



**LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W**

**TESTIMONY OF EZRA D. ROSENBERG
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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

**U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON
CYBERSECURITY, INFRASTRUCTURE PROTECTION & INNOVATION
HEARING ON**

**“Securing Democracy: Protecting Against Threats to Election Infrastructure
and Voter Confidence”**

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I. Introduction

Chairwoman Clarke, Ranking Member Garbarino, and Members of the U.S. House of Representatives Committee on Homeland Security, Subcommittee on Cybersecurity, Infrastructure Protection & Innovation. My name is Ezra Rosenberg and I am the Co-Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Thank you for giving me the opportunity to testify today regarding "Securing Democracy: Protecting Against Threats to Election Infrastructure and Voter Confidence."

My testimony will focus on the second part of the equation: the threat to voter confidence, and in particular the danger of fabricated claims of lack of voter confidence in our election results being used as a pretext to suppress the right to vote of millions of voters, predominately voters of color, not to ensure that elections are secure and run with integrity. It is important for this Subcommittee to distinguish between legitimate, particularized, and supported cybersecurity concerns so as to protect against future – and, thankfully, as yet unrealized – security threats on the one hand, and blunderbuss and unsubstantiated allegations of lack of voter confidence in an otherwise secure system on the other. The former can and should lead to protections that can continue to make our election infrastructure secure. The latter have been used with increasing frequency to make it more difficult for eligible voters to cast their votes and have their votes counted. In considering these issues, we urge the Subcommittee not to conflate the two, and specifically not to allow the erection of unnecessary obstacles to voting built on the specter of false allegations of fraud and on self-fulfilling prophecies of lack of voter confidence.

I come to the views I offer today after having devoted the bulk of the last decade of my career litigating voting rights cases on behalf of voters of color for the Lawyers' Committee. The Lawyers' Committee is a national civil rights organization created at the request of President John F. Kennedy in 1963 to mobilize the private bar to confront issues of racial discrimination pro bono. In fact, I first became associated with the Lawyers' Committee when I was a partner of a large global law firm, and volunteered in 2011 to take on a voting rights case pro bono. That case was the challenge to Texas's strict photo ID law, which I will discuss in my testimony. After I retired from private practice in 2014, the Lawyers' Committee asked me to join their staff, and since I became Co-Director of the Voting Rights Project in 2015, I have supervised the filings on behalf of voters and civil rights organizations in over 100 cases dealing with voting rights, many of them with claims brought by persons of color whose ability to vote has been compromised under the guise of insuring voter confidence in election integrity.

The right to vote holds a special place in our democracy. Well over a century ago, in trying to provide an example of the essential truths of this Nation – that a person's life, liberty, or happiness, cannot be subject to arbitrariness and that ours is a government of laws not of people, the Supreme Court described the "political

franchise of voting,” as not “strictly . . . a natural right,” but “as a fundamental political right, . . . preservative of all rights.”¹

Although the right to vote is essential to all Americans, it has perhaps an even more special place and is of, if possible, even greater importance to people to whom it had been historically denied. As Dr. Martin Luther King called it, it is “Civil Right No. 1.”² Unfortunately, before the ink was dry on the ratification of the Fifteenth Amendment to the Constitution that guaranteed the right to vote to all citizens, regardless of race or color of their skin, there were those – often in positions of power – who used every means at their disposal to stop Black voters and other voters of color from voting. It took more constitutional amendments and landmark legislation such as the Voting Rights Act of 1965 (the “Act” or the “VRA”), to stop practices such as poll taxes, literacy tests, all white primaries, and similar means used to prevent voters of color from voting.

The progress gained by these laws was great. But those who wanted to stop people of color from voting have persevered. For a few decades, they were severely hampered by Section 5 of the Voting Rights Act, which prevented those jurisdictions with a documented history of racial discrimination in voting from implementing any changes in election practices without preclearance from the United States Attorney General or the United States District Court for the District of Columbia. But Section 5 was effectively gutted by the Supreme Court’s decision in *Shelby County v. Holder*.³ Additionally, while we have yet to see the full effects of the Supreme Court’s more recent decision in *Brnovich v. Democratic National Committee*,⁴ signs point to that decision’s making it unnecessarily more difficult for plaintiffs to prove that a state’s election practices result in discrimination against voters of color under Section 2 of the Voting Rights Act. (In recent testimony before the House Judiciary Committee, I discussed these court decisions at greater length.⁵)

All this is a preface to what is happening today. Literally from the second *Shelby County* was handed down, states formerly covered under Section 5 of the Voting Rights Act have used supposed lack of “voter confidence” as justification for their implementation of election practices that make it demonstrably more difficult for people – predominately people of color – to vote. First, they claim that their new

¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

² Martin Luther King, Jr., *Civil Right No. 1: The Right to Vote*, THE N.Y. TIMES MAG., Mar. 14, 1965, at 26-27, reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 183 (James M. Washington ed., 1991).

³ 570 U.S. 529 (2013).

⁴ U.S. Supreme Court no. 19-1257, decided July 1, 2021.

⁵ U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, HEARING ON “THE IMPLICATIONS OF *BRNOVICH V. DEMOCRATIC NATIONAL COMMITTEE* AND POTENTIAL LEGISLATIVE RESPONSES,” JULY 16, 2021.

practices are necessary to stop fraud – when there is no evidence of fraud. The number of actual infractions is infinitesimal and not remotely likely to change election outcomes.⁶ Indeed, the minute number of alleged fraudulent ballots is far outweighed by the thousands of voters for whom voting is made significantly more burdensome in the name of the fiction of fraud.

Aware they cannot prove fraud, those enacting such laws point to public opinion surveys which, they say, demonstrate lack of voter confidence in the system, necessitating stronger protections. But these survey results, we will show, are the result of the lies – both big and small – spun by those who would use such pretexts to justify their imposing burdens making it more difficult for certain people – predominately people of color and poorer people – to vote. This happened in Texas in the failed attempt to implement a photo ID law that made it more difficult for Black and Latinx voters to vote than for white voters to vote. And it is happening today where, spurred by the lies that the 2020 presidential election was “stolen” and bogus claims of voting machine irregularities and rogue administrators, laws have been passed in dozens of states making it more difficult for voters of color to vote. The biggest threats to voter confidence are these lies.

That every such claim of irregularities in the last presidential election was rejected by the courts is of little solace.⁷ In the legend of the boy who cried wolf, when real danger came, no one came to help him. Here, there may be legitimate concerns about the security of our election infrastructure, and Congress should be doing everything it can to guard against those dangers, where real and substantiated. It should not be led off course by the pernicious lies of the boy crying wolf. And it should not permit the so-called lack of voter confidence fostered by those lies to perpetuate discrimination against voters of color.

II. The Use of the Fraud and Voter Confidence Myths To Burden the Right To Vote

As I suggested at the outset, my experience with the Texas voter ID case provides a good example of the use of specious allegations of fraud and lack of voter confidence to justify discriminatory voting practices.

⁶ *The Myth of Voter Fraud*, THE BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud>.

⁷ Jim Rutenberg et al., *Trump’s Failed Crusade Debunks G.O.P.’s Case for Voting Restrictions: Over and Over, Courts Find No Fraud, but Efforts to Limit Rights Persist*, N.Y. TIMES, Dec. 27, 2020, <https://static01.nyt.com/images/2020/12/27/nytfrontpage/scan.pdf>.

Prior to 2011, Texas had a robust voter identification law, allowing voters to vote upon production of any one of multiple, commonly-held IDs.⁸ To the extent that the voter ID requirements were intended to prevent fraud, they seemed to be working quite well. There had been only two convictions for in-person voter impersonation fraud – the only sort of fraud a voter ID requirement addresses – out of 20 million votes cast in Texas between 2001 and 2011.⁹

Nevertheless, in 2011, the Texas legislature passed Senate Bill 14 (“SB 14”), which limited acceptable voter IDs to a handful of photo identification documents, namely a current or not expired for more than 60 days Texas drivers’ license or personal identification card issued by the Department of Public Safety, U.S. military card, U.S. passport, Texas license to carry a concealed handgun, or Texas Election Identification Certificate, or a U.S. naturalization paper with a photograph.¹⁰ In the rushed process leading up to the passage of SB 14, the proponents and drafters of SB 14 were repeatedly made aware that, if enacted, the law would have a disproportionate effect on Black and Latinx voters. Nevertheless, they rejected dozens of amendments that would have lessened the impact of the law, and passed SB 14.¹¹

SB 14 was found by a three-judge panel of the United States District Court for the District of Columbia to have a retrogressive impact on the rights of Black and Latinx voters in proceedings brought by Texas under Section 5 of the Voting Rights Act, seeking preclearance of the law.¹² While Texas’s appeal was pending, the Supreme Court issued its decision in *Shelby County* holding unconstitutional the coverage formula which defined which jurisdictions were subject to the provisions of Section 5, thus freeing Texas from the requirements of Section 5. That very same afternoon, Texas announced it would start implementing the new photo ID law, forcing the Lawyers’ Committee, representing the Texas State Conference of the NAACP and the Mexican American Legislative Caucus of the Texas House of Representatives who had successfully intervened in the Section 5 action, as well as other civil rights organizations and the Department of Justice, to file suit under Section 2 of the Voting Rights Act.

That suit was successful, and Texas was forced to change its law, with the district court ruling – and the Fifth Circuit Court of Appeals affirmance en banc – that Texas’s photo ID law discriminated against Black and Latinx voters under the effects prong of Section 2.¹³ Specifically, the plaintiffs proved that Black voters were

⁸ *Veasey v. Abbott*, 830 F.3d 216, 225 (5th Cir. 2016) (en banc).

⁹ *Id.* at 238-39.

¹⁰ *Id.* at 225.

¹¹ *Id.* at 236, 239.

¹² *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2012).

¹³ *Veasey v. Abbott*, 830 F.3d 216.

almost twice as likely as white voters, and Latinx voters almost 2 and a half times as likely as white voters, to lack the required IDs, and that Black and Latinx voters were similarly less likely than white voters to be able to obtain the required IDs.¹⁴ As a result of these findings, the court entered an interim remedial order allowing any voter who lacked the required ID to vote upon execution of a declaration of a reasonable impediment. Ultimately, the Texas legislature replaced SB 14 with SB 5, which largely tracked the interim remedial order, and the Fifth Circuit Court of Appeals ruled that this provided the plaintiffs with their full remedy.¹⁵

For present purposes, however, it is the findings of the tenuousness of the justifications provided by the proponents of SB 14 – findings that the Fifth Circuit Court of Appeals ruled were material support to a finding of discrimination intent – that are of interest. First, the court noted that “Texas has a history of justifying voter suppression efforts such as the poll tax and literacy tests with the race-neutral reason of promoting ballot integrity.”¹⁶ The court reasoned that, while the “Legislature is entitled to set whatever priorities it wishes,” and that “Ballot integrity is undoubtedly a worthy goal,” there was virtually no evidence of in-person voter fraud in Texas.¹⁷ Second, the court highlighted “that many rationales were given for a voter identification law, which shifted as they were challenged or disproven by opponents.”¹⁸ The first of these was fraud prevention; the second was that “such laws fostered public confidence in election integrity and increase voter turnout.”¹⁹ The district court found that “there was no credible evidence” to support these claim.²⁰

III. The Next Generation of False Justifications: The Attack on Democracy

While, as the Fifth Circuit Court of Appeals noted in *Veasey v. Abbott*, the use of fraud as justification for voter suppressive laws is not new, the 2020 presidential election added a new and extraordinarily dangerous twist: using spurious and unsubstantiated voter fraud allegations – often directed at voting machine technology and other election infrastructure elements – in an attempt to reverse the will of the people altogether. This reached a crescendo in the dozens of suits brought by former President Donald Trump and his allies – many of which we at the Lawyers’ Committee participated in, representing the NAACP as an intervenor or amicus curiae, as invariably these suits targeted areas of large numbers of Black voters in places such as Atlanta, Detroit, Milwaukee, and Philadelphia.

¹⁴ *Id.* at 251.

¹⁵ *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

¹⁶ 830 F.3d at 237.

¹⁷ 830 F.3d at 238-39.

¹⁸ 830 F.3d at 240-41.

¹⁹ *Veasey v. Perry*, 71 F.Supp. 3d 627, 655 (S.D. Tex. 2014), *affirmed in part and reversed in part on other grounds sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

²⁰ *Id.*

A. The 2020 Presidential Election Was Not Perfect, But It Was Secure

During the 2020 Presidential Election, we witnessed the largest voter turnout in American history. 159,633,396 voters turned out in the 2020 election, 20 million more than in any previous election. Turnout was the highest in 120 years in terms of the percentage of voting-eligible population, with 66.7 percent casting ballots. President Joseph Biden became the first U.S. presidential candidate to receive more than 80 million votes, with a final tally of 81,283,098 votes, or 51.3 percent of all votes cast for President. Former President Trump received the second highest total of any U.S. presidential candidate, trailing President Biden by a little over seven million votes.²¹

As a result of the pandemic, an unprecedented number of ballots were cast through early voting or vote-by-mail. Over 101.4 million voters in the Presidential Election cast their ballots before Election Day, nearly two-thirds of all ballots cast. Of those early votes, about 65.6 million were returned via mail-in ballots. Elections security experts lauded the 2020 Presidential Election as the “most secure in American history.”²²

That conclusion was shared by then-President Trump’s own appointees. A joint statement issued by the Department of Homeland Security’s Cybersecurity & Infrastructure Security Agency, or CISA, concluded:

The November 3rd election was the most secure in American history.... There is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised. Other security measures like pre-election testing, state certification of voting equipment, and the U.S. Election Assistance Commission’s (EAC) certification of voting equipment help to build additional confidence in the voting systems used in 2020. While we know there are many unfounded claims and opportunities for misinformation about the process of our elections, we can assure you we have the utmost confidence in the security and integrity of our elections, and you should too. When you have questions, turn to elections officials as trusted voices as they administer elections.²³

This is not to say that the 2020 election – or any election – was perfect. The Lawyers’ Committee, which helps coordinate the national, non-partisan Election Protection coalition, including the 866-OUR-VOTE hotline, received numerous

²¹ James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN REL., (Dec. 15, 2020), <https://www.cfr.org/blog/2020-election-numbers>.

²² Sara Cook, *Election infrastructure officials: 2020 election was “most secure in American history”*, CBS NEWS (Nov. 20, 2020), <https://www.cbsnews.com/live-updates/2020-election-most-secure-history-dhs/>.

²³ Joint Statement from Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees, Nov. 12, 2020, <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

reports of voters of color having trouble registering to vote, casting their ballot or having their ballot counted. A little over 54 percent of all voters who called the Election Protection Hotline and reported their race or ethnicity were voters of color. They reported several basic barriers to voting access, which disproportionately impacted voters of color:

- Restrictions or lack of information about voter registration;
- Lack of notice about the consolidation or closure of polling places;
- Purging of voter rolls in violation of the National Voter Registration Act;
- Lack of information about how to access vote-by-mail opportunities;
- Unreasonable vote-by-mail deadlines, due to mail delivery and return delays;
- Rejection of absentee ballots through misuse of signature-matching procedures;
- Restrictive voter identification laws, which failed to provide alternatives to voters lacking required information (such as those voters with nontraditional mailing addresses) or who do not have reasonable access to government offices that offer accepted forms of identification; and
- Long lines that resulted in hours long wait times due to an insufficient number of voting machines or equipment malfunctions.

We also received reports of violations of federal law, including the failure to provide language assistance in violation of Section 203 of the Voting Rights Act and the denial of assistance from a person chosen by the voter in violation of Section 208 of the Act. Many of these problems were exacerbated by overwhelmed election officials who were unprepared and under-resourced for the unprecedented levels of voter participation, particularly during a pandemic.

B. The “Big Lie” Is Not About Election Infrastructure Security

Thus, particularly in the context of the pandemic, the 2020 election was an unqualified success insofar as ensuring that cast ballots were counted accurately. Nevertheless, lawyers representing the interests of former President Trump filed suit

after suit in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin, alleging that the election was not secure, that it had been “stolen” or “rigged.” Often the allegations took the form of attacks on the election infrastructure. These allegations, made in a Michigan suit, are representative:

1. “[T]he absentee voting counts in some counties in Michigan have likely been manipulated by a computer algorithm,’ and [] at some time after the 2016 election, software was installed that programmed tabulating machines to ‘shift a percentage of absentee ballot votes from Trump to Biden.”
2. “Smartmatic and Dominion were founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election.”
3. “The several spikes cast solely for Biden could easily be produced in the Dominion system by preloading batches of blank ballots in files such as Write-Ins, then casting them all for Biden using the Override Procedure (to cast Write-In ballots) that is available to the operator of the system.”²⁴

All of these claims and other similar claims were summarily dismissed by court after court—often by judges who had been appointed by President Trump—and some of the attorneys making these claims were ultimately subjected to sanctions and disciplinary proceedings for advancing claims that were not based on facts.²⁵

Congress should ensure that electronic voting machines are both secure from interference—domestic or foreign—and provide accessible means for all voters that are fully auditable, both by election officials to ensure that the votes counted by the machines match the votes cast by the voters and by the voters themselves before they leave the polling places. But it should do so based on sound, substantiated evidence, not political posturing.

²⁴ *Timothy King, et al. v. Gretchen Whitmer, et al.*, United States District Court for the Eastern District of Michigan, case no. 2:20-cv-13134-LVP-RSW, ECF. No. 172, Aug. 25, 2021, p. 15 (internal citations omitted).

²⁵ See generally *Tracking election disputes, lawsuits, and recounts*, BALLOTPEDIA’S 2020 ELECTION HELP DESK, <https://ballotpedia.org>; Jacob Shamsian & Sonam Sheth, *Trump and his allies filed more than 40 lawsuits challenging the 2020 election results. All of them failed*, BUSINESS INSIDER (Feb. 22, 2021), <https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11>; *Post-election lawsuits related to the 2020 United States presidential election*, WIKIPEDIA <https://en.wikipedia.org> (last accessed January 17, 2022).

For example, the Lawyers' Committee was co-counsel for plaintiffs in a case dealing with cyber-security issues in Georgia. There, the court described the evidence submitted by plaintiffs as "a mountain of evidence demonstrating the burdens to the voting process and to the casting of a secure, reliable, counted ballot that some portion of voters across Georgia, including Plaintiffs, had experienced as a result of the state's continued use of voting equipment, software, hardware, election and voter databases, that were demonstrably shown to be antiquated, seriously flawed, and vulnerable to failure, breach, contamination and attack."²⁶ As a result, in April 2019, the court enjoined the use of Georgia's Direct Recording Electronic voting machines (DRE) and Global Election Management Systems (GEMS) beyond the 2019 election cycle. But nowhere in that litigation did the plaintiffs suggest that an election had ever been tampered with. Rather, the focus of the case was on the real vulnerabilities of the system and the need to take reasonable steps to protect against potential threats.

That, unfortunately, is not what the "Big Lie" is all about. It is not tethered to reality, let alone evidence.

C. The "Big Lie's" Intent and Effect is to Undermine Voter Confidence

The "Big Lie" that the 2020 presidential election was stolen has become the stock in trade of numerous politicians, including the former President, and has become a rallying call for a sector of the electorate. This is not merely a matter of partisan politics. Were it so, the Lawyers' Committee, as a non-partisan organization, would be silent. The sad fact is that the repetition of the "Big Lie" eats at the core of our democracy.

Studies have shown that disinformation campaigns such as the "Big Lie" can have a damaging impact on voters' faith in the system. After President George W. Bush won reelection, Republicans had a high level of confidence in the accuracy of the election, but this figure dropped significantly in the following decade. During that time there was a mix of wins by both parties, but also the beginning of a vigorous campaign by certain political sectors pressing unsubstantiated claims against election systems. As the November 2016 election day approached, then-presidential candidate Trump increased the volume:

"Of course there is large scale voter fraud happening on and before election day."

²⁶ *Donna Curling, et al. v. Brad Raffensperger*, U.S. District Court for the Northern District of Georgia, no. 1:2017-cv-02989, Doc. 768, filed August 7, 2020; *Curling v. Raffensperger*, 493 F.Supp. 3d 1264 (N.D.GA. 2020).

“The election is absolutely being rigged by the dishonest and distorted media pushing Crooked Hillary – but also at many polling places – SAD”.²⁷

One survey of voting age citizens at the time of the 2016 election found that allegations of election rigging changed their belief about whether fraud was likely if the fraud would hurt their political party. An author of the study concluded, “Allegations that the election is rigged reduce Americans’ support for the democratic norms that underlie the U.S. system of government.”²⁸

In a study of former President Trump’s claims of election fraud conducted by Brendan Nyhan of Dartmouth and other scholars, researchers found the claims undermined faith in elections, especially among his supporters.²⁹ Saying that confidence in elections may be a “soft target,” Dr. Nyhan commented, “It’s complicated, hard to observe, unintuitive, and relies on trust. Trust in institutions seems to be easier to destroy than to build.” Speaking of the unsubstantiated claims, he added that his major worry is the damage to “institutional legitimacy.”³⁰

Dr. Nyhan’s fear is well-founded. In 2006, the same year that we saw a strong bipartisan reauthorization of the Voting Rights Act, the United States was ranked as a “Full Democracy” by the Democracy Index. Less than two decades later, much has changed. In 2021, the United States was ranked as a “Flawed Democracy,” driven by growing efforts at the state and local levels to suppress voting and to subvert legitimate election results. As the Democracy Index’s authors explained, “public trust in the democratic process was dealt a blow by the refusal of Donald Trump and many of his supporters to accept the election result” in the 2020 elections.³¹ Just this month, an NPR/Ipsos poll found that two-thirds of all Republican respondents subscribe to the “Big Lie” that the election was stolen from former President Trump because of

²⁷ *US election 2016: Trump says election ‘rigged at polling places’*, BBC NEWS (Oct. 17, 2016), <https://www.bbc.com/news/election-us-2016-37673797>.

²⁸ Bethany Albertson, *Allegations of Fraud Weakened Voter Confidence in the 2016 Election*, THE WASH. POST (Oct. 8, 2020), *Allegations of fraud weakened voter confidence in the 2016 election. That could happen again.*

²⁹ Nicolas Berlinski *et al.*, *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, J. OF EXPERIMENTAL POL. SCI. (2021) 1–1, [The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections, \(cambridge.org\)](https://www.cambridge.org/core); David A. Graham, *The Damage of Trump’s Voter Fraud Allegations Can’t Be Undone*, THE ATLANTIC, Jun. 19, 2020, [Study: Trump’s Voter-Fraud Allegations Do Lasting Damage.](https://www.theatlantic.com/ideas/archive/2020/06/trump-voter-fraud-allegations-do-lasting-damage/)

³⁰ David A. Graham, *The Damage of Trump’s Voter Fraud Allegations Can’t Be Undone*, THE ATLANTIC (June 19, 2020), [Study: Trump’s Voter-Fraud Allegations Do Lasting Damage.](https://www.theatlantic.com/ideas/archive/2020/06/trump-voter-fraud-allegations-do-lasting-damage/)

³¹ *Global Democracy Has a Very Bad Year*, THE ECONOMIST (Feb. 2, 2021), <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>.

rampant fraud, with fewer than half saying they are willing to accept the results of the 2020 election.³²

D. The Fabricated Loss of Voter Confidence Is Used To Support the Erection of Obstacles To Voting

Worse still, misguided public sentiment of lost confidence in our election system is then used by lawmakers as justification to impose changes in election practices. Last spring, the *New York Times* studied what they called a “feedback loop” in which falsehoods shape voter attitudes and lawmakers “cite those attitudes as the basis for major changes.” The paper counted 33 states where legislators said low public confidence in election integrity was the justification for bills to restrict voting. The report noted an instance where a state legislator asserted such justifications yet was unable to point to evidence supporting the claims about flawed elections, but still claimed restrictive laws were needed because the public believed there were problems. The *Times* noted that misgivings about election integrity are not new, but the scale of the current effort involves many more bills and far reaching restrictions, and the depressed confidence has resulted from an organized disinformation campaign.³³

In 2021, 19 states enacted 34 laws making it harder to vote, especially for people of color and lower-income people.³⁴ As the Brennan Center for Justice reported in its most recent summary of pending voting legislation:

These numbers are extraordinary: state legislatures enacted far more restrictive voting laws in 2021 than in any year since the Brennan Center began tracking voting legislation in 2011. More than a third of all restrictive voting laws enacted since then were passed this year. And in a new trend this year, legislators

³² Joel Rose & Liz Baker, *Six in 10 Americans say U.S. democracy is in crisis as the “Big Lie” takes root*, NPR (Jan. 3, 2022), <https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6>.

³³ Maggie Astor, *‘A Perpetual Motion Machine’: How Disinformation Drives Voting Laws*, N.Y. TIMES (May 13, 2021), [Here's How Disinformation Drives Voting Laws](#); Isaac Stanley-Becker, *Disinformation Campaign Stokes Fears About Mail Voting*, THE WASH. POST (Aug. 20, 2020), https://www.washingtonpost.com/politics/disinformation-campaign-stokes-fears-about-mail-voting-using-lebron-james-image-and-boosted-by-trump-aligned-group/2020/08/20/fcadf382-e2e2-11ea-8181-606e603bb1c4_story.html; Rob Kuznia et al., *Stop the Steal's Massive Disinformation Campaign Connected to Roger Stone*, CNN (Nov. 14, 2020), <https://www.cnn.com/2020/11/13/business/stop-the-steal-disinformation-campaign-invs/index.html>; Jane Mayer, *The Big Money Behind the Big Lie*, THE NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie>.

³⁴ *Voting Laws Roundup: December, 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021>

introduced bills to allow partisan actors to interfere with election processes or even reject election results entirely.³⁵

Again, Georgia and Texas are illustrative.³⁶ In Georgia, state legislators responded to the record-shattering turnout of 2020 by passing omnibus legislation, known as SB 202, that restricts the right to vote at nearly every step of the process and disproportionately affects voters of color. Among its provisions, the law requires voter identification in order to request an absentee ballot and vote absentee; severely limits access to absentee ballot drop boxes; and significantly shortens the period in which voters can apply for and cast absentee ballots.³⁷ These restrictions were adopted right after the November 2020 election where voters of color used absentee ballots to an unprecedented degree, and in the cases of Black (29.4%) and Asian (40.3%) voters, at higher rates than white (25.3%) voters.³⁸

The high turn-out, particularly by voters of color, is evidently part of what prompted the new laws. After the results of the Georgia senate races in early 2021, a Gwinnett County elections official in suburban Atlanta – a county in which people of color have been a growing proportion of the electorate – argued for voter restrictions saying, “They don’t have to change all of them, but they have got to change the major parts of them so we at least have a shot at winning.”³⁹ It is no surprise, then, that SB 202 also prohibits the providing of food and drink to voters waiting in line to vote,⁴⁰ when it is well-known that in Georgia, voters of color wait to vote for considerably longer periods of time than do white voters.⁴¹

Despite the actual motivation for Georgia’s new law, throughout the debate on SB 202, its supporters attempted to justify the bill using language similar to that used by former President Trump and his allies concerning non-existent election irregularities in the 2020 Georgia Presidential vote. Within days of the election, Representative Barry Fleming, Chair of Georgia’s House Special Committee on

³⁵ *Id.*

³⁶ See *Georgia State Conference of NAACP v. Raffensperger*, N.D. GA. No. 1:21-cv-1259-JPB, filed March 28, 2021; amended May 28, 2021; *Texas State Conference of NAACP v. Greg Abbott, et al.* District Court, Harris County, 189th Judicial District, Case no. 2021-57207, filed September 7, 2021. (The Lawyers’ Committee is, as are other civil rights organizations, challenging the laws passed by Georgia and Texas described in this testimony.)

³⁷ SB 202/AP, Section 25, 26 28. <https://www.legis.ga.gov/api/legislation/document/20212022/201498>

³⁸ *Georgia State Conference of the NAACP v. Raffensperger*, First Amended Complaint, at 47.

³⁹ Michael Wines, *After Record Turnout, Republicans are Trying to Make it Harder to Vote*, N.Y. TIMES (Mar. 26, 2021), <https://www.nytimes.com/2021/01/30/us/republicans-voting-georgia-arizona.html>.

⁴⁰ SB 202/AP, Section 33, <https://www.legis.ga.gov/api/legislation/document/20212022/201498>

⁴¹ Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, GA. PUB. BROADCASTING (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

Election Integrity, publicly likened absentee ballots to the “shady part of town down near the docks” where the “chance of being shanghaied” is significant, and concluded “Expect the Georgia Legislature to address that in our next session in January.”⁴² Among other things, the preamble to SB 202 indicates that the overhaul of Georgia’s election procedures was necessary due to a significant lack of confidence in Georgia election systems, with many electors concerned about allegations of rampant voter suppression and many electors concerned about allegations of “rampant voter fraud.” The preamble also asserts the law was designed to “address the lack of elector confidence in the election system,” reduce the burden on election officials, and streamline the process of conducting elections by promoting uniformity in voting.⁴³

Although the preamble pays lip-service to concerns about voter suppression, SB 202 increases, rather than address, those concerns. Others in Georgia were somewhat more candid. Republican Lieutenant Governor, Geoff Duncan, told CNN that the law was the fallout from a 10 week misinformation campaign by the former president and his allies, including by his personal attorney, Rudy Giuliani, who “showed up in a couple of committee rooms and spent hours spreading misinformation and sowing doubt across, you know, hours of testimony.”⁴⁴

Texas passed a law, SB 1, which, among other things, empowers partisan poll watchers with virtually unfettered access in polling places, while at the same time tying the hands of election officials to stop the poll watchers from engaging in intimidating conduct. Texas has a well-documented history of voter intimidation by poll watchers that has disproportionately affected voters of color. The courts have acknowledged this pattern before. In 2014, a federal district court described this very issue: “Minorities continue to have to overcome fear and intimidation when they vote. . . . [T]here are still Anglos at the polls who demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote. Additionally, there are poll watchers who dress in law enforcement-style clothing for an intimidating effect to which voters of color are often the target.”⁴⁵

When first introduced in early March 2021, one of the predecessor bills that would become SB 1 stated that its purpose was “to exercise the legislature’s constitutional authority under Section 4, Article VI, Texas Constitution, to make all

⁴² Barry Fleming, *Republican Party wins on Election Day, and future is bright*, THE AUGUSTA CHRONICLE (Nov. 15, 2020),

<https://www.augustachronicle.com/story/opinion/columns/guest/2020/11/15/guest-column-republican-party-wins-on-election-day-and-future-is-bright/43155971/>

⁴³ SB 202/AP, Section 2, lines 68-148,

<https://www.legis.ga.gov/api/legislation/document/20212022/201498>

⁴⁴ See Sara Murray and Jason Morris, *Georgia’s GOP lieutenant governor says Giuliani’s false fraud claims helped lead to restrictive voting law*, CNN (Apr. 8, 2021),

<https://www.cnn.com/2021/04/07/politics/geoff-duncan-voter-fraud-cnntv/index.html>.

⁴⁵ *Veasey v. Perry*, 71 F. Supp. 3d 627, 636–37 (S.D. Tex. 2014), *aff’d and reversed on other grounds*, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

laws necessary to detect and punish fraud and preserve the purity of the ballot box.” Over the course of committee hearings and floor debate on the bill, its sponsor used this “purity of the ballot box” language to defend the Bill. In its final form, the bill still referenced Section 4, Article VI of the Texas Constitution, stating that its purpose was to “make all laws necessary to detect and punish fraud.” The final bill included in its first pages a series of “findings,” which stated that “fraud in elections threatens the stability of a constitutional democracy,” “reforms are needed to the election laws of this state to ensure that fraud does not undermine the public confidence in the election process,” and reforms to the election laws “are enacted solely to prevent fraud in the electoral process and ensure that all legally cast ballots are counted.”⁴⁶

Harris County, a Texas county with a large number of Black and Latinx voters was the county that made the greatest use of drop boxes in the 2020 election, and was clearly the target of SB 1’s prohibition of drop boxes.⁴⁷ But there was no evidence of even minor voting irregularities in the 2020 election in Harris County or anywhere else in Texas.⁴⁸ The Harris County Election Security Task Force issued a final report on the 2020 election, which concluded: “In this election there were nearly 1.7 million votes cast in Harris County. Despite the record turnout, the task force received approximately twenty allegations of wrongdoing that needed to be elevated to the level of a formal investigation. Despite claims, our thorough investigations found no proof of any election tampering, ballot harvesting, voter suppression, intimidation or any other type of foul play that might have impacted the legitimate cast or count of a ballot.”⁴⁹ The Texas Attorney General’s office spent 22,000 staff hours in 2020 investigating voter fraud—more than double the hours spent prosecuting voter fraud cases in 2018.⁵⁰ These efforts resulted in 16 minor findings where voters had listed the wrong address on their voter registration card, most of which dated back to the 2018 election. None of these cases resulted in jail time.⁵¹

⁴⁶ Tex. Elec. Code Section 1.0015 Legislative Intent; Section 1.02 Purpose; Section 1.02, Findings, Senate Bill 1, 87th Tex. Legis., signed into law Sept. 9, 2021 (effective Dec. 2, 2021).

⁴⁷ Jen Kirby, *The Battle Over a Texas Order Limiting Ballot Drop-off Locations, Explained*, VOX (Oct. 13, 2020), <https://www.vox.com/2020/10/10/21506522/texas-drop-off-ballot-locations-abbott-harris-county>.

⁴⁸ Patrick Svitek, *Harris County Elections Were Fair and Secure, Task Force Finds*, THE TEX. TRIBUNE (Dec. 18, 2020), <https://www.texastribune.org/2020/12/18/harris-county-elections-secure/>.

⁴⁹ *Id.*

⁵⁰ Daily Kos Staff, *Texas Spent Another 22,000 Hours Hunting for "Election Fraud" and Didn't Find a Damn Thing*, THE DAILY KOS (June 2, 2021) <https://www.dailykos.com/stories/2021/6/2/2033306/-Texas-spent-another-22-000-hours-hunting-for-election-fraud-and-didn-t-find-a-damn-thing>.

⁵¹ Taylor Goldstein & Austin Bureau, *Ken Paxton's Beefed-Up 2020 Voter Fraud Closed 16 Minor Cases All in Harris County*, HOUS. CHRONICLE (Dec. 21, 2020), <https://www.houstonchronicle.com/politics/texas/article/Ken-Paxton-s-beefed-up-2020-voter-fraud-unit-15820210.php>.

It is difficult to overstate the nature of the new bills and laws proliferating in the states. Not only do these laws make it more difficult for voters to vote – whether early, by mail, or in-person – but even more ominously, the new wave of bills and proposals is part of a more comprehensive attack on elections, aimed at facilitating the overriding of the actual votes of the electorate.⁵² A group of scholars observed that an effort is underway to change state election rules to “entrench minority rule.” They concluded, “This is no ordinary moment in the course of our democracy. It is a moment of great peril and risk.”⁵³ Against the backdrop of January 6, 2021, these statements are not hyperbolic.

IV. Conclusion

All this is not to say that changes in election laws are not necessary or that Congress should be complacent about the security of election infrastructure. Far from it. The attack on voting rights is a key to the larger crisis of American democracy. The attack threatens to transform elections into an instrument for a faction seeking to monopolize power and exclude others, rather than a means for expressing “the consent of the governed” as a basis for building consensus to promote the good for everyone. As the letter from the scholars observed, “Defenders of democracy in America still have a slim window of opportunity to act. But time is ticking away, and midnight is approaching.”⁵⁴ Congress must reassert its historic role to support free and fair elections and preserve democracy in a moment of peril.

First, Congress must pass the John Lewis Voting Rights Advancement Act (JLVRAA) to restore the strength of the VRA to prevent racial discrimination. Second, Congress must enact the Freedom to Vote Act (FTVA) to establish uniform minimum standards across the states for early voting, same day registration, voting by mail, fair redistricting and other essential elements of elections.

The JLVRAA responds to the Supreme Court decisions weakening the VRA, updating the preclearance formula to cover states and localities with a recent record of discrimination, and clarifying the grounds they can use to justify their election laws when challenged. Further, the standards established by the FTVA are common sense rules prevalent in many states, where there was often bipartisan support.

As Congress proceeds, however, it is important to separate frivolous and fanciful fabrications—intended to inflame passions, shake voter confidence, justify voter suppression laws, and ultimately and perhaps critically injure our democracy—

⁵² Will Wilder et al., *The Election Sabotage Scheme and How Congress Can Stop It*, BRENNAN CTR. FOR JUST. (Nov. 8, 2021), [2021_11_ElectionSabotage \(1\).pdf](#).

⁵³ Statement in Support of the Freedom to Vote Act, Nov. 2021, [Democracy letter - November 2021 - DocumentCloud](#).

⁵⁴ *Id.*

from evidence-based concerns addressed not only to election security, but also to ensuring that voting is easier and more accessible for all Americans.