



**Written Testimony of Janai Nelson
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**Submitted to the
United States Senate Committee on Rules & Administration
In connection with its August 3, 2022 hearing entitled
“The Electoral Count Act: The Need for Reform”**

I. INTRODUCTION

Good morning, Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee. My name is Janai Nelson, and I am President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”). Thank you for the opportunity to testify this morning on the present crisis for our democracy, and the urgency of enacting federal legislation which meets this moment by cutting off paths to undermine the voices and votes of our increasingly diverse electorate—both prior to and on Election Day—through discriminatory barriers to the ballot, and after Election Day through manipulating election results.

This Committee meets today at a historic moment when it is not hyperbole to say that the fate of American democracy hangs in the balance. Black and Brown Americans face the greatest assault on our voting rights since the Jim Crow Black Codes rolled back the progress made during Reconstruction. The threat of our democracy breaking apart at the seams and sliding irreversibly into authoritarianism—ceasing to exist as everyone alive today has known it—has not been as acute since the Civil War.

LDF welcomes today’s discussion on critical reforms to the Electoral Count Act (ECA) that can help avert this existential threat to American democracy. We urge Congress to act urgently to resolve ambiguities and curb opportunities for abuse. A bipartisan working group of U.S. senators has done important and commendable work in drafting the Electoral Count Reform and Presidential Transition Improvement Act of 2022, and this Committee has an essential role in strengthening this draft. We ask this Committee to improve upon this needed legislation by further reducing ambiguities in the law and attendant opportunities for manipulation of electoral outcomes that accurately reflect the will of our increasingly diverse electorate, while preserving voters’ opportunities to enforce their rights under existing law.

Yet strengthening the ECA must not be the end game for this Committee or this Congress. Our democracy is presently in crisis because of a deep-seated, irrational, and discriminatory fear of the truly inclusive, multiracial, multiethnic democracy that our nation has never been, but our increasingly diverse electorate holds the promise to deliver. The violent Insurrection on January 6th, the growing threats of violence against election workers, burgeoning efforts to undermine fair vote counts in myriad ways, and the ongoing push to erect discriminatory barriers to the ballot in states across the country all have a common root cause: a white supremacist backlash to voters of color asserting power in the 2020 election. To prevent another January 6th and bring our democracy back from the brink, Congress must address

the full range of these challenges, including rampant voting discrimination, ranging from voter suppression and racial gerrymandering to violence and intimidation, that has for centuries impeded Black and Brown Americans' voice and power.

Elections can be sabotaged by preventing the will of the majority from being expressed through the ballot, or by blocking this will from taking effect once it is expressed. In fact, discriminatory barriers to the ballot, intimidation and harassment, and manipulations of the vote count were addressed together in the Voting Rights Act because they are distinct but related forms of election sabotage. Preventing qualified voters from casting ballots, refusing to credit legitimate ballots, or substituting false electors all achieve the same result: an election outcome that fails to accurately reflect the will of the People.

A. Statement of Purpose

My testimony today covers three main points. The first is to make clear that enacting even the strongest version of the legislation before this Committee today does not complete Congress's work in responding to January 6th and safeguarding our democracy. Rather, as noted above, this Congress must also address voting discrimination to fulfill its obligation to respond to the Insurrection and rescue our democracy from present peril. The second is to focus this Committee on important considerations to guide its efforts to improve the existing proposal to amend the ECA. It is critical to legislate effectively and expansively to address the full-fledged threat of sabotage and violence facing our democracy. This Committee can do important work to further clarify and strengthen the measures to protect election outcomes and resolve electoral disputes. Finally, I propose guidelines to improve the Enhanced Election Security and Protection Act which addresses some aspects of election administration and can reinforce the goals of the ECRA. While this companion legislation is not technically before this Committee, it is relevant to the ability of the ECRA to achieve its objectives in tandem with other laws.

B. LDF and Our Work

Founded in 1940 under the leadership of Thurgood Marshall, LDF is America's premier legal organization fighting for racial justice. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF was launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. From that era to the present, LDF's mission has been transformative—to achieve racial justice, equality, and an inclusive society, using the power of law,

narrative, research, and people to defend and advance the full dignity and citizenship of Black people in America.

Since its founding, LDF has been a leader in the fight to secure, protect, and advance the voting rights of Black voters and other communities of color.¹ LDF's founder Thurgood Marshall—who litigated LDF's watershed victory in *Brown v. Board of Education*,² which set in motion the end of legal segregation in this country and transformed the direction of American democracy in the 20th century—referred to *Smith v. Allwright*,³ the 1944 case ending whites-only primary elections, as his most consequential case. He held this view because he believed that the right to vote, and the opportunity to access political power, was critical to fulfilling the guarantee of full citizenship promised to Black people in the 14th Amendment to the U.S. Constitution. LDF has prioritized its work protecting the right of Black citizens to vote for more than 80 years—representing Martin Luther King Jr. and the marchers in Selma, Alabama in 1965, advancing the passage of the Voting Rights Act and litigating seminal cases interpreting its scope, and working in communities across the South to strengthen and protect the ability of Black citizens to participate in a political process free from discrimination.

In addition to a robust voting rights litigation docket, LDF has monitored elections for more than a decade through our Prepared to Vote initiative (“PTV”) and, more recently, through our Voting Rights Defender (“VRD”) project, which place LDF staff and volunteers on the ground for primary and general elections every year to conduct non-partisan election protection, poll monitoring, and to support Black political participation in targeted jurisdictions—primarily in the South. LDF is also a founding member of the non-partisan civil rights Election Protection Hotline (1-866-OUR-VOTE), presently administered by the Lawyers’ Committee for Civil Rights Under Law. Finally, I and other leaders at LDF have participated in task forces, contributed to research and reports, and published scholarship concerning ways to ensure the integrity of our democracy and protect the right to vote.⁴

¹ LDF has been an entirely separate organization from the NAACP since 1957.

² 347 U.S. 483 (1954).

³ 321 U.S. 649 (1944).

⁴ See, e.g., AD HOC COMM. FOR 2020 ELECTION FAIRNESS & LEGITIMACY, FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC’S CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS (2020), <https://electionlawblog.org/wp-content/uploads/2020ElectionReport.pdf>; NAT’L TASK FORCE ON ELECTION CRISES, STRENGTHENING OUR ELECTIONS AND PREVENTING ELECTION CRISES: LESSONS AND

II. THE PRESENT PERIL FOR OUR DEMOCRACY

Our democracy faces a disturbing array of threats not seen since the Civil War era. Longstanding voting discrimination is intensifying at the same time that efforts at election sabotage through manipulation have again come to the fore, accompanied by the normalization of political violence. Experts on authoritarianism accustomed to measuring threats abroad have pointed to disturbing warning signs of democratic backsliding here in the United States.⁵ For the first time in recent memory, experts in the law of democracy have expressed genuine fear that free and fair elections—the foundation of a constitutional republic—may not survive the present decade.

In November 2021, the International Institute for Democracy and Electoral Assistance (IDEA) put the United States on its list of “backsliding democracies” for the first time.⁶ IDEA, which bases its assessments on democratic indicators tracked in approximately 160 countries over five decades, cited President Trump’s baseless questioning of 2020 election results as an “historic turning point.”⁷ In April 2022, election law scholar Richard L. Hasen wrote in the *Harvard Law Review* that, because of the potential for state legislative usurpation of popular will, misconduct by election officials, or violent interference, “[t]he United States faces a serious risk that the 2024 president election, and other future U.S. elections, will not be conducted fairly and that the candidates taking office will not reflect the free choices made by eligible voters under previously announced election rules.”⁸

RECOMMENDATIONS FROM THE 2020 GENERAL ELECTION (2021),
https://static1.squarespace.com/static/5e70e52c7c72720ed714313ff/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf.

⁵ Edward Lempinen, *American Democracy – Stressed Out and ‘Backsliding’?*, BERKELEY NEWS (Nov. 18, 2020), <https://news.berkeley.edu/2020/11/18/american-democracy-stressed-out-and-backsliding/>; Pippa Norris, *It Happened in America: Democratic Backsliding Shouldn’t Have Come as a Surprise*, FOREIGN AFFS. (Jan. 7, 2021), https://www.foreignaffairs.com/united-states/it-happened-america?check_logged_in=1.

⁶ ANNIKA SILVA-LEANDER ET AL., INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, GLOBAL STATE OF DEMOCRACY REPORT 2021: BUILDING RESILIENCE IN A PANDEMIC ERA (2021), <https://www.idea.int/gsod/global-report#chapter-2-democracy-health-check:-an-overview-of-global-tre>.

⁷ Miriam Berger, *U.S. listed as a ‘backsliding’ democracy for first time in report by European think tank*, WASH. POST (Nov. 22, 2021, 11:18 AM), <https://www.washingtonpost.com/world/2021/11/22/united-states-backsliding-democracies-list-first-time/>.

⁸ Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=39263811. See also Barton Gellman, *Trump’s*

These interlocking challenges have a common root cause: the ideology of white supremacy. Throughout American history, cynical partisan actors and powerful interests invested in the status quo and a revisionist view of our country’s history on race have stoked racial resentment for political and economic advantage.⁹ In recent years, President Trump and his allies consolidated this rhetoric into a racially-coded frame centered on false claims of voter fraud.¹⁰ This false narrative of stolen elections is not just about a single politician or a single election but rather it foments and channels a broader wave of status insecurity and racial resentment. It is a common progenitor of the intensifying efforts to restrict access to the ballot, the violence on January 6th and attendant attempt to subvert the results of the 2020 election, and the persistent threats to sabotage future elections.

A. Discriminatory Voter Suppression is a Longstanding and Increasing Harm

Suppression of Black citizens’ right to vote was at the very heart of the Jim Crow project to enforce strict racial segregation and oppression throughout the U.S., and especially in the South. The Reconstruction Amendments¹¹ gave Congress not just the clear authority but also the affirmative obligation to act to protect civil and voting rights. Yet, for nearly 100 years, Congress failed to live up to its sacred obligation to fully enforce these constitutional provisions as State and private actors blatantly obstructed the collective promise of equality for Black Americans. Post-

Next Coup Has Already Begun, ATLANTIC (Dec. 6, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/>.

⁹ See generally IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2013); Karen Yourish et al., *Inside the Apocalyptic Worldview of ‘Tucker Carlson Tonight,’* N.Y. TIMES (May 15, 2022), <https://www.nytimes.com/interactive/2022/04/30/us/tucker-carlson-tonight.html> (analyzing over 1,000 episodes of “Tucker Carlson Tonight” to reveal how Mr. Carlson pushes extremist ideas, including “Replacement Theory,” into millions of households five nights a week); Chantal da Silva, *Trump Ad Conflating Caravan Migrants with Convicted Cop-Murderer Condemned as ‘Racist,’* NEWSWEEK (Nov. 1, 2018, 6:51 AM EDT), <https://www.newsweek.com/trump-launches-racist-ad-conflating-caravan-migrants-convicted-cop-murderer-1196067>.

¹⁰ Written Testimony from Janai Nelson, President and Dir.-Couns. of LDF to the U.S. H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol (May 3, 2022) [hereinafter Nelson Testimony], <https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Statement-for-Select-Committee-to-investigate-January-6-Attack-on-the-Capitol-FINAL-05.03.2022.pdf>.

¹¹ U.S. CONST. amend. XIII, XIV, XV.

Reconstruction, undermined by the courts¹² and ignored by Congress, Black Americans were left susceptible to racial violence and flagrant discrimination in all areas of life. With a clear understanding of the power of the franchise, white supremacists focused their most intensive campaigns of State sanctioned racial terrorism on Black citizens who attempted to vote.¹³

Empowered by the Supreme Court’s refusal to intervene, white people in the South terrorized Black voters, disenfranchised them, and enacted State laws to codify a contrived racial hierarchy of Black subjugation.¹⁴ Black people were systematically disenfranchised by poll taxes,¹⁵ literacy tests,¹⁶ threats,¹⁷ and lynching.¹⁸ Discrimination across every sector of society increased the suppressive force of many voting policies, whose very success was premised on the existence of racial discrimination in other aspects of social, economic, and political life.¹⁹

¹² See *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1898); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876).

¹³ SUSAN CIANCI SALVATORE ET AL., NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, CIVIL RIGHTS IN AMERICA: RACIAL VOTING RIGHTS (2009), https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf.

¹⁴ Referring to a white mob that murdered more than 100 Black voters, the Court noted: “[I]t does not appear that it was their intent to interfere with any right granted or secured by the constitution . . .” *Cruikshank*, 92 U.S. at 556.

¹⁵ RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* (2004).

¹⁶ JASON MORGAN WARD, *HANGING BRIDGE: RACIAL VIOLENCE AND AMERICA’S CIVIL RIGHTS CENTURY* (2016).

¹⁷ MICHAEL FELLMAN, *IN THE NAME OF GOD AND COUNTRY: RECONSIDERING TERRORISM IN AMERICAN HISTORY* (2010); 7 U.S. COMM’N ON C.R., *RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION: THE MISSISSIPPI DELTA REPORT, CH. 3: VOTING RIGHTS AND POLITICAL REPRESENTATION IN THE MISSISSIPPI DELTA* (2001), <https://www.usccr.gov/pubs/msdelta/ch3.htm>.

¹⁸ Brad Epperly et. al., *Rule by Violence, Rule by Law: Lynching, Jim Crow, and the Continuing Evolution of Voter Suppression in the U.S.*, 18 PERSPS. ON POLS. 756 (2020).

¹⁹ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 & nn.9–10 (1966) (observing that the effectiveness of literacy tests at blocking Black Americans from voting resulted, in significant part, from the pervasiveness of racial discrimination in education); *Underwood v. Hunter*, 730 F.2d 614, 619 & n.10 (11th Cir. 1984) (explaining that, after 1890, Southern state legislatures “resort[ed] to facially neutral tests that took advantage of differing social conditions” between Black and white voters”).

Almost a century after the Reconstruction Amendments were ratified, Congress—compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically²⁰—exercised its constitutional authority and obligation by passing the Voting Rights Act of 1965 (“VRA”).²¹ The VRA took a significant step towards making the promise of the Civil Rights Amendments a reality and shaping our country into a true democracy for the first time in our history.²² The passage and enforcement of the VRA has traditionally been a bipartisan enterprise, as many Republicans and Democrats alike historically have recognized that voting rights for Black and Brown Americans is fundamental to our aspirations to an equal, just, and racially and ethnically inclusive democracy.²³

However, this shared commitment towards creating an inclusive, multiracial democracy came under attack in 2013, when the Supreme Court struck at the heart of the Voting Rights Act through its decision in *Shelby County, Alabama v. Holder*.²⁴ The practical result was an abrupt halt to the successes of the VRA’s preclearance provisions. As the late Justice Ruth Bader Ginsberg noted in her dissent to the *Shelby* decision: “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm

²⁰ See Lyndon B. Johnson, Special Message to the Congress: The American Promise, March 15, 1965, in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 281-87 (1966) (“At times history and fate meet at a single time in a single place to shape a turning point in man’s unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.”); Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, August 6, 1965, in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 811-15 (1966) (“And then last March, with the outrage of Selma still fresh, I came down to this Capitol one evening and asked the Congress and the people for swift and for sweeping action to guarantee to every man and woman the right to vote. In less than 48 hours I sent the Voting Rights Act of 1965 to the Congress. In little more than 4 months the Congress, with overwhelming majorities, enacted one of the most monumental laws in the entire history of American freedom.”).

²¹ 52 U.S.C. § 10301 *et. seq.*

²² Nikole Hannah-Jones, *Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>.

²³ See e.g., *To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965*, GOVTRACK (Aug. 4, 1965), <https://www.govtrack.us/congress/votes/89-1965/s178>; Pub. L. No. 91-285, 84 Stat. 314 (signed into law by President Richard Nixon on June 22, 1970); Pub. L. No. 94-73, 89 Stat. 402 (signed into law by President Gerald Ford on Aug. 6, 1975); Pub. L. No. 97-205, 96 Stat. 134 (signed into law by President Ronald Reagan on June 29, 1982); Pub. L. No. 102-344, 106 Stat. 921 (signed into law by President George W. Bush on Aug. 26, 1992).

²⁴ 570 U.S. 529 (2013).

because you are not getting wet.”²⁵ The *Shelby* decision allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked.²⁶ At its pre-*Shelby* strength, Section 5 would have prevented many of the voter suppression schemes that we have encountered since 2013 in states that were previously covered by the preclearance provision.²⁷

These voter suppression tactics have accelerated since voters of color asserted power through robust turnout in 2020. Following the 2020 election, legislators introduced more than 400 bills in nearly every state aiming to restrict the franchise.²⁸ Eighteen states enacted at least 32 laws that roll back voting rights and erect new barriers to the ballot.²⁹ In 2021 we saw a repeat of history—a steady drip of old poison in new bottles.³⁰ Whereas in a bygone era discriminatory intent in voting restrictions was dressed up in the alleged espousal of ideals such as securing a more informed and invested electorate, the new professed justification is fighting voter fraud, an imaginary phantom used to spread false narratives and attack the right to vote.

The true purpose of the rash of voter suppression legislation was to ensure that the robust turnout among voters of color in the 2020 Presidential election could not

²⁵ *Id.* at 590 (Ginsburg, J., dissenting).

²⁶ U.S. COMM’N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES: 2018 STATUTORY REPORT (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf; THURGOOD MARSHALL INST., LDF, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-SHELBY COUNTY, ALABAMA V. HOLDER (2021), https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished_-10.06.2021-Final.pdf.

²⁷ Several instances are documented in LDF’s *Democracy Diminished* and *Democracy Defended* reports. In Texas, for example, lawmakers enacted new suppressive voting policies immediately following the *Shelby* decision which contributed to disastrous wait times to vote in certain counties during the March 2020 primaries. THURGOOD MARSHALL INST., LDF, DEMOCRACY DEFENDED (2020), <https://www.naacpldf.org/democracy-defended/>.

²⁸ *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022) [hereinafter *Voting Laws Roundup*], <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>.

²⁹ *Voting Laws Roundup: May 2022*, BRENNAN CTR. FOR JUST. (May 26, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022>.

³⁰ Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362 (2014).

be repeated. Notably, many of these laws are directly targeted at blocking pathways to the ballot box that Black and Brown voters used successfully in 2020.³¹

In 2022 lawmakers continued to introduce and enact laws that restrict access to the franchise, making it harder for eligible Americans to register, stay on the rolls, or vote.³² As of May, 39 states have considered at least 393 restrictive bills for the 2022 legislative session.³³

In addition to enacting laws that restrict access to the ballot, several states have also sought to suppress the political power of Black and Brown voters through the redistricting process. As a result of the Court’s decision in *Shelby*, states have been able to take advantage of the first centennial redistricting process in six decades without the full protection of the Voting Rights Act. The result is that Black communities entered the current redistricting cycle with a shredded shield, more

³¹ For example, after Black voters increased their usage of absentee ballots as a result of the pandemic, S.B. 90 in Florida severely curtailed the use of unstaffed ballot return drop boxes and effectively eliminated community ballot collection. *See generally* Complaint for Declaratory and Injunctive Relief, Fla. State Conferences of Branches v. Lee, No. 4:21-cv-00187-WS-MAF (N.D. Fla. May 6, 2021), ECF No. 1. And in Georgia and Texas, after strong early in-person turnout among Black voters, lawmakers initially moved to outlaw or limit Sunday voting in a direct attack on the “souls to the polls” turnout efforts undertaken by many Black churches to mobilize voters to engage in collective civic participation. Letter from Sam Spital et al., LDF, to Texas Senate (May 29, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-Conference-Committee-Report-Opposition-Senate-20210529-1.pdf>; Letter from John Cusick et al., LDF et al., to Ga. House of Representatives, Special Comm. on Election Integrity (Mar. 14, 2021), <https://www.naacpldf.org/wp-content/uploads/LDF-SPLC-Written-Testimony-on-SB202-3.18.21.pdf>. In both states, after advocacy from LDF and others, lawmakers eventually removed these blatantly discriminatory provisions from the omnibus voting bills under consideration—although in both states, the final forms of the enacted bills remained extremely harmful to voters of color. Press Release, LDF, LDF Files Lawsuit Against the State of Florida Over Suppressive Voting Law (May 6, 2021), <https://www.naacpldf.org/press-release/ldf-files-lawsuit-against-the-state-of-florida-over-suppressive-voting-law/>; Press Release, LDF, Civil Rights Groups Sue Georgia Over New Sweeping Voter Suppression Law (Mar. 30, 2021), <https://www.naacpldf.org/press-release/civil-rights-groups-sue-georgia-over-new-sweeping-voter-suppression-law/>. The 2021 omnibus voting law in Texas eliminates a number of accessible, common sense voting methods, including “drive-thru” voting and 24-hour early voting—both methods that proved invaluable for Black and Latino voters in Texas’s largest cities in 2020. Complaint for Declaratory and Injunctive Relief, Houston Justice v. Abbott, No. 5:21-cv-00848 (W.D. Tex. filed Sept. 7, 2021), ECF No. 1, <https://www.naacpldf.org/wp-content/uploads/Houston-Justice-et-al.-v.-Abbott-et-al.-Complaint.pdf>; *see also* Press Release, LDF, Lawsuit Filed Challenging New Texas Law Targeting Voting Rights (Sept. 7, 2021), <https://www.naacpldf.org/press-release/lawsuit-filed-challenging-new-texas-law-targeting-voting-rights/>.

³² *Voting Laws Roundup*, *supra* note 29.

³³ *Id.*

exposed to the manipulations of White-dominated state legislatures than at any time since Jim Crow.

Prior to the current round of redistricting, political representation in the United States was already sharply skewed. In 2019, people of color made up 39% of the U.S. population but only 12% of elected officials across the country, according to an analysis of nearly 46,000 federal, state, and local officeholders.³⁴ Put another way, White Americans occupied nearly 90% of elected offices in the U.S. despite forming just over 60% of the population.

The districting process following the 2020 Census will very likely worsen this already skewed representation. The nation has grown substantially more diverse since 2010,³⁵ but political representation is not on track to reflect this growing diversity—and Black and Brown Americans are likely to see their representation remain static or even lose ground in many places rather than see their power increase with their numbers.

According to the U.S. Census Bureau, more than 42% of Americans are now people of color.³⁶ Since the 2010 Census, the Latino population grew by 23%, compared to just 4.3% non-Latino population growth.³⁷ The Black population grew by nearly 6%.³⁸ This growth was even starker among voters of color. One 2021 report

³⁴ REFLECTIVE DEMOCRACY CAMPAIGN, *THE ELECTABILITY MYTH: THE SHIFTING DEMOGRAPHICS OF POLITICAL POWER IN AMERICA* (2019), https://wholeads.us/wp-content/uploads/2019/08/The-Electability-Myth_-The-Shifting-Demographics-of-Political-Power-In-America-8-1-19.pdf.

³⁵ U.S. Census Bureau's Diversity Index has gone up from 54.9% to 61.1% since 2010. Eric Jensen et al., *The Chance That Two People Chosen at Random Are of Different Race or Ethnicity Groups Has Increased Since 2010*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html>.

³⁶ *Id.*

³⁷ Press Release, U.S. Census Bureau, *2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity* (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html>.

³⁸ U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File*, U.S. CENSUS BUREAU (accessed July 30, 2022); U.S. Census Bureau, *2020 Census Redistricting Data (Public Law 94-171) Summary File*, U.S. CENSUS BUREAU (accessed July 30, 2022). *See also Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

projected that nearly 80% of the growth in voting eligible population would be through people of color, including 17% from Black voters.³⁹

In the leadup to the current districting cycle, Brennan Center districting expert Michael Li issued a report citing the loss of Section 5 and narrowing of Section 2 of the Voting Rights Act to warn that in substantial parts of the country “there may be even greater room for unfair processes and results than in 2011, when the nation saw some of the most gerrymandered and racially discriminatory maps in its history.”⁴⁰ Now that states have largely completed redistricting for congressional and state legislative seats, it is clear that these fears have been confirmed.

In many states, people of color’s proportion of the population has grown substantially since 2010, but their communities have no greater prospects for political representation.⁴¹ For example, both Alabama and Louisiana have enough Black voters to draw two districts where Black voters can elect candidates of choice; however, the maps passed by both states pack Black voters into one such district. LDF has litigation pending in both states.⁴² Multiple lawsuits are challenging Texas’s new congressional map where, despite the fact that people of color accounted for 95 percent of the state’s population growth since 2010, lawmakers both refused to create any additional opportunities for representation for Latinos or other communities of color and split some districts that provided opportunities for multi-racial coalitions to align around candidates of choice.⁴³

Several states have produced maps that undermine even the limited representation that Black and Brown voters currently enjoy. In various districts that

³⁹ MICHAEL LI, *THE REDISTRICTING LANDSCAPE, 2021-22*, 15, BRENNAN CTR. FOR JUST. (Feb. 11, 2021), <https://www.brennancenter.org/our-work/research-reports/redistricting-landscape-2021-22>.

⁴⁰ *Id.* at 3.

⁴¹ Nathaniel Rakich, *How This Redistricting Cycle Failed to Increase Representation for People of Color -- And Could Even Set It Back*, FIVETHIRTYEIGHT (Mar. 17, 2022, 6:00 AM), <https://fivethirtyeight.com/features/how-this-redistricting-cycle-failed-to-increase-representation-for-people-of-color-and-could-even-set-it-back/>.

⁴² *Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022) (*cert. granted before judgment sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022)); *Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022) (*cert. granted sub nom. Ardoin v. Robinson*, No. 21-1596, 2022 WL 2312580 (2022)).

⁴³ Michael Li & Julia Boland, *Anatomy of the Texas Gerrymander*, BRENNAN CTR. FOR JUST. (Dec. 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/anatomy-texas-gerrymander>.

have historically elected Black candidates the ability of Black voters to elect their preferred candidate has been thrown into question.⁴⁴

LDF has brought lawsuits challenging the anti-voter laws and the unfair redistricting maps in several states;⁴⁵ and our allies are suing in many others. However, litigation is an important but limited tool. It requires substantial resources and is often protracted, resulting in the permanent loss of voting rights and electoral opportunities.

B. Election Manipulation is a Renewed Urgent Threat

In addition to blocking Black votes through violence, intimidation and restrictive rules, election officials sabotaging election results by refusing to properly count duly cast ballots has been a serious threat throughout various periods of American history.⁴⁶ Even prior to widespread Jim Crow laws erecting barriers to the ballot, election sabotage through throwing out votes for one party or even counting them for candidates of the opposing party was common in Southern states.⁴⁷ For this reason, both the Enforcement Acts of the 1870s—enacted to apply the protections of the Reconstruction Amendments—and the Voting Rights Act of 1965 contained

⁴⁴ Rakich, *supra* note 41. Examples include districts in Georgia, Maryland, Michigan, Nevada, and North Carolina (CD1). *Id.*; Nathaniel Rakich, *The New National Congressional Map is Biased Toward Republicans*, FIVETHIRTYEIGHT (June 15, 2022, 6:00 AM), <https://fivethirtyeight.com/features/the-new-national-congressional-map-is-biased-toward-republicans/>.

⁴⁵ *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21cv186-MW/MAF, 2022 WL 969538 (N.D. Fla. Mar. 31, 2022); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, No. 1:21-cv-01284-JPB, 2021 WL 6495360 (N.D. Ga. Dec. 9, 2021); *Complaint for Declaratory and Injunctive Relief, Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. filed Sept. 7, 2021), ECF No. 1, <https://www.naacpldf.org/wp-content/uploads/Houston-Justice-et-al.-v.-Abbott-et-al.-Complaint.pdf>; *Milligan*, 142 S. Ct.; *Robinson*, 2022 WL 2312580; *S.C. State Conf. of NAACP v. Alexander*, No. 3:21-cv-03302-TJH-MBS-RMG, 2022 WL 2334410 (D.S.C. June 28, 2022).

⁴⁶ *See e.g.*, *United States v. Reese*, 92 U.S. 214 (1876) (involving the prosecution of two inspectors of elections under the Enforcement Act of 1870 for their refusal to allow a Black man to vote).

⁴⁷ *Techniques of Direct Disenfranchisement, 1880-1965*, UNIV. OF MICH., <http://websites.umich.edu/~lawrace/disenfranchise1.htm> (last visited Aug. 1, 2022); *see also The Ku Klux Klan Act of 1871*, OFF. OF THE HISTORIAN, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ (last visited Aug. 1, 2022).

sections creating federal law protections against state and local officials engaging in election sabotage both through violence and manipulation.⁴⁸

Congress passed the Enforcement Act of 1870 (the first of a series of three separate acts), making it a crime for public officers and private individuals to impede the right to vote.⁴⁹ The following year Congress passed the second and third Enforcement Acts, the latter also known as the Ku Klux Klan Act;⁵⁰ together the Acts aimed to enforce the Fourteenth and Fifteenth Amendments, including through federal protections for the electoral process.⁵¹ The Supreme Court ultimately confronted the issue of electoral manipulation in *United States v. Reese*, which involved two election officials in Kentucky who refused to receive and count the ballot of a Black voter in a local election.⁵² However, in its holding in *Reese*⁵³ and then in *United States v. Cruikshank*⁵⁴ and *Giles v. Harris*⁵⁵ the Court contributed substantially to the systemic invalidation of equal and full citizenship for Black Americans, directly undermining the promise of the Reconstruction Amendments and pushing the nation towards the Jim Crow era.

Now, 150 years after the enactment of the Enforcement Acts and more than 50 years after the enactment of the Voting Rights Act, election manipulation that targets voters of color is a renewed urgent threat: once again extending the project of voter suppression and sabotage beyond Election Day.

⁴⁸ Act of May 31, 1870, ch. 114, §4, 16 Stat. 140, 141; Act of Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 18 and 42 U.S.C., including 42 U.S.C. §1983) (allowing for civil rights suits against government officials) and §1985(3) (allowing the government to charge private actors with conspiracy to interfere with another person’s right to vote); 52 U.S.C. § 10307(a); Voting Rights Act of 1965, Pub. L. 89-110, §12(d), 79 Stat. 437.

⁴⁹ SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 718 (5th ed. 2016).

⁵⁰ Senate Hist. Off., *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> (last visited Aug. 1, 2022).

⁵¹ ISSACHAROFF, *supra* note 49.

⁵² 92 U.S. 214, 215 (1876).

⁵³ *Id.* (holding that “the Fifteenth Amendment does not confer the right of suffrage upon any one”).

⁵⁴ 92 U.S. 542 (1875) (dismissing criminal indictments that emerged out of the Colfax Massacre, where a white mob murdered a group of Black voters in Louisiana).

⁵⁵ 189 U.S. 475 (1903).

January 6th Insurrection

The January 6th Insurrection was one of the clearest attempts at election sabotage in our country's history. As the House Select Committee to Investigate the January 6th Attack on the United States Capitol has thoroughly documented, the intent of the insurrectionists was to manipulate ambiguities in the Electoral Count Act to substitute false slates of electors, abetted by a violent attack on the Capitol.⁵⁶ Critically, however, the January 6th strategy was rooted in an organized effort to discredit and devalue the votes and voices of Black and Brown Americans.

As noted in our written testimony submitted to the January 6th Committee, the driving force behind the Insurrection was a false narrative about voter fraud and a stolen election that was itself rooted in racism.⁵⁷ President Trump and his allies reacted to robust 2020 turnout among Black voters and other voters of color by asserting massive fraud and questioning vote totals, specifically targeting Black elections officials and voters in Black population centers such as Detroit (where election officials counting votes were mobbed and harassed),⁵⁸ Philadelphia (where the FBI helped local police arrest two men with weapons suspected of a plot to interfere with ballot counting),⁵⁹ and the Atlanta metro region (where Trump alleged that hundreds of thousands of ballots mysteriously appeared).⁶⁰ Similarly, President Trump and his allies alleged fraud in places like Arizona where robust turnout among

⁵⁶ *Hearings Before the H. Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. (2022).

⁵⁷ Press Release, LDF, LDF Submits Testimony to January 6 Committee Highlighting Solutions Required to Protect Our Democracy (May 31, 2022), <https://www.naacpldf.org/press-release/ldf-submits-testimony-to-january-6-committee-highlighting-solutions-required-to-protect-our-democracy>.

⁵⁸ Bill Bostock, *Videos show Trump protesters chanting 'count those votes' and 'stop the count' outside separate ballot-counting sites in Arizona and Michigan*, BUS. INSIDER (Nov. 5, 2020, 6:16 AM), <https://www.businessinsider.com/videos-trump-protesters-michigan-arizona-vote-count-2020-11>.

⁵⁹ Maura Ewing et al., *Two charged with carrying weapons near Philadelphia vote-counting site amid election tensions*, WASH. POST (Nov. 6, 2020, 7:41 PM), <https://www.washingtonpost.com/nation/2020/11/06/philadelphia-attack-plot-vote-count-election/>.

⁶⁰ Jeff Amy, Darlene Superville & Jonathan Lemire, *GA election officials reject Trump call to 'find' more votes*, ASSOCIATED PRESS (Jan. 4, 2021), <https://apnews.com/article/trump-raffensperger-phone-call-georgia-d503c8b4e58f7cd648fbf9a746131ec9>.

the Latino population was decisive. Again, we saw coordinated attempts to infiltrate ballot counting headquarters and tamper with vote counting.⁶¹

Wayne County, Michigan emerged as a central focus of attempts to translate the false narrative regarding voter fraud into actual subversion of a free and fair election. On November 20, 2020, LDF filed a lawsuit on behalf of the Michigan Welfare Rights Organization and three individuals alleging that President Trump’s attempt to prevent Wayne County from certifying its election results was a clear example of intimidating those charged with “aiding a[] person to vote or attempt to vote” in violation of the Voting Rights Act, and that this intimidation was aimed at disenfranchising Black voters.⁶² The Complaint further explained how race was a driving factor in the Michigan certification debate: “During [a meeting of the Wayne County canvassing board], one of the Republican Canvassers said she would be open to certifying the rest of Wayne County (which is predominately white) but not Detroit (which is predominately Black), even though those other areas of Wayne County had similar discrepancies [between ballot numbers and poll book records] and in at least one predominantly white city, Livonia, the discrepancies were more significant than those in Detroit.”⁶³ Subsequently, on December 21, 2020, LDF amended its Complaint adding the NAACP as a Plaintiff, and showing how President Trump and his supporters made similar efforts to disenfranchise voters—and especially Black voters—in other states, including Georgia, Pennsylvania, Wisconsin, and Arizona.⁶⁴

As the political scientist Hakeem Jefferson and the sociologist Victor Ray have written, “Jan. 6 was a racial reckoning. It was a reckoning against the promise of a multiracial democracy and the perceived influence of the Black vote.”⁶⁵ We know this in part because “those who participated in the insurrection were more likely to come

⁶¹ Dan Zak, *The mess in Maricopa*, WASH. POST (May 21, 2021), <https://www.washingtonpost.com/lifestyle/2021/05/21/arizona-election-audit-trump-maricopa/>; Jake Lahut, *Dozens of pro-Trump protesters chant 'Fox News sucks' outside major election HQ in Arizona, with several reportedly trying to get inside as votes are being counted*, BUS. INSIDER (Nov. 4, 2020), <https://www.businessinsider.com/video-fox-news-sucks-chant-crowd-outside-maricopa-election-arizona-202011?r=US&IR=T>.

⁶² Complaint, *Mich. Welfare Rights Org. v. Trump*, Civ. Action No. 20-3388 (EGS) (D.D.C. Apr. 1, 2022), <https://www.naacpldf.org/wp-content/uploads/Trump-Campaign-Complaint.pdf>.

⁶³ *Id.* at ¶ 27.

⁶⁴ Amended Complaint for Declaratory and Injunctive Relief, *Mich. Welfare Rights Org.*, Civ. Action No. 20-3388 (EGS) (D.D.C. Apr. 1, 2022), <https://www.naacpldf.org/wp-content/uploads/2020.12.21-MWRO-v.-Trump-et-al.-Amended-Complaint-Dkt.-No.-8-2.pdf>.

⁶⁵ Hakeem Jefferson & Victor Ray, *White Backlash is a Type of Racial Reckoning, Too*, FIVETHIRTYEIGHT (Jan. 6, 2022), <https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/>.

from areas that experienced more significant declines in the non-Hispanic white population — further evidence that the storming of the Capitol was, in part, a backlash to a perceived loss of status, what social scientists call ‘perceived status threat.’”⁶⁶

Some of the most enduring imagery from the attack on the U.S. Capitol points to race as a central, underlying factor. Many photographs from the January 6th insurrection were disturbing, but one in particular encapsulated the historical significance and the stakes for our Republic: the image of an insurgent inside the U.S. Capitol brandishing a Confederate flag.⁶⁷

The threat of election sabotage has only grown stronger since January 6th. Two primary approaches are to provide partisan actors more direct control over elections, and to replace nonpartisan, good-faith election workers with party loyalists who strongly believe in the false narrative around stolen elections.

Partisan Election Interference

In 2021, 32 laws were enacted in 17 states which allow state legislatures to politicize or criminalize election administration activity, or otherwise interfere with elections.⁶⁸ These include measures to shift authority over elections from nonpartisan bodies to the legislature; roll back local authority through centralization and micromanagement; and criminalize good-faith mistakes or decisions by elections officials.⁶⁹ This year state lawmakers have continued to focus intently on election interference, passing at least eleven laws across seven states that could upend how

⁶⁶ *Id.*

⁶⁷ Indeed, many insurrectionists donned Confederate paraphernalia. Javonte Anderson, *Capitol riot images showing Confederate flag a reminder of country's darkest past*, USA TODAY (Jan. 13, 2021), <https://www.usatoday.com/story/news/2021/01/07/capitol-riot-images-confederate-flag-terror/6588104002/>.

⁶⁸ Memorandum from States United Democracy Ctr., Protect Democracy & Law Forward to Interested Parties 2 (Dec. 23, 2021), https://s3.documentcloud.org/documents/21169281/democracy-crisis-in-the-making-report-update_12232021-year-end-numbers.pdf.

⁶⁹ *Id.*

election results are determined.⁷⁰ In total, lawmakers have proposed at least 148 election interference bills in 27 states.⁷¹

In some places these new rules permit White-dominated and often gerrymandered legislatures or statewide bodies to assert control over majority-Black local jurisdictions. In Georgia, for example, S.B. 202 allowed the State Election Board to assume control of county boards.⁷² Through this bill and separate legislation to reorganize county election boards, several Black election board members or supervisors have been replaced with White officials.⁷³

Furthermore, criminalization provisions expose good-faith election officials to unreasonable risk for doing their jobs. For example, Texas' S.B.1 contains a provision that exposes election judges who take action to prevent poll watchers from harassing voters to possible criminal sanctions.⁷⁴ This despite the fact that the Texas Election Code contains specific provisions designed to protect voters from exactly such interference—and it is the election judge's responsibility to enforce these provisions at a given polling location.⁷⁵ The new law thus puts good-faith election judges in a no-win situation where they can incur criminal penalties for fulfilling their duties.

⁷⁰ *Voting Laws Roundup*, *supra* note 28. Since this roundup in May, two relevant laws have passed: H.B. 2337, 55th Leg., Reg. Sess. (Ariz. 2022); H.B. 1567, 2022 Leg., Reg. Sess. (N.H. 2022).

⁷¹ *Id.*

⁷² James Oliphant & Nathan Layne, *Georgia Republicans purge Black Democrats from county election boards*, REUTERS (Dec. 9, 2021), <https://www.reuters.com/world/us/georgia-republicans-purge-black-democrats-county-election-boards-2021-12-09/>.

⁷³ For example, H.B. 162 reconstituted the Morgan County Board of Elections, giving control over all appointments to the Board of County Commissioners, and leading directly to the removal of Helen Butler and Avery Jackson, two Black Board members. Ms. Butler had served on the board for more than a decade without any allegations of wrongdoing and neglect, using her position to advocate for more accessible elections. *Protecting the Freedom to Vote – Recent Changes to Georgia Voting Laws and the Need for Basic Federal Standards to Make Sure All Americans Can Vote in the Way that Works Best for Them*, Hearing Before the S. Comm. on Rules and Admin, 117th Cong. 11 (2021) (statement of Helen Butler, Exec. Dir., Ga. Coal. for the People's Agenda), https://www.rules.senate.gov/imo/media/doc/Testimony_Butler.pdf.

⁷⁴ Tex. Elec. Code § 33.057; Complaint for Declaratory and Injunctive Relief, *Houston Justice v. Abbott*, No. 5:21-cv-00848 (W.D. Tex. Sept. 7, 2021), ECF No. 1.

⁷⁵ Tex. Elec. Code § 33.058.

Harassment and Intimidation of Election Officials

Beyond legal changes, extremists who falsely assert that the 2020 election was stolen have subjected election officials to death threats and other forms of harassment on an ongoing basis. A November 2021 Reuters Special Report documented nearly 800 threats to election workers over the previous year, including more than 100 that could warrant prosecution.⁷⁶ The increasing threat rate following the 2020 election prompted the U.S. Department of Justice to form an Election Threats Task Force in July 2021; and that Task Force has since reviewed more than 1,000 threat reports.⁷⁷ According to an April 2021 survey, approximately one-third of election officials are concerned about feeling unsafe on the job, being harassed on the job, and / or facing pressure to certify election results.⁷⁸ Nearly one-third have already felt unsafe and almost 20% have been threatened on the job.⁷⁹ This has led to a wave of retirements, causing the director of the Center for Election Innovation and Research to tell the *New York Times*, “We may lose a generation of professionalism and expertise in election administration. It’s hard to measure the impact.”⁸⁰

This concern is almost certainly more acute for Black election officials and other election officials of color. Texas election judge and LDF client Jeffrey

⁷⁶ In June, an Arizona man called Secretary of State Katie Hobbs’ office and left a messaging saying she would hang “from a f----- tree...They’re going to hang you for treason, you f----- bitch.” Linda So & Jason Szep, *Special Report: Reuters unmasks Trump supporters who terrified U.S. election workers*, REUTERS (Nov. 9, 2021), <https://www.reuters.com/legal/government/reuters-unmasks-trump-supporters-terrifying-us-election-workers-2021-11-09/>. In August 2021, a Utah man who had been listening to a Mesa County, Colorado election clerk criticize Secretary of State Jena Griswold sent Secretary Griswold a Facebook message: “You raided an office. You broke the law. STOP USING YOUR TACTICS. STOP NOW. Watch your back. I KNOW WHERE YOU SLEEP, I SEE YOU SLEEPING. BE AFRAID, BE VERRY AFFRAID. I hope you die.” *Id.*

⁷⁷ Michael Wines & Eliza Fawcett, *Violent Threats to Election Workers Are Common. Prosecutions Are Not.*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/06/27/us/election-workers-safety.html>. A Congressional Research Service report characterized the Justice Department’s findings as a “significant increase in threats of violence towards individuals who administer elections.” CONG. RSCH. SERV., OVERVIEW OF FEDERAL CRIMINAL LAWS PROHIBITING THREATS AND HARASSMENT OF ELECTION WORKERS (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10781>.

⁷⁸ BRENNAN CTR. FOR JUST., LOCAL ELECTION OFFICIALS SURVEY 6 (2021), <https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey>.

⁷⁹ *Id.* at 7.

⁸⁰ Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES (July 2, 2021), <https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html>.

Clemmons, a Black man in his early twenties, says that if he works as an election worker again in the future:

I am almost certain that I am going to face probably more harassment than I did the last time around because of the heightened political environment that we're in, where people feel again as if their elections are being stolen, that you know, democracy is being undermined left and right, which it is, but of course not in the way that they think that it is. And so you're going to have people who are signing up to be poll watchers for probably partisan campaigns and coming into polling places and attempting to identify election fraud as it were through the Texas election bills...I can only imagine things I'm going to face, whether it's someone, you know, yelling belligerently at me or taking video of me when I'm just doing my job or potentially having the cops called on me because of the color of my skin and the fact that I'm working an election.⁸¹

In heartbreaking testimony before the House Select Committee to Investigate the January 6th Attack on the Capitol, Wandrea “Shaye” Moss, a Black woman who had worked as an election official in Fulton County, Georgia, described how threats and intimidation had turned her life upside down.⁸² Ms. Moss and her mother Ruby Freeman, both Atlanta-area election workers, had been the target of false allegations of election fraud by Donald Trump and his attorney Rudy Giuliani.⁸³ As a result, she encountered death threats, racial slurs, and intense intimidation which forced her into hiding and ultimately pushed her to leave her job.⁸⁴

Ms. Moss testified that she was told “I’ll be in jail with my mother and ... things like ‘be glad it’s 2020 and not 1920.’” But, the abuse did not stop at words, instead taking the form of physical violence. Moss said that Trump supporters attacked her

⁸¹ Interview by Adam Lioz, Senior Pol’y Couns. for LDF, with Jeffrey Clemmons (Jan. 10, 2022) (on file with author).

⁸² Amy Gardner, *Election workers describe ‘hateful’ threats after Trump’s false claims*, WASH. POST (June 21, 2022, 6:40 PM), <https://www.washingtonpost.com/national-security/2022/06/21/ruby-freeman-shaye-moss-jan6-testimony/>.

⁸³ Deepa Shivaram, *Shaye Moss staffed an election office in Georgia. Then she was targeted by Trump.*, NPR (June 22, 2022, 5:15 AM), <https://www.npr.org/2022/06/22/1106459556/shaye-moss-staffed-an-election-office-in-georgia-then-she-was-targeted-by-trump>.

⁸⁴ Wines & Fawcett, *supra* note 77.

grandmother’s home, barging in and threatening to make a “citizen’s arrest.”⁸⁵ Speaking to the effects of the harassment and intimidation, she told the Committee: “It’s turned my life upside down...I don't go to the grocery store at all. I haven't been anywhere at all. I've gained about 60 pounds. I just don't do nothing anymore.”⁸⁶

Undermining Elections from the Inside

The effort to subvert elections from the inside has picked up even more steam in 2022. With Black and Latino election workers such as Shaye Moss⁸⁷ pushed out of the picture, those who embrace false claims of voter fraud are waiting in the wings to infiltrate the system. According to a December 2021 *New York Times* article, “[i]n races for state and county-level offices with direct oversight of elections, Republican candidates coming out of the Stop the Steal movement are running competitive campaigns, in which they enjoy a first-mover advantage in electoral contests that few partisans from either party thought much about before last November.”⁸⁸

Secretary of State races have also been impacted by this phenomenon. Formerly about election mechanics or perhaps how much to expand voting opportunities these contests are now being driven by inaccurate claims regarding election legitimacy. Approximately half of this year’s 27 Secretary of State contests include at least one candidate who claims the 2020 election was stolen from Donald Trump, or otherwise questions its legitimacy.⁸⁹ In total, there are more than 80

⁸⁵ Zack Beauchamp, “Do you know how it feels to have the president of the United States target you?,” VOX (June 21, 2022, 6:10 PM), <https://www.vox.com/2022/6/21/23177430/january-6-committee-hearing-georgia-poll-election-worker>.

⁸⁶ Shivaram, *supra* note 83.

⁸⁷ Julie Coleman, *Who is Shaye Moss? Former Elections Worker and Jan. 6 Witness Received Death Threats After Trump Campaign Conspiracy*, FORBES (June 21, 2022, 4:13 PM), <https://www.forbes.com/sites/juliecoleman/2022/06/21/who-is-shaye-moss-former-elections-worker-and-jan-6-witness-received-death-threats-after-trump-campaign-conspiracy/?sh=29df49356e9d>.

⁸⁸ Charles Homans, *In Bid for Control of Elections, Trump Loyalists Face Few Obstacles*, N.Y. TIMES (Dec. 11, 2021), https://www.nytimes.com/2021/12/11/us/politics/trust-in-elections-trump-democracy.html?campaign_id=9&emc=edit_nn_20211213&instance_id=47676&nl=the-morning®i_id=67300419&segment_id=76841&te=1&user_id=a026c13970046cd04a509ac0738ecf7a.

⁸⁹ Consider This From NPR, *‘The Big Lie’ Lives On, And May Lead Some to Oversee The Next Election*, NPR (Jan. 6, 2022), <https://www.npr.org/transcripts/1070864361>. Candidates have claimed that Georgia “certified the wrong result” and that “700,000 people are illegal voters” in the state; that Michigan added dead people to the voter file, while calling for an Arizona-style audit; that there were up to 35,000 “fictitious voters” in Pima County, Arizona; and that there was a group of secretary of state candidates “doing something behind the scenes to try to fix 2020 like President

candidates for key state-level election positions who have either asserted fabricated claims about the 2020 Presidential election or have explicitly supported the false notion that the election was stolen.⁹⁰

The combination of removing non-partisan or bipartisan election officials, exposing good-faith election workers to criminal penalties, and the increased stream of threats and harassment contributes to perhaps the most dangerous aspect of the efforts to subvert election results: thousands of election officials with experience and integrity are being replaced by false fraud loyalists who are on a mission to achieve a particular election outcome without regard to whether that outcome aligns with the voice and intent of the majority of the electorate.

C. White Supremacist Backlash to Voters of Color Asserting Power is a Common Root Cause

The violent attempt to overturn the results of a free and fair election on January 6th; the renewed threat of election sabotage by other means; and the escalating attacks on Black and Brown Americans' freedom to vote have a common root cause: a white supremacist backlash to voters of color asserting power in the 2020 election.

Voters overcame a host of obstacles with determination and resilience to make 2020 historic. Two-thirds of eligible voters participated in the 2020 Presidential elections.⁹¹ This is the highest turnout rate recorded since 1900; but it actually represents the highest turnout ever given the significant expansion of both the general population and the population of eligible voters since the turn of the

Trump said.” Ian Vandewalker & Lawrence Norden, *Financing of Races for Offices that Oversee Elections: January 2022*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/financing-races-offices-oversee-elections-january-2022>.

⁹⁰ Igor Derysh, *More than 80 pro-Trump election deniers are running for key state offices*, SALON (Feb. 7, 2022, 5:45 AM), <https://www.salon.com/2022/02/07/more-than-80-pro-deniers-are-running-for-key-state-offices/>.

⁹¹ Michael P. McDonald, *National General Election VEP Turnout Rates, 1789-Present*, U.S. ELECTIONS PROJECT (Jan. 14, 2022), <http://www.electproject.org/national-1789-present>.

twentieth century.⁹² Black voter turnout was greater than 65% and nearly matched records set when President Obama was on the ballot.⁹³

The resulting backlash has been fueled by the false narrative that rampant voter fraud occurred in communities of color that is itself rooted in a deep-seated fear that the changing demographics in the United States and the increasing racial and ethnic diversity of the electorate threaten the existing power structure premised on white supremacy.⁹⁴

This backlash is not a new phenomenon. The aspiration of multiracial democracy in the United States is a tale of progress, backlash, and retrenchment—at times followed by further progress, yet often long-delayed.⁹⁵ This pattern is clear in the experience of Black Americans across four centuries. The backlash that follows moments of progress can take many forms. Two manifestations, however, are consistent and concrete: violence and legal changes intended to relegate Black people to the margins of democratic society. As with past reactions to racial progress the post-2020 backlash has featured both.

III. CONGRESS'S OBLIGATION TO ACT

Congress's most sacred responsibility may be to preserve our republican form of government—both in the states and at the federal level.⁹⁶ The United States currently faces the greatest threat to our basic democratic freedoms since the Civil War. In the face of a concerted effort to undermine free and fair elections, both by blocking eligible Americans from the polls and sabotaging election results after the fact, Congress must not stand idly by. Rather, you must act decisively and expansively to protect our democracy.

⁹² *Id.*

⁹³ Michael P. McDonald, *Voter Turnout Demographics*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/home/voter-turnout/demographics> (last visited July 31, 2022).

⁹⁴ Robert Pape et al., *American Face of Insurrection: Analysis of Individuals Charged for Storming the US Capitol on January 6, 2021*, CHI. PROJECT ON SECURITY & THREATS (Jan. 5, 2022), [https://d3qi0qp55mx5f5.cloudfront.net/cpost/i/docs/Pape_-_American_Face_of_Insurrection_\(2022-01-05\).pdf?mtime=1654548769](https://d3qi0qp55mx5f5.cloudfront.net/cpost/i/docs/Pape_-_American_Face_of_Insurrection_(2022-01-05).pdf?mtime=1654548769).

⁹⁵ Indeed, eight of the seventeen post-Bill of Rights amendments to the U.S. Constitution expanded the franchise directly or expanded the constitutional rights and protection to ensure a more inclusive vision of “we the people.” U.S. CONST. amends. XIII, XIV, XV, XVII, XIX, XXIII, XXIV, XXVI.

⁹⁶ U.S. CONST. art. IV, § 4, cl. 2 (“The United States shall guarantee to every State in this Union a Republican Form of Government. . .”).

The House of Representatives has passed comprehensive legislation to restore and strengthen protections against discrimination for voters of color and set minimum standards for election access and administration.⁹⁷ It is in this context that we must evaluate the Senate’s response to the current moment.

IV. THE BIPARTISAN WORKING GROUP’S REFORM PACKAGE

In response to Congress’s clear obligation to address the present democratic crisis, the bipartisan Senate working group has produced two pieces of legislation: the Electoral Count Reform and Presidential Transition Improvement Act of 2022⁹⁸ and the Enhanced Election Security and Protection Act.⁹⁹ These bills contain updates to the ECA; revise the presidential transition process; and address some aspects of election administration.

Notably, however, the package contains no provisions that directly address voting discrimination. While ECA reform is an important way to address one specific form of election sabotage, the package as a whole fails to fully meet the moment, not only because the ECA content can be further strengthened, but because it does nothing to address voting discrimination. As noted, one can sabotage an election by preventing the will of the majority from being expressed just as much as by preventing the majority’s expressed will from taking effect—and Congress must address both. We, therefore, appreciate these initial steps towards reform at the same time that we charge this Committee to do more.

A. Electoral Count Reform Act

Election law experts across the political spectrum agree that updating the Electoral Count Act is necessary to remove ambiguities in the 145-year-old law that, at present, provide opportunities for sabotaging the presidential election.¹⁰⁰ These ambiguities played a central role in former President Trump’s attempt to subvert the

⁹⁷ Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2021-2022).

⁹⁸ S. 4573, 117th Cong. (2022).

⁹⁹ S. 4574, 117th Cong. (2022).

¹⁰⁰ Live at the National Constitution Center, *Restoring the Guardrails of Democracy*, NAT’L CONST. CTR. (July 6, 2022), <https://constitutioncenter.org/interactive-constitution/town-hall-video/restoring-the-guardrails-of-democracy>; Thomas Berry & Genevieve Nadeau, *Here’s What Electoral Count Act Reform Should Look Like*, LAWFARE (Apr. 4, 2022, 1:01 PM), <https://www.lawfareblog.com/heres-what-electoral-count-act-reform-should-look>; *General Support for ECA Reform*, PROTECT DEMOCRACY, <https://protectdemocracy.org/project/electoral-count-act/#section-5> (last visited Aug. 1, 2022) (collecting statements of support “across the political spectrum”).

clearly-expressed will of the electorate in 2020;¹⁰¹ and if unaddressed could facilitate future threats to free and fair elections.

Shoring up the ECA is a racial justice issue because communities of color are the most likely to have our voices and votes undermined by electoral count sabotage. In fact, as noted above, a key aspect of the Trump campaign’s strategy was to question vote totals in Black and Brown communities to set the stage for objections to the certification of electors in states where voters of color asserted power through robust turnout.¹⁰²

The bipartisan working group’s draft legislation is an important step forward in that it includes measures to address many of the most pressing ambiguities in the ECA. The Electoral Count Reform Act (ECRA):¹⁰³

- Clarifies that the role of the Vice President is ministerial and without substantive authority to “solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors”;¹⁰⁴
- Clarifies that states must set clear rules prior to a date certain and cannot change these rules to advance a preferred outcome once voting is complete;¹⁰⁵
- Removes confusing language regarding a state having “failed to make a choice” on Election Day;¹⁰⁶ addresses the original purpose of this provision with clearer language creating a contingency plan for a true emergency that prevents a state from completing its voting on Election Day; and clarifies

¹⁰¹ Barbara Sprunt, *A bipartisan Senate group announces a deal on reforming the Electoral Count Act*, NPR (July 20, 2022, 1:50 PM), <https://www.npr.org/2022/07/20/1105843501/electoral-count-act-changes-pence-january-6th> (noting that several ECA reform advocates observed that the vaguely worded ECA was a weakness “exploited by Trump and his allies to try to keep him in power”).

¹⁰² For a fuller explanation of this aspect of the Trump campaign and its allies’ strategy, see Nelson Testimony, *supra* note 10.

¹⁰³ Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. §§ 101-111 (2022).

¹⁰⁴ *Id.* at § 109.

¹⁰⁵ *Id.* at §§ 102, 103, 104, 106.

¹⁰⁶ 3 U.S.C. § 2.

- that the available remedy is to extend voting, not discard the election results or set an entirely new election;¹⁰⁷
- Clarifies which state official is responsible for apprising federal officials of the certified slate of electors to reduce or eliminate the possibility of Congress needing to choose between multiple purportedly legal slates;¹⁰⁸
 - Increases the threshold for congressional objections to electors or votes from one member of each chamber to one-fifth of each chamber to reduce the chances that frivolous objections delay or derail the electoral count;¹⁰⁹
 - Ensures that any electors eliminated from the count by a sustained objection are removed from the denominator when calculating the majority of Electoral College votes required to win the presidency, reducing the chances that an election will be thrown to the House of Representatives;¹¹⁰ and
 - Eliminates the confusing and unenforceable “safe harbor” provision in the existing ECA in favor of an expedited federal judicial process to conclusively resolve, prior to the meeting of the Electoral College, the narrow question of whether the election results certified under state law were lawfully ascertained and delivered by the state to federal officials.¹¹¹

This draft legislation, while urgently needed, can be strengthened in critical ways. We raise here select issues for the Committee to consider as you conduct your review. Our comments focus on the imperative to eliminate ambiguities in the law and attendant opportunities for manipulation, while taking care to preserve voters’ opportunities to enforce their rights under existing law.

Judicial Review Process

A central question that remains dangerously ambiguous under the current ECA is: Whose determination of the proper slate of electors is Congress bound to respect? What if multiple actors send Congress slates of electors purporting to be properly certified under state law? The ECRA addresses this question in two ways.

¹⁰⁷ Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 102 (2022).

¹⁰⁸ *Id.* at § 104. This state official’s determination is reviewable by the federal courts according to a process set out in Section 104.

¹⁰⁹ *Id.* at § 109.

¹¹⁰ *Id.*

¹¹¹ *Id.* at § 104.

First, it clarifies that a single state official has the responsibility of officially ascertaining the proper electoral slate and transmitting that information to federal officials at least six days before the Electoral College meets.¹¹² This means that in theory only one slate can be certified through the proper sanctioned channel. Second, the ECRA provides for an expedited federal judicial process wherein any candidate for President or Vice President can challenge the responsible state official's ascertainment of electors in a three-judge court with direct appeal to the Supreme Court.¹¹³ This reasonable approach can be further strengthened pursuant to some key principles.

Any judicial process must be fair and unbiased, both in fact and in appearance. It must yield a single, final, definitive result (not subject to competing outcomes) with respect to correct ascertainment of electors; and do so prior to the meeting of the Electoral College. And, it must protect and preserve voters' ability to vindicate their rights under existing law.

With these principles in mind, we offer the following observations about the ECRA for the Committee to consider as it works to strengthen the legislation.

First, we suggest the Committee consider shifting the manner of constituting the three-judge courts contemplated in Section 104 from assignment by the chief judge, as is the case under the existing statute referenced by ECRA,¹¹⁴ to random assignment. The current process of assignment provides the chief judge outsized power over a highly charged matter which may create an appearance of bias or impropriety in constructing the panel that could delegitimatize the result.

Second, in some cases the legislation provides only six days for litigation on whether ascertainment is proper 1) to be filed resulting in 2) the convening of a three-judge court; 3) to be briefed and argued before this court; 4) for the court to issue a decision; 5) for the decision to be appealed to the Supreme Court; 6) to conduct further briefing or argument as ordered by the Supreme Court; 7) for the Supreme Court to issue a final ruling on remand; and 8) for the three-judge court to issue its final ruling in accordance with the Supreme Court's order.¹¹⁵ This strict timeline results from the

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 22 U.S.C. § 2284.

¹¹⁵ To have the full six days, the mandatory 5-day waiting period in 22 U.S.C. § 2284 needs to be removed; as the ECRA is currently drafted there is only one day for all of these proceedings.

fact that the deadline for the responsible state official to ascertain and communicate the proper certification (which causes a relevant lawsuit to ripen) is just six days before the meeting of the Electoral College.¹¹⁶

This timeline is tight even under circumstances wherein the courts are adjudicating a fairly straightforward claim that a rogue actor has falsely ascertained an electoral slate completely outside the bounds of state law, or in the face of a clearly contrary directive from an authoritative source such as a Secretary of State or state or federal court. There may be circumstances, however, wherein a conclusive ruling on whether a governor has acted lawfully requires the reviewing court to address more complicated questions of compliance with pre-existing state law and related federal statutory or constitutional claims.¹¹⁷ In that case, more time may be required for briefing and ruling on the issue. In addition, the Supreme Court could face the prospect of claims from several states raising distinct state-law issues to resolve in the final 24-48 hours prior to the Electoral College meeting.

For this reason, we recommend the Committee consider expanding the time available for litigation. We understand that time is inherently tight between Election Day in early November and inauguration on January 20th. In the days between states must complete their vote counts and any recounts and certify their results; litigation pertaining to the conduct of the election must be resolved; the proper official must conduct an official ascertainment under the ECRA; the Electoral College must meet and then communicate its votes to Congress; and Congress must meet in joint session to officially count the electoral votes. In suggesting expanding the time available for the resolution of litigation, we recognize this may result in moving the meeting of the Electoral College back further than the one day prescribed in the current draft.¹¹⁸ In

¹¹⁶ Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 104 (2022).

¹¹⁷ Presumably this would be rare since the intent of the provision is to address circumstances in which a state actor goes “rogue” in blatant violation of state law or procedure. One potential example, however, is if there has been no clearly definitive resolution of state law claims by the statutory deadline. Either way, this is not a challenge unique to this legislation or approach; but suggests why more time for litigation to play may be advisable.

¹¹⁸ Even in a full-throated defense of the ECRA in Lawfare, Bob Bauer and Jack Goldsmith acknowledge that moving back the meeting of the electors is a viable alternative. Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, LAWFARE (July 24, 2022, 4:09 PM), <https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act>. The American Law Institute proposal also suggests moving back the meeting date “to ensure that States have more time to conduct recounts as needed, and so that legal challenges can be resolved.” A.L.I., PRINCIPLES FOR ECA REFORM 3 (April 4, 2022), https://www.ali.org/media/filer_public/31/27/312774df-88a5-4cbe-b6b0-

2024, the Electoral College would meet on December 17 according to the current draft¹¹⁹—42 days after Election Day, and 20 days before January 6th. Pushing this date to December 23, by way of example, would still provide two full weeks between the Electoral College vote and Congress’s official count. Alternatively, the Committee may determine that it is more prudent to push up the deadline for ascertainment to 12 days prior to the meeting of the electors or to pursue another avenue that would permit litigation to be adjudicated more fully.

Third, with respect to the Supreme Court’s review of the three-judge court’s determination, the Committee should consider whether a discretionary review process is preferable to mandatory direct appeal. This could avoid the Supreme Court giving unnecessary credit to frivolous claims by allowing them to take up the Court’s limited, valuable time.

Finally, we suggest that Congress make its intent explicit that the ECRA Section 104 judicial review process not intended to supplant or supersede existing state or federal court avenues for adjudicating questions about whether the election itself was conducted in conformity with state or federal statutory or constitutional requirements.¹²⁰

As a related matter, we recommend clarifying the ECRA’s language so there is no ambiguity that Congress is conclusively bound by an ascertainment as affirmed or revised by a state court, a federal court for statutory or constitutional reasons, or the particular federal judicial review process described in the ECRA.¹²¹

ofd036cd3a95/principles_for_eca_reform.pdf.

¹¹⁹ Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 106 (2022) (providing that the electors meet on the first Tuesday following the second Wednesday in December).

¹²⁰ For conflicting views on whether the ECRA supplants avenues for state court relief, see Marc Elias, *Reforms to the Electoral Count Act Miss the Mark*, DEMOCRACY DOCKET (July 22, 2022), <https://www.democracydocket.com/news/reforms-to-the-electoral-count-act-miss-the-mark/>; Bauer & Goldsmith, *supra* note 118.

¹²¹ This appears to be both the intent and the most straightforward reading of the existing statutory language; but the fact that an experienced and respected election law practitioner has raised questions about the application of the “conclusive” concept suggests that further clarification would be helpful. For conflicting views on this provision, see Elias, *supra* note 120; Bauer & Goldsmith, *supra* note 118.

Opportunities for Further Clarifications

There are also a few key places in the ECRA where there are missed opportunities to fully clarify existing ambiguities.

First, final legislation should better define which certificates of electors the Vice President should open for counting during Congress’s joint session. The ECRA retains language from the existing ECA directing the Vice President to “open the certificates and papers purporting to be certificates of the votes of electors...”¹²² While the ECRA adds helpful language clarifying that this must be according to the procedure for ascertainment outlined in the amended ECA, some could read the phrase “purporting to be” to require the Vice President to open a certificate claiming to be authentic regardless of whether it actually went through the proper ECA-defined process. This phrase should be removed and replaced with straightforward language requiring the Vice President to open the certificates were submitted by the correct official pursuant to the amended ECA’s clarified procedures, including a final determination through the judicial process if necessary. This language would greatly constrain any ambiguity about what slate of electors the Vice President is authorized to open for counting, as the structure of the ECRA is intended to ensure that Congress receives only one slate with a plausible claim to lawfulness.

Second, final legislation should make certain that states cannot manipulate election timing based upon false allegations of election fraud or other irregularities. The ECRA replaces the ECA’s problematic language related to states having “failed to make a choice on the day prescribed by law”¹²³ with a clear directive that electors shall be appointed on Election Day “in accordance with the laws of the State enacted prior to election day” and provides a limited exemption “if the State modifies the period of voting as necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to such day...”¹²⁴

This is a substantial improvement over existing law, especially because it makes clear that the only available remedy is to “modify the period of voting”¹²⁵ as opposed to electors being “appointed on a subsequent day in such a manner as the

¹²² Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 109 (2022).

¹²³ 3 U.S.C. § 2.

¹²⁴ Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 102 (2022).

¹²⁵ *Id.*

legislature of such State may direct.”¹²⁶ Nonetheless, the new language still gives states substantial leeway to define “extraordinary and catastrophic events” as long as this is done by state law prior to the election. A hyper-partisan state legislature in thrall to false claims of voter fraud could in theory attempt to define “massive voter fraud” or “an influx of illegal votes” or “the inability to verify voting machine results” as an extraordinary or catastrophic event. The fact that “extraordinary and catastrophic” is not a clearly defined term either in the ECRA or in federal law more generally presents challenges in arguing that these allegations of election irregularities fall outside its scope. It is critical that state legislatures are prohibited from substituting their own preferred results; but they must also be prohibited from manipulating the voting period to sow doubt about an existing result and motivate partisans to attempt to achieve another result through, for example, post-Election Day voting or discriminatory voter challenges.¹²⁷

We recommend the Committee work to clarify that the exemption to choosing electors on Election Day applies only when an exogenous event—such as a natural disaster or verified cyber-attack—makes it impossible to complete voting on Election Day. For example, the Committee could define the term “extraordinary and catastrophic” in the statute; or could articulate parameters that guide how states are permitted to define these events in state law in relation to selecting electors.

Finally, we recommend the Committee work to narrow and clarify the grounds for congressional objections to electoral votes. The current ECA provides that in the face of an objection “no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified...shall be rejected.”¹²⁸ This implies that the proper grounds for objection are that a particular elector or slate has not been “lawfully certified” or that a particular vote or slate of votes has not been “regularly given”—but these terms are not defined in the statute.

On January 6, 2021, an objection to Arizona’s electoral slate was premised on this ambiguity. The written objection as read by the clerk was: “Objection to the counting of the electoral votes of the State of Arizona. We a member of the House of

¹²⁶ 3 U.S.C. § 2.

¹²⁷ Bob Bauer and Jack Goldsmith argue that “[t]he important point is that the combination of the limiting phrase “extraordinary and catastrophic,” and the limitation of the remedy to modifying the voting period, means that states cannot sweep in “fraud” and related ideas as a triggering event to alter the outcome of the vote.” Bauer & Goldsmith, *supra* note 118. Hopefully this is true, but further clarification is nonetheless helpful.

¹²⁸ 3 U.S.C. § 15.

Rep. and a U.S. Senator object to the counting of the electoral votes of the state of Arizona on the ground that they were not under all of the known circumstances regularly given.”¹²⁹ In addition to being frivolous in substance, the objection was almost certainly out-of-bounds by the terms of the ECA. The concept of votes “regularly given” was intended to address the conduct of appointed electors, not whether such electors had been lawfully appointed or certified.¹³⁰ At the base of the objection was the (false and wholly unsupported) notion that flaws in Arizona’s electoral process led to certification of the wrong electors.¹³¹ A proper objection would be that a particular elector’s vote (or potentially an entire slate’s votes) was compromised or flawed because it was counter to law in some way—such as voting for a person not eligible for the presidency or voting a certain way as a result of bribery.¹³² Nonetheless, Vice President Pence credited the objection and the respective chambers divided to consider it.

Section 109 of the ECRA retains the ECA’s basic structure of objections and similarly fails to define the terms “lawfully certified” or “regularly given.” The former is less of an issue because the amended ECA now lays out a clearer process for certification.¹³³ But final legislation should more clearly define “regularly given” or replace this language with a term that more clearly connotes that the vote of the elector herself is not compromised or legally flawed such as “cast pursuant to law.” Proposals by the American Law Institute, Protect Democracy-Campaign Legal Center-Issue One, the Cato Institute, the House Committee on Administration, and Senators Klobuchar, King, and Durbin have all suggested viable ways to narrow and clarify the scope of this objection, which this Committee should consider.¹³⁴

¹²⁹ Lisa Masacaro, Mary Clare Jalonick & Aaron Glantz, *WATCH: Republicans raise first objection in Congress to Biden win*, PBS NEWS HOUR (Jan. 6, 2021, 2:18 PM), <https://www.pbs.org/newshour/politics/watch-republicans-raise-first-objection-in-congress-to-biden-win>.

¹³⁰ Derek Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021).

¹³¹ *Id.* at 1531. The January 6th objection followed upon a series of similar objections over the past decade from members of Congress using the “regularly given” concept to lodge objections to the conduct of the underlying elections that lead to certain electors being certified. *Id.* at 1542-44.

¹³² *Id.* at 1537-540.

¹³³ Electoral Count Reform and Presidential Transition Improvement Act of 2022, S. 4573, 117th Cong. § 104 (2022).

¹³⁴ For a side-by-side summary of many of these proposals, see *Current Proposals to Update the ECA*, PROTECT DEMOCRACY, <https://protectdemocracy.org/project/electoral-count-act/#section-7> (last visited

When State Rules Should be Locked in Place

In addition, in service of the need to minimize opportunities for manipulation, we suggest the Committee give careful consideration to the question of when state rules governing the conduct of elections, the certification of results, and the ascertainment of that certification by the proper official should be locked in place.

The ECRA requires these rules be set “prior to Election Day,” which—as noted above—is an important improvement over the current ECA. This still may leave open some opportunities for manipulation, however, since in most states the election will already be under way several days or even weeks before that time through the processes of early voting and absentee balloting. The Committee should consider whether requiring states to set their rules prior to the start of early voting and absentee balloting in each particular state, or perhaps at a uniform time across the nation that precedes early voting in any place, would reduce opportunities for manipulation without negative collateral consequences.¹³⁵ Of paramount concern in making this determination should be ensuring that the requirement to finalize the rules does not impede or preclude relief for voters who prove claims of discrimination or undue burdens on voting.

B. Companion Election Administration Legislation

The Enhanced Election Security and Protection Act (EESPA) is not technically before this Committee; however, because it was crafted by the bipartisan working group as companion legislation to address challenges to our democracy we address it briefly. In short, while this legislation misses the opportunity to make sufficient

July 31, 2022). *See also* Berry & Nadeau, *supra* note 100. It is true that narrowing the proper scope of objections offers limited protection if a majority in Congress is determined to obstruct a valid Electoral College vote. It is also the case that more clearly delineating between proper and improper objections makes it more likely that the Vice President, in consultation with the parliamentarian, in her role as President of the Senate may be called upon to rule an objection improper; and that this is to some degree in tension with the imperative to clarify that the Vice President’s role is ministerial rather than substantive. (Although another view is that the ministerial nature of the Vice President’s role means that she must credit any written objection regardless of whether it is clearly improper according to the ECA.) Nonetheless, being clear about the proper scope of objections is valuable because it could reduce the chances both that a spurious objection garners the one-fifth support necessary to trigger consideration by each chamber, and that such an objection obtains majority support in both chambers. It also helps anchor public debate about objections on their proper lawful scope rather than allowing any objectors to fill in a nebulous phrase such as “lawfully given” with their preferred meaning.

¹³⁵ This could help satisfy due process and reliance considerations. *See* Pamela S. Karlan, “The Virtues of the Electoral Count Reform Act,” ELECTION LAW BLOG (August 1, 2022), <https://electionlawblog.org/?p=131097>.

progress towards fair, efficient, and secure elections, it can be meaningfully improved to meet this objective.

The most glaring shortcoming of the EESPA is that it does not include any provisions that directly address the scourge of racial discrimination in voting. As noted above, the January 6th Insurrection and the renewed drive to erect discriminatory barriers to the ballot share the same root cause: a backlash to voters of color asserting power, fueled by white supremacy, shrouded in false allegations of voter fraud. Congress cannot respond effectively to January 6th and the current threat to our democracy without also addressing voting discrimination. Black Americans and other voters of color need and deserve the protections of a fully restored and strengthened Voting Rights Act. For this reason, Congress must pass the John R. Lewis Voting Rights Advancement Act which, consistent with longstanding tradition surrounding the Voting Rights Act, attracted bipartisan support in the U.S. Senate.¹³⁶

After the U.S. Senate failed to advance the Freedom to Vote: John R. Lewis Act (which contained the bipartisan Voting Rights Advancement Act) due to a filibuster in January 2022, some members of the bipartisan working group worked diligently to identify more modest protections against voting discrimination that could garner even more widespread bipartisan support. This included an effort to clarify existing long-settled law that voters can sue directly to enforce the Voting Rights Act rather than depend entirely upon the finite resources of the U.S. Department of Justice to protect voting rights across the country.¹³⁷ However, none of these modest protections are included in the EESPA. If the Senate's complete response to January 6th and the current threat to democracy contains no voting rights protections, it would be an abdication of Congress's responsibility to enforce core constitutional protections and safeguard the republic.

Even on its own terms, however, the EESPA falls short in important ways. Two key examples are provisions aimed at protecting election workers from harassment and interference and improving the U.S. Postal Service's treatment of election mail.

¹³⁶ Press Release, Senator Lisa Murkowski, Leahy, Murkowski, Durbin and Manchin Announce Bipartisan Compromise on the John Lewis Voting Rights Advancement Act, (Nov. 2, 2021), <https://www.murkowski.senate.gov/press/release/leahy-murkowski-durbin-and-manchin-announce-bipartisan-compromise-on-the-john-lewis-voting-rights-advancement-act>.

¹³⁷ 168 CONG. REC. S3600-602 (July 21, 2022) (statement of Sen. Ben Cardin).

Protecting Election Workers

As noted above, election workers face increasing threats for simply doing their jobs, contributing to the crisis facing our democracy. Title I of the EESPA aims to protect election workers, but it misses the opportunity to do so effectively and without exacerbating existing disparities in our criminal legal system.

The sole protection offered by Title I is to increase existing criminal penalties from one to two years for threats or harassment of voters, candidates, or election workers.¹³⁸ In addition to the fact that criminal penalties are often applied in ways that disproportionately target Black Americans and other people of color,¹³⁹ the difference between one year or two years in prison is not likely to deter persons intent upon engaging in violence or intimidation. Congress would do better to provide election workers with resources to protect themselves by ensuring adequate staffing, upgrading security at election offices and providing federal security protection for state government employees targeted for harassment as needed. In addition, Congress can insist through robust oversight that the Department of Justice prioritizes using its existing authority to protect election workers.

Further, harassment is not the only threat to election workers doing their jobs. The increasing criminalization and politicization of their work also undermines effective, efficient, and unbiased election administration. Congress can partially address these challenges by requiring that any removals of local officials administering federal elections be for cause, thereby ensuring that diligent, nonpartisan election officials cannot be supplanted by partisan state legislatures.¹⁴⁰

¹³⁸ Enhanced Election Security and Protection Act, S. 4574, 117th Cong. § 102 (2021-2022).

¹³⁹ NAZGOL GHANDNOOSH, PH.D., SENT'G PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES (2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/>; SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; ELIZABETH HINTON ET. AL, VERA INST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

¹⁴⁰ See e.g., Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. § 3001(b) (2021-2022).

United States Postal Service

The 2020 elections took place amid a global pandemic that prompted record numbers of Americans to vote by mail.¹⁴¹ Forty-three percent of votes were cast by mail in 2020, compared to just 21% in 2016.¹⁴² The increase in mailed ballots elevated the U.S. Postal Service (USPS)’s role as critical election infrastructure, responsible for ensuring that vote-by-mail ballot applications, blank ballots, and voted ballots reached voters and election officials by strict (and often tight) deadlines. Yet, the USPS in the summer of 2020 instituted operational changes (notably including changes to transportation policy) that slowed delivery times and threatened to impede timely delivery of ballots in the critical weeks surrounding Election Day.¹⁴³ The NAACP—represented by LDF and Public Citizen Litigation Group—sued the USPS and secured a court order requiring it to take “extraordinary measures” to ensure timely ballot delivery in 2020,¹⁴⁴ and subsequently negotiated an historic settlement requiring USPS to maintain these or similar measures through the 2028 elections.¹⁴⁵

Title II of the EESPA, the Postal Service Election Improvement Act (PSEIA), contains some helpful provisions, such as prohibiting the USPS from making operational changes that jeopardize election mail services within 90 days of an election¹⁴⁶ and encouraging standardized ballot envelope design to encourage

¹⁴¹ ERIC MCGHEE, JENNIFER PALUCH & MINDY ROMERO, PUB. POL’Y INST. OF CALIF., VOTE-BY-MAIL AND VOTER TURNOUT IN THE PANDEMIC ELECTION (2021), <https://www.ppic.org/wp-content/uploads/vote-by-mail-and-voter-turnout-in-the-pandemic-election-april-2021.pdf>.

¹⁴² Zachary Scherer, *Majority of Voters Used Nontraditional Methods to Cast Ballots in 2020*, U.S. CENSUS BUREAU (Apr. 29, 2021), <https://www.census.gov/library/stories/2021/04/what-methods-did-people-use-to-vote-in-2020-election.html#:~:text=Much%20of%20the%20surge%20in,person%20prior%20to%20Election%20Day.>

¹⁴³ Complaint for Declaratory and Injunctive Relief, *NAACP v. United States Postal Service*, Civ. Action No. 20-cv-02295 (EGS) (D.D.C. Dec. 17, 2021), <https://www.naacpldf.org/wp-content/uploads/1-Complaint.pdf>.

¹⁴⁴ *NAACP v. United States Postal Service*, No. 20-cv-2295 (EGS) 2020 WL 6441317 (D.D.C. Oct. 27, 2020).

¹⁴⁵ Stipulation of Settlement and Proposed Order, *NAACP v. United States Postal Service*, No. 20-cv-2295 (EGS) (D.D.C. Dec. 17, 2021), <https://www.citizen.org/wp-content/uploads/170-Stipulation-and-attached-sett-agmt.pdf>.

¹⁴⁶ Enhanced Election Security and Protection Act, S. 4574, 117th Cong. § 207 (2021-2022).

(although not require) states to use bar codes to facilitate better tracking of election mail.¹⁴⁷

Overall, however, the legislation misses opportunities to ensure that USPS maintains and improves election mail services over time, and that states facilitate better performance tracking by using Intelligent Mail Bar Codes or similar technology. In addition, instead of creating a private right of action to facilitate enforcement of the protections that the legislation does provide, the PSEIA does the opposite—it contains language that appears to make all of its provisions advisory rather than meaningfully binding. Specifically, Section 209, entitled “no cause of action,” states that “[n]o provision of this title shall...be construed to create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, the Postal Service, or a State, local, or Tribal government, a department, agency, entity, officer, employee, or agent thereof, or any other person.”¹⁴⁸

The U.S. Senate should strengthen the PSEIA in the following ways:

- *Create a private right of action to ensure its provisions are enforceable.* To facilitate enforcement, robust postal service reform should include a private right of action, or should amend 39 U.S.C. § 410(a) to remove USPS’s exemption from the Administrative Procedures Act.
- *Require USPS to create a separate category for election mail with the highest level of service and real-time reporting in the weeks surrounding Election Day.* This requirement will ensure that the USPS prioritizes, tracks, and reports to the public on performance related to election mail to facilitate accountability.¹⁴⁹
- *Codify USPS’s existing practice of not requiring postage on mailed ballots while delivering them in accordance with or exceeding first-class service standards.* It is the USPS’s current policy to deliver a ballot without postage and pass the cost on to the local election office.¹⁵⁰ Congress should require

¹⁴⁷ *Id.* at § 205.

¹⁴⁸ Postal Service Improvement Act, H.R. 3077, 117th Cong. § 209 (2021-2022).

¹⁴⁹ Section 201 of the Postal Service Reform Act of 2022 requires the USPS to create a dashboard to regularly report to the public its performance with respect to different mail categories, but this transparency will not extend to election mail specifically if it is not a separate category. Postal Service Reform Act, H.R. 3076, 117th Cong. § 201 (2021-2022).

¹⁵⁰ MAILING STANDARDS OF THE U.S. POSTAL SERV., DOMESTIC MAIL MANUAL §§ 703.8.3 (U.S. POSTAL SERV. 2022).

- the USPS to continue to deliver ballots without postage, and consider providing funding to enable the USPS to absorb the cost of these deliveries rather than passing it on to elections officials with tight budgets.
- *Require the USPS to maintain “extraordinary measures” to prioritize, expedite, and monitor delivery of election-related mail in the weeks surrounding Election Day.* These procedures should be at least as robust as those required of the USPS for the 2020 election as a result of the NAACP vs. USPS settlement.
 - *Provide states with the resources to facilitate effective tracking of mail pertaining to federal elections, and require them to do so.* Not all states or counties use Intelligent Mail Bar Codes or similar technology, which makes prevents comprehensive tracking of USPS election mail performance.¹⁵¹

V. THE PATH FORWARD

We are approximately three months away from critical 2022 midterm elections that will take place without the full protections of the Voting Rights Act and under district maps that courts have ruled discriminate against voters of color.¹⁵² We are approaching a presidential election at imminent risk of manipulation and sabotage. And the Supreme Court has once again injected troubling uncertainty into the voting rights and election law landscape by scheduling for review cases that challenge settled law.¹⁵³ It is this destabilizing context that requires Congress to act swiftly and expansively to safeguard and ensure the legitimacy of our elections.

First, Congress must immediately enact the strongest possible ECA reform. This Committee should build upon and strengthen the ECRA to leverage the months of bipartisan work that produced solid initial draft legislation. The Committee on House Administration should build upon its January 2022 report on ECA reform to craft a robust House companion bill that improves upon the existing ECRA but can

¹⁵¹ Chair Klobuchar’s recently introduced Election Mail Act, S.4487, 117th Cong. (2021-2022), would require states to use postal service bar codes or equivalent tracking technology.

¹⁵² *Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022) (*cert. granted before judgment sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022)); *Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022) (*cert. granted sub nom. Ardoin v. Robinson*, No. 21-1596, 2022 WL 2312580 (2022)).

¹⁵³ *Milligan*, 142 S. Ct.; *Robinson*, 2022 WL 2312580; *Harper v. Hall*, 2022-NCSC-17, 380 N.C. 317, 868 S.E.2d 499 (*cert. granted sub nom. Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (2022)).

be easily reconciled with it.¹⁵⁴ And, the Senate and House should work without delay to produce final legislation that takes the best of both chambers' work and maintains sufficient bipartisan support to overcome a filibuster in the U.S. Senate. This must all be accomplished before the Congress recesses for the 2022 election.

Second, Congress should strengthen the EESPA, and pass improved legislation. Robust protections for election workers and voters who depend upon the USPS should be prioritized and enacted. The EESPA has produced a bipartisan framework that can be strengthened in the coming weeks so that final legislation delivers for voters on the opportunity created by months of painstaking bipartisan conversations.

Finally, this Congress must also focus on addressing racial discrimination in voting. Congress's work to address the root causes of the January 6th Insurrection and the present peril for our democracy must include measures to protect voters of color from discrimination so that power is shared equitably in our increasingly diverse nation. If the U.S. Senate cannot find the will to overcome a filibuster to restore the full strength of the Voting Rights Act, certainly it can garner bipartisan support to move forward on some of the more modest measures discussed in the bipartisan working group, even if it needs to move on a separate track.

VI. CONCLUSION

Historians will study the period between 2020 and 2025 for decades to come, seeking to explain the next century of American life. They will ask the question: Did we act when we had the chance, or did we squander our last, best hope to protect the freedom to vote and save our democracy? Black Americans have played an important role in our country's history calling upon the nation to honor its highest ideals.¹⁵⁵ And, civil rights groups such as LDF have been raising alarm bells about the descent of our democracy for years.

The recent Census confirmed that the United States is growing more diverse by the day and the great question before us is whether we will embrace a truly

¹⁵⁴ MAJORITY STAFF FOR CHAIRPERSON LOFGREN, COMM. ON HOUSE ADMIN., REPORT ON THE ELECTORAL COUNT ACT OF 1887: PROPOSALS FOR REFORM (2022), https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Electoral%20Count%20Act%20Staff%20Report_.pdf.

¹⁵⁵ LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY (2009).

inclusive, multiracial multiethnic democracy or entrench a hate-filled racial hierarchy of white supremacy that has beleaguered our democracy since its inception.

Protections against voting discrimination and voter suppression leading up to and on Election Day and protections against election manipulation after Election Day are distinct but mutually reinforcing ways to prevent election sabotage. They work together to ensure that the votes and voices of all in our increasingly diverse electorate are equally heard and counted. To safeguard our republic, build the truly inclusive, multiracial multiethnic democracy this country has the potential to become, and ensure that an insurrection like that of January 6th never happens again, this Congress must act swiftly to both root out voting discrimination and prevent election manipulation. That all-important work begins with this Committee.