

MEMORANDUM

To: Interested Parties
From: States United Democracy Center, Protect Democracy, and Law Forward
Date: June 10, 2021
Re: Democracy Crisis Report Update: New Data and Trends Show the Warning Signs Have Intensified in the Last Two Months

Less than two months ago, we warned in a report of a particularly dangerous trend within the larger voter suppression landscape: many state legislatures are pursuing a strategy to politicize, criminalize, and interfere in election administration.¹ Their course of action threatens the foundations of fair, professional, and non-partisan elections.

When we wrote in April, we had identified at least 148 bills in 36 states that were a source of alarm.² Today, not only do we set that number at a minimum of 216 in 41 states, but 24 of them have been enacted into law.³ (See Chart 1). The commitment of many state legislatures to attacking the foundations of our democracy appears to have deepened. The trend toward threatening election administrators with criminal penalties is more pronounced and aggressive, and attempts by legislatures to perform core elections functions has grown more brazen, with a disturbing outburst of efforts to launch sham “audits” of voting results.

In April we cautioned: “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.” Today, a mere 49 days later, the situation is worse. Even as states continue to pass a raft of measures to erect barriers to people’s freedom to vote,⁴ state-level legislative efforts to topple longstanding norms about election administration have gained momentum.

This memorandum supplementing our report outlines three notable recent developments within the overall voter suppression movement. First, we detail how one worrisome category of proposals, those that criminalize election administration, appears poised for enactment in at least two states and are more widespread than we initially found. Second, we describe how legislatures’ attempts to usurp core

¹ The report, “[A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration](#)” was released April 22, 2021.

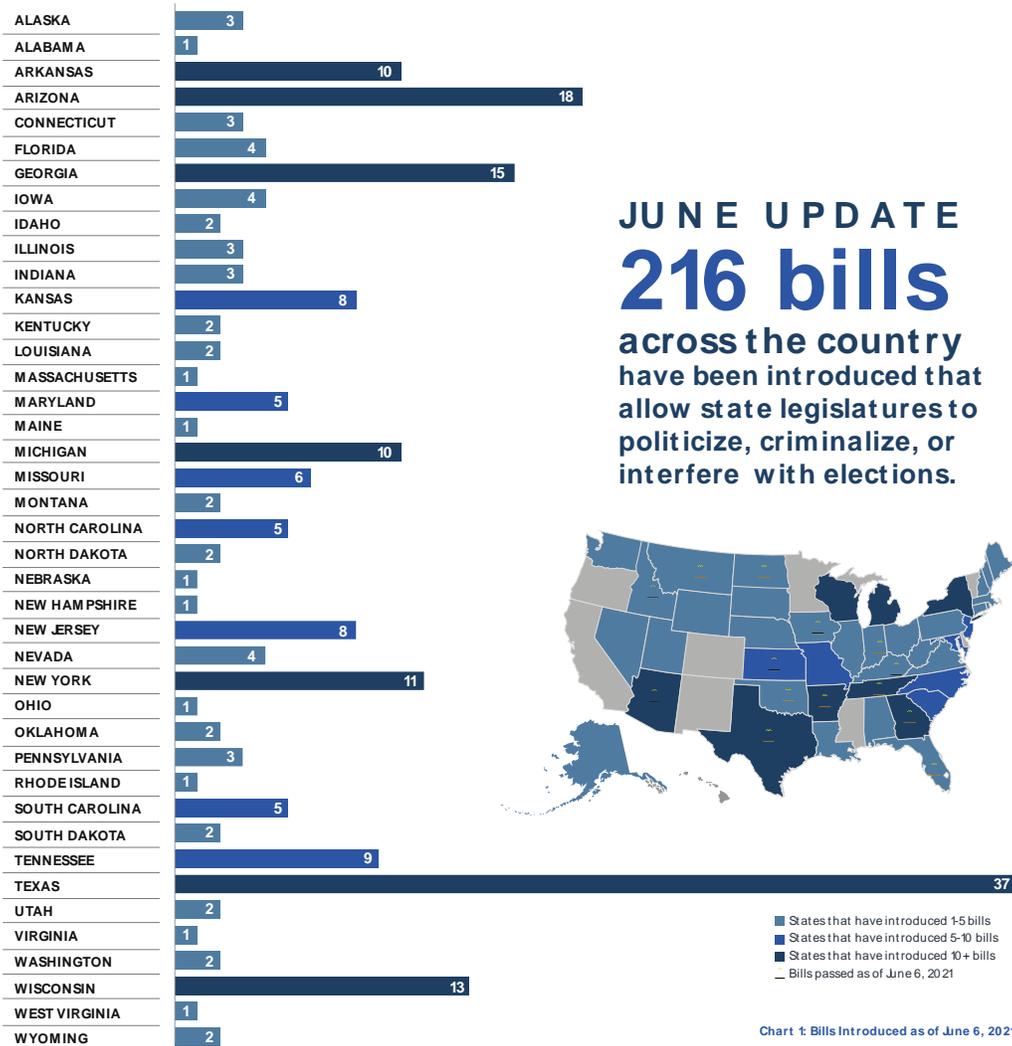
² Our report identified four categories of bills as sources of concern:

- 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.
- 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.

³ When our report was written, three laws that fell into our categories of dangerous bills had been enacted: Georgia’s S.B. 202, Iowa’s S.B. 413, and Kentucky’s S.B. 1. Cumulatively, then, 24 laws of the sort we warned about have passed into law. Another seven have passed through both chambers of the state legislature and are awaiting a governor’s action as of June 6.

⁴ In a May report, the Brennan Center for Justice catalogues 44 anti-voter laws enacted in 14 states thus far this year. https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021#footnote56_9l8yxwh

election functions has picked up steam, with more of them considering ways to conduct charade “audits.” Finally, we provide an update on which bills of the sort we warned about that have advanced and become law.



Two Surging Trends: Criminalization of Election Administration and Legislature-Driven Partisan Reviews of Ballots

When the report was initially published, it was against the backdrop of disturbing provisions enacted in Georgia, including one that gave 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. Now, the center of gravity of state legislative efforts to interfere with elections has shifted westward to Texas and Arizona.

In Arizona, the trend continues to unfold. There, the state legislature is considering multiple bills that would reshape the state’s elections and inject more partisanship into the system. Many of these bills were covered in our initial report. For example, we continue to keep a close eye on proposals like S.B.

1068,⁵ which would shift authority over Arizona’s Elections Procedures Manual away from the secretary of state and the governor and give it to a committee of seven state legislators, and H.B. 2800, which would require the legislature to come into special session after each election and potentially overturn the result.

There have also been other concerning legislative developments in the state. For example, one provision, tucked inside an appropriations bill, would, among other things, preclude the attorney general from representing or providing legal advice to the secretary of state *and* would bar the secretary of state from using public funds to hire outside counsel through June 2023.⁶ Moreover, the legislature would expressly vest the defense of the state’s election laws with the attorney general until January 2023. Not coincidentally, that is when the term of the current secretary of state—who has been a vocal critic of the state Senate’s “audit,” which is discussed in more detail below—will come to an end. In sum, this proposal is an assault on the ability of the official designated as the state’s chief elections officer to perform her core duties. Although both the House and Senate appropriations committees have already passed a version of this provision, it along with the rest of Arizona’s budget continues to be subject to intense closed-door negotiations. Nevertheless, it epitomizes the wave of bills across the country that make needless changes to the design of our election administration systems solely for partisan advantage—a trend that jeopardizes the core democratic principle that elections should be a level playing field for all.

Criminalization of Election Administration

In Texas, legislators have taken one trend we warned about—the criminalization of election administration—to unprecedented levels. Texas has also invented a new dubious approach to overturning election results that we had not previously seen.

SPOTLIGHT: Texas S.B. 7

Over the course of a tumultuous Memorial Day weekend, Texas legislators attempted to pass an omnibus elections reform measure known as S.B. 7. A version of the proposal had passed both the House and Senate, and negotiators from both chambers had agreed upon a final version. But their efforts failed due to a parliamentary move by Democratic members of the state legislature. Although the legislative session has expired, Texas’s governor has indicated that he intends to call the legislature back in to special session to resume its efforts to pass S.B. 7 (or something very much like it).⁷

The version of S.B. 7 that was on the verge of enactment contains the most extensive and vague set of criminal penalties for election administrators and workers pursued by any state thus far.⁸ All told, election administrators could face criminal penalties in 14 new scenarios were the law to be enacted. (See Chart 2).

⁵ For clarity, we use “H.B.” and “S.B.” for state house and senate measures throughout.

⁶ See Howard Fischer, GOP leaders move to limit Arizona secretary of state’s power, [Tucson.com](https://tucson.com/news/government-and-politics/gop-leaders-move-to-limit-arizona-secretary-of-states-power/article_f99c615a-bd85-11eb-9abd-5fe3fb41e549.html) (May 25, 2021), https://tucson.com/news/government-and-politics/gop-leaders-move-to-limit-arizona-secretary-of-states-power/article_f99c615a-bd85-11eb-9abd-5fe3fb41e549.html.

⁷ See Patrick Svitek (@PatrickSvitek), Twitter, (June. 3, 2021:51 AM), <https://twitter.com/patricksvitek/status/1400449991232024577?s=12>.

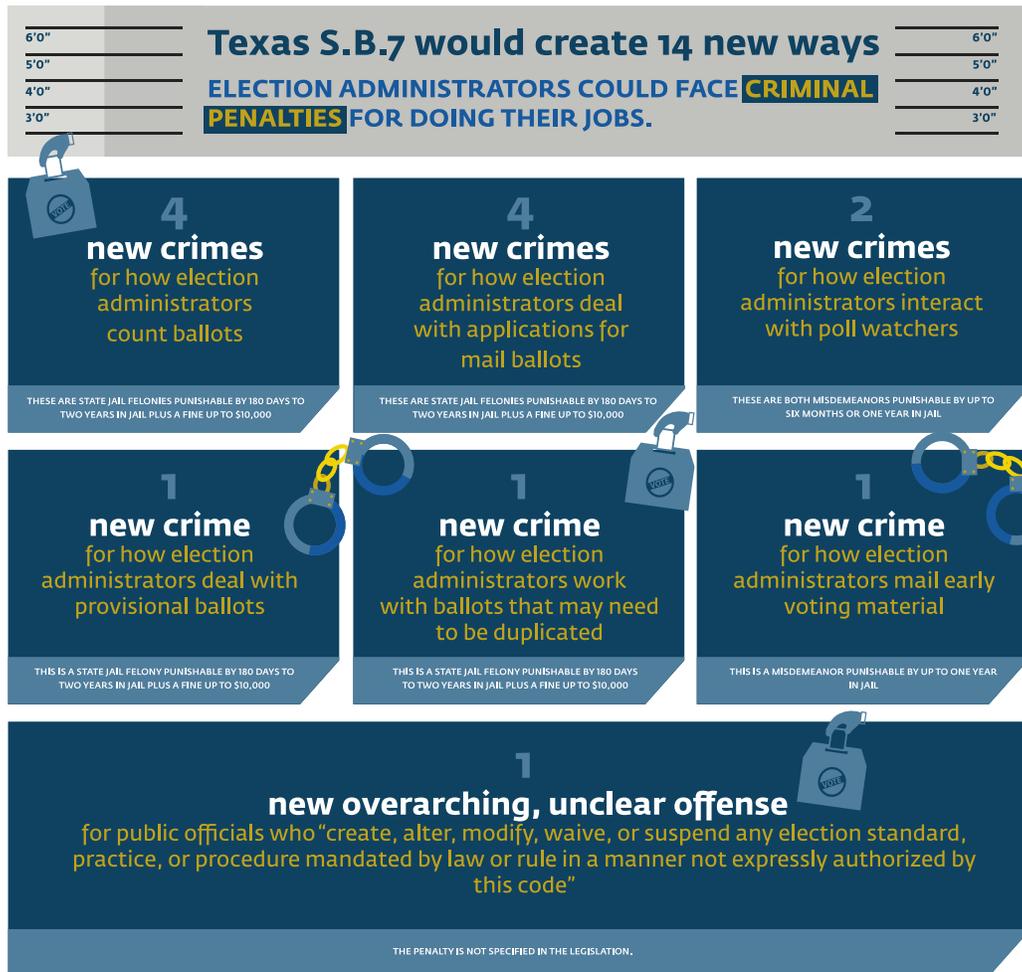
⁸ S.B. 7, 87th Leg., Reg. Sess. (Tex. 2021).

The most sweeping provision in the bill makes it an offense for a public official to “create, alter, modify, waive, or suspend any election standard, practice, or procedure mandated by law or rule in a manner not expressly authorized by this code.” This provision is so expansive and unclear that it could effectively freeze every local election official or worker in their tracks when faced with any need to adapt their practices to local circumstances or to emergency situations, which are not uncommon in a state that has faced both natural and other disasters regularly in the last decade. It would suppress reasonable and customary efforts to approach the myriad problems that inevitably arise in complex voting systems.

Other portions of S.B. 7 impose criminal penalties for activities involving counting ballots, dealing with mail in ballot applications, mailing early voting material, provisional ballots, ballot duplication, and poll watchers. To take one provision as an example, an election administrator could face jail for knowingly making any effort to count a vote that is “invalid...or should otherwise not be counted.” Another provision makes it a felony for a public official even to solicit a person to submit an early voting ballot application unless the official knows that the person had also already requested an application.

Texas’ S.B. 7 also forges a new, perilous path in overturning election results. It creates a new category of election litigation if the case involves allegations of fraud conducted by a candidate or affiliates of the candidate. Under the new provision, a losing party may file an election contest and allege fraud. He or she is then only required to prove that fraud occurred by a preponderance of the evidence—in other words, whether the fraud more likely occurred than not. If the number of votes at issue would have been outcome determinative, then a judge can overturn the election “without attempting to determine how individual voters voted.” The combination of a low burden of proof and the availability of such a dramatic remedy is an open door to near constant election litigation and uncertainty in Texas.

CHART 2: Texas' S.B. 7 Next Level Criminalization of Election Administration



Texas is far from alone in its efforts to criminalize aspects of election administration.⁹ Arizona has passed a law that makes it a felony for an official to modify an election-related date or deadline unless ordered by a court to do so.¹⁰ Iowa makes it a felony for a local election official to fail to follow guidance issued by the state's election commissioner. An election official who fails to perform list maintenance duties could face up to two years in jail.¹¹ And North Dakota's enacted prohibition of the acceptance of private funds for election administration comes with a misdemeanor penalty.¹²

Thus far, much of the worst legislation in this category has not passed, although a substantial number of proposals are winding their way through state legislatures. For example, Wisconsin's senate passed a proposal in mid-May that is rivaled only by Texas in the number of ways it would criminalize activities by election officials. Under Wisconsin S.B. 212, election administrators face criminal penalties surrounding

⁹ See Bob Bauer and Ben Ginsberg, State Election Officials Are Under Attack. We Will Defend Them., The New York Times. (June 4, 2021). <https://www.nytimes.com/2021/06/04/opinion/republican-state-laws-election-officials.html>.

¹⁰ H.B. 2794, 55th Leg., First Reg. Sess. (Ariz. 2021).

¹¹ S.F. 413, 87th Gen. Assemb., Reg. Sess. (Ia 2021).

¹² H.B. 1253, 67th Leg., Reg. Sess. (Nd. 2021).

voter registration, vote casting, vote counting, and correcting mistakes on a voter’s mail-in ballot.¹³ The state’s assembly is now considering the measure.

Not only is the forward movement of these Wisconsin and Texas proposals concerning, but the magnitude of the trend is greater than previously suspected. In addition to these legislative efforts and those discussed in our April report, we have uncovered 46 other bills that were introduced this year that also contain provisions criminalizing common aspects of election administration. Not surprisingly, 18 of them originated in Texas.

Legislature-Driven Partisan Reviews of Ballots

While Texas has blazed a new path in criminalizing election administration and possibly overturning election results, Arizona has demonstrated the consequences of direct legislative meddling in election administration. There, the legislature has ushered in new ways to sow confusion and distrust of our democratic systems: legislature-driven, post-election partisan ballot inspections, which they call an “audit.”¹⁴

That purported review of the Maricopa County presidential election results has grabbed headlines since it began in April and has illustrated the danger of partisan state legislators becoming enmeshed in complex aspects of election administration best left to experienced professionals. The state Senate’s chosen vendor, Cyber Ninjas—whose owner, Doug Logan, has supported the Stop the Steal movement—has conducted the ballot inspection with complete disregard for election best practices, including a rushed count, inadequate verification measures, and inconsistent procedures.¹⁵ At the same time, the “auditors” are chasing wild conspiracy theories, including looking for bamboo fibers because of a false story that thousands of fake ballots were flown in from Asia. And because the Senate chose to hand the county’s voting equipment to the untrained election administration amateurs for inspection, without appropriate chain of custody controls, Secretary of State Hobbs has advised the county to purchase new machines and warned that the old machines may be decertified—at a likely cost running to the millions of dollars.¹⁶

Nevertheless, the “audit” has continued for months, and its supporters say they will see it through to the end. Commentators have warned that it is a “disinformation blueprint.”¹⁷ And it appears some legislatures and other people are picking up the blueprint¹⁸ as activities akin to the Arizona post-election ballot inspection scheme have moved to other states—with variable outcomes. They include:¹⁹

¹³ S.B. 212, 2021-2022 Leg. Reg. Sess. (Wi. 2021).

¹⁴ For a discussion of expert auditors assessment of the Arizona activity, See Jen Fifield, Is the Maricopa County election audit truly an audit? Here’s what professional auditors have to say., AZ Central. (June 1, 2021).

<https://www.azcentral.com/story/news/politics/elections/2021/06/01/professional-auditors-take-a-look-at-arizona-senate-audit-of-maricopa-county-2020-election/5212065001/>; and see Jennifer Morrell, I watched the GOP’s Arizona election audit. It was worse than you think., Wash. Post. (May 19, 2021). <https://www.washingtonpost.com/outlook/2021/05/19/gop-arizona-election-audit/>

¹⁵ Jennifer Morrell, I watched the GOP’s Arizona election audit. It was worse than you think., Wash. Post. (May 19, 2021), <https://www.washingtonpost.com/outlook/2021/05/19/gop-arizona-election-audit/>.

¹⁶ Jeremy Duda, Hobbs: Maricopa County can’t use voting machines given to Senate auditors, AZ Mirror (May 20, 2021), <https://www.azmirror.com/2021/05/20/hobbs-maricopa-county-cant-use-voting-machines-given-to-senate-auditors/>.

¹⁷ Miles Park, Experts Call It A 'Clown Show' But Arizona 'Audit' Is A Disinformation Blueprint, NPR. (June 3, 2021), <https://www.npr.org/2021/06/03/1000954549/experts-call-it-a-clown-show-but-arizona-audit-is-a-disinformation-blueprint>.

¹⁸ According to press reports, legislators from Alaska, Georgia, Nevada, Pennsylvania, Virginia, and Wisconsin have flown to Arizona to observe and learn more about the ballot inspection. See Brahm Resnik (@brahmresnik), Twitter, June. 8, 2021, 2:05 PM, <https://twitter.com/brahmresnik/status/1402325819809140736>

¹⁹ An audit of the 2020 election results in Windham, New Hampshire, is often included in reporting about these disreputable legislature-driven ballot inspections. We do not include it in this list, however, because our research indicates that there was sufficient justification for the audit; proper legislative procedure was followed authorizing it; qualified auditors were hired to conduct it; and those auditors engaged in a

- Several Pennsylvania state senators visited Arizona over Memorial Day weekend and indicated a desire to reproduce the effort in their state.²⁰ Since then, a public pressure campaign on the legislature to conduct an audit has swelled.²¹ Additionally, last year, one of the Arizona contractors undertaking its “audit” also undertook an unofficial “audit” of results in Fulton County, Pennsylvania.
- In Michigan, legislators are indicating that they expect an audit proposal to be introduced there this week.²²
- On a county level in Michigan, a lawsuit to force an audit of 2020 results in Antrim County was dismissed by a state court judge in mid-May.²³ In Cheboygan County local officials have indicated they want to proceed with an “audit” of 2020 results although the state elections director has warned that it is not allowed under state law.²⁴
- In Wisconsin, the state’s assembly leader announced that he was hiring three former police officers and an attorney to conduct a three-month investigation into unsubstantiated claims of 2020 “election fraud.”²⁵ Separately, the state’s Joint Legislative Audit Committee voted earlier this year to conduct an audit of the election results.²⁶
- In Fulton County, Georgia, a judge ordered the inspection of approximately 147,000 absentee ballots after a lawsuit alleged they were compromised. The inspection has not begun, and the matter is set for further hearings later this month which may dismiss the effort.²⁷

Laws Enacted Thus Far This Year & New Bills Introduced Since April 6

Legislative proposals of the type we have warned about have advanced through the legislative process in many states, and been enacted into law in several states. Thus far this year, 14 states have passed 24

transparent and professional process. The audit concluded at the end of last month with an unofficial finding that there was no fraud. See Michael Casey, Auditors Find No Fraud in Disputed New Hampshire Election, NBC Boston. (May 28, 2021), <https://www.nbcboston.com/news/politics/auditors-find-no-fraud-in-disputed-new-hampshire-election/2392907/>. There are, nevertheless, some troubling aspects to the Windham audit. The audit process and auditors have been drawn into a hyperpartisan political environment and a troubling disinformation cycle. See Windham NH Auditors (@WAuditors), <https://twitter.com/WAuditors>. And the dispute over the Windham results (and consequent audit) has become a part of the myth of the lost election. See Eric Bradner, Trump and his allies seize on small New Hampshire town's vote discrepancies to push lies about election outcome, CNN. (May 21, 2021), <https://www.cnn.com/2021/05/21/politics/new-hampshire-town-audit-trump-election-lies/index.html>

²⁰ Jonathan J. Cooper, Arizona GOP election audit draws more Republican politicians, AP. (June 2, 2021), <https://apnews.com/article/donald-trump-arizona-election-2020-elections-election-recounts-0f822ded24fb3cddb9894c175dffa91>.

²¹ Stephen Caruso, ‘Walk as free people’: Conservatives rally at the Pa. Capitol to celebrate referenda wins, Pennsylvania Capital Star. (June 5, 2021), <https://www.penncapital-star.com/government-politics/walk-as-free-people-conservatives-celebrate-referenda-wins-in-harrisburg/>

²² Craig Mauger, Audits become new front in Michigan GOP’s fight against 2020 election, Detroit News. (June 6, 2021).

<https://www.detroitnews.com/restricted/?return=https%3A%2F%2Fwww.detroitnews.com%2Fstory%2Fnews%2Fpolitics%2F2021%2F06%2F06%2Faudits-new-front-michigan-republicans-fight-2020-election%2F7573847002%2F>

²³ Rosalind S. Helderman, Michigan judge dismisses lawsuit seeking new audit of Antrim County vote, one of the last remaining 2020 legal challenges, Wash. Post. (May 18, 2021), https://www.washingtonpost.com/politics/antrim-county-lawsuit/2021/05/18/e324451a-b802-11eb-a5fe-bb49dc89a248_story.html.

²⁴ Craig Mauger, Cheboygan board can't require access to voting machines, Michigan elections director says, Detroit News. (May 26, 2021), <https://www.detroitnews.com/story/news/politics/2021/05/25/michigan-county-board-cant-require-access-voting-machines/7436649002/>.

²⁵ Katie Shepard, Despite little evidence of fraud, Wisconsin Republican leader hires retired police to probe 2020 election, Wash. Post. (May 27, 2021), <https://www.washingtonpost.com/nation/2021/05/27/wisconsin-robin-vos-election-fraud/>.

²⁶ Patrick Marley, Republican lawmakers order an audit of Wisconsin’s elections, Milwaukee Journal Sentinel. (Feb 11, 2021), <https://www.jsonline.com/story/news/politics/2021/02/11/wisconsin-republicans-order-audit-2020-elections/6722833002/>.

²⁷ Mark Niese and David Wickert, Critics say election fraud can't be found because it doesn't exist, Atlanta Journal-Constitution. (May 27th, 2021), <https://www.ajc.com/politics/ballot-inspection-seeks-elusive-proof-of-fraud-in-georgia-election/OEQEOPIY4FDC3KPN3W47MNMKEU/>.

laws²⁸ that fall into at least one of our four categories. (See Chart 3). These laws have taken aim, in ways large and small, at the system of professional and largely non-partisan election administration that America has carefully nurtured since the civil rights movement. The danger identified in our report—that state legislatures might pass laws that disrupt election administration and throw our democratic system into chaos—has only deepened.

Three of the 24 laws that have passed thus far illustrate some of the potential impacts of these new provisions.

SPOTLIGHT: Kansas H.B. 2332 and H.B. 2183 & Arkansas H.B. 1803

In early May, the Kansas state legislature overrode gubernatorial vetoes of two bills, H.B. 2332 and H.B. 2183. The two measures significantly rework the way Kansans vote. But tucked into the laws are several provisions that take direct aim at the independent administration of elections, which insert the legislature into crucial functions and depriving the governor or secretary of state of vital powers. One of the new laws strips the governor of any authority to modify election laws or procedures. The secretary of state is barred from settling any litigation regarding elections without the consent of the legislative coordinating council. And Kansas state courts are deprived of any authority to modify state election laws except under powers that may be granted to them by the state's constitution.²⁹ As a result, in the event of an emergency—for example a flood or tornado making polling places inaccessible—the governor will be unable to act quickly to modify election procedures as needed. Likewise, the secretary of state, who is the state's chief elections officer and who employs a professional legal staff, will have his hands tied in court. Instead, every lawsuit regarding voting in Kansas—potentially everything from the certification or election results to how voter registration is conducted—will be effectively overseen by a group of partisan political actors. In addition, another newly enacted law bars all election officials from accepting any private money to help administer voting. Other states that have passed similar provisions,³⁰ but Kansas's legislature went one step further and made it a felony to accept such funds.³¹

In Arkansas, the state enacted a new measure that expands the power and investigative scope of its partisan State Board of Election Commissioners to oversee or even undo election results. The seven-member board is chaired by the secretary of state, and the remaining six members of the board are appointed by the state's governor, legislative leaders, and the heads of its Republican and Democratic parties. Under previous law, the board was empowered to hear and resolve complaints about violations of voter registration laws and general election complaints. However, it was, according to the bill's sponsor, "toothless." Now, the state board can now use the state police to seize public records. And among other things, under the new law resulting from H.B. 1803, the board may also hear a broader range of specific complaints including about how county boards tabulated ballots or certified results, as well as their "election processes" or the conduct of elections in general. If the board finds a complaint valid it is entitled to impose

²⁸ As of today, seven additional measures have passed the legislature and are awaiting signature by a state's governor. Our data gathering for this addendum and for the original report was done using the bill tracker developed by the Voting Rights Lab as well as research on bills identified by our organizations and voting rights attorneys in some key battleground states.

²⁹ H.B. 2332, 2021-22 Reg. Sess. (Ks. 2021).

³⁰ The following states in addition to Arkansas have passed laws that ban or severely restrict the acceptance of private money to help local administrators in running elections: Arizona, Florida, Georgia, Idaho, Kansas, Missouri, North Dakota, and Tennessee. A bill in Texas is likely to be final in a few days.

³¹ H.B. 2183, 2021-22 Reg. Sess. (Kan. 2021).

finances and demand corrective actions. The board has expanded power to upend county-based election administration, not unlike the Georgia law that passed earlier this year to much alarm.³²

As these enactments in Kansas and Arkansas demonstrate, state legislative efforts to seize or disrupt election responsibilities are gaining a foothold across the nation. Indeed, we have found 18 more proposals that would criminalize, politicize, or interfere in election administration that have been introduced since we researched our report.³³

CHART 3: Election Interference Bills Passed & Enacted as of June 6, 2021

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

Conclusion

Many of the bills we have chronicled will force public officials who are attempting to administer elections to constantly look over their shoulder, comply with byzantine rules, seek permission for standard operating practices, work without being able to accept special funding in a crisis, and live in fear that a mistake will land them in a middle of a criminal investigation. They will know that even after

³² H.B. 1803, 93rd Gen. Assemb., Reg. Sess.2021 (Ark. 2021).

³³ Our report covered legislation introduced up to April 6.

they have professionally counted and certified the votes, their decisions may be subject to relentless and baseless attack. This is no way to run a democracy.

We renew our warning: The 2021 state legislative season may ultimately prove to be a turning point in the history of America's democracy. The number of anti-voter laws that have been introduced and passed is unprecedented.³⁴ These are the ingredients for a democracy crisis.

³⁴ See Brennan Center for Justice, Voting Laws Roundup: May 2021, *supra* note 4.