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Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States

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IDENTIFYING AND MINIMIZING THE RISK OF ELECTION SUBVERSION AND STOLEN ELECTIONS IN THE CONTEMPORARY UNITED STATES

Richard L. Hasen[*]

INTRODUCTION

The United States faces a serious risk that the 2024 presidential election, and other future U.S. elections, will not be conducted fairly and that the candidates taking office will not reflect the free choices made by eligible voters under previously announced election rules. The potential mechanisms by which election losers may be declared election winners are: (1) usurpation of voter choices for President by state legislatures purporting to exercise constitutional authority, possibly with the blessing of a partisan Supreme Court and the acquiescence of Republicans in Congress; (2) fraudulent or suppressive election administration or vote counting by law- or norm-breaking election officials; and (3) violent or disruptive private action that prevents voting, interferes with the counting of votes, or interrupts the assumption of power by the actual winning candidate.

Until recently, it would have been absurd to raise the possibility of such election subversion or a stolen election in the United States. Few cases have emerged in at least the last fifty years of actual election sabotage by election officials,[1] leading to an election loser being declared the election winner, despite other unique pathologies of American election administration.[2]

The conduct of former President Donald Trump in repeatedly and falsely claiming that the 2020 election was stolen has markedly raised the potential for an actual stolen election in the United States. Millions of Trump's Republican supporters now believe the false claim of a stolen election, and some Republican elected officials have pursued sham "audits" and taken other steps that undermine voter confidence in the fairness of the election process. States have passed new laws not only restricting the vote but also making it easier to sabotage election results. Threats of violence and intimidation have led to unprecedented attrition

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[1] *See infra* note 134.

[2] Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, And How to Treat and Cure Them*, 19 ELECTION L.J. 263, 263 (2020) (describing three pathologies: "First, the United States election system features deep fragmentation of authority over elections. Second, protection of voting rights in the United States is marked by polarized and judicialized decision making. Third, constitutional protections for voting rights remain weak.").

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among election administrators, and some exiting officials are being replaced by those who may not have allegiance to the integrity of the election system. Those Republican election officials who stood up to President Trump in 2020 and saved the United States from a potential constitutional and political crisis have been censured, stripped of power, and challenged for office by those embracing the "Big Lie." Together, these actions serve both to delegitimate the election of Democrats, including President Joe Biden in 2020, and to open the door to election manipulation in future elections. Elected officials, election officials, and others believing or purporting to believe the false claim that the 2020 presidential election was stolen may seek to justify subverting future election results in response to earlier purported fraud.

The solutions to these problems are both legal and political. Legal changes should include: (1) paper-ballot, chain-of-custody, and transparency requirements, including risk-limiting audits of election results; (2) rules limiting the discretion of those who certify the votes, including Congress, through reform of the Electoral Count Act[3] (ECA); (3) rules limiting the overpoliticization of election administration, especially by state legislatures; (4) increased criminal penalties imposed on those who tamper with federal elections or commit violence or intimidation of voters, election officials, or elected officials who certify candidates; and (5) rules countering disinformation about elections, particularly disinformation about when, where, and how people vote. In addition, it will be necessary to organize for political action to reenforce rule-of-law norms in elections. This means advocating for laws that deter election subversion and against laws making stolen elections easier; politically opposing would-be election administrators who embrace false claims about stolen elections; and preparing for mass, peaceful protests in the event of attempts to subvert fair election outcomes.

Part I of this Essay describes the path to this unexpected moment of democratic peril in the United States. Part II explains the three potential mechanisms by which American elections may be subverted in the future. Part III recommends steps that can and should be taken to minimize this risk. Preserving and protecting American democracy from the risk of election subversion should be at the top of everyone's agenda. The time to act is now, before American democracy disappears.

I. HOW WE GOT HERE

Republican claims of widespread voter fraud committed mostly by Democrats, people of color, and union members are not new, but they accelerated after the disputed election between then–Governor George W. Bush and Vice President Al Gore in 2000.[4] These statements from a

[3] Ch. 90, 24 Stat. 373 (1887) (codified as amended at 3 U.S.C. §§ 5–7, 15–18).

[4] *See* RICHARD L. HASEN, THE VOTING WARS 44–51 (2012).

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segment of conservatives and Republicans (and resisted by other conservatives and Republicans) persist despite all reliable evidence that voter fraud in the contemporary United States is rare and that when such fraud occurs it tends to happen on a small scale that does not tip the result of elections.[5] The purported "evidence" of widespread voter fraud consists primarily of describing isolated instances of fraud as the "tip of the iceberg" or by taking administrative error or slack in election administration as conclusive proof of malfeasance.[6]

The statement of Trump-supporter and attorney Rudy Giuliani is typical of the genre of unsupported, vague allegations. He told CNN's *State of the Union* program during the 2016 presidential election campaign: "I'm sorry, dead people generally vote for Democrats rather than Republicans . . . . You want me to [say] that I think the election in Philadelphia and Chicago is going to be fair? I would have to be a moron to say that."[7]

The primary purpose of such voter fraud claims, at least until the Trump presidency, was two-fold: First, such claims served as the basis to pass laws, such as voter identification laws, aimed at making it harder for people likely to vote for Democrats to register and to vote.[8] Second, such claims riled up the Republican base and helped with fundraising by convincing supporters that Democrats were cheating and did not legitimately deserve to serve in office. The claims fueled party tribalism and animus, convincing both sides that the other was trying to manipulate election outcomes.[9] The Trump presidency moved the voting wars from a tired debate over the relative threats of voter fraud compared to voter suppression to a new level of delegitimation of the election process itself, raising the danger of election subversion.

Trump's voter fraud claims were a hallmark of his presidency. He remarkably claimed that there was voter fraud in the 2016 election that he won against Democrat and former Secretary of State Hillary Clinton, falsely stating that at least three million noncitizens voted in the election,

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[5] For details, see *id.* at 52–54.

[6] *See* RICHARD L. HASEN, ELECTION MELTDOWN 15–46 (2020) (describing lawsuit against Kansas law requiring documentary proof of citizenship to register to vote and former Kansas Secretary of State Kris Kobach's characterization of the evidence of noncitizen voting to support such a law as the "tip of the iceberg," *id.* at 24); *id*. at 24 (quoting the federal district court examining the evidence put forward by Kobach and concluding: "There is no iceberg . . . only an icicle, largely created by confusion and administrative error" (quoting Fish v. Kobach, 309 F.3d 1048, 1103 (D. Kan. 2018))).

[7] Mahita Gajanan, *Donald Trump Claims Election Will Be Rigged at Polling Sites*, TIME (Oct. 17, 2016, 8:54 AM), http://time.com/4532679/donald-trump-election-rigged [https://perma.cc/MG2E-EUXQ] (alteration in original).

[8] Although suppressing likely Democratic votes appears to be the purpose of many such laws, these laws did not always have such a suppressive effect, in part because the laws provoke backlash and countermeasures. *See* HASEN, *supra* note 6, at 44–45, 152 n.64.

[9] *See id.* at 15–46.

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all for his opponent.[10] Not coincidentally, the number of purported fraudulent votes matched the margin by which Clinton beat Trump in the national popular vote for President.[11]

Once in office, President Trump formed a presidential commission on voter fraud that was populated with commissioners, including former Kansas Secretary of State Kris Kobach (who served as vice-chair below Vice President Mike Pence), the Heritage Foundation's Hans von Spakovsky, and former Department of Justice (DOJ) lawyer and frequent Fox News contributor J. Christian Adams, each known for making false or exaggerated claims of voter fraud.[12] The Commission had only two meetings before it was disbanded, after numerous lawsuits over the Commission's transparency and its work.[13] Its purpose appeared to have been to make findings of the potential for widespread voter fraud to serve as the predicate for Congress passing a law allowing states to require documentary proof of citizenship before people would be eligible to register to vote.[14]

As the 2020 election neared with Trump's reelection chances uncertain and with the COVID-19 pandemic raging in the United States, President Trump markedly increased his rhetoric charging that the upcoming election would be "rigged" or "stolen," focusing primarily on vote-by-mail.[15] The rate of voting by mail unsurprisingly exploded during the pandemic because many voters and election officials saw it as a safer way of balloting than voting in person at polling places,[16] and

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[10] *See* Aaron Blake, *Donald Trump Claims None of Those 3 to 5 Million Illegal Votes Were Cast for Him. Zero.*, WASH. POST (Jan. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/25/donald-trump-claims-none-of-those-3-to-5-million-illegal-votes-were-cast-for-him-zero [https://perma.cc/E7UM-S635] ("Of those [supposed three-to-five million fraudulent] votes cast, none of 'em come to me. None of 'em come to me. They would all be for the other side. None of 'em come to me.").

[11] *See* Alana Abramson, *Hillary Clinton Officially Wins Popular Vote by Nearly 2.9 Million*, ABC NEWS (Dec. 22, 2016, 4:35 PM), https://abcnews.go.com/Politics/hillary-clinton-officially-wins-popular-vote-29-million/story?id=44354341 [https://perma.cc/UQG4-BQQC]; ROB GRIFFIN, RUY TEIXEIRA & JOHN HALPIN, CTR. FOR AM. PROGRESS, VOTER TRENDS IN 2016, at 1 (2017); Steven Porter, *Clinton Wins US Popular Vote by Widest Margin of Any Losing Presidential Candidate*, CHRISTIAN SCI. MONITOR (Dec. 22, 2016), https://www.csmonitor.com/USA/Politics/2016/1222/Clinton-wins-US-popular-vote-by-widest-margin-of-any-losing-presidential-candidate [https://perma.cc/N9ZG-ECMP].

[12] *See* HASEN, *supra* note 6, at 16, 25–27.

[13] *See id.* at 29–30.

[14] *Id.* at 28–32.

[15] For a detailed chronology, see RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS — AND HOW TO CURE IT 1–19 (2022).

[16] *See* Reid J. Epstein, *Democrats' Vote-by-Mail Effort Won in Wisconsin: Will It Work Elsewhere?*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/05/10/us/politics/Wisconsin-election-vote-by-mail-.html [https://perma.cc/A4FJ-3K7K] ("In Georgia, more than 1.2 million people have requested absentee ballots for the state's June 9 primary — compared to just 36,200 requests for the 2016 presidential primary."); Drew DeSilver, *Mail-in Voting Became Much More Common in 2020 Primaries as COVID-19 Spread*, PEW RSCH. CTR. (Oct. 13, 2020),

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President Trump himself voted by mail — even allowing his ballot to be "harvested" by someone else to deliver it to Florida election officials — during the 2020 presidential primaries.[17] Despite Trump's statements about fraud and the unprecedented nature of conducting a modern presidential election during a pandemic, no evidence emerged anywhere in the United States of significant fraud or other problems in the administration of the 2020 U.S. presidential election.[18]

President Trump repeatedly used social media, including Twitter and Facebook, to spread false claims of fraud, going so far as to claim that the only way he could lose the election was if it was "rigged."[19] The "cheap speech" revolution that lessened the news media's important intermediary role in helping voters receive truthful content facilitated the spread of Trump's false claims directly to tens of millions of followers.[20] President Trump disseminated over four hundred false claims of rigged

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https://www.pewresearch.org/fact-tank/2020/10/13/mail-in-voting-became-much-more-common-in-2020-primaries-as-covid-19-spread [https://perma.cc/H3U8-XH9X]; Emily Bazelon, *Will Americans Lose Their Right to Vote in the Pandemic?*, N.Y. TIMES (July 18, 2021), https://www.nytimes.com/2020/05/05/magazine/voting-by-mail-2020-covid.html [https://perma.cc/W3V8-SP9K]; ERIC MCGHEE, JENNIFER PALUCH & MINDY ROMERO, PUB. POL'Y INST. OF CAL., VOTE-BY-MAIL AND VOTER TURNOUT IN THE PANDEMIC ELECTION 5–6, 9–10 (2021).

[17] Miles Parks, *Trump, While Attacking Mail Voting, Casts Mail Ballot Again*, NPR (Aug. 19, 2020, 4:11 PM), https://www.npr.org/2020/08/19/903886567/trump-while-attacking-mail-voting-casts-mail-ballot-again [https://perma.cc/U462-VVSX].

[18] *See* 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 [https://perma.cc/TFP7-HXWZ]; Pam Fessler, Miles Parks & Barbara Sprunt, *As Trump Pushes Election Falsehoods, His Cybersecurity Agency Pushes Back*, NPR (Nov. 14, 2020, 7:00 AM), https://www.npr.org/sections/live-updates-2020-election-results/2020/11/14/934220380/as-trump-pushes-election-falsehoods-his-cybersecurity-agency-pushes-back [https://perma.cc/6XS7-SSLW] (citing joint statement signed by prominent government actors concluding 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"); Samantha Putterman, Amy Sherman & Miriam Valverde, *Rudy Giuliani, Trump Legal Team Push Conspiracy Theories, Baseless Claims About 2020 Election*, POLITIFACT (Nov. 20, 2020), https://www.politifact.com/article/2020/nov/20/giuliani-trump-legal-team-push-conspiracy-theories [https://perma.cc/B9GA-54HU].

[19] *See* William Cummings, Joey Garrison & Jim Sergent, *By the Numbers: President Donald Trump's Failed Efforts to Overturn the Election*, USA TODAY (Jan. 6, 2021, 10:50 AM), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001 [https://perma.cc/79U5-44T4]; Alex Hern, *Trump's Vote Fraud Claims Go Viral on Social Media Despite Curbs*, THE GUARDIAN (Nov. 10, 2020, 1:43 PM), https://www.theguardian.com/us-news/2020/nov/10/trumps-vote-claims-go-viral-on-social-media-despite-curbs [https://perma.cc/8458-PVJY]; Greg Sargent, Opinion, *Trump Just Repeated His Ugliest Claim About the Election. Why Isn't It Bigger News?*, WASH. POST (Sept. 15, 2020), https://www.washingtonpost.com/opinions/2020/09/15/trump-just-repeated-his-ugliest-claim-about-election-why-isnt-it-bigger-news [https://perma.cc/7Y7Z-QAYV].

[20] HASEN, *supra* note 15, at 2; *see id.* at 1–19.

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or stolen elections to his supporters via Twitter following the election in 2020.[21]

The turning point on electoral fraud claims came after President Trump lost the presidential election in November 2020 to his Democratic opponent, then–Vice President Joe Biden. Few people who closely followed President Trump expected he would ever concede defeat; the question was whether he would merely grumble about voter fraud and acquiesce to his defeat or double down on his false claims.

President Trump did more than double down. He pursued a political and legal strategy aimed not just at sowing doubt but also at subverting the outcome of the presidential election. This strategy, which has no precedent at any point in American history,[22] had many parts, but the best evidence now available shows that this was less about saving face and more about reversing election outcomes.

A key part of Trump's strategy aimed to activate the Trumpian base by continuing to spread false claims of a stolen election on social media and through friendly cable television and news outlets such as Fox, Newsmax, and the One America News Network.[23] The claims included traditional false claims of ballot box stuffing and fraudulent ballots, outlandish ones about Italian satellites being used to manipulate votes,[24] and tired tropes of votes being stolen in Democratic cities in swing states with large populations of people of color. On November 27, 2020, for example, President Trump tweeted: "Biden can only enter the White House as President if he can prove that his ridiculous '80,000,000 votes' were not fraudulently or illegally obtained. When you see what happened in Detroit, Atlanta, Philadelphia & Milwaukee, massive voter fraud, he's got a big unsolvable problem!"[25]

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[21] 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 [https://perma.cc/LZN4-RUV2] ("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."). For more details, see HASEN, *supra* note 15, at 3–11.

[22] *See* Ned Foley, *How Best to End "Electoral McCarthyism"?*, ELECTION L. BLOG (Sept. 13, 2021, 8:49 AM), https://electionlawblog.org/?p=124540 [https://perma.cc/75QN-C4PZ] ("Based on the research I did for *Ballot Battles*, I'm not aware of a historical example (prior to 2020) in which a serious dispute over counting votes was accompanied by the kind of blatant falsification of reality that is the mark of McCarthyism-style demagoguery. Not even the Hayes-Tilden dispute, in my judgment, was of that nature.").

[23] For a more detailed chronology, see HASEN, *supra* note 15, at 1–19.

[24] Martin Pengelly, *Trump Aide Asked DOJ to Investigate Bizarre "Italygate" Claim Votes Were Changed by Satellite*, THE GUARDIAN, (June 6, 2021, 9:35 AM), https://www.theguardian.com/us-news/2021/jun/06/donald-trump-mark-meadows-doj-italygate [https://perma.cc/5CHD-M48E].

[25] The tweet from President Trump, which originally appeared on Twitter on November 27, 2020, is no longer available on Twitter (which deplatformed Trump). The archived version is available at: Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2020, 10:56 AM), https://web.archive.org/web/20201211212108/https://twitter.com/realDonaldTrump/status/1332352538855747584 [https://perma.cc/E2YV-HFJQ].

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This drumbeating led to public protests over vote counting and threats of violence against election officials. It also helped to bring pressure from below on elected officials to consider taking steps to turn a Trump loss into a victory. Election offices where tabulating and recounting took place were subject to sometimes-violent protests, and election officials received death threats and intimidating messages, which continue to this day as President Trump continues to falsely claim fraud.[26]

For example, Claire Woodall-Vogg, the executive director of the Milwaukee Election Commission, "received voicemails calling for her hanging" in August 2021, nine months after the end of the election.[27] One angry caller railed: "You motherfucker. You rigged my fucking election, you fucking piece of shit. We're going to try you, and we're going to fucking convict your piece-of-shit ass, and we're going to hang you. You fucking piece — you get the fuck out of my country, you pile of shit."[28] A report by the Brennan Center for Justice and Bipartisan Policy Center found one in three election officials reported feeling unsafe because of their job.[29] No doubt in part driven by this conduct, states and local governments are beginning to witness a mass exodus of election officials.[30]

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[26] *See, e.g.*, Linda So & Jason Szep, *Reuters Unmasks Trump Supporters Who Terrified U.S. Election Officials*, REUTERS (Nov. 9, 2021, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-election-threats [https://perma.cc/HX2Y-EMQ3]; Linda So & Jason Szep, Special Report, *Terrorized U.S. Election Workers Get Little Help from Law Enforcement*, REUTERS (Sept. 8, 2021, 1:46 PM), https://www.reuters.com/legal/government/terrorized-us-election-workers-get-little-help-law-enforcement-2021-09-08 [https://perma.cc/5MTG-JHSJ]; John Kruzel, *Threats of Violence Spark Fear of Election Worker Exodus*, THE HILL (Aug. 2, 2021, 6:00 AM), https://thehill.com/homenews/campaign/565722-threats-of-violence-spark-fear-of-election-worker-exodus [https://perma.cc/V8VE-6EZ2]; Nick Corasaniti, Jim Rutenberg & Kathleen Gray, *Threats and Tensions Rise as Trump and Allies Attack Elections Process*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2020/11/18/us/politics/trump-election.html [https://perma.cc/887Q-3YXD].

[27] Rob Kuznia, Bob Ortega & Casey Tolan, *In the Wake of Trump's Attack on Democracy, Election Officials Fear for the Future of American Elections*, CNN (Sept. 13, 2021, 7:30 AM), https://www.cnn.com/2021/09/12/politics/trump-2020-future-presidential-elections-invs [https://perma.cc/G348-8D8D].

[28] *Id.* The audio of the call may be accessed directly at: https://pmd.cdn.turner.com/cnn/2021/images/08/27/threatening-call-wi.mp3 [https://perma.cc/QT7Z-F8Z2].

[29] Press Release, Brennan Ctr. for Just., One in Three Election Officials Report Feeling Unsafe Because of Their Job (June 16, 2021), https://www.brennancenter.org/our-work/analysis-opinion/one-three-election-officials-report-feeling-unsafe-because-their-job [https://perma.cc/8BNH-5WGV]. For the report itself, see BRENNAN CTR. FOR JUST. & BIPARTISAN POL'Y CTR., ELECTION OFFICIALS UNDER ATTACK (2021).

[30] 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-voting-officials.html [https://perma.cc/RG2P-B7S9]; Fredreka Schouten, *Personal Threats, Election Lies and Punishing New Laws Rattle Election Officials, Raising Fears of a Mass Exodus*, CNN (July 21, 2021, 7:02 AM), https://www.cnn.com/2021/07/21/politics/election-officials-exodus [https://perma.cc/7F7T-22Y7].

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By one count, President Trump and his allies filed at least sixty-two lawsuits aimed at contesting the results of elections in states President Biden had won.[31] Among the most high-profile of these cases was an original action that the State of Texas filed directly in the United States Supreme Court against four other states seeking to reverse the outcome of the election.[32] The claims were based upon false evidence of voter fraud and unsupported legal theories, and the Supreme Court rejected them without a hearing.[33] President Trump and his allies eventually lost all but one of the cases.[34]

Trump's behind-the-scenes activities were the most nefarious. He made over thirty contacts with governors, state election officials, state elected officials, and others to either stall or reverse official certification of presidential election results in the states and to facilitate state legislative action on presidential election results.[35] In one of the most notorious incidents captured on an audio recording, President Trump

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[31] Cummings et al., *supra* note 19.

[32] *See* Adam Liptak, *Supreme Court Rejects Texas Suit Seeking to Subvert Election*, N.Y. TIMES (Jan. 15, 2021), https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html [https://perma.cc/AW9V-NEPC].

[33] *See* Texas v. Pennsylvania, 141 S. Ct. 1230, 1230 (2020) (mem.).

[34] Cummings et al., *supra* note 19 ("Out of the 62 lawsuits filed challenging the presidential election, 61 have failed . . . . Some cases were dismissed for lack of standing and others based on the merits of the voter fraud allegations. The decisions have came [sic] from both Democratic-appointed and Republican-appointed judges — including federal judges appointed by Trump."); *see also* Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, But Not a Wipe-Out*, BROOKINGS INST. (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out [https://perma.cc/E2RP-W288] ("Trump . . . lost all but one case — and the great majority of judicial votes in all cases disfavored his claims."); Rosalind S. Helderman & Elise Viebeck, *"The Last Wall": How Dozens of Judges across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/YBD3-H2FC] ("In a remarkable show of near-unanimity across the nation's judiciary, at least 86 judges — ranging from jurists serving at the lowest levels of state court systems to members of the United States Supreme Court — rejected at least one post-election lawsuit filed by Trump or his supporters . . . ."); Liptak, *supra* note 32; HASEN, *supra* note 15, at 159–60 (describing losing lawsuits).

[35] Anita Kumar & Gabby Orr, *Inside Trump's Pressure Campaign to Overturn the Election*, POLITICO (Dec. 21, 2020, 4:30 AM), https://www.politico.com/news/2020/12/21/trump-pressure-campaign-overturn-election-449486 [https://perma.cc/H5MB-RU4V] ("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."); Maria Polletta, *Trump Lashes Out at Gov. Doug Ducey Following Certification of Arizona Election Results*, AZCENTRAL (Dec. 1, 2020, 12:35 PM), https://www.azcentral.com/story/news/politics/elections/2020/11/30/president-trump-slams-arizona-gov-ducey-after-election-certification/6472784002 [https://perma.cc/39NC-LMGE]; Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election*

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pressured Georgia Secretary of State Brad Raffensperger to "find" at least 11,780 votes to reverse President Biden's win in Georgia.[36] Secretary Raffensperger refused.[37]

In addition to reaching out to state officials, President Trump was working with an assistant attorney general in DOJ, Jeffrey Clark, to get DOJ to weigh in on election disputes by falsely claiming fraud cost President Trump the election.[38] Clark prepared a letter that would have had DOJ falsely claim that there were serious irregularities in the conduct of the election in Georgia, and he pushed for DOJ to file federal litigation in the Supreme Court mirroring the defeated Texas lawsuit.[39] Acting Attorney General Jeffrey Rosen rejected Clark's attempts, and President Trump considered firing Rosen and replacing him with Clark, an attempt that apparently failed only because several high-profile DOJ officials threatened to resign in protest.[40]

President Trump, along with at least one Republican member of Congress and members of his own legal team, including his attorney John Eastman, attempted to pressure Vice President Pence, who presided over the joint congressional session counting Electoral College votes on January 6, 2021, either to delay the proceedings to give state legislatures a chance to send in alternative slates of electors or simply to declare President Trump the election winner.[41]

Results, POLITICO (Nov. 21, 2020, 10:21 PM), https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031 [https://perma.cc/UNT9-K3RV].

[36] 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://perma.cc/ZF8M-9JS6].

[37] *Id.*

[38] *See* Katie Benner, *Report Cites New Details of Trump Pressure on Justice Dept. over Election*, N.Y. TIMES (Nov. 6, 2021), https://www.nytimes.com/2021/10/06/us/politics/trump-election-fraud-report.html [https://perma.cc/3JBS-Q8V2].

[39] *See* Mark Joseph Stern, *The DOJ Official Who Tried to Steal the Election for Trump Has a Sweet New Gig*, SLATE (Aug. 4, 2021, 2:35 PM), https://slate.com/news-and-politics/2021/08/jeffrey-bossert-clark-justice-department-covid-vaccine.html [https://perma.cc/XYX7-XLJX].

[40] Benner, *supra* note 38; *see also* Katie Benner, *Former Acting Attorney General Testifies About Trump's Efforts to Subvert Election*, N.Y. TIMES (Aug. 7, 2021), https://www.nytimes.com/2021/08/07/us/politics/jeffrey-rosen-trump-election.html [https://perma.cc/993B-AF7X]; Katherine Faulders & Alexander Mallin, *DOJ Officials Rejected Colleague's Request to Intervene in Georgia's Election Certification: Emails*, ABC NEWS (Aug. 7, 2021, 2:56 PM), https://abcnews.go.com/US/doj-officials-rejected-colleagues-request-intervene-georgias-election/story?id=79243198 [https://perma.cc/EAE4-AC4D].

[41] Jamie Gangel & Jeremy Herb, *Memo Shows Trump Lawyer's Six-Step Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021, 5:39 PM), https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo [https://perma.cc/DM92-SABH]; *see also* Kevin Breuninger, *Trump Ally Jim Jordan Forwarded Mark Meadows Argument for Mike Pence to Reject Biden Electoral Votes*, CNBC (Dec. 16, 2021, 6:50 PM), https://www.cnbc.com/2021/12/15/jim-jordan-texted-mark-meadows-argument-for-mike-pence-to-reject-biden-electoral-votes.html [https://perma.cc/J763-ULMK]. For a rebuttal to Eastman's arguments on the merits, see generally Matthew A. Seligman, The Vice President's Non-existent Unilateral Power to Reject Electoral Votes

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Putting together all of these actions, the endgame was: (1) to get state legislatures to rely on purported evidence of fraud or other irregularities to declare alternative slates of presidential electors, despite a lack of legal authority to do so; (2) to argue that the ECA, which governs the counting of Electoral College votes, permitted Congress to consider these alternative slates of electors because the irregularities constituted a "failed" election under the Act[42] or that portions of the ECA limiting the discretion of Congress to count legislatively submitted alternative slates of electors[43] were unconstitutional; and (3) either to get Vice President Pence to delay the counting of Electoral College votes until enough states could declare alternative slates of electors (or simply declare President Trump the winner), or alternatively, to prevent President Biden from obtaining a majority of Electoral College votes, triggering a procedure for choosing the President via votes by each state's House of Representatives delegation,[44] which would have favored President Trump.[45]

Vice President Pence refused to participate in the scheme,[46] and the counting on January 6, 2021, confirmed Biden's victory, even as it was interrupted by a violent invasion of the United States Capitol in the middle of the vote counting.[47] Even after the insurrection, 138 Republican members of the House and seven Republican Senators voted

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(unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3939020 [https://perma.cc/973D-EPW6].

42 *See* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

43 *See id.* § 15.

44 U.S. CONST. amend. XII.

45 *See* Deanna Paul, *Trump Campaign Wants States to Override Electoral Votes for Biden. Is that Possible?*, WALL ST. J. (Nov. 21, 2020, 10:48 AM), https://www.wsj.com/articles/trump-campaign-wants-states-to-override-electoral-votes-for-biden-is-that-possible-11605973695 [https://perma.cc/SD9D-FU36]. A federal district court reviewing a challenge by John Eastman to a subpoena from a House committee investigating the January 6 insurrection concluded that Eastman and Trump's actions "more likely than not constitute attempts to obstruct an official proceeding." Eastman v. Thompson, No. 22-cv-00099, at *33 (C.D. Cal. Mar. 28, 2022), https://storage.courtlistener.com/recap/gov.uscourts.cacd.841840/gov.uscourts.cacd.841840.260.0_4.pdf [https://perma.cc/H2QC-5YKS]. The court concluded: "If Dr. Eastman and President Trump's plan had worked, it would have permanently ended the peaceful transition of power, undermining American democracy and the Constitution. If the country does not commit to investigating and pursuing accountability for those responsible, the court fears January 6 will repeat itself." *Id.* at 44.

46 *See* Maggie Haberman & Annie Karni, *Pence Said to Have Told Trump He Lacks Power to Change Election Result*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election-results.html [https://perma.cc/QZY9-PJY5].

47 Lisa Mascaro, Eric Tucker, Mary Clare Jalonick & Andrew Taylor, *Biden Win Confirmed After Pro-Trump Mob Storms US Capitol*, ASSOCIATED PRESS (Jan. 7, 2021), https://apnews.com/article/joe-biden-confirmed-0409d7d753461377ff2c5bb91ac4050c [https://perma.cc/F4GN-YGSD].

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to object to the counting of Pennsylvania's Electoral College votes based upon spurious grounds.[48]

The bravery of Republican and other election officials and elected officials prevented Trump's gambit from succeeding. It was not just Vice President Pence, Secretary Raffensperger, and Acting Attorney General Rosen who stood up to President Trump, but also Republican governors, Republican-appointed election officials, and others, many of whom faced pressure and condemnation from both President Trump and the base of the Republican Party.[49] For example, Secretary Raffensperger faces a Republican primary challenge as he runs for reelection as Secretary of State against Representative Jody Hice, a current member of Congress who has parroted Trump's claims of a stolen 2020 election.[50]

President Trump riled up his supporters to attend "wild" protests in Washington, D.C., and thousands of his supporters obliged.[51] And at his January 6 rally, he directed his supporters to the Capitol after he and other speakers once again claimed a rigged and stolen election and demanded that Vice President Pence and others do something about it.[52]

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[48] Harry Stevens, Daniela Santamariña, Kate Rabinowitz, Kevin Uhrmacher & John Muyskens, *How Members of Congress Voted on Counting the Electoral College Vote*, WASH. POST (Jan. 7, 2021, 12:48 PM), https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/ [https://perma.cc/AN8W-Q93K]; *Tempers Flare as Congress Rejects Objections to Pennsylvania Electoral Votes*, 6ABC (Jan. 7, 2021), https://6abc.com/conor-lamb-morgan-griffiths-house-confrontation-pennsylvania-electoral-votes/9430160 [https://perma.cc/L25K-39KP]; Jonathan Tamari, *Eight Pennsylvania Republicans in Congress Will Join a Push Today to Reverse Trump's Election Loss*, PHILA. INQUIRER (Jan. 6, 2021), https://www.inquirer.com/politics/election/electoral-college-certification-congress-pennsylvania-republicans-20210106.html [https://perma.cc/HG7R-MNT6].

[49] Helderman & Viebeck, *supra* note 34; Richard L. Hasen, *More and More Republican Officials Are Standing Up to Trump and His Effort to Overturn the Election*, SLATE (Dec. 1, 2021, 2:58 PM), https://slate.com/news-and-politics/2020/12/republican-officials-who-have-gone-against-trump-barr-ducey-kemp.html [https://perma.cc/D73V-BRJ2].

[50] *See* Ian Millhiser, *Jody Hice Tried to Overturn the 2020 Election. Now He Wants to Be in Charge of Georgia's Elections*, VOX (Mar. 22, 2021, 6:10 PM), https://www.vox.com/2021/3/22/22345029/jody-hice-2020-election-donald-trump-georgia-secretary-of-state-brad-raffensperger [https://perma.cc/6L9F-L572].

[51] Dan Barry & Sheera Frenkel, *"Be There. Will Be Wild!": Trump All but Circled the Date*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html [https://perma.cc/UN5J-TY2K].

[52] For a detailed chronology, see Trial Memorandum of the United States House of Representatives in the Impeachment Trial of President Donald J. Trump at 20–22, *In re* Impeachment of President Donald J. Trump (U.S. Sen. Feb. 2, 2021), https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf [https://perma.cc/6SWZ-TEST].

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The January 6, 2021, riot left over 140 law enforcement officers injured,[53] four Trump supporters dead,[54] and four Capitol police officers who died by suicide by August 2021.[55] Some officers' injuries were serious, including a lost eye, broken ribs and spinal disks, and concussions; insurrectionists tased one officer so many times that he had a heart attack.[56]

It was the first successful violent attack on the Capitol since the British attacked during the War of 1812.[57] Had things gone even slightly differently, the Vice President and congressional leadership could have been captured or killed;[58] the events could have provoked a military response and left the counting of election results uncompleted.[59] Thanks to the bravery of law enforcement officials and members of Congress, the counting resumed after the violence, and President Biden was found to be the winner early on the morning of January 7.[60]

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[53] Michael S. Schmidt & Luke Broadwater, *Officers' Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html [https://perma.cc/6XXW-WFFY].

[54] Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html [https://perma.cc/2HV9-TWYY].

[55] Jan Wolfe, *Four Officers Who Responded to U.S. Capitol Attack Have Died by Suicide*, REUTERS (Aug. 2, 2021, 11:19 PM), https://www.reuters.com/world/us/officer-who-responded-us-capitol-attack-is-third-die-by-suicide-2021-08-02 [https://perma.cc/TH7B-TXGD]; Peter Hermann, *Two Officers Who Helped Fight the Capitol Mob Died by Suicide. Many More Are Hurting.*, WASH. POST (Feb. 21, 2021, 2:56 PM), https://www.washingtonpost.com/local/public-safety/police-officer-suicides-capitol-riot/2021/02/11/94804ee2-665c-11eb-886d-5264d4ceb46d_story.html [https://perma.cc/5E22-XZPA].

[56] Peter Baker & Sabrina Tavernise, *One Legacy of Impeachment: The Most Complete Account So Far of Jan. 6*, N.Y. TIMES (Aug. 31, 2021), https://www.nytimes.com/2021/02/13/us/politics/capitol-riots-impeachment-trial.html [https://perma.cc/VBE5-UYSY].

[57] Jackie Salo, *US Capitol Building Invaded for the First Time Since War of 1812*, N.Y. POST (Jan. 6, 2021, 6:57 PM), https://nypost.com/2021/01/06/us-capitol-building-invaded-for-first-time-since-war-of-1812 [https://perma.cc/93YK-5ZZH].

[58] *See* Ashley Parker, Carol D. Leonnig, Paul Kane & Emma Brown, *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/QZ8X-6D5F]; Adam Goldman, John Ismay & Hailey Fuchs, *Man Who Broke into Pelosi's Office and Others Are Charged in Capitol Riot*, N.Y. TIMES (Jan. 10, 2021), https://www.nytimes.com/2021/01/08/us/politics/capitol-riot-charges.html [https://perma.cc/XT3K-RMLC]; *New Timeline Shows Just How Close Rioters Got to Pence and His Family*, CNN (Jan. 15, 2021), https://www.cnn.com/videos/politics/2021/01/15/mike-pence-close-call-capitol-riot-foreman-vpx.cnn [https://perma.cc/7R2D-KHCP].

[59] *See* Dan Lamothe, Karoun Demirjian & Devlin Barrett, *Generals Cast Military Response to Capitol Riot as an "Unforeseen" Change in Mission*, WASH. POST (June 15, 2021, 8:10 PM), https://www.washingtonpost.com/politics/generals-cast-military-response-to-capitol-riot-as-an-unforeseen-change-in-mission/2021/06/15/5201dcbe-ce0a-11eb-a7f1-52b8870bef7c_story.html [https://perma.cc/P3KC-HJDF].

[60] Mascaro, Tucker, Jalonick & Taylor, *supra* note 47. For example, Eugene Goodman was the Capitol police officer who single-handedly led a portion of the January 6 mob away from discovering the entrance to the Senate chambers. Rebecca Tan, *A Black Officer Faced Down a Mostly*

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President Trump reluctantly left office at his constitutionally prescribed time on January 20, 2021, but he refused to participate in the custom of attending his successor's inauguration and affirming the peaceful transition of power that has been a hallmark of U.S. elections.[61] President Trump instead continues to insist falsely that the 2020 election was stolen, even as many of his comments on the subject reach fewer readers thanks to the decisions of Facebook and Twitter to remove his accounts from their websites.[62]

Deplatforming President Trump did little to dampen the enthusiasm among some conservatives and Republicans to relitigate November 2020 and insist on a Trump victory. Arizona's Republican-led Senate ordered an "audit" of the state's presidential election results months after President Biden took office.[63] The senators employed a firm, "Cyber Ninjas," that had no experience conducting election audits and that was headed by someone who had parroted Trump's false claims of a stolen election;[64] the sham audit revealed no evidence of a stolen election.[65] Pressure fell on Republicans in other states to emulate the "audit,"[66] and similar bogus investigations began in states including Wisconsin and

White Mob at the Capitol. Meet Eugene Goodman., WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/local/public-safety/goodman-capitol-police-video/2021/01/13/08ab3eb6-546b-11eb-a931-5b162d0d033d_story.html [https://perma.cc/SRJ4-4ZZY]. For these efforts, Goodman was unanimously awarded a Congressional Gold Medal by the Senate. Alana Wise, *Senate Unanimously Votes to Award Officer Eugene Goodman a Congressional Gold Medal*, NPR (Feb. 12, 2021, 7:27 PM), https://www.npr.org/sections/trump-impeachment-trial-live-updates/2021/02/12/967520702/senate-unanimously-votes-to-award-officer-eugene-goodman-a-congressional-gold-me [https://perma.cc/5LD7-6EB6].

61 Ayesha Rascoe, *For 1st Time in 150 Years, Outgoing President Doesn't Attend Inauguration*, NPR (Jan. 20, 2021, 4:10 PM), https://www.npr.org/2021/01/20/958905703/for-1st-time-in-150-years-outgoing-president-doesnt-attend-inauguration [https://perma.cc/C37L-W5RU]; *see also* Michael D. Shear, Maggie Haberman, Nick Corasaniti & Jim Rutenberg, *Trump Administration Approves Start of Formal Transition to Biden*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/2020/11/23/us/politics/trump-transition-biden.html [https://perma.cc/64N7-QA97].

62 On the deplatforming of President Trump by Facebook and Twitter, see HASEN, *supra* note 15, at 2, 15–16, 123, 145–57.

63 Michael Wines, *Half a Year After Trump's Defeat, Arizona Republicans Are Recounting the Vote*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/04/25/us/Election-audit-Arizona-Republicans.html [https://perma.cc/6SFV-DDC2].

64 *Id.*; *see* Nicholas Riccardi, *Experts or "Grifters"? Little-Known Firm Runs Arizona Audit*, ASSOCIATED PRESS (May 23, 2021), https://apnews.com/article/donald-trump-arizona-business-technology-election-recounts-c5948f1d2ecdff9e93d4aa27ba0c1315 [https://perma.cc/4LMS-2RS9].

65 Jack Healy, Michael Wines & Nick Corasaniti, *Republican Review of Arizona Vote Fails to Show Stolen Election*, N.Y. TIMES (Sept. 30, 2021), https://www.nytimes.com/2021/09/24/us/arizona-election-review-trump-biden.html [https://perma.cc/D7NW-28LD].

66 Andrew Seidman, *Pennsylvania GOP Leaders Face Growing Pressure to Pursue an Arizona-Style 2020 Election "Audit,"* PHILA. INQUIRER (June 4, 2021), https://www.inquirer.com/politics/pennsylvania/pennsylvania-republicans-election-audit-legislature-arizona-20210604.html [https://perma.cc/9A2G-2MPJ].

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Pennsylvania.[67] Some Wisconsin Republicans advocated eliminating the state's bipartisan election agency to replace it with party loyalists.[68]

Those Republican election officials and elected officials who stood up in 2020 to President Trump have faced censure, removal from office, and other consequences. Party organizations have condemned secretaries of state and governors who vouched for the fairness of the 2020 election;[69] a Republican on Michigan's Board of State Canvassers, who served in a ceremonial role in certifying the state's presidential election results, was replaced by Republicans unhappy that he did his ministerial duty.[70] Republican members of the House who voted for Trump's impeachment for events related to the January 6 insurrection have faced threats as well. Representative Anthony Gonzalez decided not to run for reelection, citing the threats and calling President Trump "a cancer for the country."[71] Republican Adam Kinzinger, who is serving on a House committee investigating the January 6 events, also declined to run for reelection.[72]

The State of Georgia passed a law removing Secretary of State Raffensperger from his position as Chair of the State Election Board, replacing him with someone chosen by the state legislature.[73] That same

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[67] *See* Nick Corasaniti, *Republicans Seek Pennsylvania Voters' Personal Information as They Try to Review the 2020 Results.*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/09/15/us/politics/pennsylvania-election-audit-republicans.html [https://perma.cc/K7L9-MWDP]; Scott Bauer, *Wisconsin Election Clerks Say GOP Investigator's Inquiry Landed in Junk Folders*, PIONEER PRESS (Sept. 14, 2021, 5:19 PM), https://www.twincities.com/2021/09/14/wisconsin-election-clerks-say-gop-investigators-inquiry-landed-in-junk-folders [https://perma.cc/GMP7-62UW].

[68] Reid J. Epstein, *Wisconsin Republicans Push to Take Over the State's Elections*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/politics/wisconsin-republicans-decertify-election.html [https://perma.cc/AF7F-JQQM].

[69] Michelle L. Price, *Nevada GOP Censures Election Official Who Defended Results*, ASSOCIATED PRESS (Apr. 11, 2021), https://apnews.com/article/donald-trump-barbara-cegavske-nevada-elections-bccf4ffe9a52dd6ebbe6e93ad0285e5a [https://perma.cc/W7UH-VHE7]; Lisa Lerer, *Republicans in Two Rural Georgia Counties Censure Gov. Brian Kemp and Others*, N.Y. TIMES (Aug. 30, 2021), https://www.nytimes.com/2021/04/14/us/politics/georgia-kemp-raffensperger-trump-republicans.html [https://perma.cc/RD8A-R4VU].

[70] Dave Boucher, *Whitmer Appoints New Member to Elections Board After GOP Wanted Replacement*, DET. FREE PRESS (Jan. 19, 2021, 5:24 PM), https://www.freep.com/story/news/politics/elections/2021/01/19/tony-daunt-whitmer-gop-michigan-board-state-canvassers/4210262001 [https://perma.cc/U3R4-6WG9].

[71] Jonathan Martin, *Ohio House Republican, Calling Trump "a Cancer," Bows Out of 2022*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/09/16/us/politics/anthony-gonzalez-ohio-trump.html [https://perma.cc/2Q4V-Q6VZ].

[72] Reid J. Epstein, *Adam Kinzinger, Republican Trump Critic, Won't Seek Re-election in House*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/politics/adam-kinzinger-illinois-election.html [https://perma.cc/B6AT-AYDA].

[73] Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html [https://perma.cc/4WWL-DXB5].

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legislation gave the board authority to suspend county election officials, including in heavily Democratic counties such as Fulton County.[74]

The Georgia law was one of 216 bills across forty-one states that gave or would give partisan state legislators greater control of the election process over state and local election officials, according to a report by the States United Democracy Center, Protect Democracy, and Law Forward.[75] In Iowa, local election officials could face criminal penalties for sending an absentee ballot application to a voter unless first requested by the voter;[76] in Texas, poll workers could face criminal sanctions for interfering with the activities of "poll watchers," who can now engage in intimidation and interference at polling places.[77] While many of these laws have provisions that might be seen as aimed at voter suppression, at least some of them appear geared to providing a path for overturning election results.[78] Perhaps the most troubling bills introduced so far, but not passed, are those in the State of Arizona, which would have given the state legislature authority to ignore the vote of Arizonans and appoint its own slate of presidential electors upon flimsy allegations of election irregularities or for any reason at all.[79]

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[74] *See id.*

[75] STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & LAW FORWARD, A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION 1 (2021) [hereinafter DEMOCRACY CRISIS IN THE MAKING], https://s3.documentcloud.org/documents/20688594/democracy-crisis-report-april-21.pdf [https://perma.cc/3HBS-XAS2]; STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & LAW FORWARD, DEMOCRACY CRISIS REPORT UPDATE: NEW DATA AND TRENDS SHOW THE WARNING SIGNS HAVE INTENSIFIED IN THE LAST TWO MONTHS 1 (2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II_June-10_Final_v7.pdf [https://perma.cc/7SM2-BDEE] (updating earlier report).

[76] DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, at 26 (citing Act of Mar. 8, 2021, ch. 12, 2021 Iowa Acts Reg. Sess. 22 (codified at scattered sections of IOWA CODE)); *see* IOWA CODE §§ 39A.2(1)(g), 39A.6(3)(a), 53.2(1)(c), 53.8(4) (2022).

[77] Sean Morales-Doyle, *We're Suing Texas over Its New Voter Suppression Law*, BRENNAN CTR. FOR JUST. (Sept. 7, 2021), https://www.brennancenter.org/our-work/analysis-opinion/were-suing-texas-over-its-new-voter-suppression-law [https://perma.cc/9TBM-83GE] (describing new Texas law that "threatens poll workers with criminal prosecution if they try to stop partisan poll watchers from harassing or intimidating voters"). On the general danger of election surveillance intimidating voters and poll workers, see Rebecca Green, *Election Surveillance*, 57 WAKE FOREST L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3982460 [https://perma.cc/5U8H-R3BZ].

[78] *See* Green, *supra* note 77 (manuscript at 23–31); Lawrence Norden, *Protecting American Democracy Is No Crime: New Laws Could Make Election Officials Legal Targets*, FOREIGN AFFS. (Apr. 7, 2021), https://www.foreignaffairs.com/articles/united-states/2021-04-07/protecting-american-democracy-no-crime [https://perma.cc/5RCD-D7UK]. On the differences and similarities between voter-suppression and election-subversion concerns, see *infra* note 105.

[79] *See* DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, at 9–10 (describing and criticizing proposed Arizona laws).

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The changed laws and continued threats and harassment aimed at election officials have caused an unprecedented exodus of election officials, who already faced harsh conditions and budget shortfalls.[80] The loss of these officials creates two simultaneous risks to election integrity. First, lack of professionalization increases the risk of election-administrator error, which, in the current hyperpolarized atmosphere in the United States, can further undermine confidence in the election process. Second, vacancies in election positions in the current atmosphere may facilitate the population of these positions with those who believe the 2020 election was stolen and who may be more willing to break the rules out of a mistaken desire to level the playing field. Thousands of Trump loyalists, at the urging of Trump-ally Steve Bannon, have been filling positions as Republicans on local election boards, raising the serious danger of vote miscounting in future elections and the undermining of confidence in elections for those on the left.[81]

The risk of election officials undermining the security of election systems was on full display in August 2021, when the Mesa County, Colorado, election administrator Tina Peters spoke at a conference organized by MyPillow chief executive Mike Lindell that perpetuated false statements that the 2020 election was stolen.[82] Although Peters denied releasing the source code used on Dominion Voting Systems (Dominion) voting machines, she admitted copying it, and the Lindell conference made the code publicly available, raising serious questions about whether those machines would now be more vulnerable to hacking.[83] A Brennan Center report explains how the "insider" threat of election sabotage is growing.[84]

And among the Republican base, beliefs have hardened that the 2020 election was stolen. Trump's stolen election claim has become a core article of faith, part of what it means in the contemporary United States to *be* a Republican: in a September 2021 CNN poll, 59% of Republicans

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[80] *See* sources cited *supra* note 30.

[81] *See* Isaac Arnsdorf, Doug Bock Clark, Alexandra Berzon & Anjeanette Damon, *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP — And Reshape America's Elections*, PROPUBLICA (Sept. 2, 2021, 5:00 AM), https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections [https://perma.cc/JJ5J-Z3FF] ("ProPublica contacted GOP leaders in 65 key counties, and 41 reported an unusual increase in signups since Bannon's campaign began. At least 8,500 new Republican precinct officers (or equivalent lowest-level officials) joined those county parties. We also looked at equivalent Democratic posts and found no similar surge.").

[82] Nick Corasaniti, *G.O.P. Election Reviews Create a New Kind of Security Threat*, N.Y. TIMES (Oct. 27, 2021), https://www.nytimes.com/2021/09/01/us/politics/gop-us-election-security.html [https://perma.cc/ETQ8-YC6F].

[83] *See id.*

[84] Lawrence Norden & Derek Tisler, *Addressing Insider Threats in Elections*, BRENNAN CTR. FOR JUST. (Dec. 8, 2021), https://www.brennancenter.org/our-work/analysis-opinion/addressing-insider-threats-elections [https://perma.cc/KMR3-8HMP].

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and Republican-leaning independents said "[b]elieving that Donald Trump won the 2020 election" was "very" or "somewhat" important to what it means to be a Republican today.[85] Overall, 36% of Americans polled in the summer of 2021 did not believe that Biden was the legitimate president.[86] "Among Republicans, 78% say that Biden did not win and 54% believe there is solid evidence of that, despite the fact that no such evidence exists. That view is also deeply connected to support for Trump."[87] The report further found that "[a]mong Republicans who say Trump should be the leader of the party, 88% believe Biden lost — including 64% who say there is solid evidence that he did not win — while among those Republicans who do not want Trump to lead the Party, 57% say Biden won legitimately."[88]

Most amazing about the continued Republican belief that the election was stolen from President Trump is the utter lack of reliable evidence supporting the claim; a pandemic-laden election raised the risk of serious errors in election administration[89] that could have been parlayed into false charges of malfeasance. But this was perhaps the best administered presidential election in American history.[90]

Given the new Republican orthodoxy of a stolen 2020 election, it is no wonder that false claims of voter fraud costing Republicans election victories have spread beyond President Trump. Other Republican politicians preemptively and without evidence have raised claims of stolen elections before polls have even closed, including former state Attorney General Adam Laxalt, running for a U.S. Senate seat in Nevada,[91] and Larry Elder, who ran unsuccessfully in the recall election against

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[85] CNN Poll Conducted by SSRS 10 (Sept. 12, 2021, 8:00 AM), http://cdn.cnn.com/cnn/2021/images/09/12/rel5c.-.partisanship.pdf [https://perma.cc/D5EZ-53SH].

[86] Jennifer Agiesta & Ariel Edwards-Levy, *CNN Poll: Most Americans Feel Democracy Is Under Attack in the US*, CNN (Sept. 15, 2021, 12:01 PM), https://www.cnn.com/2021/09/15/politics/cnn-poll-most-americans-democracy-under-attack/index.html [https://perma.cc/MTE5-YX6M].

[87] *Id.*

[88] *Id.*

[89] *See* Eugene D. Mazo, Essay, *Voting During a Pandemic*, 100 B.U. L. REV. ONLINE 283, 287–294 (2020).

[90] *See* Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 Election*, 32 J. DEMOCRACY 159, 159, 165–170 (2021).

[91] Nick Corasaniti, Blake Hounshell & Leah Askarinam, *A Republican Fights Voter Fraud in His Race (231 Days Before Election Day)*, N.Y. TIMES (Mar. 22, 2022, 7:01 PM), https://www.nytimes.com/2022/03/22/us/politics/adam-laxalt-election-fraud.html [https://perma.cc/CY9K-WXPD].

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California's Democratic governor,[92] Gavin Newsom.[93] (After the election in which the recall vote failed by an almost 2–1 margin,[94] Elder quietly abandoned those claims on his website.[95]) As Greg Sargent writes: "So is this really how it's going to be? Are more and more Republican candidates across our great land going to treat it as a requirement that they cast any and all election losses as dubious or illegitimate by definition?"[96]

II. THREE PATHS TO ELECTION SUBVERSION IN THE UNITED STATES

It is a long way from thinking that an American President was illegitimately elected to the possibility of election subversion. After all, millions of Democrats and others did not accept the legitimacy of George W. Bush's presidency after the disputed 2000 election ended up in the United States Supreme Court,[97] with the Court's conservatives siding with then–Governor Bush and ending Vice President Al Gore's attempt to recount some ballots following Bush's razor-thin lead in Florida.[98] But I am unaware of anyone arguing after the 2000 election that the lack of Democrats' acceptance of President Bush's victory would lead to the demise of American democracy.

There is much more reason for concern this time, in part because President Trump has galvanized a popular movement around his stolen election claim, while Vice President Gore was willing to accept the Supreme Court's determination regarding his request for a recount and

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92 John Myers & Phil Willon, *California's Recall Election Officially Ends as Newsom Prepares for 2022*, L.A. TIMES (Oct. 22, 2021, 2:30 PM), https://www.latimes.com/california/story/2021-10-22/california-recall-election-official-results-gavin-newsom-prepares-for-2022 [https://perma.cc/M5P8-3V6J].

93 Greg Sargent, Opinion, *A Dangerous Trend Among GOP Candidates Shows the Trump Threat Is Here to Stay*, WASH. POST (Sept. 10, 2021, 11:03 AM), https://www.washingtonpost.com/opinions/2021/09/10/dangerous-trend-among-gop-candidates-shows-trump-threat-is-here-stay [https://perma.cc/63JE-FS8D].

94 *See* Myers & Willon, *supra* note 92.

95 Lara Korte, *Larry Elder's Voter Fraud Messaging Depressed Republican Turnout, GOP Consultant Charges*, SACRAMENTO BEE (Sept. 16, 2021, 5:28 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article254265763.html [https://perma.cc/FPB4-WSA8] ("When asked why the language claiming voter fraud was removed from Elder's website, as The Sacramento Bee and others noted on Tuesday, [Elder advisor Jeff] Corless said to his knowledge, nothing had been changed. That is incorrect; The Bee has screenshots of content referring to the 'twisted' results of the recall, which no longer appears on the site.").

96 Sargent, *supra* note 93.

97 *See* Joseph Carroll, *Seven out of 10 Americans Accept Bush as Legitimate President: Seventeen Percent Continue to Say Bush "Stole" Election*, GALLUP (July 17, 2001), https://news.gallup.com/poll/4687/seven-americans-accept-bush-legitimate-president.aspx [https://perma.cc/MER9-HG3P].

98 *See* Bush v. Gore, 531 U.S. 98, 110, 123, 129 (2000) (per curiam).

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conceded defeat when the Court ruled against him.[99] The terrorist attacks on the United States on September 11, 2001, also blunted political forces against President Bush.[100]

Trump's actions also must be considered in the context of his entire presidency, which featured consistent attacks on institutions of civil society and government that help preserve order and promote legitimacy, including not just the opposition Democratic Party but also the judiciary, the free press, and the FBI.[101] Scholars such as Professors Larry Diamond, Steven Levitsky, and Daniel Ziblatt who study how democratic countries backslide and move toward authoritarianism, like Prime Minister Viktor Orbán's Hungary, see serious warning signs for the United States.[102] Manipulating election outcomes is a key component in many states' slides into authoritarianism. Indeed, in July 2021, Levitsky and Ziblatt penned an essay for *The Atlantic* entitled, *The Biggest Threat to Democracy Is the GOP Stealing the Next Election*,[103] in which they explained that:

> Elections require forbearance. For elections to be democratic, all adult citizens must be equally able to cast a ballot and have that vote count. Using the letter of the law to violate the spirit of this principle is strikingly easy. Election officials can legally throw out large numbers of ballots on the basis of the most minor technicalities (e.g., the oval on the ballot is not entirely penciled in, or the mail-in ballot form contains a typo or spelling mistake).[104]

Of greatest concern is that the activities of President Trump and his allies from the November 2020 election through January 7, 2021, served as dress rehearsal for how to subvert election results in 2024 or in other

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[99] HOWARD GILLMAN, THE VOTES THAT COUNTED 151–52 (2001).

[100] Hannah Hartig & Carroll Doherty, *Two Decades Later, The Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11 [https://perma.cc/JB68-PR7N] ("George W. Bush, who had become president nine months earlier after a fiercely contested election, saw his job approval rise 35 percentage points in the space of three weeks. In late September 2001, 86% of adults — including nearly all Republicans (96%) and a sizable majority of Democrats (78%) — approved of the way Bush was handling his job as president.").

[101] *See* Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 20–45 (2020).

[102] The already-classic works drawing lessons from other countries to warn of the risk of authoritarianism in the United States are STEVEN LEVITSKY & DANIEL ZIBLATTT, HOW DEMOCRACIES DIE (2018) and LARRY DIAMOND, ILL WINDS (2019). Professor Michael Klarman nicely summarizes this literature, obviating the need for a restating here. *See* Klarman, *supra* note 101, at 11–19. *See also* Jacob M. Grumbach, Laboratories of Democratic Backsliding 24–26 (Apr. 5, 2021) (unpublished manuscript), https://t.co/O4DJAxizHY [https://perma.cc/BXG4-H4M7].

[103] Steven Levitsky & Daniel Ziblatt, *The Biggest Threat to Democracy Is the GOP Stealing the Next Election*, THE ATLANTIC (July 9, 2021), https://www.theatlantic.com/ideas/archive/2021/07/democracy-could-die-2024/619390 [https://perma.cc/GA53-6GW2].

[104] *Id.*

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future elections. This Part describes three ways in which election subversion may emerge in the United States as demonstrated by the post–2020 election period.[105]

A. Usurpation of Voter Choice for President

By far the most likely way in which election subversion would infect United States elections in the near term is through a respectable bloodless coup dependent upon technical legal arguments overcoming valid election results. These arguments would be based on state courts or others usurping the power of state legislatures to set the manner for choosing presidential electors.[106] The benefit of technical arguments to subvert election results is that they have an aura of respectability and expertise. Lawyers in fine suits making legalistic arguments are much more appealing than desperate lawyers making unsubstantiated claims of ballot-box stuffing and other chicanery.

President Trump and his allies began to make such arguments in 2020, and this path is much simpler than the bogus claims of voter fraud that failed to work for Trump in 2020. Indeed, in a March 2021 interview with *Washington Post* journalists Carol Leonnig and Phil Rucker, President Trump sounded the same themes about the 2020 election:

> [T]he legislatures of the states did not approve all of the things that were done for those elections. And under the Constitution of the United States, they have to do that. And the Supreme Court, they didn't find fact — don't forget, they didn't say well, we disagree — they said we're not going to hear the case. I'm very disappointed in the Supreme Court. Had Mike Pence had the courage to send it back to the legislatures, you would have had a different outcome, in my opinion. . . . And before you even start about the

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[105] In the interest of space, this Essay does not address the related question of voter suppression, in which a state or locality makes it harder for people to register or to vote. I believe concerns about voter suppression are serious, and I have devoted two books to that topic, HASEN, *supra* note 4; and HASEN, *supra* note 6. Voter suppression is about laws and rules that make it harder for people to register and to vote. Election subversion is about attempts to mess with the counting or aggregation of ballots, or to prevent an election winner from taking office. The two are related because successful attempts to suppress votes also can alter election outcomes. *See infra* notes 137–139 and accompanying text (describing how unscrupulous state legislatures can interfere with county election officials to suppress voter registration in certain areas). But primary strategies to combat voter suppression are different, such as through court cases brought under the Voting Rights Act, and they deserve their own treatment elsewhere.

Until the Trump presidency, election subversion was not a serious concern in the modern United States; the events following the 2020 presidential election now make it the most urgent concern facing American democracy even as the threat of voter suppression remains serious.

[106] I first advanced an argument along these lines in Richard L. Hasen, *Trump Is Planning a Much More Respectable Coup Next Time*, SLATE (Aug. 5, 2021, 11:48 AM), https://slate.com/news-and-politics/2021/08/trump-2024-coup-federalist-society-doctrine.html [https://perma.cc/KRC5-PEUQ]. *See also* Barton Gellman, *Trump's Next Coup Has Already Begun*, THE ATLANTIC (Dec. 9, 2021, 3:21 PM), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843 [https://perma.cc/6GDG-NRCG].

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> individual corruptions, . . . when you are handed these votes, and you know that the legislature of any one of those states did not approve those vast changes — hours, days, when to vote — it was all done by local politicians and local judges — right there you should have sent them back to the legislatures. And I can show you letters . . . from legislatures. They wanted them back. . . . [H]ad they gotten them, it would have been a much different story.[107]

The technical legal argument depends upon arcana of federal statutory law and the Constitution's rules for choosing presidential electors and counting their votes. It begins with Article II of the Constitution, which gives each state "Legislature" the power to set the manner for choosing presidential electors.[108] A parallel provision in Article I, section 4 gives each state "Legislature" the power to set the rules for congressional elections, subject to congressional override.[109]

Although each state and Washington, D.C., allow voters to vote directly for President, with the winner of the state's election entitled to that state's Electoral College votes,[110] the Supreme Court affirmed in its 2000 *Bush v. Gore*[111] decision ending the 2000 election controversy that a state legislature could reclaim its Article II power directly to appoint presidential electors in future elections.[112] In 2020, when voters cast

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[107] Hasen, *supra* note 106 (quoting Carol D. Leonnig & Philip Rucker, *Audio: Trump Says He Spoke to a "Loving Crowd" at Jan. 6 Rally*, WASH. POST, at 03:22 & 05:42 (July 21, 2021, 10:48 PM), https://www.washingtonpost.com/politics/2021/07/21/trump-interview-i-alone-can-fix-it [https://perma.cc/NMS3-BMQV]).

[108] U.S. CONST. art. II, § 1, cl. 2.

[109] *Id.* art. I, § 4, cl. 1.

[110] All states aside from Maine and Nebraska award the state's Electoral College votes to the plurality winner of the presidential election in the state; Maine and Nebraska assign a portion of each state's Electoral College votes by congressional district. Meilan Solly, *Why Do Maine and Nebraska Split Their Electoral Votes?*, SMITHSONIAN MAG. (Nov. 5, 2020), https://www.smithsonianmag.com/smart-news/why-do-maine-and-nebraska-split-their-electoral-votes-180976219 [https://perma.cc/3HVE-NL9B]. With the Biden victory in one of Nebraska's congressional districts in 2020, the state is considering moving to a winner-take-all system. Jon Kipper, *NE Bills Would Combine Electoral Votes and Require Voter ID; NE-02 Would Not Be Counted Separately*, KMTV (Jan. 9, 2021, 2:14 PM), https://www.3newsnow.com/news/local-news/ne-bills-would-combine-electoral-votes-and-require-voter-id-ne-02-would-not-be-counted-separately [https://perma.cc/TMY6-V6TE].

[111] 531 U.S. 98 (2000).

[112] *Id.* at 104 ("The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.").

Once the election process has begun, however, the state legislature has selected "the manner" for its conduct, and it cannot be taken back from the people for *that* election. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 545–46 (2021). Post-election appointment of electors by a state legislature raises serious due process concerns. Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1071 (2021) ("[T]he Due Process Clause would be implicated in any attempt to replace, after the election had begun, the popular election processes currently authorized by statute with another means of elector selection."); Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 706–07 (2001). Some commentators also have suggested that a legislature's

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their ballots for President, each state followed its own procedures to certify President Biden or President Trump as the winner of the state's Electoral College votes.[113] State officials then sent those ballots to be opened and counted in Congress, and despite some Republican objections to accepting the Electoral College votes from Arizona and Pennsylvania, a majority in both the House and Senate accepted the Electoral College votes cast for each candidate, confirming that President Biden had won by a vote of 306 to 232.[114]

While it would be perfectly constitutional for a state like Arizona to give back to the legislature the power to appoint directly the state's presidential electors in future elections, it is a political nonstarter: it would be profoundly antidemocratic to take away voters' ability to vote for the most important office in the United States, and legislators who sought to do so would likely face the voters' wrath.

But a provision of the ECA provides that a state legislature may send in a slate of presidential electors when the state has "failed" to make a choice of President on Election Day.[115] This section of the ECA applies to something like a natural disaster that prevents voters from casting their ballots.[116] President Trump and his allies sought to use that section as a hook for state legislatures to flip Electoral College results for political reasons. In particular, Trump's lawyers and allies argued that in states where President Biden won, the election had "failed" because other actors besides state legislators were involved in making rules for implementing the 2020 elections, thereby allowing state legislatures to appoint a rival slate of electors to be sent to Congress.[117]

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appointment of its own electoral slate after Election Day would violate the federal statute establishing a uniform day for the appointment of electors on the first Tuesday after the first Monday in November, 3 U.S.C. § 1. NAT'L TASK FORCE ON ELECTION CRISES, A STATE LEGISLATURE CANNOT APPOINT ITS PREFERRED SLATE OF ELECTORS TO OVERRIDE THE WILL OF THE PEOPLE AFTER THE ELECTION 2, https://static1.squarespace.com/static/5e70e52c7c7272oed714313f/t/5f625c790cef066e940ea42d/1600281722253/State_Legislature_Paper.pdf [https://perma.cc/X7B7-PNAS].

113 *See generally* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL ELECTORS (2020), https://www.nass.org/sites/default/files/surveys/2020-10/summary-electoral-college-laws-Oct20.pdf [https://perma.cc/X5C5-5TZ6].

114 *See* Mascaro, Tucker, Jalonick & Taylor, *supra* note 47.

115 3 U.S.C. § 2.

116 This part of the ECA dates to 1845, and Congress apparently passed it in part to accommodate the fact that New Hampshire and Massachusetts had majority-threshold provisions for their elections such that if voters failed to elect a candidate on Election Day by a majority vote, there would be a separate process for appointing the electors. Levitt, *supra* note 112, at 1076–77; Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1829 (2021).

117 *See* Levitt, *supra* note 112, at 1054 nn.6–7 (collecting sources); Steve Coll, *The Outdated Law that Republicans Could Use to Upend the Electoral College Vote Next Time*, NEW YORKER (Dec. 18, 2020), https://www.newyorker.com/news/daily-comment/the-outdated-law-that-republicans-could-use-to-upend-the-electoral-college-vote-next-time [https://perma.cc/5ZXR-PXEY].

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The lawyers also argued in reliance on the ECA provision that federal courts could throw out or reverse election results if a state's election rules deviated in any way from statutory requirements enacted by the state legislature.[118] The argument that Article II and Article I, section 4 give state legislatures virtually unlimited powers over the rules for running presidential and congressional elections — even if their use means violating the state's own constitution and ignoring its interpretation by the state supreme court — has come to be known as the "independent state legislature" theory.

This Essay is not the place for a full exploration of the theory, but there are serious reasons to doubt the muscular reading put forward by President Trump and his allies in 2020 to allow courts or state legislatures to overturn election results.[119] Indeed, even one of the most prominent advocates for a strong reading of the theory, Professor Michael Morley,[120] cautions against a reading that would turn it into a political weapon:

> [M]ost disturbingly — a legislature might attempt to claim power to simply disregard the results of a popular presidential election and appoint a slate

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[118] *See, e.g.*, Trump v. Wis. Elections Comm'n, 506 F.3d 620, 624, 637–38 (2020).

[119] For a detailed historical account debunking much of this muscular reading, see Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923205 [https://perma.cc/NG7P-HMTM]. *See generally* Levitt, *supra* note 112; Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2020); Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001); Michael Weingartner, Liquidating the Independent State Legislature Theory (Sept. 25, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044138 [https://perma.cc/2GTR-G5N7].

Four Justices on the Supreme Court recently signalled an interest in reviewing a case raising the independent state legislature theory. The application for stay concerned a North Carolina Supreme Court decision striking down the legislature's congressional redistricting plan as an unconstitutional partisan gerrymander under the state constitution. Moore v. Harper, No. 21A455, slip op. at 2 (U.S. Mar. 7, 2022) (Alito, J., dissenting from denial of application for stay). Justice Alito, for himself and Justices Thomas and Gorsuch, would have granted a stay of the state supreme court's order on grounds it likely violated the independent state legislature theory. *Id.*, slip op. at 1–5. Justice Kavanaugh did not agree with issuing a stay given the timing of the request but stated that he would vote to hear the case on the merits once a petition for writ of certiorari had been filed. *Id.*, slip op. at 1–2 (Kavanaugh, J., concurring in denial of application for stay). *See* Adam Liptak, *Supreme Court Allows Court-Imposed Voting Maps in North Carolina and Pennsylvania*, N.Y. TIMES (Mar. 7, 2022), https://www.nytimes.com/2022/03/07/us/supreme-court-voting-maps.html [https://perma.cc/QSG7-FNDL] ("[I]n the North Carolina case, there were signs that at least four of the court's more conservative justices could later rule that state courts are powerless to change congressional maps adopted by state legislatures.").

[120] *See, e.g.*, Morley, *supra* note 112, at 502–03 ("[The independent state legislature] doctrine teaches that a state legislature's power to regulate federal elections does not arise from its state constitution (like most of the legislature's other powers) but rather from an independent grant of authority directly from the U.S. Constitution. The doctrine is rooted in the fact that states lack inherent authority to regulate federal elections; their only power over such elections comes from the U.S. Constitution.").

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> of electors reflecting its own partisan preferences. Such a step would be historically unprecedented, fly directly in the face of our democratic traditions, and likely destabilize the entire presidential election. Once a legislature has made the decision to award presidential electors based on a popular vote and the election has been conducted, it would be both unjustifiable and disastrous for the legislature to unilaterally decide to ignore the will of the people.[121]

Despite these dangers, the theory could have upended the 2020 election results from Pennsylvania. There, the state supreme court, applying a Pennsylvania constitutional provision guaranteeing "free and equal" elections, agreed with voting rights plaintiffs that COVID-related problems with voting justified extending the deadline for the receipt of mail-in ballots from the Election Day deadline set by the state legislature to three days after Election Day.[122] Republican lawyers argued that the state supreme court ruling violated the powers of the state legislature.[123]

Justice Alito, seeing at least some merit in the argument, required Pennsylvania officials during the 2020 election to set aside mail-in ballots that arrived in the three days after Election Day for possible exclusion from the count.[124] Mercifully, the Supreme Court did not have to address this issue in the midst of a presidential election: there were only about 10,000 such ballots, and Biden had won the state by about 80,000 votes, rendering the legal dispute moot as to the presidential election.[125]

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[121] *Id.* at 545–46.

[122] Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371 (Pa. 2020). Similarly, in North Carolina, Trump-allied lawyers argued that state election administrators usurped the North Carolina General Assembly's power in setting rules for conducting the election during the COVID-19 pandemic. They dropped the argument once it was clear that President Trump had won the state. *See* Moore v. Circosta, 141 S. Ct. 46, 46–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); Rick Hasen, *Before the Election, Republicans Complained to the Supreme Court About Ballot Deadlines in Pennsylvania and North Carolina Under the Same Theory, But Now They Are Perfectly Fine with Counting Late Ballots in NC Where They Are Leading*, ELECTION L. BLOG (Nov. 11, 2020, 7:40 AM), https://electionlawblog.org/?p=118482 [https://perma.cc/4DJR-8XBD].

[123] *See* Hasen, *supra* note 122.

[124] *See* Republican Party of Pa. v. Boockvar, No. 20A84, 2020 WL 6536912, at *1 (U.S. Nov. 6, 2020). An alternative way to usurp voter choice is by seeking to have broad swaths of legitimately cast ballots set aside, without necessarily asking for the state legislature to take over the role of selecting presidential electors. For example, in *Hotze v. Hollins*, No. 20-cv-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020), *aff'd in part, vacated in part sub nom.* Hotze v. Hudspeth, 16 F.4th 1121 (5th Cir. 2021), Steve Hotze, a well-known Republican activist in Texas, joined by three Republican candidates for election, filed a lawsuit in the Southern District of Texas seeking to have 127,000 votes disqualified because they were cast in "drive-thru" voting sites, which allegedly violated a Texas election statute. *See Recent Case:* Hotze v. Hollins, HARV. L. REV. BLOG (Nov. 14, 2020), https://blog.harvardlawreview.org/recent-case-_hotze-v-hollins [https://perma.cc/9JRD-4T9N]. Even if such a theory for disqualifying votes is without merit, a state court could order disqualification of such ballots, and a federal court could decline to second-guess that determination, potentially changing the outcome of an election.

[125] *See* Jonathan Lai, *Only 10,000 Pa. Mail Ballots Arrived After Election Day — Far Too Few to Change the Result if Thrown Out*, PHILA. INQUIRER (Nov. 11, 2020), https://

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Had the election been closer and the results turned on Pennsylvania, it is possible the Supreme Court would have relied on the theory in flipping election results or throwing the matter back to the state legislature.[126]

In all, four conservative Justices on the Supreme Court at one point or another during the 2020 Term expressed at least some support for the theory,[127] and the other two Court conservatives could embrace some form of the theory as well.[128] It is unclear what will happen with the theory in the courts in 2024 and beyond.

Although the federal judiciary was largely unsympathetic to Trump's baseless election challenges in 2020,[129] this historical fact was contingent on judges maintaining some fidelity to judicial independence. Such independence is not guaranteed in the future given the fact that the President is in the unique position of picking who will adjudicate future challenges. While he was challenging the results of the 2020 election, President Trump seemed to publicly ask the Justices he appointed to rule in his favor as a sort of quid pro quo for being put on the bench. At a Hanukkah reception in 2020, President Trump told supporters: "All I ask for is people with wisdom and with courage, that's all," because

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www.inquirer.com/politics/election/pennsylvania-mail-ballots-counted-deadline-supreme-court-20201111.html [https://perma.cc/97MZ-BBGH]; Jonathan Tamari & Jonathan Lai, *With the Vote Count Now Over, Here's How Pennsylvania Broke for Joe Biden,* PHILA. INQUIRER (Nov. 29, 2020), https://www.inquirer.com/politics/election/pennsylvania-2020-election-biden-trump-20201129.html [https://perma.cc/9A32-HMPB].

126 Aziz Huq, Opinion, *The Roberts Court Is Dying. Here's What Comes Next.*, POLITICO MAG. (Sept. 15, 2021, 4:30 AM), https://www.politico.com/news/magazine/2021/09/15/the-roberts-court-is-dying-heres-what-comes-next-511784 [https://perma.cc/S8GT-9CXF].

127 *See* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 738 (Alito, J., dissenting from denial of certiorari); Moore v. Circosta, 141 S. Ct. 46, 47–48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); Republican Party of Pa. v. Boockvar, 141 S. Ct. 1, 2 (2020) (statement of Alito, J.); Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanagh, J., concurring in denial of application to vacate stay).

128 Justice Barrett, new to the Court during the end of the 2020 election season, has not weighed in on the issue. Chief Justice Roberts was not willing to invoke the independent state legislature theory in the context of the 2020 election, but he was the lead dissenter when a similar issue came up involving the power of Arizona voters to use the initiative process to create a redistricting commission, taking the power to draw congressional districts outside the power of state legislatures. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting).

Aside from the risk of subversion, judicial acceptance of the strong reading of the independent state legislature theory would create a potential earthquake in American election law by upending everything from voter initiatives setting the rules for congressional primaries to normal election-administration decisions of state and local election administrators — not to mention, rendering state constitutional protections for voting rights a nullity in congressional and presidential elections.

129 Jan Wolfe, *U.S. Judiciary, Shaped by Trump, Thwarts His Election Challenges*, REUTERS (Dec. 1, 2020, 1:18 PM), https://www.reuters.com/article/us-usa-election-trump-judges/u-s-judiciary-shaped-by-trump-thwarts-his-election-hallenges-idUSKBN28B60O [https://perma.cc/5E6M-EFXT].

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"if certain very important people, if they have wisdom and if they have courage, we're going to win this election in a landslide."[130] It is hard not to read this statement as being directed at Justices whom President Trump placed on the bench, like Justice Barrett. A future President may learn from Trump's 2020 failure and seek to identify more explicitly partisan candidates for the Supreme Court.

Even if the courts do not bless use of the theory to subvert elections, however, and even if there were no good reason to believe that state courts or state election officials somehow violated legislative prerogatives to set presidential election rules under Article II, state legislatures could still choose to convene and send to Congress an alternative slate of electors. State legislatures could point to supposed "irregularities" in the conduct of the election that they would claim allow them to choose new electors after declaring a "failed" election.

If enough states with majority-Republican legislatures whose voters chose the Democratic presidential candidate sent in alternative slates of electors (or perhaps blocked the sending in of the electors for the winning Democratic candidate), and if Republicans controlled both houses of Congress, Congress could accept such bogus results and declare a Republican presidential loser the winner. Or, if the houses of Congress are divided, the stalemate could lead to several scenarios under the ECA and the Twelfth Amendment: the Speaker of the House could become temporary President, or, if no candidate received a majority of the electors, state delegations in the House could likely elect a Republican President.

It is not just Democrats who need to worry about holes in constitutional and statutory rules for translating voters' choices into an Electoral College winner. Republicans might fear that the current Democratic Vice President, Kamala Harris, who will preside over the counting of the Electoral College votes in January 2025, could embrace the Eastman theories[131] and attempt to unilaterally reject slates of electors sent in from Republican states (perhaps alternative slates based upon complaints of irregularities), exacerbating a political and constitutional crisis.

B. Election-Official Manipulation of Election Results

The second means by which election results can be subverted is through direct manipulation of the conduct of elections or vote counting by corrupt election officials. The hyperdecentralized election system of

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[130] Andrew Feinberg, *Trump Wonders Why the Supreme Court Justices He Appointed Won't Support Him. He Shouldn't*, THE INDEPENDENT (Dec. 11, 2020, 4:30 PM), https://www.independent.co.uk/voices/trump-lawsuits-election-supreme-court-gorsuch-b1770104.html [https://perma.cc/3B2F-BD9Y].

[131] *See* Gangel & Herb, *supra* note 41.

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the United States creates room for vulnerabilities. Take the 2020 election results: thanks to the Electoral College system, a shift of about 45,000 votes across three states (a relatively small number of votes when vote totals exceed 150 million votes[132]) would have turned President Trump into the election winner and President Biden into the loser.[133] The risk is that a few unscrupulous actors could make minor changes in vote totals that could prove decisive in a very close presidential election.

Elections are already administered in many places by partisan actors who are elected or appointed as Democrats or Republicans, but there has been no evidence of such officials directly manipulating vote totals in federal elections since the 1960s.[134] The new risk is that election officials who have embraced the false claims of a stolen election in 2020 will manipulate election results in a misguided effort to "even the score." Embracing such claims demonstrates a lack of credibility and seriousness of election administration. There is no room for debate about the overall integrity of the 2020 election vote count, and someone who claims there is or who says they are "just asking questions" about the vote counts cannot be trusted to administer a fair election.

Election officials lacking scruples and seeking to manipulate election outcomes might also attempt to interfere with the fair administration of the election by creating conditions for long lines in parts of a jurisdiction

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[132] Drew DeSilver, *Turnout Soared in 2020 as Nearly Two-Thirds of Eligible U.S. Voters Cast Ballots for President*, PEW RSCH. 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 [https://perma.cc/WQU3-EEYC].

[133] *See* Paul Waldman, Opinion, *We Came Much Closer to an Election Catastrophe than Many Realize*, WASH. POST (Nov. 18, 2020), https://www.washingtonpost.com/opinions/2020/11/18/how-2020-election-was-closer-than-2016 [https://perma.cc/DH36-YWSF].

[134] I am unaware of any statewide or federal elections since at least 1970 in which there is credible evidence that election officials were involved in illegally manipulating election results to turn an election loser into an election winner. There are isolated examples of such election subversion on the state and local level in recent decades. *See, e.g.*, Jeff Gottlieb, Hector Becerra & Ruben Vives, *Feds Detail Scale of Graft in Cudahy*, L.A. TIMES (July 13, 2012, 12:00 AM), https://www.latimes.com/local/la-xpm-2012-jul-13-la-me-cudahy-20120713-story.html [https://perma.cc/4FSG-NWFC] (describing election officials destroying ballots cast for challengers in Cudahy, California, municipal races); Marks v. Stinson, 19 F.3d 873, 875, 877–78 (3d Cir. 1994) (detailing absentee ballot fraud committed by a candidate's committee in a Pennsylvania state senate race in cooperation with officials on the Philadelphia County Board of Elections).

Earlier periods in U.S. history include examples of such election subversion on the federal level. Professor Ned Foley, who has meticulously studied the history of disputed elections in the United States, concludes that President Lyndon Johnson likely won his U.S. Senate race from Texas in 1948 due to ballot-box stuffing of the infamous "Ballot Box 13" in Alice, Texas. *See* EDWARD B. FOLEY, BALLOT BATTLES 206–17 (2016); *see also id.* at 217–28 (discussing potential but uncertain tampering by election administrators in Illinois and Texas in the 1960 presidential election between then–Senator John F. Kennedy and then–Vice President Richard Nixon). I am aware of no more recent examples, although there are examples of disputed elections in which the losing side was convinced that election rules were manipulated to resolve the dispute. *See id.* at 257–78 (discussing controversies over a 1984 congressional race in Indiana resolved by Congress and a 1994 Alabama state supreme court race).

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to dampen turnout or by engaging in aggressive voter purges that remove eligible voters. Such efforts to suppress the vote are not new, but they might be taken to more extreme and potentially illegal levels by those who are not committed to the rule of law and the integrity of the voting system.

One particularly tricky issue concerns state election-administrator oversight and takeovers of local election boards and administrations. Sometimes such actions are completely justified. For example, the State of Michigan made a smart decision to help oversee elections in Detroit in 2020 by putting in place a very experienced former state election official.[135] Detroit had a history of poor election administration and needed help from the state, help that diffused some false claims of election chicanery in 2020.[136]

But the more recent trend has been Republican legislatures changing laws to allow takeovers of local election boards run in Democratic cities, as in Georgia,[137] or removing the ability of local election administrators to offer easier voter registration and voting opportunities, as in Texas.[138] It is hard to understand some of this new state authority over local election administration as anything but an attempt to put in place those who would manipulate election outcomes or at the very least seek to suppress the vote in heavily Democratic areas.[139]

C. Violence or Intimidation Interfering with Election Processes

Even if state legislatures are unwilling to bend or break election rules to overturn voters' choice for President in a state, and even if conspiracy-minded new election administrators refuse to break the law in running fair elections, American elections may still be subverted by violence or intimidation interfering with election processes. The fear was encapsulated in the comments of Trump-ally Representative Madison Cawthorn who told a crowd in August 2021 that "if our

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[135] *See* Alex Ebert, *Meet the Technocrat Who Keeps Killing Trump Voter Fraud Claims*, BLOOMBERG GOV'T (Aug. 5, 2021, 2:05 PM), https://about.bgov.com/news/meet-the-technocrat-who-keeps-killing-trump-voter-fraud-claims [https://perma.cc/EA88-MRBN].

[136] *See id.*

[137] *See* Stephen Fowler, *State Appoints Bipartisan Panel to Review Fulton Election Board's Actions*, GA. PUB. BROAD. (Aug. 19, 2021, 1:11 PM), https://www.gpb.org/news/2021/08/18/state-appoints-bipartisan-panel-review-fulton-election-boards-actions [https://perma.cc/HT2S-LQCC].

[138] *See* Morales-Doyle, *supra* note 77 ("The bill also makes it a crime for election officials — like our plaintiff Harris County Elections Administrator Isabel Longoria — to encourage eligible voters to apply to vote by mail.").

[139] DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, provides more detailed analysis of the way that state legislatures are seeking to take election-administration powers away from local election officials for partisan reasons.

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election systems continue to be rigged and continue to be stolen, then it's going to lead to one place — and it's bloodshed."[140]

The violence surrounding the 2020 election seemed to mark a shift from political violence in the past: it is no longer fringe groups from both sides of the political aisle and is now "older and more established" persons "overwhelmingly from the right."[141] The danger of election-related violence is so palpable that a recent Supreme Court amicus brief filed by well-respected former Fourth Circuit Judge Michael Luttig in a Second Amendment gun rights case raised the connection between easy availability of firearms and future election-related violence:

> Adopting petitioners' "whenever and wherever" right to carry [firearms] would be to throw gasoline on the fires of our Nation's future political conflicts. Although the January 6, 2021, attack on the Capitol itself was unprecedented, political violence in our streets unfortunately is not. Indeed, elected officials and others have continued to make statements long *after* January 6, 2021 that threaten more political violence.[142]

New polling shows that violence to resolve political disputes is becoming more acceptable in American society, particularly among Trump's supporters.[143]

Election-related violence and intimidation could keep voters from the polls or deter them from voting, interfere with the job of election administrators or official bodies in running elections or counting or certifying votes, or prevent lawfully elected officials from taking office.

Legal changes could help facilitate violence and intimidation. For example, the Texas law empowering poll watchers over poll workers

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[140] Felicia Sonmez, *Rep. Madison Cawthorn Falsely Suggests Elections Are "Rigged," Says There Will Be "Bloodshed" if System Continues on Its Path*, WASH. POST (Aug. 31, 2021, 3:17 PM), https://www.washingtonpost.com/politics/rep-madison-cawthorn-says-there-will-be-bloodshed-if-us-elections-continue-to-be-rigged/2021/08/30/297a9fa2-09c8-11ec-aea1-42a8138f132a_story.html [https://perma.cc/5JJC-AJG8].

[141] Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. DEMOCRACY 160, 161 (2021); *see also* Rachel Kleinfeld, *The U.S. Shows All the Signs of a Country Spiraling Toward Political Violence*, WASH. POST (Sept. 11, 2020), https://www.washingtonpost.com/outlook/america-political-violence-risk/2020/09/11/be924628-f388-11ea-999c-67ff7bf6a9d2_story.html [https://perma.cc/AHZ6-SQYC]. Note that Kleinfeld wrote the latter article before the January 6, 2021, insurrection.

[142] Brief of J. Michael Luttig, Peter Keisler, Carter Phillips & Stuart Gerson et al. as Amici Curiae in Support of Respondents at 23, N.Y. State Rifle & Pistol Ass'n v. Bruen, No. 20-843 (Sept. 13, 2021), https://www.supremecourt.gov/DocketPDF/20/20-843/192273/20210913145956623_20-843_Amici%20Brief.pdf [https://perma.cc/DU5D-5N3T] (citation omitted); *see also* MICHAEL C. DORF, BRENNAN CTR. FOR JUST., DISAGGREGATING POLITICAL VIOLENCE 2 (2021), https://www.brennancenter.org/sites/default/files/2021-06/Dorf_final.pdf [https://perma.cc/2XKW-JDKW] (tying political violence of January 6, 2021, with debate over Second Amendment firearm rights).

[143] 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, 11:17 AM), https://www.washingtonpost.com/politics/2021/11/01/4-10-who-say-election-was-stolen-trump-say-violence-might-be-needed-save-america [https://perma.cc/G9R9-2RBR].

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seems destined to end badly, potentially leading to interference with voters and pollworkers that ends in violence. If anything, our country needs need more laws protecting election workers.

III. MINIMIZING THE RISK OF AMERICAN ELECTION SUBVERSION

Minimizing the risk of American election subversion requires both legal change and political action, especially to enforce norms respecting the rule of law. Legal change alone is not enough because rules for conducting fair elections are not binding without a deeper commitment to the rule of law.[144] What saved American democracy from election subversion in 2020 was not just law but also the refusal of most election and elected officials to disobey or ignore legal constraints, as urged by President Trump. Law still constrains many, and strong law protecting election integrity can help provide roadblocks to an escalation of anti-democratic conduct.

The legal changes described below would promote free and fair elections for all voters, regardless of their political affiliations. Indeed, in a recent CNN poll, fifty-seven percent of Republicans (compared to only forty-nine percent of Democrats) thought it was "very" or at least "somewhat" likely that "in the next few years, some elected officials will successfully overturn the results of an election in the United States because their party did not win."[145] The rules and norm changes proposed here minimize the risks of subversion whether they come from Republicans or Democrats.

A. Legal Change

1. Improved Transparency, Chain of Custody, and Auditing Capacity. — All jurisdictions should run elections that produce paper ballots.[146] Paper is a verified, tangible record that may be examined by

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144 *See* Levitsky & Ziblatt, *supra* note 103.

145 CNN Poll Conducted by SSRS 12 tbl.066 (Sept. 15, 2021, 12:00 PM), http://cdn.cnn.com/cnn/2021/images/09/15/rel5e.-.elections.pdf [https://perma.cc/4UBA-PYAT].

146 There is a controversy raging over the integrity of ballot-marking devices (BMDs) used for voting. Like direct-recording electronic (DRE) machines, BMDs allow voters to make choices on a computer touchscreen. But whereas a DRE machine stores votes in an electronic format, BMDs produce a printed paper ballot that is subsequently counted by a ballot-reading machine. Typically, these BMDs produce a QR or bar code that the ballot-reading machine reads to record votes, but the ballots also include the voters' choices in a human-readable format that can later be counted in a manual recount. Computer science critics of BMDs believe that not enough voters will check to make sure that the printed ballot accurately reflects their choices, meaning that the code used to record voter choices can be manipulated without voters recognizing it. Supporters of the use of BMDs, who point to their value in providing multiple languages and assistance to disabled voters, believe that risk-limiting audits that hand count a portion of BMD-produced ballots, discussed

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courts or others to ensure that there has been an accurate count. Paper ballots not only assure that counts can be verified but also help to bolster public confidence. In 2020, when President Trump attacked the integrity of the vote in Georgia, the state conducted a full hand recount of all the ballots for President, which confirmed the results that President Biden had won the state.[147] Fully electronic voting systems that produce no paper record should be illegal for use in American elections. Imagine the Georgia recount was nothing but vote totals spit out by a computer. Even setting aside any risk that the machines may be hacked, use of these machines can spawn dangerous conspiracy theories that cannot be refuted with adequate physical evidence.[148]

The threat of such conspiracies is not merely hypothetical. In November 2020, fledgling news outlets One America News and Newsmax "saw their standings rise with conservatives after the election . . . while Fox News's ratings dropped after it was the first major

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below, can ensure that BMDs accurately record voter choices. For the statement of the main argument against the machines, see Andrew W. Appel, Richard A. DeMillo & Phillip B. Stark, *Ballot-Marking Devices Cannot Assure the Will of the Voters*, 19 ELECTION L.J. 432, 432 (2020). The Brennan Center's approach has been more nuanced. Andrea Córdova McCadney, Elizabeth Howard & Lawrence Norden, *Voting Machine Security: Where We Stand Six Months Before the New Hampshire Primary*, BRENNAN CTR. FOR JUST. (Aug. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voting-machine-security-where-we-stand-six-months-new-hampshire-primary [https://perma.cc/T6EP-D2KC]. Concerns over the security of BMDs were heightened after the leak of software for Dominion voting machines carried out in connection with Mike Lindell's activities. *See* Corasaniti, *supra* note 82; John Myers, *Security of Some Ballot-Marking Devices Could Be Vulnerable in California Recall, Researchers Say*, L.A. TIMES (Sept. 3, 2021, 9:09 AM), https://www.latimes.com/california/story/2021-09-03/some-ballot-marking-devices-could-be-vulnerable-in-california-recall-say-researchers [https://perma.cc/J5H2-LF9G].

It is beyond my technical expertise to weigh in on whether risk-limiting audits adequately deal with the risks of BMDs. I can say only that a BMD that produces a paper ballot is far better from the point of view of election subversion than DRE machines, which produce no possible physical evidence from which to conduct a recount or audit.

147 Richard Fausset, *Hand Tally of Georgia Ballots Reaffirms Biden's Win*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2020/11/19/us/georgia-recount-biden-trump.html [https://perma.cc/D46A-NNE3].

148 A move toward paper ballots is gaining momentum worldwide. Germany and Brazil, for example, have moved from electric voting machines back to paper ballots. Scott J. Shackelford, Bruce Schneier, Michael Sulmeyer, Anne Boustead, Ben Buchanan, Amanda N. Craig Deckard, Trey Herr & Jessica Malekos Smith, *Making Democracy Harder to Hack*, 50 U. MICH. J.L. REFORM 629, 653–54, 656 (2017). India has enforced a paper-trail audit requirement. Shamika Ravi, *How Electronic Voting Machines Have Improved India's Democracy*, BROOKINGS INST. (Dec. 6, 2019), https://www.brookings.edu/blog/techtank/2019/12/06/how-electronic-voting-machines-have-improved-indias-democracy [https://perma.cc/B762-NWGY]. The EU's Network and Information Systems Cooperation Group has proposed stricter cybersecurity requirements. *See* NETWORK & INFO. SYS. COOP. GRP., COMPENDIUM ON CYBER SECURITY OF ELECTION TECHNOLOGY 38–39 (2018), https://www.ria.ee/sites/default/files/content-editors/kuberturve/cyber_security_of_election_technology.pdf [https://perma.cc/E4RV-NTBJ].

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network to project that Mr. Biden had won the election in Arizona."[149] This rise in popularity among Trump supporters was due in part to those outlets' false reporting that Smartmatic and Dominion "altered votes to ensure President Biden won."[150] Although Newsmax walked back some of these statements after being threatened with legal action,[151] the networks still face several lawsuits based on their allegedly defamatory language,[152] as does Fox News for similar reporting.[153]

Paper ballots are only the first step toward transparency and confirmation of election results. States should require the adoption of risk-limiting audits, a procedure to ensure that the vote totals announced by election officials, and often tallied using electronic processes, are accurate. Such audits can help ferret out not only deliberate manipulation of election results but also software glitches and human errors.[154]

Paper ballots and results confirmed by audits are trustworthy only if there are adequate chain-of-custody and transparency requirements for the handling of ballots.[155] Procedures must be in place so that the work of election officials may be monitored by bipartisan and nonpartisan observers to assure fairness in the entire process. The rules must allow

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[149] Jonah E. Bromwich & Michael M. Grynbaum, *Smartmatic Sues Newsmax and One America News Network, Claiming Defamation*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/business/media/smartmatic-newsmax-oan.html [https://perma.cc/8LS5-5QWT].

[150] *Smartmatic Files Defamation Claims Against Newsmax and OANN*, SMARTMATIC (Nov. 3, 2021), https://www.smartmatic.com/us/media/article/smartmatic-files-defamation-claims-against-newsmax-and-oann [https://perma.cc/2LE9-5R9C]; *see* Bromwich & Grynbaum, *supra* note 149.

[151] *See* John Whitehouse (@existentialfish), TWITTER (Dec. 21, 2020, 12:49 PM), https://twitter.com/existentialfish/status/1341078245878472706?s=20 [https://perma.cc/PN53-2L6P].

[152] Erik Larson, *Smartmatic Sues Newsmax, OAN Over Election-Fraud Claims*, BLOOMBERG (Nov. 3, 2021, 4:01 PM), https://www.bloomberg.com/news/articles/2021-11-03/newsmax-oan-sued-by-smartmatic-over-election-fraud-claims [https://perma.cc/QNZ2-85YL].

[153] Michael M. Grynbaum & Jonah E. Bromwich, *Fox News Faces Second Defamation Suit Over Election Coverage*, N.Y. TIMES (Sept. 23, 2021), https://www.nytimes.com/2021/03/26/business/media/fox-news-defamation-suit-dominion.html [https://perma.cc/M4UE-KWUE].

[154] For an introduction, see AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, FAIR ELECTIONS DURING A CRISIS 17–19 (2020), https://electionlawblog.org/wp-content/uploads/2020ElectionReport.pdf [https://perma.cc/MP6B-KDSS]; RISK-LIMITING AUDITS WORKING GRP., RISK-LIMITING POST-ELECTION AUDITS (Jennie Bretschneider et al. eds., 2012), https://www.stat.berkeley.edu/~stark/Preprints/RLAwhitepaper12.pdf [https://perma.cc/5LV2-JF6P]; *Post-Election Audits*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/defend-our-elections/election-security/post-election-audits [https://perma.cc/56CY-NUZK]; and *Risk-Limiting Audits*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 16, 2021), https://www.ncsl.org/research/elections-and-campaigns/risk-limiting-audits.aspx [https://perma.cc/MU9A-SD5P].

[155] AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, *supra* note 154, at 17 ("[M]aintaining control over the chain of custody of ballots is critical not only to ensure that the initial count is accurate, but to ensure that any disputes that arise are resolved based on the votes cast."); *id.* ("[Risk-limiting audits] require paper ballots or records, and a degree of chain-of-custody over ballots that few states and local jurisdictions currently require.").

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observers to observe and not to interfere with or delay legitimate election-administration procedures.[156]

2. Rules Limiting the Discretion of Those Who Certify the Votes, Including Congress. — Transparency and related rules minimize the risk of subversion by those who collect and tally the votes. A different set of actors is involved in certifying the vote totals. Depending on the state, this certifier may be a state or county election board or some other official.[157] When it comes to the presidential election, certification happens first on the state level and then Congress counts the certified votes.[158]

In some jurisdictions, certification is essentially a ministerial act; there is no discretion in the normal decision whether to accept or reject votes as counted by election officials.[159] States should change laws to eliminate any discretion in the certification process;[160] if there is a bona fide dispute about fraud or about who actually won an election, states should have procedures for judicial or administrative review by those empowered to examine facts and evidence and make a determination about election outcomes.

Congress also must amend or replace the 1887 ECA not only to confirm that the Vice President has no unilateral authority to accept or reject Electoral College votes but also to make it harder for Senators or Representatives to raise frivolous objections to Electoral College vote counts. Right now, it takes only one Representative and one Senator to raise an objection and trigger a two-hour debate and vote on the legitimacy of a particular state's electoral votes.[161] Congress should set the threshold higher and otherwise rewrite the rules to bar frivolous challenges. Relatedly, Congress should ensure that the "safe harbor" provision of the ECA precludes Congress from reconsidering Electoral College votes submitted in compliance with a state's law within the time

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156 *See* Green, *supra* note 77 (manuscript at 59).

157 Anthony Izaguirre, *Explainer: How Does Election Certification Usually Work?*, ASSOCIATED PRESS (Nov. 18, 2020), https://apnews.com/article/donald-trump-local-elections-michigan-elections-36d033a3db637c380e054e867f667d11 [https://perma.cc/TX9G-84N4].

158 *Electoral College Fast Facts*, HIST. ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Electoral-College/Electoral-College/ [https://perma.cc/M9YX-22SK].

159 *Compare* CAL. ELEC. CODE § 15505 (West 2022) (ministerial certification), *with* M.L. Elrick, Paul Egan & Clara Hendrickson, *What Persuaded the GOP Members of Wayne County Board of Canvassers to Reverse Course*, DET. FREE PRESS (Nov. 20, 2020, 5:00 PM), https://www.freep.com/story/news/local/michigan/wayne/2020/11/19/wayne-canvassing-board-monica-palmer-william-hartmann/3770140001 [https://perma.cc/98FY-6QUW] (describing breakdown of discretionary certification process in Wayne County, Michigan).

160 Richard L. Hasen, *We Can't Let Our Elections Be This Vulnerable Again*, THE ATLANTIC (Jan. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-our-elections-be-vulnerable-again/617542 [https://perma.cc/BP6H-3FUK].

161 *See* 3 U.S.C. §§ 15, 17.

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set by the safe harbor provision.[162] It should also clarify that the reference to a "failed election" in the ECA would allow a legislative submission of a slate of electors only in cases such as natural disasters and terrorist attacks that prevent voting.[163]

3. Rules Limiting the Overpoliticization of Election Administration, Especially by State Legislatures. — State legislative takeovers of certification procedures or local election administration present special concerns. On the one hand, state supervision of local election processes is essential when election administrators lack basic competence.[164] On the other hand, many of the recent laws and proposed bills coming from Republican legislatures appear intended to interfere with local election administration for political, not competence, reasons. There is no good reason to criminalize the sending of absentee ballot applications to voters or not to offer voters secure opportunities to vote early, such as through early voting centers. Laws that allow state takeovers of local elections should include safeguards that ensure that the takeovers are not politically motivated and that the actual administration of elections will be done on a fair bipartisan or nonpartisan basis. Any laws allowing for state takeovers of elections that do not ensure fairness should be rejected.

4. Rules Increasing the Criminal Penalties on Those Who Tamper with Federal Elections or Commit Violence or Intimidation of Voters, Elected Officials, or Electoral Candidates. — Elected officials, election officials, or private individuals who tamper with federal election vote totals or election processes should face increased penalties for chicanery.

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[162] *See id.* § 5.

[163] For some general principles for ECA reform, see NAT'L TASK FORCE ON ELECTION CRISES, CONGRESS MUST UPDATE THE ELECTORAL COUNT ACT TO GUARD AGAINST CRISES DURING FUTURE PRESIDENTIAL ELECTIONS, https://static1.squarespace.com/static/5e70e52c7c7272oed714313f/t/6128044f8b752c57532dfoab/1630012496256/Congress+Must+Update+the+Electoral+Count+Act.pdf [https://perma.cc/8MK6-UPLM]; Matthew A. Seligman, Disputed Presidential Elections and the Collapse of Constitutional Norms 63–90 (Jan. 30, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3283457 [https://perma.cc/3Y5X-E3FM]; and Greg Sargent, Opinion, *How to Prevent the Next Jan. 6, As Revealed in an Important New Analysis*, WASH. POST (Aug. 30, 2021, 10:44 AM), https://www.washingtonpost.com/opinions/2021/08/30/how-prevent-next-jan-6-revealed-an-important-new-analysis [https://perma.cc/EV3U-XAUR]. On how election law should cope with natural disasters, see Michael T. Morley, *Election Emergencies: Voting in Times of Pandemic*, WASH. & LEE L. REV. (forthcoming 2022) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964186 [https://perma.cc/YU6R-UKH4]; Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 WASH. & LEE L. REV. ONLINE 179, 208–14 (2020); and Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 613–17 (2018).

[164] *See* HASEN, *supra* note 4, at 1–4 (describing local election-administration problems in Wisconsin); HASEN, *supra* note 6, at 47–74 (describing problematic local election administrators as the "weakest link," *id.* at 59, in the election-administration process).

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These activities are already illegal, but enhanced penalties and a realistic threat of prosecution could deter election-subversion activities on the margin.[165] Increased penalties for election-related violence should be coupled with additional resources provided to law enforcement and DOJ to secure voting, tabulation, certification, and transitions of power.

5. Rules Countering Disinformation About Elections, Particularly Disinformation About When, Where, and How People Vote. — As explained in Part I, future election subversion in the United States is much more likely because of the viral spread of disinformation by President Trump and others that the 2020 election was stolen. Such a widespread belief sets the stage for countermeasures that themselves can undermine election integrity and lead to election subversion.

Several key legal measures may counter disinformation in elections, such as laws making it a crime to spread false information about when, where, and how people vote. Such laws must be carefully crafted to avoid infringing on First Amendment rights of free speech and association. I explore this delicate task and explain why law alone is not enough to counter the risk of disinformation undermining election integrity in a book-length treatment elsewhere.[166]

B. Political Action Enforcing Norms Respecting the Rule of Law

Law can only go so far in protecting American democracy against election subversion, and new laws must be enacted and not just proposed if they are going to counter the risk. Political organization is necessary to pass those laws and to reinforce norms respecting the rule of law and fair election processes.

Political organization can help advance the proposed legal changes advocated above. For example, aside from a paper-ballot requirement, no anti–election subversion provisions appeared in the original version of the For the People Act of 2021,[167] the main Democratic Party–backed election reform measure being considered in the current Congress.[168]

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[165] *See, e.g.*, 52 U.S.C. § 20511(2)(b) (creating up to five-year penalty for any person in federal election who knowingly and willfully commits fraud in tabulation of ballots). Other statutes that could be amended to provide broader enforcement and harsher penalties include 18 U.S.C. § 241, which criminalizes conspiracies to deprive people of constitutional rights; *id.* § 242, which outlaws depriving persons of constitutional rights under the color of state law; *id.* § 245(b)(1)(A), which criminalizes intimidating someone from voting or qualifying to vote; *id.* § 1512(c)(2), which creates penalties for corruptly obstructing or impeding an official proceeding; 52 U.S.C. § 10307(a), which prohibits the failure to allow voting or counting or tabulating of a ballot while acting under the color of state law; and *id.* § 10307(b), which criminalizes intimidating or threatening someone against voting or attempting to vote.

[166] HASEN, *supra* note 15, at 77–133.

[167] H.R. 1, 117th Cong. (2021); S. 1, 117th Cong. (2021). Section 1502 of both bills contains the paper-ballot requirement.

[168] *See* Nate Cohn, *Georgia's New Law, And the Risk of Election Subversion*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/04/06/upshot/georgia-election-law-risk.html

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The most recent version of the Democrats' proposal, now dubbed the Freedom to Vote Act,[169] does contain important antisubversion provisions, thanks in part to public airing of the dangers of election sabotage. Among those provisions are: a requirement to use paper ballots; chain-of-custody requirements for handling ballots; a guarantee of federal judicial review of vote counting by including a statutory right to have one's vote counted; a prohibition on removing state and local election officials from office without good cause; protection of election workers from intimidation; and a reaffirmation that manipulating election tabulation or results is a federal crime.[170] It is not enough, but it is a good start. The big question now is whether Democrats in an equally divided Senate will find a way around the filibuster to pass such urgent reform or if there is a coalition in the Senate willing to pass bipartisan legislation addressing election subversion.[171]

Political organizing against bad proposed legislation is just as crucial. As states have considered new, restrictive voting legislation, political pushback from corporations, civic groups, nongovernmental organizations, and others can be helpful. The original version of Texas's new voting legislation, for example, would have lowered the legal standards for overturning election results in court based on claims of irregularities.[172] After complaints, Texas Republican legislative leaders dropped that provision from the bill.[173] Although Arizona is the site of

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[https://perma.cc/D5QK-WWSD]; Richard L. Hasen, Opinion, *Republicans Aren't Done Messing with Elections*, N.Y. TIMES (Apr. 23, 2021), https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html [https://perma.cc/L3TV-BQZS].

169 S. 2747, 117th Cong. (2021).

170 A summary from the group Protect Democracy points to the specific provisions of the Freedom to Vote Act providing these protections. Protect Democracy, How the Freedom to Vote Act Stops Election Subversion, https://s3.documentcloud.org/documents/21062171/election-subversion-freedom-to-vote-two-pager.pdf [https://perma.cc/3RL2-GAGW].

171 *See* Claudia Grisales & Juana Summers, *Senate Democrats Offer a New Voting Bill, But a GOP Filibuster Likely Blocks the Way*, NPR (Sept. 14, 2021, 4:36 PM), https://www.npr.org/2021/09/14/1036812609/senate-democrats-offer-a-new-voting-bill-but-a-gop-filibuster-likely-blocks-the [https://perma.cc/T3F8-AVAZ]. On the potential for bipartisan compromise on anti–election subversion legislation, see Jordain Carney, *Manchin, Collins Leading Talks on Overhauling Election Law, Protecting Election Officials* (Jan. 20, 2022, 1:42 PM), https://thehill.com/homenews/senate/590634-manchin-collins-leading-talks-on-overhauling-election-law-protecting-election [https://perma.cc/3NPX-PSXY].

172 Daniel Dale, *Fact Check: Here Are 20 Things Texas Republicans' Elections Bill Would Do*, CNN (June 3, 2021, 12:27 PM), https://www.cnn.com/2021/06/02/politics/fact-check-texas-elections-bill-voting-sb7-republicans-abbott/index.html [https://perma.cc/7FGD-4UCA].

173 Alexa Ura, *Republican Bill Tightening Texas Election Laws Is Headed to Gov. Greg Abbott's Desk*, TEX. TRIB. (Aug. 31, 2021, 6:00 PM), https://www.texastribune.org/2021/08/31/texas-voting-restrictions-bill [https://perma.cc/NES6-Y3L5] ("Left off were controversial provisions from the spring that would've restricted Sunday voting hours and made it easier for judges to overturn elections.").

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the sham "audit" that is fueling more conspiracy theories about the integrity of the 2020 election,[174] proposed bills that would have made it easier for that state legislature to overturn the voters' choice of presidential electors did not make it out of committee or get significant support in the state legislature.[175]

Political opposition must be mounted against those who embrace the false claim that the 2020 election was stolen from President Trump and who run for office or seek appointment to run elections. Spreading these false claims shows rejection of a commitment to the rule of law, and those who share the false claims deserve to have their positions on the 2020 election relentlessly challenged during their campaigns. If any of these persons attains office, then oversight from more fair-minded, responsible people will be urgently required. Getting such oversight may require new legislation, lawsuits, or even peaceful protests.

Indeed, the ultimate safeguard of American democracy during this period of democratic instability may be millions of people taking to the streets for peaceful protests to demand fair vote counting and adherence to the rule of law. In 2020, it was enough to avoid election subversion that some heroes stepped up to assure that elections ran smoothly, votes were fairly counted, and a peaceful transition of power took place. Next time, a few heroes in the right places may be inadequate. I fear that only concerted, peaceful collective action against an attempt to subvert election results stands between American democracy and nascent authoritarianism.

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174 Wines, *supra* note 63.

175 *See* DEMOCRACY CRISIS IN THE MAKING, *supra* note 75, at 9–10 (describing and criticizing proposed Arizona laws); H.B. 2720, 55th Leg., 1st Reg. Sess. § 3(B) (Ariz. 2021) (granting legislature authority to overturn presidential election results); Laurie Roberts, Opinion, *Rep. Shawnna Bolick Says Your Vote for President Shouldn't Count (But Hers Should)*, AZCENTRAL (Jan. 29, 2021, 3:13 PM), https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2021/01/28/arizona-legislator-wants-veto-your-vote-president/4302254001 [https://perma.cc/N7FT-NB5K] (describing H.B. 2720); *Bill History for HB2720*, ARIZ. STATE LEGISLATURE, https://apps.azleg.gov/BillStatus/BillOverview/77783 [https://perma.cc/EK9S-GP35] (showing that HB2720 died in committee); Laurie Roberts, Opinion, *Sen. David Gowan's Plan to Veto Your Presidential Vote Dies. That's a Darn Shame*, AZCENTRAL (Feb. 25, 2021, 5:29 PM), https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2021/02/25/arizona-senate-plan-veto-your-presidential-vote-dies-bring-back/6818371002 [https://perma.cc/45ER-XTMZ] (describing false start for proposed state constitutional amendment declaring "plenary power" of legislature to appoint presidential electors).

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