



MEMORANDUM

To: Interested Parties
From: States United Democracy Center, Protect Democracy, and Law Forward
Date: December 23, 2021
Re: Democracy Crisis in the Making Report Update: 2021 Year-End Numbers

As one of the most challenging years in modern American history draws to a close, the emerging threat posed by efforts to subvert free and fair election administration has come into sharper focus. To put it simply, the future of fair, professional, and nonpartisan elections is on the line and the erosion of public trust in our democracy is deeply concerning.

In our first report, [*A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration*](#), released in April of this year, we identified 148 bills of concern in 36 states. At that time, when the full scope of the trend was still unknown, only three had been enacted into law in three states. As of December 15, 2021, there have been at least 262 bills introduced in 41 states that would interfere with election administration — and 32 of these bills have become law across 17 states.¹

The number of proposed bills that fall into the categories we have identified as promoting election sabotage has continued to grow and the number of bills enacted into law has also increased, despite the fact that most state legislatures went out of session mid-year. Additionally, the variety of ways that state legislatures now endeavor to undermine independent election administration is evolving.

Our first report focused on efforts to sabotage or subvert elections in this country and ultimately to take power away from the American people.² We identified and analyzed a dangerous trend underway in state legislatures: many were taking up proposals that would politicize, criminalize, and interfere in election administration.³ Then, in June, we released an

¹ Our June update found 216 measures introduced in 41 states. Twenty-four had been enacted in 14 states.

² We use the terms sabotage and subvert interchangeably in this memorandum.

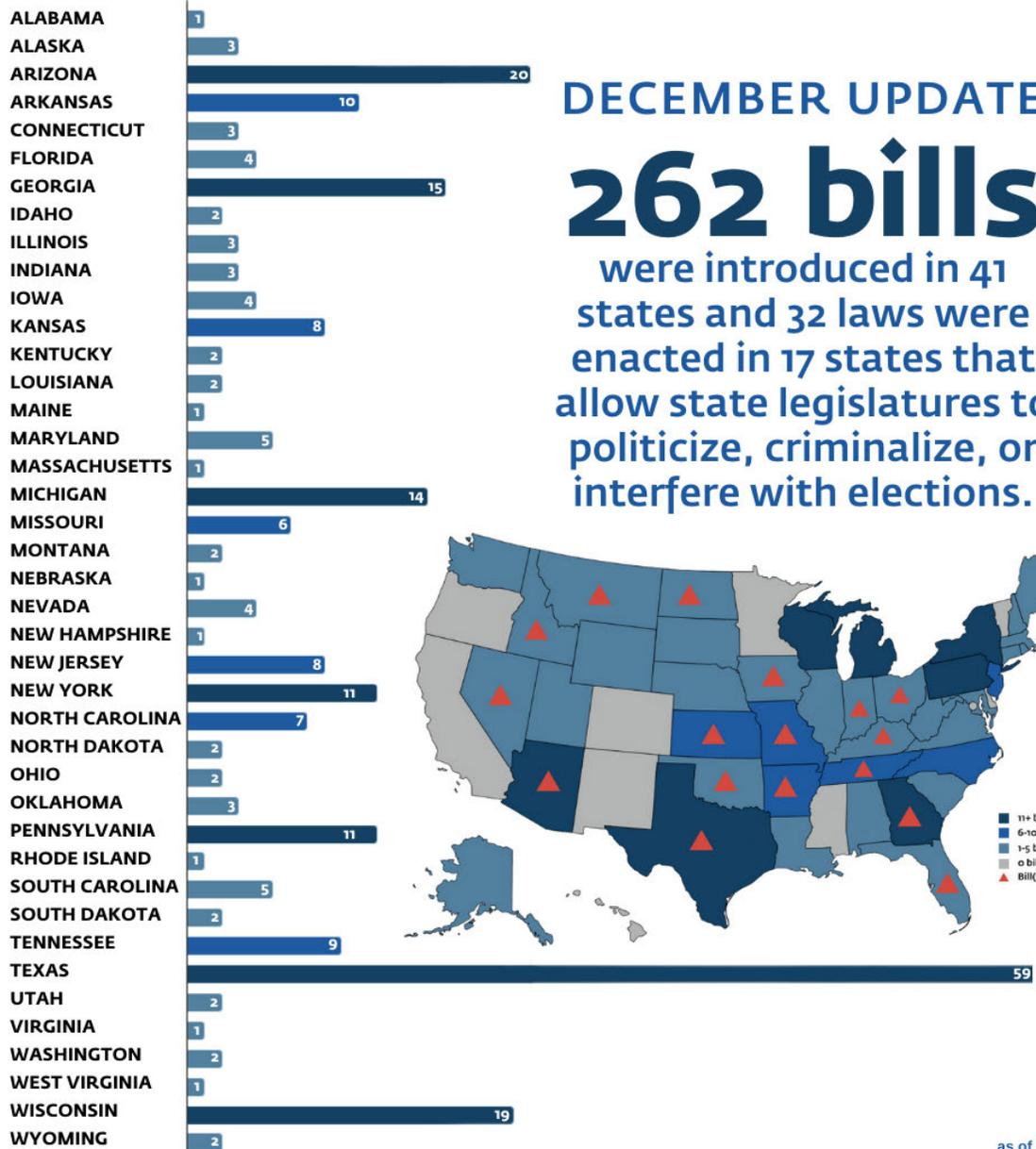
³ The report was released April 22, 2021. An update, "[*Democracy Crisis Report Update: New Data and Trends Show the Warning Signs Have Intensified in the Last Two Months*](#)," was released June 10, 2021.

Our report identified four categories of bills as sources of concern:

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

update, warning that “the commitment of many state legislatures to attacking the foundations of our democracy appears to have deepened.”

CHART 1:



- Legislative seizure of election responsibilities. These proposals strip executive power, shift authority to legislatures, or include provisions that would seize the power to appoint state and local election officials and to administer elections.
- Legislative meddling in election minutiae. These proposals would restrict local authority in favor of micromanagement by state legislatures.
- Legislative imposition of criminal or other penalties for election decisions. These bills would create additional criminal and civil penalties for election administrators and public officials.

Today, election subversion concerns are not limited to bills introduced or enacted into law. The nature of the threat has metastasized beyond proposing or passing bills. As we look toward 2022, we anticipate the anti-democratic strategy will consist of four key pillars: (i) changing the rules to make it easier to undermine the will of the voters; (ii) changing the people who defend our democratic system by sidelining, replacing, or attacking professional election officials; (iii) promoting controversial constitutional theories about our elections to justify partisan takeovers; and (iv) eroding public confidence and trust in elections.⁷ These four pillars are the foundation for election sabotage, contrary to the will of the voters.

We have already seen elements of this strategy at play in 2021. And in the coming year, which will feature heated election battles for control of the U.S. House, U.S. Senate, state legislatures, and state and local positions up and down the ballot, it is likely that the use of this anti-democratic strategy will accelerate.

CHART 2:

	 Legislative seizure of election oversight	 Legislative meddling in election minutiae	 Legislative imposition of criminal or other penalties for election decisions
ARIZONA		⊗	⊗
ARKANSAS		⊗	⊗
FLORIDA	⊗	⊗	
GEORGIA	⊗	⊗	
IDAHO		⊗	
INDIANA		⊗	⊗
IOWA		⊗	⊗
KANSAS	⊗	⊗	⊗
KENTUCKY	⊗		
MISSOURI		⊗	
MONTANA	⊗		
NEVADA		⊗	
NORTH DAKOTA		⊗	⊗
OHIO			⊗
OKLAHOMA		⊗	
TENNESSEE	⊗	⊗	⊗
TEXAS	⊗	⊗	⊗

⁷ This strategy will undoubtedly be coupled with classic efforts to restrict voting rights and to make voting harder for individuals. See *Voting Laws Roundup: December 2021*, Brennan Center for Justice, (Dec. 21, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

- **Changing the Rules:** When we first identified the trend, we warned that many of the proposals would make “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.”

In the last six months of this year, state legislatures have continued pursuing their efforts to micromanage election administration, criminalize human error, and seize control of election administration.

For example, in Pennsylvania, a wide-ranging measure to rewrite the state’s election law, which included election subversion provisions, was vetoed by the governor in late June.¹³ Undeterred, the legislature launched a sweeping, ad hoc, and standardless audit of the 2020 election, which, among other things, attempted to subpoena the private information of more than nine million registered voters for analysis by a firm with no experience in election law or data analytics.¹⁴ The legislature then initiated an effort to bypass the governor’s veto via a constitutional amendment. Most alarmingly, a version of the proposed constitutional amendment, currently working its way through the legislature, would allow the legislature to unilaterally scuttle any election regulations issued by the state’s chief elections officer (as well as other executive branch agencies) and would also create a permanent audit system subject to the legislature’s rules.¹⁵

In Wisconsin, where the bipartisan Wisconsin Elections Commission is being swarmed with a third-party investigation into the 2020 election, litigation, flawed reviews, and criminal inquiries,¹⁶ the state Senate passed a resolution in early November “castigating” the Commission “for ignoring statutory requirements, for sidestepping the administrative rulemaking process, and for not following both the letter and intent of state statute.”¹⁷ But the state legislature has done more than that; it has allocated more than \$700,000 to a special counsel, who has indicated he is not familiar with election law, to conduct a free-wheeling investigation of the 2020 election. In addition, the legislature has launched ongoing hearings into the findings of a separate review concluded by its Legislative Audit Bureau earlier this fall. Finally, in late November, legislators introduced a measure that would allow the imprisonment, for up to three and half years, of members of the Elections Commission *or its staff* if they willfully neglect to engage in a particular version of voter registration list maintenance (the law

¹³ Marie Albiges, *Pennsylvania Governor Vetoes GOP-Led Election Overhaul Citing Voter ID Restrictions*, Spotlight PA, (June 30, 2021), <https://www.spotlightpa.org/news/2021/06/pa-election-overhaul-voter-id-wolf-veto/>.

¹⁴ See Danielle Ohl, *Court Battle Over Pa. GOP’s Subpoena of Sensitive Voter Data Centers on Legislative Power vs. Privacy*, Spotlight PA, (Dec. 15, 2021), <https://www.spotlightpa.org/news/2021/12/pa-election-audit-commonwealth-court/>.

¹⁵ S.B. 106, 2021-2022 Regular Session (PA 2021).

¹⁶ Reid J. Epstein, *Wisconsin Republicans Push to Take Over the State’s Elections*, The New York Times, (Nov. 19, 2021), <https://www.nytimes.com/2021/11/19/us/politics/wisconsin-republicans-decertify-election.html>.

¹⁷ S.R. 11, 2021-2022 Regular Session (WI 2021).

establishing the Commission was drafted by a Republican legislature and signed into law by then-Governor Scott Walker in 2015).

- **Changing the People:** Our democracy depends on the hard work and commitment of hundreds of thousands of people, from the precinct-level election judges who open polling places at dawn, to the county boards that canvass and report results, to secretaries of state who certify elections. They form a chain that makes our democratic elections work, and this year, we have seen concerted efforts to weaken every link in the chain.

A States United analysis of precinct-level candidates for election judge and inspector in two Pennsylvania counties raised alarm bells when we uncovered a cluster of election deniers who had won their races. Our investigation revealed concerted efforts to recruit hyper-partisan election skeptics and conspiracy theorists at a precinct level, raising the prospect that voters may encounter hostility or intimidation at the polls from the very election officials whose job traditionally has been to smooth the road for democratic participation.²³

Other links in the chain are also under assault. For example, in Michigan, in eight of the eleven largest counties in the state, county Republican parties have systematically replaced their appointees to county canvassing boards with election deniers who embrace conspiracy theories and lies about the 2020 election.²⁴ In Pennsylvania, the state legislature threatened to impeach the members of two county election commissions who voted to count timely received mail-in or absentee ballots that lacked

²³ Russell Berman, *The Desperate Scramble to Stop an Insider Election Threat*, The Atlantic, (Nov. 14, 2021), <https://www.theatlantic.com/politics/archive/2021/11/pennsylvania-election-threat/620684/>; see also Burden & Milyo, *The Recruitment and Training of Poll Workers: What We Know from Scholarly Research*, VTP WORKING PAPER #111 (September 6, 2013) https://www.eac.gov/sites/default/files/event_document/files/Barry-Burden-Jeff-Milyo-The-Recruitment-and-Training-of-Poll-Workers.pdf; Isaac Arnsdorf, Doug Bock Clark, Alexandra Berzon and Anjeanette Damon, *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP – and Reshape America's Elections*, ProPublica, (Sept. 2, 2021), <https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections>

²⁴ Amy Gardner, Tom Hamburger, and Josh Dawsey, *Trump Allies Work to Place Supporters in Key Election Posts Across the Country, Spurring Fears About Future Vote Challenges*, The Washington Post, (Nov. 29, 2021), https://www.washingtonpost.com/politics/trump-allies-election-oversight/2021/11/28/3933b3ce-4227-11ec-9ea7-3eb2406a2e24_story.html.

a date handwritten by the voter.²⁵ One of the threatened boards proceeded with counting the ballots, and litigation is ongoing regarding the validity of those votes.²⁶

At the Secretary of State level, a number of candidates running in 2022 are campaigning on radical positions that would undercut independent election administration. Indeed, former President Donald Trump has endorsed three candidates for Secretary of State who contend that he won the 2020 presidential election: Mark Finchem in Arizona, Jody Hice in Georgia, and Kristina Karamo in Michigan. Endorsing in primaries and interfering with down-ballot races is uncommon behavior by a former president, particularly one potentially planning to run for office again.²⁷ As *The Washington Post* reported, “there are a number of viable Republican candidates in states that could decide the next presidential election who question whether Trump actually lost in 2020. And they are proposing big changes to how elections are run.”²⁸

Finally, across the board, election administrators have been subject to unprecedented assault and violent threats. According to a survey by the Brennan Center for Justice, “one in three election officials feel unsafe because of their job, and nearly one in five listed threats to their lives as a job-related concern.”²⁹

This environment contributes to the trend of election officials quitting in droves.³⁰

- **Promoting Controversial Constitutional Theories:** In recent years, a small group of conservative legal scholars have begun promoting what they call the “independent state

²⁵ Jonathan Lai, *Pa. Republican Lawmakers Threaten to Impeach Philly Officials for Counting Undated Mail Ballots*, *The Philadelphia Inquirer*, (May 28, 2021), <https://www.inquirer.com/politics/election/pennsylvania-republican-lawmakers-impeachment-philadelphia-city-commissioners-20210528.html>; Ford Turner, *Pennsylvania House Republicans Threaten to Remove Lehigh County Elections Board Unless It Rescinds Acceptance of Undated Ballots*, *The Morning Call*, (Nov. 17, 2021), <https://www.mcall.com/news/elections/mc-nws-pa-elections-house-reforms-20211117-ybyorcfqambarja2te2yhpnvokm-story.html>.

²⁶ *Judge: Undated Mail Ballots Must Be Counted in Lehigh Co. Race*, WFMZ-TV 69 News, (Nov. 30, 2021), https://www.wfmz.com/news/area/lehighvalley/judge-undated-mail-ballots-must-be-counted-in-lehigh-co-race/article_32db8688-5243-11ec-8a5a-37afb8b8451c.html.

²⁷ The Associated Press, *Trump Endorses ‘Big Lie’ Proponents for State Election Posts*, *U.S. News & World Report*, (Sept. 20, 2021), <https://www.usnews.com/news/politics/articles/2021-09-20/trump-endorses-big-lie-proponents-for-state-election-posts>.

²⁸ Amber Phillips, *How Trump-Backed Secretary of State Candidates Would Change Elections in the United States*, *The Washington Post*, (Dec. 1, 2021), <https://www.washingtonpost.com/politics/2021/12/01/how-trump-backed-secretary-state-candidates-would-change-elections-america/>; Tim Reid, Nathan Layne, and Jason Lange, *Special Report: Backers of Trump’s False Fraud Claims Seek to Control Next Elections*, *Reuters*, (Sept. 22, 2021), <https://www.reuters.com/world/us/backers-trumps-false-fraud-claims-seek-control-next-us-elections-2021-09-22/>.

²⁹ Brennan Center for Justice and the Bipartisan Policy Center, *Election Officials Under Attack: How to Protect Administrators and Safeguard Democracy*, (June 16, 2021), <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack>; Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, *Reuters*, (June 11, 2021), <https://www.reuters.com/investigates/special-report/usa-trump-georgia-threats/>.

³⁰ Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, *The New York Times*, (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html>.

legislature doctrine.” According to them, state legislatures have the sole and unilateral authority to set election rules under the U.S. Constitution. Under this controversial theory, their authority is immune from court review and action from a governor or attorney general.³¹

Fortified by this novel theory, legislators in several states are increasingly bold in arguing that they can change election outcomes. In Wisconsin, one of the state’s sitting U.S. Senators proposed that the legislature seize control of elections. “There’s no mention of the governor in the Constitution” with regard to elections, Senator Ron Johnson told a Milwaukee newspaper. “It says state legislatures, and so if I were running the joint — and I’m not — I would come out and I would just say, ‘We’re reclaiming our authority. Don’t listen to WEC anymore. Their guidances are null and void.’”³²

Detailing the growing embrace of this theory and explaining its faults is beyond the scope of this update and will be the subject of forthcoming research and reports.

- **Undermining Confidence:** More than a year after the 2020 election, while a majority of Americans trust the 2020 election results, a substantial portion of the American population still believes that the election was stolen. Seventy-three percent of Republicans believe that President Joe Biden was not the rightful winner of the election. And looking forward to 2022, while 80 percent of Democrats believe next year’s midterm election will be fair, only 42 percent of Republicans feel it will be fair.³³ Worse yet, 39 percent of people who think that the 2020 election was stolen believe that violence may be justified to “save our country.”³⁴

This breakdown in public confidence in our elections is alarming. And it is clearly one of the intended results of the election sabotage movement. An electorate that has lost faith in how we run our elections is more likely to support, or even encourage, nakedly overturning the will of the people.³⁵

³¹ For an introduction to the doctrine, see Michael Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530136.

³² Patrick Marley and Bill Glauber, *Ron Johnson Calls for Having Republican Lawmakers Take Over Federal Elections in Wisconsin*, Milwaukee Journal Sentinel, (Nov. 10, 2021), <https://www.jsonline.com/story/news/politics/elections/2021/11/10/ron-johnson-calls-gop-wisconsin-lawmakers-take-over-elections/6376079001/>.

³³ Eli Stokols, *Republicans’ Belief in Trump’s Big Lie Holds Steady as Eroding Confidence in U.S. Elections Wanes*, Los Angeles Times, (Dec. 16, 2021), <https://www.latimes.com/politics/story/2021-12-16/republicans-belief-in-trumps-big-lie-holds-steady-as-eroding-confidence-in-u-s-elections-wanes>.

³⁴ Aaron Blake, *Nearly 4 in 10 Who Say Election Was Stolen From Trump Say Violence Might Be Needed to Save America*, The Washington Post, (Nov. 1, 2021), <https://www.washingtonpost.com/politics/2021/11/01/4-10-who-say-election-was-stolen-trump-say-violence-might-be-needed-save-america/>.

³⁵ David Byler, *Why Do Some Still Deny Biden’s 2020 Victory? Here’s What the Data Says*, The Washington Post, (Nov. 10, 2021), <https://www.washingtonpost.com/opinions/2021/11/10/why-do-some-still-deny-bidens-2020-victory-heres-what-data-says/>.

As 2021 draws to an end, we are faced with a sobering reality. The election subversion trend shows no signs of slowing down or being stemmed. Indeed, it has gained new adherents and has expanded in ways we could not have predicted. In many states, the anti-democratic movement is coming perilously close to unravelling a century's worth of progress to create professional and fair election systems that accurately count people's votes and respect the will of the people.

While many damaging proposals and efforts were beaten back in 2021 and pro-democracy officials from both parties continue to use every tool available to fight for free and fair elections, we again renew our warning ahead of 2022: we have a democracy crisis is in the making.