179</sup> Enacting these federal baselines, among others, will reinforce our national ideals that, no matter where someone lives or how many resources they have, all citizens should have a fair chance to participate in the electoral process.

Second, Congress should legislatively reinforce that states have no power to disturb the results of popular elections. Congress can do so by updating the Electoral Count Act (ECA), focusing on two core clarifying revisions that remove ambiguities in the 1887 statute’s at-times obscure and outdated language. Critically, the ECA must make clear that once a state holds a legitimate popular election to select its presidential electors, the state legislature has no power to displace those results. The

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<sup>175</sup> See, e.g., Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Sec. 1031. Same Day Registration, at 71-75 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=71>; see also *See Same Day Voter Registration*, Nat’l Conf. of State Legislatures (Sept. 9, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

<sup>176</sup> See, e.g., Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Sec. 1201. Early Voting, at 119-126 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=119>; see also *Early In-Person Voting*, Nat’l Conf. of State Legislature (Jan. 17, 2022), <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx>.

<sup>177</sup> See, e.g., Daniel M. Thompson, et al., *Universal vote-by-mail has no impact on partisan turnout or vote share*, Proceedings on the National Academy of Sciences (June 9, 2020), <https://www.pnas.org/doi/10.1073/pnas.2007249117>; see also sources cited *supra* notes 28 & 29.

<sup>178</sup> See, e.g., Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Subtitle D—Voting by Mail, at 128-169 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=128>.

<sup>179</sup> See, e.g., Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Sec. 1201. Early Voting, at 126-27 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=126>.

ECA is key to reinforcing what we know from our Constitution to be true—that any post-hoc usurpation of the presidential electors power from the people violates voters’ fundamental constitutional rights, and intrudes on the federal government’s constitutional prerogative to designate the time for holding presidential elections and the process for counting the duly-provided votes from states’ legitimate popular election results.

Along similar lines, Congress must update the ECA to expressly provide that once a state’s election results are settled, the state governor has no authority to refuse to certify that outcome. Again, our Constitution forbids any contrary result. But the ECA can and should be updated to fortify that elections in our modern democracy are dictated by the people, not one potentially rogue official. Congress can likewise enact additional laws that authorize the Department of Justice, as provided in existing legislative proposals, to prevent interference with state and local officials conducting the vote count and election certification to ensure the people’s voice is accurately reflected.<sup>180</sup>

Third, Congress must urgently pass new laws that provide greater federal protections for election officials and volunteers. Existing federal criminal law generally prohibits threats made through interstate communications, which has been the source of the Department of Justice’s recent prosecutions of two stolen election extremists who threatened officials in Nevada and Georgia.<sup>181</sup> But that leaves enforcement gaps for certain intrastate and in-person threats that federal law may not reach, and fails to protect the specific security needs of election officials under attack.<sup>182</sup> Existing proposals in legislation before Congress that add new federal criminal offenses and resources for the prosecutions of violent stolen election

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<sup>180</sup> See, e.g., Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Title III—Preventing Election Subversion, Subtitle A—Restrictions on Removal of Election Administrators, at 251-62 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=251>.

<sup>181</sup> See sources cited *supra* note 135.

<sup>182</sup> See Linda So & Jason Szep, *supra* note 118.

conspiracists would aid the Department of Justice to provide needed protections for election workers.<sup>183</sup>

Additionally, the federal government, through CISA and other agencies, must engage now to coordinate more trainings and provide additional funding for election offices to protect themselves against threats and take steps to remove identifying information online to avoid harassment or doxing.<sup>184</sup> Programs that protect the information of domestic violence and stalking victims in government databases can serve as a model.<sup>185</sup> Additionally, election officials under threat should be provided federal grants to purchase home intrusion detection systems, and further funding for training and education related to maintaining greater personal security.<sup>186</sup>

Fourth, Congress can enact new laws to strengthen protections over the security of state voting equipment, voters' ballots, and the counting process. Provisions in existing proposals before Congress include improving security and chain-of-custody procedures for voting equipment and ballots to prevent their manipulation by state actors or private companies during sham partisan reviews of election results.<sup>187</sup> Federal law should also be updated to prohibit federal actors from improperly seizing state or county voting equipment and materials.<sup>188</sup>

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<sup>183</sup> See, e.g., Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Subtitle B—Increased Protections for Election Workers at 263-64 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=263>; Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Sec. 3205. Private Rights Of Action By Election Officials, Sec. 3206. Making Intimidation Of Tabulation, Canvass, And Certification Efforts A Crime, at 278-80 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=278>.

<sup>184</sup> See Brennan Ctr. for Justice, *Election Officials Under Attack*, *supra* note 118, at 8–9.

<sup>185</sup> *Id.* at 7.

<sup>186</sup> *Id.*

<sup>187</sup> Freedom to Vote: John R. Lewis Act, Rules Committee Print 117–28 Text of the House Amendment to the Senate Amendment to H.R. 5746, Subtitle D—Protection of Election Records & Election Infrastructure, at 280-86 (Jan. 12, 2022), <https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5746EAS-RCP117-28.pdf#page=280>.

<sup>188</sup> See, e.g., Matthew S. Schwartz, *Jan. 6 panel is investigating a Trump administration plan to seize voting machines*, NPR (Jan. 23, 2022), <https://www.npr.org/2022/01/23/1075219215/jan-6-panel-is-investigating-a-trump-administration-plan-to-seize-voting-machine>.

Fifth, Congress should enact new laws that seek to address post-election misinformation, as well as fraudulent fundraising and spending on efforts to perpetuate the stolen election lies. Congress can do so by prohibiting misinformation campaigns intended to impede the lawful counting of ballots or certification of results.<sup>189</sup> Congress can address problematic financial incentives for stolen election lies<sup>190</sup> and protect donors by restricting fraudulent post-election fundraising for frivolous election contests.<sup>191</sup> It can also increase post-election spending transparency for voters by defining spending by candidates and groups on efforts to influence vote counting as election spending, so it is subject to the same limits and disclosure requirements as other campaign spending.

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<sup>189</sup> See, e.g., Social Media Misinformation and Administration in the 2020 General Election, Stanford-MIT Healthy Elections Project (Mar. 10, 2021), [https://healthyelections.org/sites/default/files/2021-06/Social\\_Media\\_Misinformation.pdf](https://healthyelections.org/sites/default/files/2021-06/Social_Media_Misinformation.pdf).

<sup>190</sup> See, e.g., Isaac Stanley-Becker, et al., *Prosecutors demanded records of Sidney Powell's fundraising groups as part of criminal probe*, Wash. Post (Nov. 30, 2021), <https://www.washingtonpost.com/politics/2021/11/30/sidney-powell-defend-the-republic-criminal-probe/>.

<sup>191</sup> See, e.g., John L. Dorman, *supra* note 18.