



# A DEMOCRACY CRISIS IN THE MAKING

How State Legislatures are  
Politicizing, Criminalizing,  
and Interfering with  
Election Administration



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April 22<sup>nd</sup>, 2021

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## Executive Summary

In the aftermath of the 2020 election, a wave of legislative proposals to remake election law has swept across the country, state by state. One organization, the Voting Rights Lab, has identified more than 2,000 bills that deal in one way or another with the way elections are administered.<sup>1</sup>

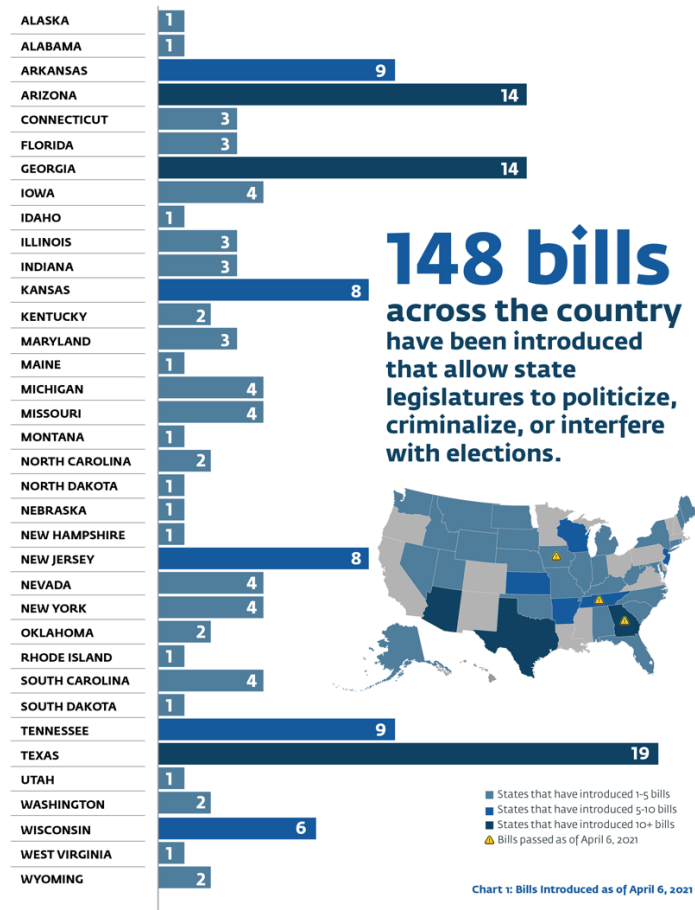
Among this group, one set of consequential proposals has flown under the radar. They involve efforts to alter basic principles about how elections should be administered and aspire to put highly partisan elected officeholders in charge of basic decisions about our elections. In 2021, state legislatures across the country—through at least 148 bills filed in 36 states<sup>2</sup>—are moving to muscle their way into election administration, as they attempt to dislodge or unsettle the executive branch and/or local election officials who, traditionally, have run our voting systems. (See Chart 1). This attempted consolidation would give state legislatures the power to disrupt election administration and the reporting of results beyond any such power they had in 2020 or indeed throughout much of the last century. Had these bills been in place in 2020, they would have significantly added to the turmoil that surrounded the election, and they would have raised the alarming prospect that the outcome of the presidential election could have been decided contrary to how the people voted. These are substantial changes that, if enacted, could make elections unworkable, render results far more difficult to finalize, and in the worst-case scenario, allow state legislatures to substitute their preferred candidates for those chosen by the voters. American democracy relies on the losers of elections respecting the results and participating in a peaceful transition of power. If, instead, the losing party tries to override the will of the voters, that would be the death knell for our system of government.

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<sup>1</sup> STATE VOTING RIGHTS TRACKER, <https://tracker.votingrightslab.org> (last visited Apr. 19, 2021). This includes legislation dealing with campaign finance or redistricting. Many of these bills deal with ministerial matters—they may slightly adjust timelines or change forms that have to be filled out. Some expand ballot access. Another set takes aim at many of the practices from 2020 that helped eliminate barriers to the freedom to vote. See BRENNAN CENTER FOR JUSTICE, Voting Laws Roundup: March 2021 (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021> (counting 361 bills in 47 states with provisions that restrict ballot access as of March 24).

<sup>2</sup> As of April 6, 2021. This number reflects bills tracked by Voting Rights Lab that may further insert the legislature into election administration, as well as additional bills identified by voting rights attorneys in some key battleground states. Of the 148 bills we catalogued, some have already been enacted, others have passed at least one chamber, and a number have failed, either because they were voted down or because the state's legislative session has expired. For clarity, we use "H.B." and "S.B." as abbreviations for state house and senate proposals throughout.

Chart 1: Bills Introduced as of April 6, 2021



For the most part, throughout American history, elections have been administered by local governments—attuned to their communities and the way their voters live their lives. In the twentieth century, local administrators were driven to increase their levels of professionalism and to limit the effects of partisanship,<sup>3</sup> while state officials, usually the secretary of state, created a base level of uniformity and coherence on a statewide basis. At the federal level, a variety of laws, from the Voting Rights Act of 1965 to the National Voter Registration Act and the Help America Vote Act, have assured a level of national uniformity. Altogether, this system of robust and clear federal-state-and-local procedures and decentralized administration has created a

<sup>3</sup> See Ernest Hawkins, *Creating Professionalism in the Field*, *THE FUTURE OF ELECTION ADMINISTRATION*. 105 (Mitchell Brown, Kathleen Hale, & Bridgett A. King eds. 2019), [https://doi.org/10.1007/978-3-030-18541-1\\_13](https://doi.org/10.1007/978-3-030-18541-1_13).

stable election system.<sup>4</sup> It is imperfect to be sure, but for decades Americans have been confident that their vote would be counted in large part because of this system.<sup>5</sup>

In 2020, these longstanding arrangements, embraced by both parties, produced an election that was free and fair, with some of the highest turnout numbers in many decades. Our election system did all that despite an unprecedented set of challenges. Nevertheless, legislation introduced in 2021 threatens to introduce a new volatility into the system. In this report we analyze four major types of legislative efforts that take aim at the balance of powers in administering elections and in doing so threaten to jeopardize future elections. (To see which states are considering legislation in these four areas covered in this report, go to Chart 2).

Legislative seizure of control over election results. In at least three states, in what appears to be a clear reaction to the 2020 election, legislators have introduced measures that would give the legislature final authority over the certification of election results. If these measures were to be enacted—which does not appear imminent—legislatures would have the power to reject the will of the voters if they don't like the results of the election. In short, these proposals would dramatically increase the probability of an election crisis.<sup>6</sup>

Legislative seizure of election responsibilities. In at least 16 states, legislators have proposed or passed measures that would remove certain election administration authorities from the purview of the governor, the secretary of state, or other executive branch officers and place them under the control of the legislature. These proposals would alter the balance of power between branches of state government in significant ways. State legislatures' role in elections has typically been limited: legislators establish the rules for elections at a relatively high level of generality, while the executive branch often appoints election officials,<sup>7</sup> issues more granular regulations, and administers or oversees elections according to those rules. Bills being introduced this year would strip the branch of government

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<sup>4</sup> Polling shows that people have the utmost faith in their local leaders and election officials. States United Democracy Center, New Poll Finds Americans Want Every Legal Vote Counted, (Nov. 4, 2020), <https://statesuniteddemocracy.org/2020/11/04/new-poll-finds-americans-want-every-legal-vote-counted/>; Kim Hart, Golden age of local leaders, Axios (Oct. 2, 2019), <https://www.axios.com/local-state-government-trust-congress-b820f103-7952-429d-bfea-adf7fc7beaa4.html>. Recent polling shows 64% of voters believe local elected officials provide fair and accurate information to the public. Pew Research Center, Why Americans Don't Fully Trust Many Who Hold Positions of Power and Responsibility, [Pewresearch.org](https://www.pewresearch.org/politics/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility/) (Sept. 19, 2019), <https://www.pewresearch.org/politics/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility/>. And local officials are also viewed more favorably than state elected leaders by both Democrats and Republicans, something that has been a trend for the last decade. Justin McCarthy, Americans Still More Trusting of Local Than State Government, Gallup News (Oct. 8, 2018), <https://news.gallup.com/poll/243563/americans-trusting-local-state-government.aspx>.

<sup>5</sup> In general, while Americans are often mistrustful of overall election results, they have tended to believe that their vote will be counted accurately. See MIT ELECTION DATA AND SCI. LAB, Voter Confidence, (Apr. 19, 2021, 12:30 PM), <https://electionlab.mit.edu/research/voter-confidence> ("Research by scholars such as Lonna Atkeson, Mike Alvarez, Thad Hall, and Paul Gronke tells us that voters tend to be more confident when they don't wait a long time to vote, when they encounter polling place officials who seem competent, and when they vote in person rather than by mail. Some of these factors certainly can be affected by state policies, but more often, they are influenced by local administrators' decisions about how to allocate resources to polling places and how rigorously they train poll workers.").

<sup>6</sup> By election crisis, we mean generally a situation in which the election process itself, along with any lawful and regular process for recounts, contests, and other post-vote challenges, failed to identify a winner or respect the will of the voters.

<sup>7</sup> This is not uniformly so. In some cases, those officials are elected or are appointed at the local level.

charged with executing the law of its powers and grant them instead to the legislature. In doing so, they would create a heightened potential for partisan election meddling, undermine public confidence in the electoral process, and make it more difficult to respond to emergency conditions.

Legislative meddling in election minutiae. In the key battleground states of Arizona, Texas, and Michigan, as well as several others, legislatures are attempting to inject themselves into the minutiae of election administration or to radically shift administrative responsibilities. In one state, everything from voter registration roll maintenance, to on-the-ground equipment checks, to vote tallies would be subjected to a new layer of legislative hyper-supervision. These micro-management efforts raise the prospect of unmediated conflicts between traditional executive branch election administrators and the legislature. In addition, it is unclear whether legislatures, designed to pass laws, are institutionally capable of day-in, day-out election administration. And even in instances where the legislatures are not proposing to run elections themselves, we found several bills that if enacted would subject local election administrators to unworkable or burdensome supervisory schemes.

Legislative imposition of criminal or other penalties for election decisions. A final cluster of proposals imposes new criminal or civil penalties on local election officials. These proposals—like one in Texas that would impose criminal sanctions on an election administrator who obstructs the view of a poll watcher in a manner that makes observation “ineffective” or one in Iowa that would impose \$10,000 fines for “technical infractions” of election law—may severely curtail the ability of administrators to run their polling places or to adapt to local circumstances.



**Chart 2: State-by-State Legislative Interference by Category**





	 Seizure of control over election results	 Seizure of election responsibilities	 Meddling in election minutiae	 Imposition of criminal or other penalties for election decisions
ALABAMA				X
ARIZONA	X	X	X	
ARKANSAS		X	X	X
CONNECTICUT		X		
FLORIDA			X	
GEORGIA	X	X	X	
INDIANA		X	X	
IOWA				X
KANSAS		X	X	
KENTUCKY		X		
MARYLAND		X		
MICHIGAN		X	X	
MISSOURI	X	X	X	
NEVADA	X			
NEW YORK			X	
NORTH CAROLINA		X	X	
NORTH DAKOTA			X	
OKLAHOMA		X		
PENNSYLVANIA		X		
SOUTH CAROLINA		X	X	
TENNESSEE		X	X	
TEXAS		X	X	X
WEST VIRGINIA			X	
WISCONSIN			X	X
WYOMING			X	

Chart 2: analyzes select bills in *Democracy Crisis in the Making*

These measures portend turmoil. They may prevent effective emergency responses and result in duplicated expenses, red tape, and unworkable timelines that would disrupt election administration, undermine faith in government, and increase court challenges to election results. In the worst cases, they will make it easier for partisan actors to manipulate an election or even overturn the results.

The 2020 election has been rightly praised for its record turnout, the accuracy of the results, and the tenacity of election administrators as they adapted to an unprecedented set of challenges. While many state legislatures, recognizing this, have proposed legislation to improve our voting systems and to support election administrators, this report highlights a more worrying trend that has not received as much attention. If unchecked, the trend could result in electoral chaos and undermine the legitimacy of our democratic processes.

## Introduction

In the wake of the 2020 presidential election and a concerted effort to discredit both the process and the result of the vote, elected officials at the state and federal levels are moving to reform nearly every dimension of voting and election administration. The substance and aim of many of these proposals stand in sharp contrast to the broad desires of the American public for more accessible voting options. While much of the public focus has been on provisions that affect access to the ballot, this report focuses on another trend—towards increasing partisanship and greater legislative usurpation of election administration.

In 2021, state legislatures across the country are moving to assert their own power over elections—power that is currently, and has been traditionally, held by the executive branch and/or local officials. In a break with traditional bipartisanship in election administration, partisan majorities in individual statehouses are moving to consolidate command over elections in the political hands of the legislative branch. These efforts, if successful, would give state legislatures the ability to disrupt election administration and the reporting of results far beyond what they were able to employ in 2020. Instead of administrative agencies and nonpartisan local officials managing the details of elections, efforts to increase partisan political power over decisions in all arenas present a challenging new chapter in our democracy.

These proposals would do more than disproportionately and unprecedentedly shift power over elections to the political party that might dominate a legislature. They seek to implement serious changes that threaten to make elections unworkable, would render results impossible to finalize, and would undermine fundamental principles of democracy by opening the door to election manipulation by self-interested partisan actors. In many states, these efforts are paired with proposals to increase criminal and civil penalties for election officials, voters, and other parties. In some cases, these new penalties are prescribed in vague or sweeping language, and we see another risk: increased litigation that would require courts to settle new disputes about the most ministerial task (even as other proposals explicitly purport to cut the judiciary out of election clashes).

States have significant discretion over how to administer their own elections, including those for federal offices. However, this flexibility is not limitless; state election policies are bound by a state's own constitution and by the federal Constitution and voting rights laws. Not all of the bills discussed in this report run afoul of those limitations, but, even where lawful, the altered processes they would create are often practically unworkable or ripe for exploitation by a small number of self-interested actors. Increasing the partisan political tenor of—and indeed actual power over—voting logistics will not improve election administration in this country.

Robust but clear procedures and apolitical administration are necessary preconditions for stable elections. This is why, over time, America has developed, tested,

and refined recount procedures and legal challenges as an effective set of checks and balances to protect our elections from partisan influence, from corruption, and from malfeasance. Many of the proposals we discuss would not only upset these time-tested approaches but would also increase the destabilizing instances in which candidates are in charge of their own elections. We know from experience that this invites controversy, raises suspicion, and may lead officials to make decisions that actually tilt the electoral playing field in their own favor.

The bills discussed in this report are just examples. They are indicative of recent legislative trends across the country but are by no means the only or even the most pressing proposals. These specific bills may be amended or become part of broader omnibus packages. We do not evaluate the likelihood of individual bills becoming law but rather seek to explore themes illustrated by these current proposals and raise general cautions about them. Many other examples could fill these pages, and the absence of a particular bill or state does not mean we have dismissed it as irrelevant to this conversation. This report offers a first look at these proposals, which may be amended, reimagined, or more thoroughly analyzed in the coming weeks and months.

To be sure, there is room to improve our elections. But most of the proposals catalogued here neither protect voters' rights nor enhance the efficiency of election administration. Instead, they create more rules yet provide less clarity. In the process, they significantly interfere with both fair elections and the fundamental principles of our American democracy. Contrary to traditional principles of conservatism that preserve local control and resist centralized authority, these bills seize and consolidate power in the hands of politically motivated state legislators. These legislators may find themselves in an untenable position should these proposals become law: responsible for handing down the outcomes of their own re-election races and other partisan contests. What is clear is that the untried systems imagined by many of these legislative endeavors are unworkable, bound to lead to increased litigation and expense in administering a core task of our democracy: elections.

This report highlights legislative trends in the states, focused on bills that involve:

Legislative seizure of control over election results. These proposals increase the probability of an election crisis by allowing legislators to overturn the will of the voters and insert the state legislature in the process for certifying elections, allowing them to change election results after the voters have already spoken.

Legislative seizure of election responsibilities. These proposals strip executive power, shift authority to legislatures, and include provisions that would seize the power to appoint state and local election officials and to administer elections. Some eliminate emergency powers that allowed executives to respond to the COVID-19 pandemic in 2020 by ensuring safe voting options during the public health crisis.

Legislative meddling in election minutiae. New bills would restrict local authority in favor of micromanagement by state legislatures. They would replace the

traditional local—often nonpartisan—administration of elections with processes overseen by partisan elected officials in the state legislatures. Formal votes would be required to make even the most basic decisions like testing election equipment and conducting post-election audits.

Legislative imposition of criminal or other penalties for election decisions. These bills would create additional criminal and civil penalties, which invite expensive, time-consuming litigation. With these changes, election administrators may be hesitant to perform even basic ministerial tasks under the threat of liability, which will incentivize additional litigation during the election process. Voters and volunteers would also face new penalties for a myriad of acts such as minor omissions or assisting others.

### Legislative Seizure of Control over Election Results: Increasing the Probability of an Election Crisis

Perhaps the most worrying of the election interference bills are those that would create the serious prospect of an election crisis by giving state legislatures the opportunity to overturn election results they don't like. Bills introduced in Arizona, Missouri, and Nevada would create opportunities for the legislatures in those states to hijack the process for certifying election results and choose a winner that does not correspond with the popular vote. Had they been in place in 2020, these bills would have significantly added to the turmoil that surrounded the election, and they would have raised the alarming prospect that the outcome of the presidential election could have been decided contrary to the will of the voters.

These bills are a transparent response to the failed effort by some legislators in key swing states to change the result of the 2020 election. In Georgia, President Trump and several Republican legislators called on Governor Brian Kemp to call the legislature into special session to allow them to overturn the state's presidential election results, based on false claims of "fraud."<sup>8</sup> Kemp and Lt. Gov. Geoff Duncan rejected this effort because "[s]tate law is clear" that the maneuver was not permitted.<sup>9</sup> Republicans in Arizona, including Congressman Paul Gosar, made similar calls for Governor Doug Ducey to convene a special session,<sup>10</sup> but Ducey refused and promptly certified the election results.<sup>11</sup>

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<sup>8</sup> Felicia Sonmez, Georgia leaders rebuff Trump's call for special session to overturn election results, WASH. POST. (Dec. 6, 2020), [https://www.washingtonpost.com/politics/brian-kemp-trump-election-results/2020/12/06/4c5db908-37d4-11eb-9276-ae0ca72729be\\_story.html](https://www.washingtonpost.com/politics/brian-kemp-trump-election-results/2020/12/06/4c5db908-37d4-11eb-9276-ae0ca72729be_story.html).

<sup>9</sup> Press Release, Office of Governor Brian P. Kemp, Gov. Kemp, Lt. Gov. Duncan Issue Statement on Request for Special Session of General Assembly (Dec. 7, 2020), <https://gov.georgia.gov/press-releases/2020-12-07/gov-kemp-lt-gov-duncan-issue-statement-request-special-session-general>.

<sup>10</sup> Jeremy Duda, Ducey mum on election fraud claims but says Arizona will respect election results, ARIZ. MIRROR (Nov. 9, 2020), [azmirror.com/2020/11/09/ducey-mum-on-election-fraud-claims-but-says-arizona-will-respect-election-results/](https://azmirror.com/2020/11/09/ducey-mum-on-election-fraud-claims-but-says-arizona-will-respect-election-results/).

<sup>11</sup> Alexander Tin, Arizona certifies election results, finalizing victories for Biden and Kelly, CBS NEWS (Nov. 30, 2020), <https://www.cbsnews.com/news/arizona-certifies-election-results-finalizing-victories-for-biden-and-kelly/>.

Bills and constitutional amendments now under consideration in several states would have allowed legislatures to return to session, without the governor's cooperation, and would give them new opportunities to override the popular vote, at least in some circumstances. In Nevada, legislators have introduced a proposed amendment to the state constitution that would transfer the power to certify the state's election results from the supreme court to the legislature.<sup>12</sup> The bill would also require the legislature to convene a special session for the purpose of conducting the canvass and certification. To become law, this proposed amendment would have to be passed by two consecutive sessions of the legislature and ratified by the voters.

In Missouri, H.B. 1301 would create two interlocking provisions of law. First, the bill purports to bar courts from setting aside any portion of the state's election laws based on violations of the state constitution, and would also bar the executive branch from issuing executive orders or administrative rules that “modif[y], waive[] or alter[] in any fashion” the statutory scheme for “the counting of votes and administration of elections.”<sup>13</sup> Second, the bill provides that the General Assembly “shall retain its authority to name presidential electors in cases of fraud” or if a court or the executive branch purported to modify the statutory scheme for counting votes. The law appears to leave it to the legislature to determine whether the fraud or legal violation exists to justify their intervention. And in such circumstances, the bill would allow the legislature to meet and act by joint resolution without the signature of the governor.

#### **SPOTLIGHT: Arizona H.B. 2720, H.B. 2800, H.B. 2826**

A slew of bills introduced in Arizona would create new opportunities for legislators to create an election crisis by dictating the results of the election.

Republican legislators were frustrated by Governor Doug Ducey's refusal to call the legislature back into special session in 2020 and have now proposed several mechanisms to ensure that they are not dependent on the governor to intervene in a future election. H.B. 2826 would give the legislature the power to call itself into session to review the county canvasses, certify them, and transmit the results to the secretary of state.<sup>14</sup> H.B. 2800 would require the legislature to come into special session after each regular primary and general election.<sup>15</sup> At the special session, they could conduct hearings and receive evidence “relating to any irregularities . . . regarding voting, tallying the votes and any other election procedures.” The legislature could then “vote to reject or confirm the preliminary results of the election. . . .”

H.B. 2720 goes even further.<sup>16</sup> Rather than inserting the legislature into the regular process for certifying the election—worrying enough—H.B. 2720 explicitly invokes the “legislative authority regarding the office of presidential elector” and

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<sup>12</sup> Assemb. J. Res. 13, 81st Leg., 2021 Reg. Sess. (Nev. 2021).

<sup>13</sup> H.B. 1301, 101st Gen. Assemb., Reg. Sess. (Mo. 2021).

<sup>14</sup> H.B. 2826, 55th Leg., Reg. Sess. (Ariz. 2021).

<sup>15</sup> H.B. 2800, 55th Leg., Reg. Sess. (Ariz. 2021).

<sup>16</sup> H.B. 2720, 55th Leg., Reg. Sess. (Ariz. 2021).

would allow the legislature to override the popular vote for any reason: “[B]y majority vote at any time before the presidential inauguration [the legislature] may revoke the secretary of state’s issuance or certification of a presidential elector’s certificate of election.” The bill would allow the legislature to take action pursuant to this provision whether or not it is in regular scheduled session or in special session (which generally requires the governor’s consent).

Fortunately, for the moment, none of these proposals appears close to being enacted into law. However, given the potential consequences for the integrity of elections were a state legislature to overturn the will of the voters, proposals of this type should be vocally and emphatically rejected.

### Legislative Seizure of Election Responsibilities: Stripping Executive Power Over Elections

In at least 16 states, legislators have proposed or passed measures that would remove certain election administration powers from the purview of the governor and other executive officers and place them under the control of the legislature. These proposals would alter the balance of power between branches of state government in significant ways.

State legislatures’ roles in elections typically have been limited: legislators establish the rules for elections at a relatively high level of generality, while the executive branch appoints election officials,<sup>17</sup> issues more granular regulations, and oversees elections according to those rules. The bills being introduced—and, in Georgia, enacted—this year would strip the executive branch of some of those powers and shift them instead to the legislature. In doing so, they would create opportunities for partisan election meddling, undermine public confidence in the electoral process, and make it more difficult to respond to emergency conditions.

These legislative maneuvers are not entirely novel. They echo other recent events in both North Carolina and Wisconsin. Both of those states had strong Republican legislative majorities at a time when the voters elected Democrats over incumbent Republican governors running for re-election. And in both instances, the legislative majority reacted by passing legislation, in lame-duck sessions for signature by lame-duck governors, that substantially trimmed the power of the incoming governor and arrogated that power to the legislature itself. In North Carolina, where this occurred in 2016, the legislature created a new authority to approve cabinet appointments, slashed the number of state employees who are appointed by the governor, and restructured the state and county boards of elections in ways the legislature deemed favorable to Republican interests.<sup>18</sup> In Wisconsin two years later, the legislature went much further. Among other things, it expanded legislative opportunities to kill proposed regulations,

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<sup>17</sup> Of course in many states, election officials are elected or are appointed at the local level.

<sup>18</sup> Tara Golshan, North Carolina Republicans’ shocking power grab, explained, Vox (Dec. 16, 2016), <https://www.vox.com/policy-and-politics/2016/12/16/13971368/republican-power-grab-north-carolina-explained>.

curtailed executive agencies' authority to work with their counterparts in the federal government, limited the governor's authority over the Wisconsin Economic Development Corporation, required legislative approval for the attorney general to settle litigation on behalf of the state, created the right of the legislature to intervene in any litigation on behalf of the state and to use taxpayer dollars to pay private attorneys to litigate in parallel to the Department of Justice, and limited early voting.<sup>19</sup> Michigan's legislature considered proposals along similar lines in 2018, but the outgoing governor vetoed the bills.<sup>20</sup>

These approaches have increased partisan friction in state governance. In Wisconsin, for example, the legislature rejected the governor's budget and started from scratch in 2019. It has announced its intention to do so again in 2021.<sup>21</sup> This is in addition to a pattern of conduct in which the legislature has rebuffed gubernatorial overtures to address state problems (including the COVID-19 pandemic) and has repeatedly responded to the governor calling special legislative sessions by gaveling those sessions out immediately after convening, without any consideration or debate.<sup>22</sup> In addition these approaches have unleashed extensive litigation between the legislature and the executive branch.<sup>23</sup>

This year's proposals to transfer election-related powers to the legislature largely fall into two categories. In the first, proposals shift the power to appoint key election administrators from the executive branch to the legislature. In the second, proposals curb the executive's ability to respond to crises, emergencies, and litigation, depriving governors and secretaries of state of the tools that were so essential in the operation of elections during the COVID-19 pandemic that continues to this day. We consider each category in turn.

### *Seizing the Appointment Power*

In many states, the primary responsibility for administering elections lies with state and local elections boards, whose appointments have typically rested with officials like the governor or secretary of state or local governing bodies like a county executive. In 2021, legislators across the country have sought to gain more control over these appointments, sometimes in radical ways.

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<sup>19</sup> Tara Golshan, How Republicans are trying to strip power from Democratic governors-elect, VOX (Dec. 14, 2018), <https://www.vox.com/policy-and-politics/2018/12/14/18123784/gop-legislature-wisconsin-michigan-power-grab-lame-duck>.

<sup>20</sup> Jim Malewitz, Governor Snyder vetoes Michigan bills criticized as Republican 'power grabs', BRIDGE MICHIGAN (Dec. 28 2018), <https://www.bridgemi.com/michigan-government/gov-snyder-vetoes-michigan-bills-criticized-republican-power-grabs>.

<sup>21</sup> Nathan Denzin & Rosie Marder, Gov. Evers releases his 2021-23 budget, unlikely to go far in GOP legislature, DAILY CARDINAL (Feb. 17, 2021), <https://www.dailycardinal.com/article/2021/02/gov-evers-releases-his-2021-23-budget-unlikely-to-go-far-in-gop-legislature>.

<sup>22</sup> Mitchell Schmidt, Wisconsin Republicans punt again on Tony Evers' special session, WIS. STATE J. (Jan. 20, 2021) [https://madison.com/wsj/news/local/govt-and-politics/wisconsin-republicans-punt-again-on-tony-evers-special-session/article\\_bf92eb80-5adb-56fo-aa08-b5a8b8956of8.html](https://madison.com/wsj/news/local/govt-and-politics/wisconsin-republicans-punt-again-on-tony-evers-special-session/article_bf92eb80-5adb-56fo-aa08-b5a8b8956of8.html).

<sup>23</sup> See, e.g., League of Women Voters of Wis. v. Evers, 929 N.W.2d 209 (Wis. 2019); Service Employees Intern. Union (SEIU), Local 1 v. Vos, 946 N.W.2d 35 (Wis. 2020); Wis. Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020); Kaul v. Wis. State Legislature, 2020AP1928-OA (Wis. Mar. 24, 2021); Bartlett v. Evers, 945 N.W.2d 685 (Wis. 2020); Wisc. Legislature v. Evers, 2020AP608-OA (Wis. April 6, 2020).

Some proposals merely give legislators a modest role in the process, while leaving control largely in the hands of an executive branch official. For instance, in South Carolina, S.B. 499 adds an “advice and consent” requirement for appointments to the state election commission appointments, meaning that the state senate would be required to confirm the governor’s nominees to the commission.<sup>24</sup>

Other provisions make more sweeping changes to the appointment processes for election officials. In Maryland, H.B. 163 would remove the authority to appoint and remove members of the state Board of Elections from the governor to the speaker of the Maryland House and the president of the Maryland Senate—effectively transferring control from the Republican governor to Democratic legislators.<sup>25</sup> In Tennessee, H.B. 1560 would remove all election administration responsibilities from the secretary of state and give them to a board appointed by the legislature.<sup>26</sup> And in Georgia, discussed more fully below, the recently passed omnibus election bill granted the legislature control of the State Election Board, and then granted that Board broad powers to investigate and suspend local election officials or municipal superintendents.<sup>27</sup>

The significance of these measures is apparent when we look back to the 2020 post-election period. Statewide, executive branch elected officials like the governor and secretary of state of Georgia, as well as independent-minded local election officials like Michigan’s Aaron Van Langevelde and the Maricopa County Board of Supervisors in Arizona, were critical bulwarks against state legislators who sought to take steps to alter the outcome of the 2020 election.

The more aggressive proposals to transfer power from the executive to the legislative branch will create more opportunities for election interference or even manipulation by partisan legislators. And whether or not that power is exercised, they will increase the perception of partisan interference in elections, especially given that many would in effect shift the party in control of these appointments. These provisions could fundamentally compromise public confidence in an impartial electoral process.

### **SPOTLIGHT: Georgia S.B. 202**

Buried among its many more-publicized provisions, the omnibus election bill enacted in Georgia in March 2021 fundamentally altered the balance of power between the executive and legislative branches as to elections by changing the appointments power and restricting the state Board of Elections’ ability to respond to emergencies:

- The law replaces the directly elected secretary of state as chair of the State Election Board with a “chairperson elected by the General Assembly.”<sup>28</sup>

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<sup>24</sup> S. 499, 124th Leg., Reg. Sess. (S.C. 2021).

<sup>25</sup> H.B. 163, 2021 Reg. Sess. (Md. 2021).

<sup>26</sup> H.B. 1560, 112th Gen. Assemb. (Tenn. 2021).

<sup>27</sup> S.B. 202, 2021-22 Reg. Sess. (Ga. 2021).

<sup>28</sup> *Id.* § 5.



- The law empowers the State Election Board—now chaired by a legislative appointee—to investigate and replace local election officials whose competence has been “call[ed] into question.”<sup>29</sup>

In the context of the 2020 election, when Governor Brian Kemp and Secretary of State Brad Raffensperger resisted calls from state legislators and others (including President Trump) to overturn the presidential election results, this is a clear effort by legislators to wrest control of the state’s elections into their own hands. Before this year, the State Election Board was chaired by the secretary of state and, in addition, was comprised of two legislative appointees and one representative of each political party. Under the new law, the chair is selected by a simple majority vote of the Georgia Senate and House.<sup>30</sup> While the chair must be “nonpartisan,” this merely means that she must not have engaged in partisan politics—for example, by participating in a party organization or partisan campaign or donating to a partisan candidate—for the previous two years.<sup>31</sup> And the chair can be removed and replaced by the legislature at any time by a majority vote. Thus, the legislature now retains effective control of the Board.

And those legislative appointees now have the power to replace local election officials with their own hand-picked substitutes. In Georgia, elections are administered by “superintendents”—usually bipartisan or nonpartisan county election boards. Superintendents have wide-ranging responsibility for election administration, including establishing polling places, setting early voting hours, deciding challenges to voter eligibility, and certifying election results. Under the new law, the state Election Board can replace superintendents if it finds at least three violations of the Georgia election code or state Election Board rules over the last two election cycles, or otherwise determines that there has been “demonstrated nonfeasance, malfeasance, or gross negligence in the administration of . . . elections” over a two-year period.<sup>32</sup>

This vague standard raises the specter of election manipulation by partisan actors. In an extreme case, the legislature—acting through the Board—might be able to abuse this power in order to overturn the results of the election, for example, by replacing a superintendent to prevent the certification of election results. The potential for this crisis scenario is mitigated (although not entirely eliminated) by certain procedural safeguards. For example, a superintendent cannot be replaced without a hearing, which must take place at least 30 days after the initiation of proceedings against the superintendent.<sup>33</sup> But less

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<sup>29</sup> Id. §§ 7, 12.

<sup>30</sup> Id. § 5.

<sup>31</sup> Id. § 5(2).

<sup>32</sup> Id. § 7(c).

<sup>33</sup> Id. § 7(b).

blatant forms of manipulation are not hard to imagine.<sup>34</sup> For example, the Board could replace superintendents in target jurisdictions—those that tilt heavily toward one political party—in order to raise barriers to voting (e.g., fewer polling places, shorter hours for early voting, etc.) and suppress turnout. This is more than idle speculation: in 2020, many state legislators lodged unproven claims of misconduct at local election officials in Fulton County<sup>35</sup>—the types of allegations that, under these new provisions, could be used to remove local officials and replace them with someone favored by the legislature.

### ***Stripping Emergency and Rulemaking Powers***

In 2020, election officials' swift actions to modify election procedures in the midst of the COVID-19 pandemic were widely credited with producing a successful, secure election and record participation.<sup>36</sup> Yet legislators in many states have responded to this success by proposing bills that would restrict future efforts to modify or clarify election rules either in cases of an emergency or simply as part of the normal process where election administrators fill gaps in the law.

In several states, legislators are seeking to insert themselves into the rule-making process.<sup>37</sup> For example, in Connecticut, H.B. 5540 would require the secretary of state (the state's chief election administrator) to submit any electoral instructions or rulings issued within 90 days of an election to the legislature. The legislature would then have the power to disapprove of the instructions or rulings by a majority vote.<sup>38</sup> In Arkansas, H.B. 1517 would require legislative approval for any rules promulgated by the secretary of state in the 180 days prior to an election.<sup>39</sup> In Arizona, H.B. 2794 would make it a felony for any state official to change any election-related dates or deadlines specified in statute under any condition.<sup>40</sup>

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<sup>34</sup> Nathaniel Rakich, It's Not Just Georgia: More Than A Dozen Other States Are Trying To Take Power Away From Local Election Officials, FIVETHIRTYEIGHT (Apr. 13, 2021), <https://fivethirtyeight.com/features/its-not-just-georgia-more-than-a-dozen-other-states-are-trying-to-take-power-away-from-local-election-officials/>.

<sup>35</sup> McKenzie Sadeghi, Fact check: Claim of Georgia vote spike for Biden after pipe burst at counting site is false, USA TODAY (Dec. 16, 2020), <https://www.usatoday.com/story/news/factcheck/2020/12/16/fact-check-claim-ga-vote-spike-biden-after-pipe-burst-false/3879081001/>.

<sup>36</sup> NATIONAL TASK FORCE ON ELECTION CRISES, Lessons and Recommendations from the 2020 General Election 5-8 (Jan. 2021), [https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report\\_2021.pdf](https://static1.squarespace.com/static/5e70e52c7c72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf).

<sup>37</sup> Another set of proposals includes legislative efforts to bar election administrators from changing rules as a result of court orders or litigation settlement without either legislative approval or notification. See H.B. 2302, 55th Leg., Reg. Sess. (Ariz. 2021) (limiting the secretary of state's litigation authority); S.B. 202, 2021-22 Reg. Sess. (Ga. 2021) (requiring notice to the judiciary committees before the state election board or secretary of state enters into any agreement or settlement that limits, alters, or interprets provisions of the election code); H.B. 2183, 2021-22 Reg. Sess. (Kan. 2021) (requiring specific approval of the state's Legislative Council for the secretary of state to enter into a consent decree or other agreement in federal or state court); S. 360, 2021-22 Reg. Sess. (N.C. 2021) (requiring North Carolina State Board of Elections to seek approval of the speaker of the House and president of the Senate before entering into a consent decree); S. 499, 124th Leg., Reg. Sess. (S.C. 2021) (authorizing the legislature to intervene in election litigation).

<sup>38</sup> H.B. 5540, 2021 Sess. (Conn. 2021).

<sup>39</sup> H.B. 1517, 93rd Gen. Assemb., Reg. Sess. 2021 (Ark. 2021).

<sup>40</sup> H.B. 2794, 54th Leg., Reg. Sess. (Ariz. 2021).

Some states are advancing legislation that would more particularly limit the ability of election administrators to respond to emergencies. In Georgia, the omnibus election bill discussed above (S.B. 202) requires the state Election Board to submit proposed emergency rules to the House and Senate Judiciary Committees at least 20 days before they would take effect, and provides that the emergency rules can be suspended by the majority vote of either committee.<sup>41</sup> In Pennsylvania, the state legislature inserted a item in the upcoming May election proposing an amendment to the state's Constitution curtailing the governor's emergency powers.<sup>42</sup> If approved by the voters, a governor's emergency declaration could not last longer than 21 days unless the legislature agrees to it. Another constitutional amendment also on the ballot would allow the legislature to unilaterally terminate a governor's emergency declaration. These provisions—including those, like Arkansas's, requiring the legislature's affirmative consent—would place a significant obstacle to efforts to modify election rules in true emergency conditions, such as natural disasters or future public health crises.<sup>43</sup>

Other proposals are even more drastic. Missouri's H.B. 1301 would prevent the governor or local officials from making any emergency changes to election procedures except through legislation approved by the General Assembly.<sup>44</sup> The original version of Indiana's S.B. 353 would have prohibited the governor from declaring by executive order a different time, place, or manner for holding elections, and from instituting, increasing, or expanding vote by mail or absentee vote by mail; that provision was subsequently removed from the proposed bill.<sup>45</sup> Proposed legislation in Kansas would also have limited the governor's emergency powers by preventing her from altering election laws or procedures by executive order; that provision was subsequently removed from the proposed bill.<sup>46</sup>

These rigid policies would undermine effective election administration in times of crisis and could also endanger public health and safety. Many of the emergency measures taken in 2020 to ensure the effective administration of elections during a global pandemic would have been impossible under these proposals. In an era of increasing natural disasters and an ongoing global pandemic, these proposals to restrict the executive branch's flexibility to respond to emergencies are profoundly short-sighted, and seriously threaten the future smooth administration of the electoral process.

### **SPOTLIGHT: Texas Bills H.B. 3303, H.B. 3448, S.B. 7, S.B. 1765, S.B. 1236, & S.B. 1675**

In Texas, multiple pieces of proposed legislation would radically restrict the ability of state and local officials to modify or suspend election rules, or otherwise

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<sup>41</sup> S.B. 202, 2021-22 Reg. Sess. §50 (Ga. 2021).

<sup>42</sup> S.B. 2, 2021-22 Reg. Sess. (Pa. 2021).

<sup>43</sup> This is not a hypothetical: Wisconsin was the first state to hold an election during the COVID-19 pandemic, in April of 2020. The state's governor attempted use his emergency powers to avoid the crowds associated with a massive in-person election but was blocked by the state supreme court. *Wis. Legislature v. Evers*, 2020AP608-OA (Wis. April 6, 2020).

<sup>44</sup> H.B. 1301, 2021101st Gen. Assemb., Reg. Sess. (Mo. 2021).

<sup>45</sup> S.B. 353, 2021 Reg. Sess. (Ind. 2021) (version as of Feb. 16, 2021).

<sup>46</sup> H.B. 2183, 2021-22 Reg. Sess. (Kan. 2021) (as amended by House committee).

expand voting, in an emergency. These bills appear to target actions by both Republican Governor Greg Abbott and local officials like Democratic Harris County Judge Lina Hidalgo, who took measures to ease voting procedures in 2020 because of the COVID-19 pandemic.

Citing the pandemic and his own emergency powers, Abbott added six days to the early voting period for the November 2020 election.<sup>47</sup> He also allowed voters to turn in mail-in ballots in person at any point during the early voting period, not just on Election Day.<sup>48</sup> Two proposed bills would restrict similar efforts to respond to future election emergencies by barring the governor's ability to suspend provisions of the Election Code due to an emergency.<sup>49</sup> Other bills would generally bar state and local officials from suspending or waiving any election rules.<sup>50</sup>

S.B. 7 directly prohibits many of the measures taken by Judge Hidalgo to expand access to the polls during the pandemic.<sup>51</sup> For example, it bars localities from mailing absentee voter applications to all voters, limits voting hours, and bars the use of drive-thru voting sites.

Taken together, these measures would severely limit the ability of Texas officials to tailor election procedures to future emergencies—which, in a natural-disaster-prone state, could be devastating to future election administration.

Finally, in Michigan, the state legislature is reported to be considering a form of election interference that defies categorization. With a Republican-dominated legislature and a Democratic governor, changes to the state's election laws under normal circumstances would be the result of negotiations between the two. Give and take between the legislature and executive—each exercising their prerogatives—is rightly considered a cornerstone practice that inhibits the abuse of powers by either branch. But Michigan has a singular constitutional provision<sup>52</sup> that allows the legislature to adopt laws without submitting them for a governor's signature (or veto) if a petition initiative gathers enough signatures. And the number of signatures required is comparatively small—just 8 percent of the total number of votes cast in the last gubernatorial election. According to press reports, the legislature is considering precisely this maneuver to enact new election laws, which the governor has otherwise threatened to veto.<sup>53</sup>

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<sup>47</sup> See Patrick Svitek, Texas Republicans Sue to Stop Gov. Greg Abbott's Extension of Early Voting Period During the Pandemic, *Tex. Tribune* (Sept. 23, 2020), <https://www.texastribune.org/2020/09/23/texas-republicans-greg-abbott-early-voting/>.

<sup>48</sup> *Id.*

<sup>49</sup> See S.B. 1675, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1236, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>50</sup> See H.B. 3303, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 3448, 87th Leg., Reg. Sess. (Tex. 2021); S.B. 1765, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>51</sup> S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>52</sup> Mich. Const. art. II, § 9. ("The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum."); see also Michigan Manual 2009-2010, How an Issue Becomes a Ballot Proposal, [http://www.legislature.mi.gov/Publications/MichiganManual/2009-2010/09-10\\_MM\\_IX\\_pp\\_01-03\\_Issue\\_Becomes.pdf](http://www.legislature.mi.gov/Publications/MichiganManual/2009-2010/09-10_MM_IX_pp_01-03_Issue_Becomes.pdf).

<sup>53</sup> Clara Hendrickson, Gilchrist Condemns Michigan GOP Plan to Circumvent Whitmer Veto on Election Bills, *Detroit Free Press*, Apr. 1, 2021, <https://www.freep.com/story/news/politics/2021/04/01/garlin-gilchrist-condemns-gop-plan-circumvent-veto-election-bills/4840675001/>; Jane C. Timm, The 'Loophole' Michigan Republicans Could Use to

## Legislative Meddling in Election Minutiae: Degrading Local Competence and Control in Favor of Micromanagement by State Legislatures

Another significant category of state proposals involves efforts by legislatures to inject themselves into the minutiae of election administration or radically to shift administrative responsibilities from local actors to the state legislature.

Nonpartisan, local control over elections has been a quintessential aspect of American democracy. Local election officials supervise, staff, and monitor multiple aspects of elections and are expected to be highly trained experts.<sup>54</sup> Specific training and responsibilities vary by state and type of election (local, county, or statewide), but election officials are typically provided a framework for how to structure elections by the state legislatures and are then responsible for preparing for and executing safe and secure elections within that framework. The reliance on local administrators by legislatures is hardly surprising in a country as large as the United States. In the 2018 midterm elections there were more than 200,000 polling locations staffed by more than 600,000 poll workers and by many more volunteers.<sup>55</sup> Setting up and running such a vast and complex operation requires tremendous dedication and expertise on a local level.<sup>56</sup>

Two bills introduced in Arizona's House of Representatives and an ongoing effort by the Arizona State Senate to audit 2020 election results from Maricopa County illustrate the level of micromanaging local election officials that some state legislatures are contemplating. Everything from voter registration roll maintenance, to on-the-ground equipment checks, to vote tallies is subject to the trend of administration by a statewide political body. This level of legislative involvement in the day-by-day administration of elections raises concerns about potential conflicts or deadlocks between election administrators and legislators and about institutional capacity, since state legislatures by definition are structured to—and constitutionally permitted to—pass laws, not enforce or implement them.

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Sidestep Whitmer on Voting Laws, NBC News, Apr. 18, 2021, <https://www.nbcnews.com/politics/elections/loophole-michigan-republicans-could-use-sidestep-whitmer-voting-laws-n1264133>.

<sup>54</sup> Karen L. Shanton, Cong. Research Serv., R45549, *The State and Local Role in Election Administration: Duties and Structures* 12-13 (Mar. 4, 2019), <https://fas.org/sgp/crs/misc/R45549.pdf>.

<sup>55</sup> U.S. Election Assistance Commission, *Election Administration and Voting Survey: 2018 Comprehensive Report* 7, 9 (June 2019), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_FAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_FAVS_Report.pdf).

<sup>56</sup> While the chief election official was once a mainly clerical position, it has morphed in recent decades to include numerous tasks to ensure accuracy and security throughout the process. The typical requirements and skills expected of election administrators include knowledge of federal, state, and local election laws, as well as aptitude with logistics, budgeting, and asset management. Some states require a full certification in election management. Most states require that any and all election officials take an oath to remain nonpartisan and impartial while representing the state and office to ensure that officials are seen as apolitical.

## SPOTLIGHT: ARIZONA H.B. 2722 & H.B. 2799

One proposal introduced in the Arizona House by the chair of its Ways and Means Committee, Shawna Bolick, would insert the legislature into field checking and reviewing all of the state's voting machines.<sup>57</sup> Under current law, the secretary of state oversees the office charged with evaluating and approving the state's voting equipment. As part of that process, she appoints an expert committee that helps craft standards for the equipment, and she then certifies (or revokes the certification) of those machines.<sup>58</sup> She also provides expert personnel to help test the reliability of the voting machines that localities have chosen to use.

Bolick's proposal, H.B. 2722, would create a parallel machine review system disconnected from the main processes used by the secretary of state. Under the proposed law, the legislature would be entitled to send additional experts to check and review machines on location, in addition to those currently provided by the secretary of state. The legislature would also be authorized to propose changes to the state's election instructions and procedures manual. It is unclear how potential conflicts between the two entities regarding either the manual or the machine checks would be resolved, or what would happen were the secretary of state and the legislature to deadlock over an issue.

In another proposal, H.B. 2799, currently under consideration in Arizona, the legislature would mandate that the secretary of state establish a new, non-public, statewide database of recently deceased Arizonans.<sup>59</sup> Then, the legislature would be entitled to access that database, putatively to use it to confirm whether state voter registration lists had been updated by striking those dead people from the rolls.<sup>60</sup> Under current law, the secretary of state receives a monthly report from the state's Department of Health Services of state residents who died in the previous month, including identifying information like social security numbers and address data for the decedents. The secretary of state uses those reports to update the statewide voter registration roll. This is not a rote process. It is a complex and sensitive operation, as voter registration list maintenance is both governed by federal law and fraught with concerns about improper purges based on poor list matching practices.<sup>61</sup> Overall, as with the proposal regarding voting equipment, this measure would establish a parallel—and unnecessary—regime for reviewing voter registration rolls. The bill also does not include any provisions for staffing or funding the legislative audit of the registration rolls, nor does it

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<sup>57</sup> See H.B. 2722, 55th Leg., 1st Reg. Sess. (Ariz. 2021). Rep. Bolick separately introduced another bill that we discuss in Section I and that would allow the legislature to appoint the state's presidential electors notwithstanding results certified by the secretary of state. See H.B. 2720, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

<sup>58</sup> See 16 A.R.S. 16-442.

<sup>59</sup> The secretary of state currently receives a monthly report of state residents who died in the last month from the state's Department of Health Services. The report contains the names and other identifying information including social security number and address data of the decedents. She uses those reports to update the statewide voter registration rolls.

<sup>60</sup> H.B. 2799, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

<sup>61</sup> See Kevin Morris and Myrna Pérez, *Purges: A Growing Threat to the Right to Vote*, Brennan Center, July 20, 2018, <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote>.

propose any standards for that review. There are more than 4.3 million registered voters in Arizona.

These two proposals are being considered against the backdrop of an unprecedented, ongoing legislative audit of the 2020 Maricopa County presidential election results by the state senate. In December 2020, the Arizona State Senate first issued a subpoena demanding access to more than 2 million ballots cast, and the voting equipment used to process them, in Maricopa County in November. Maricopa resisted the subpoena, pointing out that it had already conducted an audit as required by law and had undertaken a variety of other efforts to ensure the accuracy of the results.<sup>62</sup> Then, the county went one step further, and in January 2021, hired a professional testing firm to audit its election equipment and software. That second county-based audit revealed no issues.<sup>63</sup> Nevertheless, the state senate insisted that it wanted to conduct its own third audit. After months of legal wrangling between the county and the senate, in late February, a state court ordered the ballots and other election material to be produced to the senate.<sup>64</sup>

However, the senate did not have a secure location to store the ballots, nor did it have an auditor in place to conduct the review.<sup>65</sup> After a one month delay, at the end of March, the senate announced it had allocated \$150,000 to hire an audit team led by a Florida-based firm, Cyber Ninjas. The founder of that firm posted claims that the 2020 election was stolen and spread QAnon conspiracies on social media before he deleted his account in January, raising concerns about the objectivity and qualification of the lead audit firm.<sup>66</sup>

These two proposals and the ongoing audit demonstrate an unprecedented level of legislative interest in the minutiae of election administration that is not necessarily coupled with institutional competence. The Arizona legislature is not a full-time institution, and it is typically in session for less than half a calendar year.<sup>67</sup> To be sure, the legislature is well-funded. The Senate and House have a

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<sup>62</sup> Letter from Members of the Board of Supervisors to Maricopa County Voters (Nov. 17, 2020), <https://www.maricopa.gov/DocumentCenter/View/64676/PR69-11-17-20-Letter-to-Voters>.

<sup>63</sup> Press Release, Maricopa County Election Forensic Audit Results Released, (Feb. 23, 2021), <https://www.maricopa.gov/CivicAlerts.aspx?AID=2106>.

<sup>64</sup> See *Maricopa County v. Fann*, CV 2020-016840 (Super. Ct. Ariz. 2021), <https://assets.documentcloud.org/documents/20492775/maricopa-county-v-fann-superior-court-ruling-2-26-21.pdf>.

<sup>65</sup> See Brahm Resnik, 2.1 Million Ballots Packed with Nowhere to Go: Arizona Senate GOP Not Prepared for Election Materials, 12 News, Mar. 3, 2021, <https://www.12news.com/article/news/politics/21-million-ballots-packed-with-nowhere-to-go-arizona-senate-gop-not-prepared-for-election-materials/75-ecabeb6e-a9c8-424a-a260-1442124f3690>.

<sup>66</sup> See Katie Hobbs (@SecretaryHobbs), Twitter, (Apr. 1, 2021 9:48 PM), <https://twitter.com/SecretaryHobbs/status/137799988764237824/photo/2>; Jon Skolnik, Owner of Firm Hired to Conduct Arizona Election Audit Promoted Baseless Election Conspiracy Theories, Salon, Apr. 2, 2021, <https://www.salon.com/2021/04/02/owner-of-firm-hired-to-conduct-arizona-election-audit-promoted-baseless-election-conspiracy-theories/>.

<sup>67</sup> See Nat'l Conference of State Legislatures, Full- and Part-Time Legislatures (June 14, 2017), <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx#average> (characterizing Arizona as a "gray" state, meaning legislators "spend more than two-thirds of a full time job being legislators" but the "income from legislative work is . . . usually not enough to allow them to make a living without having other sources of income.").

combined budget of more than \$30 million and have almost 600 staff.<sup>68</sup> But that staff and budget have to cover every single matter of substance that the legislature deals with. In contrast, Maricopa County alone had a \$30 million budget just for elections in fiscal year 2021,<sup>69</sup> and Pima County's was close to \$6.5 million.<sup>70</sup> The Secretary of State's total budget exceeded \$18 million in fiscal year 2021.<sup>71</sup>

The current dispute over the senate-demanded audit illuminates the resource and expertise disparity. Not only was the senate unprepared to conduct the audit after it was given access to the ballots by a court, but once it hired an auditor, it stepped away from responsibility for supervising the process. As a result, it is unclear whether the Senate has established any standards for the handling, security, or confidentiality of the ballots.<sup>72</sup> Moreover, the auditor has been allowed to accept private money from undisclosed sources in addition to the state fee for its work.<sup>73</sup>

Even were the Arizona state legislature institutionally prepared to oversee voter registration rolls, voting equipment, and auditing election results, its ability to do so without generating unproductive tension with the secretary of state and local administrators is an open question.

These Arizona examples are emblematic of a trend. While not all of the proposed (or enacted) legislation involves the legislature intruding directly into election administration, much of it involves an unprecedented level of hyper-supervision that imposes new, unworkable burdens on local administrators, or gives the legislature a role in the process of finalizing election results. In Missouri, the state House of Representatives passed a bill that would allow the secretary of state to audit local voter rolls and then direct the local election authority to remove voters from the rolls in certain circumstances. If the local authority does not cooperate with the audit, the

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<sup>68</sup> State of Arizona FY 2021 Appropriations Report, at BH-9 (July 2020), <https://www.azleg.gov/jlbc/21AR/FY2021AppropRpt.pdf>; Nat'l Conference of State Legislatures, Size of State Legislative Staff (Mar. 9, 2021), <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx>.

<sup>69</sup> Maricopa County FY 2021 Adopted Budget 11, <https://www.maricopa.gov/ArchiveCenter/ViewFile/Item/5039>. More than half of Arizona's population resides in Maricopa County. See Maricopa County, Maricopa County Quick Facts, <https://www.maricopa.gov/3598/County-Quick-Facts>, (last visited Apr. 19, 2021).

<sup>70</sup> Pima County Fiscal Year 2020/2021 Adopted Budget, at 10-46, [https://webcms.pima.gov/UserFiles/Servers/Server\\_6/File/Government/Finance%20and%20Risk%20Management/Adopted%20Budget/2020-2021/FY%202021.2%20Adopted%20Budget.pdf](https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Finance%20and%20Risk%20Management/Adopted%20Budget/2020-2021/FY%202021.2%20Adopted%20Budget.pdf).

<sup>71</sup> State of Arizona FY 2021 Appropriations Report 288 (July 2020), <https://www.azleg.gov/jlbc/21AR/FY2021AppropRpt.pdf>. The secretary of state's office has 143 full-time employees and handles more than just elections. A portion of its budget passes through to counties for election administration. *Id.* at 289–90.

<sup>72</sup> See Letter from Secretary of State Katie Hobbs to Senate President Karen Fann and Senator Warren Petersen (Mar. 3, 2021), [https://www.documentcloud.org/documents/20499460-fann-letter-3\\_3\\_2021](https://www.documentcloud.org/documents/20499460-fann-letter-3_3_2021) (regarding procedures and standards for conducting the election audit); Katie Hobbs (@SecretaryHobbs), Twitter, (Apr. 1, 2021 9:48 PM), <https://twitter.com/SecretaryHobbs/status/137799988764237824/photo/2> (posting letter from Secretary of State Katie Hobbs to Maricopa County Board of Supervisors from April 1, 2021, regarding election auditor). [https://www.documentcloud.org/documents/20499460-fann-letter-3\\_3\\_2021](https://www.documentcloud.org/documents/20499460-fann-letter-3_3_2021)

<sup>73</sup> See Howard Fischer, Public in the Dark on Private Election Audit Funds, Arizona Capitol Times, Apr. 12, 2021, <https://azcapitoltimes.com/news/2021/04/12/public-in-the-dark-on-private-election-audit-funds/>.



secretary of state could withhold its funding.<sup>74</sup> In Michigan, proposed legislation would require a county elections clerk to obtain the approval of the county's board of canvassers every time he or she wanted to hire an assistant.<sup>75</sup> Another Michigan proposal requires the secretary of state to submit a report to the legislature containing the names of all local clerks who are not current with instruction, training, or continuing education requirements.<sup>76</sup> Yet another Michigan proposal makes it illegal for the secretary of state to post a link on her website to an absentee ballot application.<sup>77</sup>

### **SPOTLIGHT: TEXAS S.B. 7, S.B. 1340, & S.B. 1730**

In Texas, where 292 pieces of legislation dealing with voting have been introduced, a number of them, if enacted, would substantially rework the nature of local election administration.<sup>78</sup> One provision, S.B. 1340, which passed the Senate on April 13, upends the decades-long voter registration system for the state's 16.9 million registered voters.<sup>79</sup> S.B. 1340 would put the secretary of state in charge of registering voters and maintaining the rolls. The secretary would conduct the day-in and day-out work of list maintenance, as well as adjudicate all hearings and appeals challenging registration applications. Local county clerks, who are situationally aware of the needs of their communities and who are physically close to local voters in order to hear their appeals, largely would be cut out of the process.<sup>80</sup>

Other proposals would limit the ability of local administrators to adapt to situations on the ground and would impose a heavy bureaucratic toll on them. The Austin, Texas, newspaper concluded the proposal legislation "is designed to diminish local control over elections."<sup>81</sup>

One measure, S.B. 1730, would establish a presumption that all changes to election administration within 45 days of an election are invalid unless there is a

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<sup>74</sup> H.B. 738, 101st Gen. Assembly, 1st Reg. Sess. (Mo. 2021). Other states have analogous proposals. See, e.g., H.B. 1026, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>75</sup> S.B. 297, 101st Leg., Reg. Sess. (Mich. 2021), <http://www.legislature.mi.gov/documents/2021-2022/billintroduced/Senate/pdf/2021-SIB-0297.pdf>.

<sup>76</sup> S.B. 306, 101st Leg., Reg. Sess. (Mich. 2021).

<sup>77</sup> S.B. 310, 101st Leg., Reg. Sess. (Mich. 2021).

<sup>78</sup> According to Voting Rights Lab's "State Voting Rights Tracker," 67 of the Texas bills are "anti-voter" and another 32 are "mixed or unclear." See Voting Rights Lab, <https://tracker.votingrightslab.org/pending/search> (last updated Mar. 12, 2021).

<sup>79</sup> Texas Secretary of State, Turnout and Voter Registration Figures (1970-current), <https://www.sos.state.tx.us/elections/historical/70-92.shtml> (last accessed Apr. 19, 2021).

<sup>80</sup> S.B. 1340, 87th Leg., Reg. Sess. (Tex. 2021); see also H.B. 1026, 87th Leg., Reg. Sess. (Tex. 2021). Currently, the secretary of state is charged with monitoring registrars' compliance with state law and notifying them of potential improper registrations. One proposal, which has also passed the state Senate, would expand the monitoring criteria and would impose a \$100 penalty if the registrar fails to make a correction demanded by the Secretary of State. S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>81</sup> Brandon Mulder, Fact-check: Dan Patrick Insists that SB 7 Doesn't Change Early Voting Rules. Is He Right?, Austin American-Statesman, Apr. 9, 2021, <https://www.statesman.com/story/news/politics/politifact/2021/04/09/yes-texas-senate-election-bill-sb-7-changes-early-voting-rules/7144819002/> ("All of the changes packaged in SB 7 taken together, the overall effect of the bill, as in bills in other states, is the removal of authority from local election officials, [David] Becker [executive director of the nonpartisan Center for Election Innovation and Research] said. 'The fact is that the election code, as every election code does, leaves areas for local government to manage their elections . . . . That has absolutely changed.'").

declared disaster or emergency.<sup>82</sup> Another, S.B. 7, would create a complex formula dictating where counties can place countywide polling locations. The same proposal, which has passed the Senate, also entitles poll watchers to “free movement” within a polling place as well as the exclusive right<sup>83</sup> to capture video, audio, or images to be shared with the secretary of state as evidence of “unlawful activity.”<sup>84</sup> In general, transparency in election administration should be favored. But this particular provision raises the specter of indiscriminate, untrained partisan poll watchers interfering with the election process and acting as freelance supervisors reporting to the secretary of state.

Local Texas election administrators have warned that the rules amount to “micromanagement” that would result in long lines and confusion—driven by the fact that the legislature is attempting to write one-size-fits-all rules for a state of extraordinary geographic and demographic diversity.<sup>85</sup> The former Republican secretary of state for Kentucky observed: “The bill also micro-manages local election administrators by adopting rules governing precinct size and location of polling places, and by making drive-thru voting illegal. Texas has more counties than any other state, and those counties vary in size and population. These inflexible rules hamper the ability of local election administrators to meet the needs of their voters.”<sup>86</sup>

### **SPOTLIGHT: Bans on Efforts by Local Officials to Supplement Their Budgets**

Perhaps the most widespread type of measure being considered is one that limits local election jurisdictions from accepting any private funding, even from non-profits. During the 2020 election, many local election administrators faced unprecedented challenges as they attempted to deal with the Covid-19 pandemic and a number of rapid-fire changes to their normal procedures. Their budgets were severely strained or exceeded as they tried to do everything from procuring personal protective equipment for poll workers to buying new sorting machines to process a surge in mail in ballots. More than 2,000 localities were given private assistance grants, largely from an organization supported by Mark Zuckerberg, the founder of Facebook. But other private funds were also provided, including from the former Republican Governor of California, Arnold Schwarzenegger.<sup>87</sup>

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<sup>82</sup> S.B. 1730, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>83</sup> Election judges, voters, and anyone other than a poll watcher still would be prohibited from having a recording device.

<sup>84</sup> S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>85</sup> See Isabel Longoria, Testifying Against Senate Bill 7, Facebook (Mar. 27, 2021),

<https://www.facebook.com/watch/?v=742078446670809> (Harris County elections administrator Isabel Longoria testifying at Senate Committee on State Affairs hearing on S.B. 7); Michelle Homer and Adam Bennett, 'I'm Bewildered' County Judge Lina Hidalgo Accuses Lt. Gov. Dan Patrick of Attacking His Own Constituents, KHOU, Apr. 9, 2021, <https://www.khou.com/article/news/local/texas/county-judge-lina-hidalgo-responds-lt-gov-dan-patrick/285-f6137ebf-53f6-486e-80b5-f06daaeb56e4> (Harris County Judge Lina Hidalgo commenting on S.B. 7).

<sup>86</sup> Trey Grayson, Opinion: Bills Would Make Elections Less Secure, Less Accessible, Austin American-Statesman, Apr. 11, 2021, <https://www.statesman.com/story/opinion/columns/your-voice/2021/04/11/bills-would-make-elections-less-secure-less-accessible/7132964002/>.

<sup>87</sup> See Kenneth P. Vogel, Short of Money to Run Elections, Local Authorities Turn to Private Funds, N.Y. Times, Sept. 25, 2020, <https://www.nytimes.com/2020/09/25/us/politics/elections-private-grants-zuckerberg.html>.

In the 2021 legislative cycle, however, at least 16 states are attempting to bar—or have already barred—these types of funding efforts.<sup>88</sup> See Chart 3. These measures, if enacted, could constrain the ability of local election officials to supplement their often meager resources even as many state legislatures decline to provide sufficient funding.

**Chart 3: Limiting Local Resources to Run Elections**

	State	Bill Number	Summary of Proposal
1	ARKANSAS	HB 1866	Bars election boards from accepting private money for administering elections.
2	ARIZONA	HB 2569	Bars the state and any other jurisdiction from using private money to prepare for, conduct, or administer elections or to register voters.
3	FLORIDA	HB 7041	Bars the state, counties, and any other authority that conducts elections from soliciting, accepting or using any private funding or support for election-related expenses or voter education or registration programs.
4	GEORGIA	SB 202	Bars election superintendents from accepting any funding, grants, or gifts other than from the governing authority of the county or municipality, the state, or the federal government.
5	INDIANA	SB 398	Bars any jurisdiction that conducts elections from using private money to prepare for, conduct, or administer elections or to register voters.
6	KANSAS	SB 293 & HB 2183	Bars election officials from receiving private funds to pay for any expenditures related to conducting, funding or otherwise facilitating the administration of an election pursuant to law unless it has been authorized in advance. Any election official who receives such funding is guilty of a felony.
7	MICHIGAN	SB 284	Bars all governmental entities from accepting private donations or support for any election related activity (including voter registration) or for election related equipment.
8	NORTH CAROLINA	SB 326	Bars election boards from accepting private money for administering elections.
9	NORTH DAKOTA	HB 1256	Bars all governmental entities from accepting private donations or grants for elections operations or administration
10	NEW YORK	HB 4158	Bars all governmental entities from accepting private donations or grants for the expenses associated with conducting referenda.
11	SOUTH CAROLINA	HB 3877	Bars all election commissions or boards from receiving or using any private funding unless authorized.
12	TENNESSEE	HB 966, HB 1197, HB 1276, SB 1315, SB 1365	Bars all private people and entities from contributing money or equipment to election officials for the purposes of conducting elections.
13	TEXAS	HB 2283, SB 7	Bars all election officials from accepting private contributions and any expenditures using funds not appropriated by the governing body of the relevant political subdivision.
14	WISCONSIN	SB 207	Bars municipalities or counties from accepting private money for election administration but allows the Wisconsin Election Commission to accept them. The Commission would be required to distribute grants throughout the state on a per capita basis.
15	WEST VIRGINIA	SB 565, HB 173	Bars all election entities from receiving or using any private funding unless authorized.
16	WYOMING	SB 142	Bars local election entities from accepting private money. However, the Secretary of State may for training or education. Meals or food provided or donated in support of election training or education or provided on election day to poll workers and other election staff are acceptable.

Chart 3: analyzes select bills in *Democracy Crisis in the Making*

## Legislative Imposition of Criminal or Other Penalties for Election Decisions: Inviting Costly, Time-consuming, and High-stakes Legal Challenges

Bills that would create additional criminal and civil penalties for election administrators (and in some cases, voters) mark another recent legislative trend. Given that neither voter fraud nor deliberate maladministration of elections occurs with much frequency, it may be tempting to dismiss these bills as solutions in search of a problem and to assume, therefore, that they are unlikely to cause much harm. That would be a mistake. Many of these bills—which seem designed to posture and express outrage—change legal standards, rewrite existing investigative processes, or shift legal burdens in

<sup>88</sup> See, e.g., H.B. 2569, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

ways that will increase the incidence of litigation over election processes and outcomes in the states.

While most new laws augur some litigation, the lack of clarity in these bills may invite costly, time-consuming, and extraordinarily high-stakes legal challenges that will primarily involve government and state actors. These bills seek to impose penalties on local and state actors who administer elections. Given that such administrators are individual community members, often working to administer elections on a volunteer or part-time basis, these bills could very well paralyze election administration in communities across the country. By creating a well-founded fear of criminal or civil penalties (not to mention to expense of legal fees in defense),<sup>89</sup> these bills likely will dissuade people from stepping up and helping make our elections work.

Even with respect to full-time government employees and officials who administer elections in larger communities, there will be negative consequences. When officials believe they cannot perform even the most basic ministerial functions without opening themselves up to harsh legal penalties, our election system will become ossified and unable to react to changing circumstances. Officials who fear that any attempt to solve a practical problem facing a voter or poll worker could lead to personal liability will be unable to function effectively. Instead, these bills create an incentive to race to court for rulings on the most trivial of issues. A sand-in-the-gears approach to government is one thing where it comes to slowing legislation, but here it will disrupt time-sensitive processes that need to function for elections to reflect the will of the people. These delays could create further opportunities for interference in elections: in 2020, there was an unprecedented push by a losing campaign and its allies to pressure state legislatures to usurp the people's electoral power by having legislators designate the state's Electoral College members, rather than following the results of the ballot box. Delays that involve litigation and disputes close to the Electoral Count Act's "safe harbor" deadline could create opportunities for additional legislative interference in elections, with state officials acting to certify election results to their own agenda while legal battles continue.

Overall, these bills will lead to an avalanche of election litigation, largely on minor issues. This will put courts in the untenable position of being expected to administer elections, rooting in dry statutory provisions the kind of guidance currently provided by local election administrators and subject-matter experts with both experience and insight into the practical, factual scenarios that play out on election day. This is even

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<sup>89</sup> Jim Small, Senate GOP all back arresting Maricopa County supervisors for contempt, Arizona Mirror, (Feb. 3, 2021), <https://www.azmirror.com/2021/02/03/senate-gop-all-back-arresting-maricopa-county-supervisors-for-contempt/>; Trump campaign sues to block mail-in ballot rule changes, Associated Press, (Sept. 28, 2020), <https://apnews.com/article/election-2020-virus-outbreak-voting-state-elections-lawsuits-7104cfbeb854710e7ff9528560249a>; Caroline Bleakley and David Charns, Federal judge in Nevada rejects emergency motion claiming voter fraud, signature verification issues, KSN, (Nov. 5, 2020), <https://www.ksn.com/news/your-local-election-hq/live-trump-campaign-to-hold-news-conference-in-las-vegas-at-830-a-m-republicans-filing-lawsuit/>.

more concerning given courts' consistent expressions of reluctance to intervene and change or clarify voting procedures in the moment.<sup>90</sup>

### **SPOTLIGHT: Arkansas S.B. 604**

One example of the shift toward increased penalties is Arkansas S.B. 604.<sup>91</sup> Under current law, Arkansas's State Board of Election Commissioners undertakes an investigation when someone alleges there has been a violation of election law or voter registration requirements. Arkansas S.B. 604 allows—and in some cases requires—the Board instead to refer such initial investigations to the Division of Arkansas State Police, which is then required to investigate the complaint, without first independently evaluating the complaint's merits. The bill sets a 180-day timeline, from the filing of the complaint, for the State Police investigation, its report to the State Elections Board, and the Board's own review and final action. Where a complaint alleges possible violations by election officials, police referral for investigation is mandatory. Here, the bill creates a new definition of "election official," which includes any poll worker designated by a county board of election commissioners to be an election clerk, an election judge or sheriff, or a deputy county clerk assigned to conduct early voting.

This bill also substantially broadens the liability in of election officials, making it a civil violation for an official to knowingly fail to perform a duty prescribed by law; to fail to follow or implement administrative guidance;<sup>92</sup> or to perform a duty or responsibility in a manner that "hinders or disregards the purpose of the duty or responsibility." An election official may be fined up to \$1,000 and (potentially more significantly) ordered to pay the costs of the investigation, if the Board determines the official violated this section.

Of course, the State of Arkansas and its citizens have an interest in ensuring election officials follow all laws and properly promulgated guidance. The Arkansas Code already provides not only criminal penalties, but collateral consequences that include prohibitions on public employment and impeachment for officials who violate election law.<sup>93</sup> The expanded and vague liability here, however, creates uncertainty that threatens to paralyze officials and massively expand the legal costs of administering elections.

In practice, provisions like those in Arkansas S.B. 604 create legal stand-offs for officials who are administering elections on the ground. Subjective standards like "a manner that hinders or disregards the purpose of the duty or responsibility" are ripe for deployment by partisan actors seeking to disrupt the process. If an election official has a duty or responsibility to ensure equal access to the polls for all qualified voters, then any

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<sup>90</sup> See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641–42 (7th Cir. 2020).

<sup>91</sup> S.B. 604, 93rd Gen. Assembly; Reg. Sess. (Ark. 2021).

<sup>92</sup> Such guidance includes "all necessary rules to assure even and consistent application of voter registration laws and fair and orderly election procedures." Ark. Code Ann. §7-4-101(f)(5).

<sup>93</sup> See Ark. Code Ann. § 7-1-103.

procedures that make voting more onerous might draw charges of violations of this section. But if the purpose is to limit access to only those voters who are qualified, then efforts to make voting more efficient and accessible might draw similar charges. Where the underlying standard is highly subjective, these prohibitions (and increased penalties) may increase threats against election administrators, paralyze election workers, and spawn unnecessary and unhelpful litigation that further politicizes election administration.

Such an approach fundamentally undermines public confidence. If an election official's duty or responsibility is to promote public transparency, any delay in public disclosure of election information may inspire these accusations. While the Arkansas State Board of Election Commissioners retains discretion over the results of an investigation, this does little to mitigate the cost of such investigations or to provide guidance to understandably risk-averse election officials faced with threats of official complaints. How should an election official proceed if they believe their duty is clear, but an observer placed at the polling site on behalf of a political party disagrees? In the face of potentially thousands of dollars of personal liability, it seems likely many officials will decide it is best not to take any action until a declaratory judgment or other court opinion can be obtained.

Beyond election administrators, there is also a trend towards expanding criminal penalties for individuals who assist others with the voting process. This includes new prohibitions on providing assistance for registered voters who need help requesting absentee ballots or returning their completed ballots by mail.<sup>94</sup> In the wake of expanded use of vote-by-mail, early voting and absentee voting in the 2020 pandemic election, some states are moving to restrict these options in particular, despite their popularity with voters.<sup>95</sup> New criminal penalties for assisting voters with ballot return and prohibitions on the use of ballot drop boxes or drive-thru voting sites by local election clerks are amongst current proposals.

### **SPOTLIGHT: Wisconsin Assembly Bill 179**

Wisconsin Assembly Bill 179<sup>96</sup> proposes new criminal penalties, specifically aimed at staff in nursing homes and residential care facilities. Wisconsin law already provides for Special Voting Deputies, individuals authorized by local election administrators to visit such facilities and help registered voters cast their ballots. This bill would in effect restrict nearly anyone but a Special Voting Deputy from speaking to residents about voting. It would prohibit staff at nursing homes and residential care facilities from influencing a resident to vote for or against a candidate or measure. But the proposal extends liability well beyond that relatively clear prohibition. It threatens staff with criminal penalties for actions as innocuous as reminding residents to request an absentee ballot or influencing

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<sup>94</sup> See, e.g., A.B. 192, 105th Leg., Reg. Sess. (Wis. 2021), H.B. 6, 87<sup>th</sup> Leg., Reg. Sess. (Tex. 2021), S.B. 413, 89<sup>th</sup> Gen. Assemb., Reg. Sess. (Iowa 2021) (enacted).

<sup>95</sup> See, e.g., S.B. 7, 87<sup>th</sup> Leg., Reg. Sess. (Tex. 2021), H.B. 285, \_\_\_ Leg., Reg. Sess. (Ala. 2021), H.B. 7041 53<sup>rd</sup> Leg., Reg. Sess. (Fla. 2021).

<sup>96</sup> A.B. 179, 105th Leg., Reg. Sess. (Wis. 2021).

them not to do so. Under Assembly Bill 179, any action that influences an eligible resident voter to request an absentee ballot or refrain from doing so is a Class I felony. This “gag order” is so broadly defined in the bill that any statement or action related to absentee ballots—even something as innocuous as mentioning Election Day—could be litigated as a potential violation.

Under current law, a relative of a resident may request to be notified of the days and times Special Voting Deputies will be present at the resident’s care facility. Assembly Bill 179 would require notification of all relatives for whom a facility administrator has contact information. The bill contains no exception for residents who have obtained domestic-abuse protective orders or have other privacy concerns. Failure to comply with the notification requirement could subject facility administrators to civil penalties enforced by the Wisconsin Elections Commission.

The Arkansas and Wisconsin examples above are far from alone. Other proposed legislation that follows this theme includes the Kansas Senate Substitute for H.B. 2183 (creating felony penalties for delivering an advance voting ballot on behalf of another person without a specific and compete sworn statement)<sup>97</sup> and numerous examples from Texas.

Texas H.B. 3080 would add a criminal penalty for any individual sending a mail ballot application to any person who did not request it.<sup>98</sup> (This is already against the law, and there is no evidence that there have been violations or that there is any other rationale for increasing the penalties for such conduct.) This bill also institutes a thumb print matching program for voting by mail.

Texas S.B. 1589 creates special “election marshals” appointed by the secretary of state, who would have the power to investigate violations of the election code and file criminal charges.<sup>99</sup> Like the provision of Arkansas S.B. 604, this outsourcing of criminal investigations from statewide election officials to others seems likely to cause confusion, increase both the incidence and intrusiveness of investigations, and cause fear that will paralyze local election workers. None of these consequences strengthens our elections or democratic processes.

Texas H.B. 6 includes many additional criminal prohibitions, including vote-by-mail related penalties proposed in other states. H.B. 6 would create new crimes for the collection and return of completed ballots by certain groups and individuals with financial or political motivations; distributing an absentee ballot application to anyone who has not requested one; distributing an absentee ballot to anyone other than the requester directly; encouraging anyone to submit an absentee ballot application who did

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<sup>97</sup> Committee on Federal and State Affairs, S. Substitute for H.B. 2183, 2021 Leg. Sess. (Kan. 2021), [http://www.kslegislature.org/li/b2021\\_22/measures/documents/hb2183\\_03\\_0000.pdf](http://www.kslegislature.org/li/b2021_22/measures/documents/hb2183_03_0000.pdf).

<sup>98</sup> H.B. 3080, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>99</sup> S.B. 1589, 87th Leg., Reg. Sess. (Tex. 2021).

not request one; and completing any portion of an absentee ballot application for an applicant.<sup>100</sup>

These bills would not just create additional, and in many cases unnecessary and duplicative, penalties.<sup>101</sup> They threaten to paralyze election administration in the states, making election officials, volunteers and voters wary of any basic task a politically motivated actor might challenge. Litigation related to these changes would impact both individuals and the state, complicating election administration, straining courts and increasing the cost of carrying out elections.

## Conclusion

This report is not aimed at raising the alarm on any particular state bill, as concerning as some may be. The bills spotlighted here are indicative of a larger national effort, being prosecuted at the state level, that threatens the free and fair elections on which American democracy prides itself. The defeat (or death in committee) of any single bill will not be sufficient to right the ship. The goal here is to sound the alarm about the prevailing winds.

The winds shaping these emerging legislative trends are cause for concern. If and when proposals based on these trends take root, that concern will ripen into distress. The proposals offered thus far, while varying from state to state, have a clear through-line: making election administration itself (not just the actual election contests) more partisan, unwieldy, and contentious. Bucking the traditional bipartisan approach to competent election administration, this new wave of micromanagement and political interference in the basic tasks of government cannot go unaddressed. Efforts to strip executive branch powers and local control in favor of consistent, if not constant, interference by state legislatures will make elections unwieldy under the best circumstances and will create a crisis in the face of the next natural disaster or public health emergency. New civil and criminal penalties targeting election administrators will spark additional litigation, at great cost to state and local governments not only financially, but practically, as they seek to finalize election results under statutory timelines. In the most catastrophic cases, these poorly-considered proposals would give state partisans the power to certify (or refuse to certify) election results themselves.

Quelling these attempts to undermine democratic processes is urgent. If adopted, proposals like those outlined in this report will result in an inability to react to emergencies, duplicative expenses, and unworkable timelines. They would disrupt election administration, undermine faith in government, and invite costly, time-consuming, and destabilizing litigation. In short, they weaken a set of systems that weathered a national public health crisis in large part due to the competence and

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<sup>100</sup> H.B. 6, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>101</sup> In addition, Iowa has enacted a law that creates new felony offenses for election officials, including for “failure to perform duties” and a new aggravated misdemeanor for failing to perform required voter list maintenance. See S.B. 413, 89<sup>th</sup> Gen. Assemb., Reg. Sess. (Iowa 2021) (enacted).



expedient action of election administrators. This is a disaster in the making—one that could potentially unravel much of the progress American democracy has made over centuries toward fairer, more open, more inclusive election processes. Our democracy both deserves and requires a better, and less politically motivated, approach.