



A Democracy Crisis in the Making Report Update: 2022 Year-End Numbers

We have been warning of an emerging democracy crisis since early 2021. After the 2022 midterm elections, the risk of election subversion in 2024 has decreased because election deniers who ran for key statewide offices in key states lost their elections—but the risk is still real and demands vigilance.

The modern election subversion trend began in 2021 with a burst of activity. In the wake of the 2020 election, many state legislatures sought to implement a wide variety of proposals that would have increased the possibility that election outcomes would not reflect the will of the voters. In state after state, lawmakers began proposing legislation that spurned the ideals of American democracy and sought to undo decades of work to make elections reliable, professionally administered, and open to all eligible voters. In early 2021, we warned that these efforts “could make elections unworkable, render results far more difficult to finalize, and in the worst-case scenario, allow state legislatures to substitute their preferred candidates for those chosen by the voters.”¹

The state legislature-driven election subversion trend gained momentum throughout the last two years. All told, we have catalogued more than 400 legislative proposals that would enable election subversion. Over that time, the proposals have morphed and become more far-reaching and aggressive.

The first round of these legislative proposals will die out as the 2021-22 state legislative sessions draw to a close. The question now is to what extent the trend will continue and evolve. Will it abate or gain strength? Will it evolve or stagnate? The social and political fissures that have fueled the democratic turmoil of the last few years are still in place, and the intensity of the upcoming presidential election is likely to exacerbate these rifts.

¹ States United Democracy Center, Protect Democracy, & Law Forward, *A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Election Administration*, (April 22, 2021), <https://statesuniteddemocracy.org/resources/democracy-crisis-in-the-making-how-state-legislatures-are-politicizing-criminalizing-and-interfering-with-elections/>

At least two early signals are worth paying attention to. First, moves made in the Texas legislature as it prepares for its 2023 session (discussed in Part III of this memorandum) suggest that the fever has not broken. The criminalization trend, which we noted was surging this year, likely will continue. Second, with the Supreme Court set to issue a decision regarding the independent state legislature theory sometime next year, the legal underpinnings of legislature control of election administration could change dramatically. That doctrine and its implications were discussed at greater length in our August report, where we noted that the forthcoming decision in *Moore v. Harper* “could rewrite constitutional elections doctrine with an extreme legal theory, upend decades of election law, and accelerate election subversion efforts.”²

This end-of-year memorandum assesses the election subversion trend in light of the recently concluded elections and gauges the ongoing risks in several key states. It then attempts to evaluate what we have learned about how these efforts are affecting elections and provides a glimpse at the year ahead.

Part I. The Post 2022 Midterm Landscape

With the 2022 midterm elections concluded, the landscape of America's democracy crisis has shifted. In our 2021 and 2022 reports we warned that state legislatures were considering a range of proposals that would increase the chances of election subversion—that is, they aimed to increase the risk that the purported outcome of an election would not reflect the choice of the voters. That danger is still present, but its level has decreased because voters in the 2022 midterm elections largely rejected candidates for statewide office who embrace election denialism. As a result, the state-level officials who will administer elections in 2024 in key states—such as secretaries of state and governors—are less likely to seek to manipulate the results or overturn the will of the voters. In addition, several states that were at the vanguard of proposing or enacting legislation that would increase the risk of election subversion have elected new legislative majorities that reject election denialism. Together—the decreased likelihood of subversion legislation being passed and the decreased likelihood of state executive branch officials engaging in subversion even if the legislatures encourage it—these factors reduce the risk of election subversion in the 2024 election.

The threat is not gone, however. The highest risk locations are now Florida, North Carolina, and Texas. Other states, like Arizona, Michigan, Pennsylvania, and Wisconsin—which either were at a high risk for election subversion in 2024 or might have become at a high risk depending on the 2022 election results—now seem less likely to present a risk of election

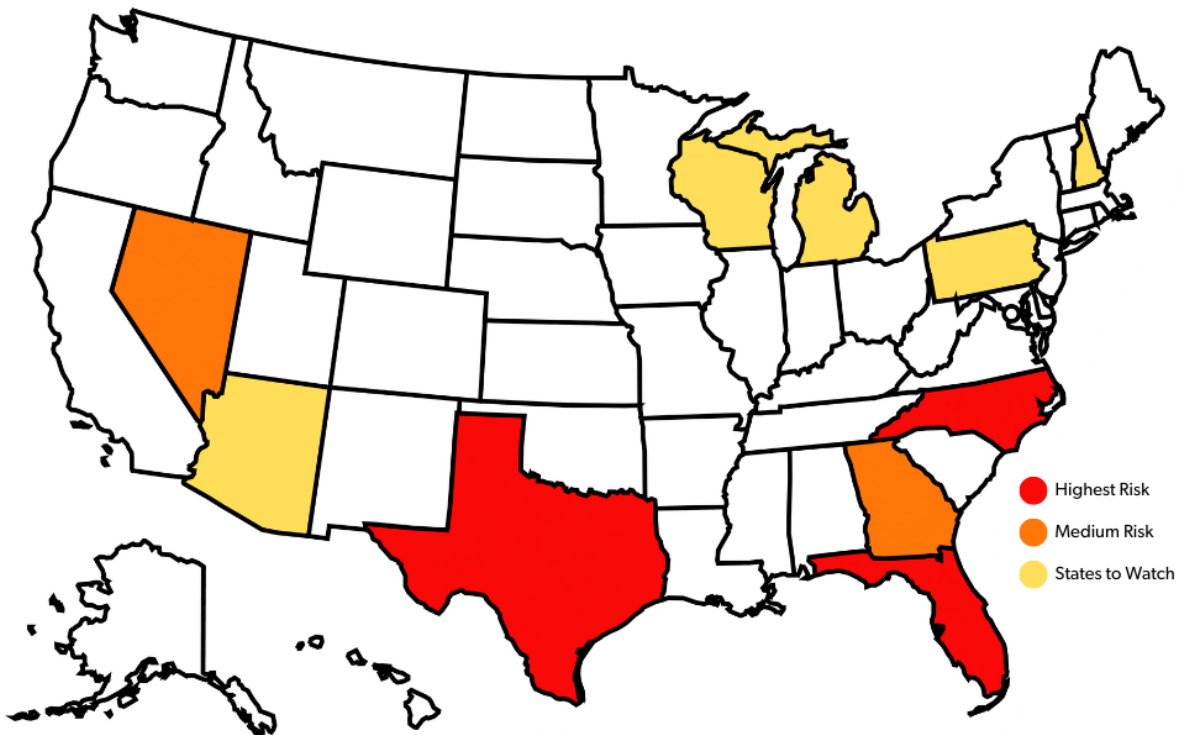
² States United Democracy Center, Protect Democracy, & Law Forward, *A Democracy Crisis in the Making: August 2022 Edition* (September 22, 2022), <https://statesuniteddemocracy.org/resources/dcitm-august-2022/>.

subversion in 2024. That risk may increase in the future; it is too early to say whether the defeat of election deniers in 2022 represents a one-time reprieve or a long-term shift away from election subversion. The public, elected officials, and the media must remain vigilant against potential election subversion, even while acknowledging that the risk has decreased for now.

Which states are now at risk for election subversion?

The risk of election subversion has shifted given the new composition of state legislative and executive branch leadership. The risk is highest in states where the executive branch leaders—governors, secretaries of state, and attorneys general—are more likely to engage in election subversion *and* where the legislature is likely to pass laws increasing the risk of election subversion.

The number of states meeting those criteria has decreased after the midterm election. Now, the states at highest risk of election subversion are Florida, North Carolina, and Texas. Nevada and Georgia are at medium risk, and the states that are at lower risk—but still worth watching closely—are Arizona, Georgia, Michigan, New Hampshire, Wisconsin, and Pennsylvania.



Highest Risk States

Florida. The risk of election subversion in Florida was high before the 2022 midterm elections, and it remains high. Florida’s legislature proposed or passed legislation in 2021 and 2022, across multiple categories that we identified as increasing the risk of election subversion.³ Both before and after the 2022 midterms, Florida has a governor, an attorney general, a secretary of state (appointed by the governor), and a legislative majority that embrace election denialism. The risk of subversion in the state in 2024 will be especially acute if the presidential election is closely contested. Regardless of whether election subversion in Florida would affect the outcome of the presidential election, it could affect other statewide and local races.

North Carolina. The risk of election subversion in North Carolina has increased since the 2022 elections. Both before and after the midterm election, the governor and attorney general are both officials who reject election denialism. The secretary of state is appointed by the governor, and elections are run by the State Board of Elections, the majority of whom reject election denialism. However, as we noted in the August update to our 2022 report, North Carolina considered five bills that would increase the risk of election subversion during the 2022 legislative session.⁴ While none of those bills became law, similar efforts might succeed in the new legislature. In the 2022 midterm elections, Republicans gained a supermajority in the state senate and are one seat short of a supermajority in the state house.⁵ It is unclear how many members of that majority would support election subversion bills, but if there is unanimity among the legislative majority (or bipartisan support for election subversion legislation), they could override the Governor’s veto. In addition, the composition of the North Carolina Supreme Court also changed as a result of the 2022

³ These categories are: Usurping control over election results; requiring partisan or unprofessional election “audits” or reviews; seizing power over election responsibilities; creating unworkable burdens in election administration; and imposing disproportionate criminal or other penalties. See States United Democracy Center, Protect Democracy, & Law Forward, *A Democracy Crisis in The Making: May 2022 Edition* (May 19, 2022), <https://statesuniteddemocracy.org/resources/dcitm-2022/> at 9.

⁴ *Supra* note 2 at 6.

⁵ In the last few years, a large segment of the Republican party has embraced election denialism. See FiveThirtyEight Staff, “60 Percent Of Americans Will Have An Election Denier On The Ballot This Fall,” *Fivethirtyeight.com*, November 8, 2022, <https://projects.fivethirtyeight.com/republicans-trump-election-fraud/>; Amy Gardner, “A majority of GOP nominees deny or question the 2020 election results,” *The Washington Post*, October 12, 2022, <https://www.washingtonpost.com/nation/2022/10/06/elections-deniers-midterm-elections-2022/>; Pew Research Center, “Two Years After Election Turmoil, GOP Voters Remain Skeptical on Elections, Vote Counts,” *Pewresearch.org*, October 31, 2022, <https://www.pewresearch.org/politics/2022/10/31/two-years-after-election-turmoil-gop-voters-remain-skeptical-on-elections-vote-counts/>. Nevertheless, a number of Republican legislators continue to reject election denialism or have questioned election subversion efforts. And there are, of course, some Democrats who have questioned election results or who have introduced legislation that increases the risk of election subversion. See Cathy Young, “Yes, Democrats Have Called Some Elections Illegitimate. GOP Election Denialism Is Far Worse,” *The Bulwark*, November 8, 2022, <https://www.thebulwark.com/yes-democrats-have-called-some-elections-illegitimate-gop-election-denialism-is-far-worse/>. When this report notes that Republicans have majority control of a legislature, it does so advisedly and because of the fact that membership in the party is disproportionately associated with election denialism. But as the next legislative session progresses, we will continue to evaluate whether the signal grows weaker.

election, and it is unclear how that could affect the risk of election subversion if relevant issues go before that court.

Texas. In our April 2021 report, we identified Texas as leading the charge in proposing and passing legislation that would increase the risk of election subversion. In our 2022 report, Texas was absent only because its legislature does not sit during even-numbered years. Like Florida, both before and after the 2022 midterms, Texas has a governor, an attorney general, a secretary of state, and a legislative majority that embrace election denialism.⁶ Thus, the risk of election subversion in Texas remains high.

Medium Risk States

Georgia. The risk of election subversion in Georgia remains largely unchanged after the 2022 midterm elections. The incumbent governor, attorney general, and secretary of state of Georgia were all reelected in 2022, all three of whom publicly rejected election denialism in the immediate aftermath of the 2020 election. The composition of the state legislature did not dramatically change in 2022—Republicans held majorities in both houses both before and after the election. As noted in our May 2022 report, the Georgia legislature considered four bills that would increase the risk of election subversion, and in 2021, one such bill passed. The newly elected lieutenant governor of Georgia is a vocal election denier and will hold power as the president of the state senate, thus increasing the risk of election subversion legislation passing. Moreover, now that Georgia’s SB 202—which gives the legislature more control over local election officials—has been in place since 2021, there is further risk that the legislature could increase the risk of election subversion through local election officials. Thus, the risk of legislature-led election subversion in Georgia is still significant, although it is blunted by a governor and secretary of state who reject election denialism.

Nevada. The risk of election subversion in Nevada remains similar after the 2022 elections as before. Importantly, the risk did not increase. In 2021, the Nevada legislature considered a constitutional amendment that would have dramatically increased the risk of election subversion by giving certification authority to the legislature, but it did not pass. The legislature did not sit in 2022.⁷ Despite this extreme proposal, a state legislative majority has rejected election denialism before and after the 2022 midterm election. The governor, attorney general, and secretary of state also all reject election denialism (both the

⁶ In 2021, Texas proposed the highest number of election subversion bills of any state. See *A Democracy Crisis in The Making: May 2022 Edition*, at 10. As of publication, Texas also continues to have a legislature-led partisan “audit” of the 2020 election, which at each stage has found no evidence of widespread election problems.

⁷ See States United Democracy Center, Protect Democracy, & Law Forward, *A Democracy Crisis in the Making: How State Legislatures are Politicizing, Criminalizing, and Interfering with Elections*: June 2021 Edition, (June 10, 2021), <https://statesuniteddemocracy.org/resources/democracy-crisis-in-the-making-how-state-legislatures-are-politicizing-criminalizing-and-interfering-with-elections/>, at 8, 9 (Assemb. J. Res. 13, 81st Leg., 2021 Reg. Sess. (Nev. 2021)).

governorship and the secretary post were won by opposing parties, both by candidates who reject election denialism).

The main risk of election subversion in 2024 in Nevada comes from county-level election officials who could engage in election subversion, which could in turn interfere with the statewide process of certifying election results. In fact, during the 2022 midterm, Nye County officials—motivated by conspiracy theories that falsely link voting machines to fraud—insisted on hand-counting its 20,000 ballots, which would have caused a delay that interfered with certification and went against the state’s official tabulation procedure. The county ultimately relented.⁸ However, because the relevant statewide officials all reject election denialism, they likely could prevent a local subversion effort from becoming a statewide crisis.

Other States to Watch

The five key states in this category—Arizona, Michigan, New Hampshire, Pennsylvania, and Wisconsin—have these key features in common: (1) because election deniers were on the ballot, the 2022 midterm election determined whether there would be a high risk of election subversion in 2024; (2) the legislature had previously considered multiple election subversion proposals; and (3) the states are likely to be key states in the 2024 presidential election such that state-level election subversion could create a national crisis. In all five of these states, the election deniers that ran for statewide office lost. As a result, all five states are now at lower risk of subversion, although still worth keeping a close eye on.

Arizona. The risk of election subversion in Arizona has declined after the 2022 midterm election. While most of Arizona’s executive branch officials resisted efforts to subvert the 2020 election, the Arizona state legislature was the most aggressive in the country in spreading disinformation about that election, introducing legislation that would increase the risk of election subversion and would set the stage for election subversion in 2024.⁹ The 2022 midterm election in Arizona pitted election deniers against candidates who reject election denialism in races for governor, secretary of state, and attorney general. All three election denier candidates lost. As a result, the risk of election subversion by direct action in the executive branch in Arizona has not increased.

It is possible, however, that the state legislature will continue to lead in promoting election denial legislation. Republicans won slim majorities in both houses of the legislature, and while it is unclear how many members of that majority would support election subversion

⁸ Brett Forrest, “Nye County ballot hand-count won’t make Thursday deadline,” *3News*, November 16, 2022, <https://news3lv.com/news/election/nye-county-ballot-hand-count-likely-wont-make-thursday-deadline-mark-kampf-southern-nevada-aclu-supreme-court-election-midterms-ballots>.

⁹ *Supra* note 3 at 10 (noting that Arizona and Wisconsin have been “at the vanguard” of the trend of election subversion in 2022).

bills, if there is any bipartisan support for election subversion legislation, more such bills might pass. However, because the new governor is likely to veto election subversion legislation, the risk of legislative subversion has increased only slightly. An additional risk of election subversion in Arizona comes from local election officials who might interfere with certification. For example, in the 2022 midterm elections, a majority of the Cochise County Board of Supervisors refused to certify until ordered to do so by a court. However, because all three relevant statewide officials reject election denialism, it is unlikely that individual counties will create a statewide crisis because officials can likely force them to follow their legal obligations.

Michigan. The risk of election subversion in Michigan has declined following the 2022 elections. During the 2020 elections, officials who rejected election denialism held the offices of governor, attorney general, and secretary of state, and they were able to prevent election subversion efforts that occurred in specific counties from affecting the statewide process of certification.¹⁰ As in Arizona, all three executive branch races were between election deniers and candidates who rejected election denialism, and all three election deniers lost. As we noted in our 2022 reports, the Michigan legislature considered 12 election subversion bills in 2022 (none passed). Although the risk of those bills becoming law was always relatively low because the governor could veto them, after the 2022 midterm elections that risk is slightly lower, because Democrats who reject election denialism hold one-vote majorities in both houses of the legislature. However, if there is bipartisan support for any election subversion proposals, they could pass the legislature.

New Hampshire. The risk of election subversion in New Hampshire remains similar after the 2022 midterm election as before: lower than other states, but still at risk. As we noted in our May 2022 report, the New Hampshire legislature considered (but did not pass) eight bills that would have increased the risk of election subversion.¹¹ The governor of New Hampshire was re-elected in the 2022 midterm election; the governor appoints the attorney general, and the legislature appoints the secretary of state.¹² All three officials have rejected election denialism, although the governor has endorsed some candidates for other offices who are election deniers.¹³ As of the publication of this memorandum, the makeup of the state house and state senate is similar to that before the election. However, given that the current secretary of state is not an election denier, there is no reason to believe that the legislature

¹⁰ Colin Dwyer, "Michigan's Wayne County Certifies Election Results After Brief GOP Refusal," *National Public Radio*, November 18, 2020, <https://www.npr.org/sections/live-updates-2020-election-results/2020/11/18/936120411/michigans-wayne-county-certifies-election-results-after-brief-gop-refusal>.

¹¹ *Supra* note 3 at 4, 6, 43.

¹² New Hampshire Department of State, *About*, <https://sos.nh.gov/about/#:~:text=About%20the%20Office.deputy%20appointed%20by%20the%20secretary>.

¹³ William Saletan, "Even the Sane Republicans Are Embracing Election Deniers," *The Bulwark*, November 1, 2022, <https://www.thebulwark.com/even-the-sane-republicans-are-embracing-election-deniers/>.

will appoint a more extreme candidate going forward. Thus, the risk of election subversion in New Hampshire is low.

Pennsylvania. The risk of election subversion in Pennsylvania has decreased slightly after the 2022 midterm election, but it is still a state worth watching closely. Importantly, the risk did not increase due to the midterm election. Both before and after the midterm election, the governor is an official who rejects election denialism—and the governor-elect defeated a candidate who made election denialism the centerpiece of his campaign. The governor-elect may appoint his replacement as attorney general (an office that would otherwise be elected), as well as appoint the secretary of state. As a result, all three executive branch officials overseeing the 2024 election will be officials who reject election denialism.

As we noted in our August update, the Pennsylvania legislature considered 16 proposals that would increase the risk of election subversion and passed two such proposals.¹⁴ Prior to the 2022 midterm election, Republicans held majorities in both the state house and senate and used that majority to promote election subversion proposals. After the election, Republicans hold the majority in the state senate but not the state house—although, because of races to fill newly vacant seats, there will be a several-month period in 2023 when the people who supported election subversion measures will still hold a majority in the state house as well.¹⁵ It is not clear what percentage of the Republican majority would support election subversion legislation, but given the ultimate change in power in the state house, the risk of election subversion legislation passing the state legislature has decreased.

There also continues to be the risk in Pennsylvania—as in Arizona and Wisconsin—that local election officials could engage in election subversion by refusing to certify the results in specific counties, or through other means, as several counties threatened to do in 2022. Because the officials responsible for election administration all reject election denialism, it is likely that they could prevent such an event from becoming a statewide crisis.

Wisconsin. The risk of election subversion in Wisconsin is similar after the 2022 midterm election as it was before: lower than some other states, but still a risk. Importantly, the risk did not increase due to the midterm election. The governor, attorney general, and secretary of state, all of whom reject election denialism, were re-elected in the 2022 midterm election. The governor defeated an election denier who had refused to commit in advance to

¹⁴ *Supra* note 2 at 6.

¹⁵ Marshall Keely, “Pa. House vacancies leave 2023 power, leadership in question,” *Fox43*, December 7, 2022, <https://www.fox43.com/article/news/politics/pa-house-vacancies-leave-2023-power-leadership-in-question-pennsylvania/521-436deee6-768a-4e82-a3e1-a8072138dcc1>.

certifying the 2024 election results and had long refused to commit to conceding his own defeat (though he ultimately did).¹⁶

As we noted in our May 2022 report, the Wisconsin state legislature has been at the vanguard of introducing election subversion legislation, acting as a laboratory of election subversion efforts that other election deniers have emulated. Indeed, in 2022, the legislature considered 38 bills that would increase the risk of election subversion; seven were passed before being vetoed by the Governor.¹⁷ While none of those 38 bills became law, due to the governor's veto, Wisconsin has been a state to watch in order to understand how the efforts at legislative election subversion have increased and changed since 2020 and where such efforts might go in the future. This trend will likely continue and may even increase after the midterm election: the legislature now has an election subversion-friendly Republican supermajority in the senate and a majority in the assembly. It is unclear precisely how many members of that majority would support election subversion bills. Because of the governor's veto power, election subversion efforts in 2021 and 2022 were more likely to be implemented by legislative leaders through means other than legislation, such as the unprofessional "investigation" conducted at the Wisconsin Assembly Speaker's instruction, which was later dissolved and disgraced.¹⁸ That trend may continue after the midterm election. However, because of the governor's reelection, the risk of election subversion in 2024 is now lower than it might have been.

Is the risk of election subversion over?

The 2022 midterms were undoubtedly encouraging for our democracy because voters rejected many candidates who subscribed to election conspiracy theories—particularly those who sought offices with some control over election administration. While there is ample room for optimism, we cannot assume that the risk of election subversion is over for a number of reasons.

First, although the election denier candidates who ran for statewide office largely lost their races, many election deniers were elected in 2022, particularly in races for Congress and state legislatures.¹⁹ As a result, the ongoing risk of election subversion persists even if some

¹⁶ Emilie Fannon, "Tim Michels says he will accept Nov. election results after not fully committing", *CBS 58*, October 18, 2022, <https://www.cbs58.com/news/tim-michels-says-he-will-accept-nov-election-results-after-not-fully-committing>.

¹⁷ *Supra* note 2 at 6. The Senate also passed two Joint Resolutions that were a first step to constitutional amendments with potential subversive effects. However, these SJRs will need to pass the Senate again and then be approved by voters before taking effect. *Supra* note 5 at 45; Wis. Constitution Art. XII Section 1.

¹⁸ Molly Beck, "Robin Vos fires Michael Gableman, ending a 2020 election review that's cost taxpayers more than \$1 million and produced no evidence of fraud," *Milwaukee Journal Sentinel Online*, August 12, 2022, <https://www.jsonline.com/story/news/politics/2022/08/12/robin-vos-fires-michael-gableman-ending-1-million-review-2020-election/10299570002/>.

¹⁹ Jacob Rosen, Robert Legare, Aaron Navarro, "2022 midterm elections: Election deniers who won and lost," *CBS News*, November 15, 2022, <https://www.cbsnews.com/news/election-deniers-2022-midterm-elections/> ("at least 60% of the Republican candidates who raised unfounded doubts about the validity or integrity of the 2020 election results — 185 of 308 — are projected to win their midterm races so far").

of the states at the highest risk—such as Texas—are unlikely to affect the outcome of the 2024 presidential election. Election subversion at the local and statewide level is still a threat to democracy. And even in states where the 2022 midterms made election subversion less likely for 2024, the risk is still present.

Second, election subversion efforts are still being deployed in many states, even if not always from legislatures or statewide officials. There continues to be a rise in threats against election officials;²⁰ a rise in aggressive poll watchers intimidating voters and election workers;²¹ the threat of hand-counts causing chaos and delay;²² and local officials engaging in election subversion.²³ All of these threats became a reality during the 2022 midterms—they just did not lead to crises due to the dedicated work of many defenders of democracy. As we warned in our initial report, these types of threats—whether facilitated by legislation or not—can pose a risk of election subversion.

Third, voters’ prioritization of pro-democracy candidates in 2022 is not guaranteed to hold in future elections. In 2022, the election results were bolstered by more than a year of advocacy, education, and intense media focus on the threat of Election Deniers running for election oversight roles. The fact that voters rejected election denying candidates in multiple states is a gift to democracy for which the whole country should be grateful. But the threat is likely to change shape in 2024 and will require a similar effort to keep voters engaged, even as other threats to democracy take shape and draw attention elsewhere. Every election brings new opportunities and risks, and election denying candidates may gain power in the future.

Voters must continue to remain vigilant and state officials must continue to support pro-democracy efforts and reject legislation or non-legislative efforts that would increase the risk of subversion. And at the federal level, Congress should pass the bipartisan Electoral Count Act to reduce vulnerabilities in the way presidential elections are administered. The risk of an election subversion crisis in 2024 has been dramatically reduced—but we still have a potential democracy crisis in the making.

²⁰ Chelsey Cox, “‘We’re going to hang you’: DOJ cracks down on threats to election workers ahead of high-stakes midterms,” *CNBC*, October 27, 2022, <https://www.cnn.com/2022/10/27/were-going-to-hang-you-doj-cracks-down-on-threats-to-election-workers-ahead-of-high-stakes-midterms.html>.

²¹ Sasha Hupka, “Federal judge limits ballot drop box monitors’ activities in Arizona,” *AZCentral.com*, November 1, 2022, <https://www.azcentral.com/story/news/politics/elections/2022/11/01/federal-judge-arizona-limits-ballot-drop-box-monitors-activities/8241192001/>.

²² Amy Gardner, “Nevada county shows how election deniers could transform vote counting,” *The Washington Post*, October 28, 2022, <https://www.washingtonpost.com/elections/2022/10/28/election-deniers-nevada-vote-count/>.

²³ Brahm Resnik, “Cochise County board ordered to meet Thursday and certify election results,” *12News*, December 1, 2022, <https://www.12news.com/article/news/politics/elections/decision/cochise-county-fails-to-find-attorney-to-defend-itself-from-lawsuit-over-refusal-to-certify-election/75-4e21c40f-4325-4ca7-ae48-10c27a35baf5>.

Part II. What lessons can be learned from what election subversion bills passed or failed in 2022?

As voters went to the polls on November 8, 2022, they did so knowing about the election denial movement and legislative efforts to give legal effect to that movement.

All told, in 2022, 244 bills were introduced in 33 states that would interfere with election administration—and 24 of those bills became law (or were adopted) across 17 states.²⁴ All told, from 2021 through 2022, 26 states enacted 56 laws that we evaluate as increasing the risk of election subversion. Those laws fall into the latter four of the five major types of legislative trends that we consider to increase the risk of election subversion. They either: (1) seek to usurp control over election results; (2) require partisan or unprofessional election “audits” or reviews; (3) seize power over election responsibilities; (4) create unworkable burdens in election administration; or (5) impose disproportionate criminal or other penalties.²⁵

Although it is too early for a thorough and definitive analysis of how recent state-level legislation affected the 2022 midterms, some lessons are clear.

²⁴ This is the same number of bills that we reported in our August update to this report. Most legislatures had adjourned by late summer, and those few that remained in session did not introduce or adopt major changes to election law in the three months before November 8.

To quantify the number of legislative proposals that increase the risk of election subversion, we relied on the Voting Rights Lab database and supplemented it with our independent research. The States United Democracy Center, Protect Democracy, and Law Forward worked together to analyze each proposal to determine whether it would—if adopted—materially increase the risk of election subversion, and to filter out those that we concluded did not meet that criterion. See Voting Rights Lab, State Voting Rights Tracker, <https://tracker.votingrightslab.org>.

Both the Voting Rights Lab and the Brennan Center for Justice also have identified and chronicled this trend, and there is substantial overlap between their findings and ours.

²⁵ For a thorough discussion of our descriptions of these types of efforts, see, *A Democracy Crisis in the Making: May 2022 Edition*, *supra* note 3 at 8-9.

Types of Election Subversion Measures Enacted or Adopted
2021-2022

State	Unprofessional Audits	Seizing Responsibility	Creating Burdens	Imposing Penalties
Alabama			x	x
Arizona	x		x	x
Arkansas			x	x
Florida		x	x	x
Georgia	x	x	x	x
Idaho			x	
Indiana			x	x
Iowa			x	x
Kansas		x	x	x
Kentucky		x	x	x
Mississippi			x	
Missouri			x	
Montana		x		
Nevada			x	
North Dakota			x	x
Ohio				x
Oklahoma			x	x
Pennsylvania*	x		x	
South Carolina		x	x	
South Dakota			x	
Tennessee		x	x	x
Texas		x	x	x
Utah			x	
Virginia			x	
West Virginia			x	
Wisconsin*		x	x	

*Some measures adopted by the legislature without presentation to the governor.

New laws increased the risk of election subversion in some jurisdictions, even if the worst-case scenarios did not come to pass. For example, in Texas, this was the first major election under SB 1, which the governor signed on September 7, 2021, and which has largely gone into effect despite a series of court challenges. SB 1 has had sweeping effects on election administration, including requiring paper ballots and new voting machines, imposing misdemeanor penalties for failure to provide election supplies, and tightening vote-by-mail rules. As we predicted, this led to disorder at some polling places in Harris County, Texas’s most populous county, in 2022. Some sites ran out of paper ballots or experienced voting machine failures. Hundreds of voters were turned away from the polls. The state is now investigating what went wrong, including possible criminal charges against election workers (under the new strict criminal statutes). Some experienced poll workers are reportedly no longer interested in returning to their posts in future elections.²⁶

This is a perfect illustration of the dangers of creating unworkable burdens in election administration and imposing criminal penalties on election workers, both of which create roadblocks to successful election administration.

²⁶ See Molly Hennessy-Fiske, “Texas investigating voting difficulties in Houston’s Harris County,” *Washington Post*, November 16, 2022, <https://www.washingtonpost.com/politics/2022/11/16/texas-harris-county-voting-problems/>; see also Alexa Ura, “Gov. Greg Abbott signs Texas voting bill into law, overcoming Democratic quorum breaks,” *Texas Tribune*, September 7, 2021, <https://www.texastribune.org/2021/09/01/texas-voting-bill-greg-abbott/>.

In Wisconsin, on the other hand, the relatively smooth election suggests the benefits of *preventing* legislative interference in election administration. None of the legislature's numerous proposed election subversion bills became law, because the governor vetoed them. After weeks of apprehension over potentially disruptive election observers and vocal conspiracy theorists, the election ran smoothly, with only minor hiccups.²⁷ All the losing candidates have conceded their races, including an election denier gubernatorial candidate who had not previously confirmed that he would do so.²⁸

In some states, the full impact of harmful legislation is less clear. In Georgia, voters and election officials appear to have largely overcome the election administration challenges created by SB 202, but Fulton County election administrators are still waiting to find out if the state will take over administering their elections based on a performance review of the midterms.²⁹ Overall, the consensus is that the November election went smoothly (though mail-in voting was dramatically lower under new restrictions),³⁰ but a five-member state board has been monitoring Fulton County's elections via state investigators and election observers from the nonprofit Carter Center. As we discussed in an earlier report, lawmakers have used SB 202 to target Democratic-leaning Fulton County, which has many voters of color, as well as some rural counties with significant Black populations.³¹ If the board concludes that Fulton County has failed to properly administer its elections, under SB 202, state-level officials would seize control of election administration. If the 2024 election is close, interference from anti-democratic state-level actors could impact how the votes are counted in Fulton County, which could affect the overall statewide results.

The 2024 presidential election may face additional unique anti-democratic challenges. Some states previously considered bills that would affect how a state chooses its presidential electors, and while those measures have so far failed, there is still time before 2024 for fresh attempts. Also, policies that increase the risk of election subversion that were enacted in 2022 are still the law, even if they did not lead to a crisis during the

²⁷ Genevieve Redsten, "Election officials braced themselves. But in the end, voting in Wisconsin was smooth," *Milwaukee Journal Sentinel*, November 11, 2022, <https://www.jsonline.com/story/news/politics/elections/2022/11/11/wisconsin-2022-midterm-election-voting-process-went-smoothly/69635051007/>.

²⁸ See Henry Redman, "Candidates concede, voting smooth in first major election since Trump conspiracies," *Wisconsin Examiner*, November 9, 2022, <https://wisconsinexaminer.com/2022/11/09/candidates-concede-voting-smooth-in-first-major-election-since-trump-conspiracies/>; see also Sophie Carson, "Republican Amy Loudenbeck concedes to Doug La Follette in Secretary of State Race," *Milwaukee Journal Sentinel*, November 21, 2022, <https://www.jsonline.com/story/news/politics/2022/11/21/wisconsin-secretary-of-state-amy-loudenbeck-concedes-to-la-follette/69668140007/>.

²⁹ Brentin Mock, "Why Georgia is Keeping Such a Close Watch on Atlanta's Elections," *Bloomberg CityLab*, November 7, 2022, <https://www.bloomberg.com/news/articles/2022-11-07/why-georgia-is-watching-fulton-county-for-election-irregularities>.

³⁰ See Stephen Fowler, "Georgia election officials breathe a sigh of relief after uneventful voting," *NPR* November 21, 2022, <https://www.npr.org/2022/11/21/1137746823/georgia-election-officials-midterms-voting>; see also Charles M. Blow, "Georgia Voters Defy Efforts to Suppress Them," *The New York Times*, November 30, 2022, <https://www.nytimes.com/2022/11/30/opinion/georgia-runoff-voter-suppression.html>; See also Nick Corasaniti, "Turnout Was Strong in Georgia, but Mail Voting Plummets After New Law," *The New York Times*, December 1, 2022, <https://www.nytimes.com/2022/12/01/us/politics/georgia-voting-election-law-midterms.html>.

³¹*Supra* note 3 at 18.

midterm election. With each election there is a risk that anti-democratic actors will use them to derail the voting, vote-counting, and certification processes. In a presidential election year, many politicians will face increased pressure to manipulate election processes and results.

Part III. Early Legislative Trends for 2023

In 2023, all 50 state legislatures embark upon new legislative sessions, many of which will include bills and budget proposals impacting election administration and voting procedures across the country. Some states have begun their pre-filing period, where legislators can submit bills for introduction before the official start of the legislative session.

While pre-filed bills are in a nascent stage and only in print in a handful of states so far, they preview the issues and topics that will form the legislative debate once sessions commence. One state that already has shown its hand via the pre-file system is Texas. Texas has introduced several bills to criminalize the conduct of election officials and voters, as well as increase criminal penalties for election-related offenses: H.B. 239 (criminalizing voters' conduct in primaries); H.B. 39 (raising the penalty for election fraud); H.B. 397, H.B. 52, S.B. 166, and H.B. 222 (raising the penalty for illegal voting). In Texas, H.B. 549 and S.B. 220 would establish a new network of state election marshals, with the top marshal appointed by the secretary of state (who is appointed by the governor). Marshals would be empowered to investigate claims of election law violations, seek court intervention, and file criminal charges where applicable. H.B. 678 would increase the involvement of the state attorney general's office in the local prosecution of election law violations, while shifting oversight and authority away from the secretary of state. H.B. 125 would limit local prosecutorial discretion with regard to election crimes. In addition to the new set of subversion by criminalization, H.B. 294 could increase administrative and logistical barriers for election officials and voters by paving a path where Texas would have to create a separate voter registration process for federal versus state and local elections.

Collectively, election officials across the country administered a safe and secure 2022 election midterm cycle that saw robust voter participation. However, as demonstrated by past legislative sessions, many introduced bills introduced are inspired by events that occurred during an election cycle. For example, isolated incidents with voting machines in the midterms could give rise to legislation governing the use and testing of voting machines in the future. The refusal by a small number of recalcitrant jurisdictions to certify the 2022 election results could potentially fuel legislation changing the procedures, or the state and local actors, involved in election certification. Additional states may follow the trend of establishing "election integrity units" in offices of state attorneys general that increase the number of law enforcement entities charged with enforcing election laws. Montana already

has a pre-filed bill to establish such a unit (L.C. 0974).³² The state budgeting process may also become a forum for significant movement on election issues, with the level and types of state financial investments in election administration and voting systems up for debate and negotiation.

Conclusion

The state legislature-driven election subversion trend is complex and multi-faceted. Yet, in the November 2022 elections, voters sent a simple message: they do not want politicians who attack and undermine election administration running their states' elections. It remains to be seen how state legislatures will react to that message, but it is clear that the next two years will be pivotal.

³² "Detailed Bill Information, Draft Number LC0974," 68th Montana Legislature, November 7, 2022, , [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=&P_BILL_NO=&P_BILL_DFT_NO=0974&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ02=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20231&P_BLTP_BILL_TYP_CD=&P_BILL_NO=&P_BILL_DFT_NO=0974&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ02=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=).