



**TESTIMONY OF
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**HEARING ON
ASSESSING THE ELECTION “AUDIT” IN ARIZONA AND
THREATS TO AMERICAN DEMOCRACY**

**THE COMMITTEE ON OVERSIGHT AND REFORM
U.S. HOUSE OF REPRESENTATIVES**

OCTOBER 7, 2021

Chairwoman Maloney, Ranking Member Comer, and members of the Committee:

Thank you for the opportunity to discuss the Arizona Senate’s sham partisan review and the associated movement to sabotage our elections.¹ The Brennan Center for Justice—a nonpartisan law and policy institute that focuses on democracy and justice—appreciates the opportunity to report on the role these partisan reviews play in the ongoing threat to our democracy. In the last year, we have seen a variety of techniques employed to undermine the will of voters expressed through free and fair elections: the flagrant violence of January 6th,² the behind-the-scenes phone calls pressuring Department of Justice personnel³ as well as state and local officials,⁴ an alleged secret memo advocating for a coup,⁵ and violent threats against election officials and workers.⁶ None of these techniques succeeded in overturning the 2020 election, but willfully ignorant partisan reviews are serving up innuendo and baseless suspicion, ready for deployment by superspreaders of lies, and nurturing systematic efforts at election sabotage in the future.⁷ With primary elections in 2022 around the corner, followed by a presidential election in 2024, the dangers to democracy loom large.

At the Brennan Center, I focus on election security, and I frequently engage with state and local election officials to advocate for and assist with the implementation of election security and resiliency measures. I have coauthored multiple reports on strengthening our election infrastructure, including a report on the state of election vendor oversight and multiple reports on best practices for election resiliency against cyberattacks and technical failures. Most recently, I have coauthored two reports that I will discuss today, which address the ongoing election

¹ The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country’s system of democracy and justice. I am a senior counsel in the Brennan Center’s Democracy Program. My testimony does not purport to convey the views, if any, of the New York University School of Law.

² Mary Clare Jalonick, “‘This is How I’m Going to Die’: Officers Tell Jan. 6 Stories,” Associated Press, July 27, 2021, <https://apnews.com/article/jan-6-capitol-riot-hearing-aquilino-gonell-michael-fanone-96fd6e07e1d2700417575880df2fde69>.

³ Katie Benner, “Trump Pressed Justice Dept. to Declare Election Results Corrupt, Notes Show,” *New York Times*, last updated September 21, 2021, <https://www.nytimes.com/2021/07/30/us/politics/trump-justice-department-election.html>.

⁴ Michael D. Shear and Stephanie Saul, “Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election,” *New York Times*, last updated May 26, 2021, <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html>; and Associated Press, “Records Show Pressure by Trump, Allies on Arizona Officials,” July 3, 2021, <https://apnews.com/article/joe-biden-arizona-election-2020-government-and-politics-ea625760283abb4c0cd3971dde91e76d>.

⁵ Jamie Gangel and Jeremy Herb, “Memo Shows Trump Lawyer’s Six-Step Plan for Pence to Overturn the Election,” CNN, September 21, 2021, <https://www.cnn.com/2021/09/20/politics/trump-pence-election-memo/index.html>.

⁶ Linda So and Jason Szep, “U.S. Election Workers Get Little Help from Law Enforcement as Terror Threats Mount,” Reuters, September 8, 2021, <https://www.reuters.com/investigates/special-report/usa-election-threats-law-enforcement/>.

⁷ Jonathan Bydlak et al., *Partisan Election Review Efforts in Five States*, Brennan Center for Justice, July 8, 2021, 16, <https://www.brennancenter.org/sites/default/files/2021-07/Partisan%20Election%20Review%20Efforts%20Across%20the%20United%20States%20in%202021%20-%2007.08.21.pdf>.

disinformation campaign that is threatening the security of our elections and the people who administer them.⁸

I hope to make three points in my testimony:

First, after more than nine months⁹ and millions of dollars spent,¹⁰ the partisan review that the Arizona Senate contracted for has given us the same baseless innuendo that purveyors of voter fraud myths have been pushing, and that real experts in election administration, data, and probability have been debunking, for years. The so-called “critical” and “high” importance findings from their report demonstrate, on their face, the incompetence and bias of the contractors the Senate chose.

Second, we cannot dismiss these foolish exploits out of hand because they are providing seed material that malevolent actors leverage as part of their disinformation campaigns, leading toward a dangerous end result: the disenfranchisement of their fellow citizens, and the sabotage of our democracy and our elections. And these disinformation campaigns are already resulting in real world harm, today: violent threats and harassment of the dedicated public servants and their staff who work tirelessly to administer our elections safely and securely so that our democracy functions and our voices are heard.¹¹

Third, many actors, including internet companies, traditional media, and federal, state, and local government, must do their part to protect our democracy from sabotage. Congress can consider ways to strengthen protections for election records and equipment, provide resources to help election officials defend against these attacks, and protect honest election officials from retaliation merely for doing their job, which is to ensure eligible voters can vote and have their votes properly counted. It can also protect election workers during the vote tabulation process, by penalizing intimidation during that process, as the Freedom to Vote Act does.¹² The post-election audit phase can be protected by requiring and providing funding for legitimate audits, such as the risk-limiting audits required in the Freedom to Vote Act.¹³ Finally, the Act creates a private right of action that would let voters bring a lawsuit if their right to vote, including having that vote

⁸ Bydlak et al., *Partisan Election Review Efforts in Five States*; and Brennan Center for Justice and Bipartisan Policy Center, *Election Officials Under Attack*, June 16, 2021, <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack>.

⁹ Karen Fann, “Statement from Senate President Fann on Subpoenas Issued to Maricopa County Board of Supervisors,” press release, December 15, 2020, <https://www.azsenaterepublicans.com/post/statement-from-senate-president-fann-on-subpoenas-issued-to-maricopa-county-board-of-supervisors>, (December 15, 2020 subpoena embedded); and Laura Gómez, “Senate Issues Subpoenas for All Ballots, Voting Machines to Audit Maricopa County Election,” *Arizona Mirror*, December 15, 2020, <https://www.azmirror.com/2020/12/15/senate-issues-subpoenas-for-all-ballots-voting-machines-to-audit-maricopa-county-election/>.

¹⁰ Nicholas Reimann, “Arizona Audit Cost Trump Supporters Nearly \$6 Million—Only To Assert Biden Won By Even More,” *Forbes*, September 24, 2021, <https://www.forbes.com/sites/nicholasreimann/2021/09/24/arizona-audit-cost-trump-supporters-nearly-6-million-only-to-assert-biden-won-by-even-more/?sh=62247dc62410>.

¹¹ So and Szep, “U.S. Election Workers Get Little Help from Law Enforcement as Terror Threats Mount.”

¹² Freedom to Vote Act, S.2747, § 3206, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/2747>.

¹³ Freedom to Vote Act, S.2747, § 4001, 117th Cong. (2021).

counted, in a federal election has been impaired.¹⁴ This last provision would provide a remedy in case a state legislature or election succumbs to any future election sabotage attempts.¹⁵ At the same time, the private sector should step up. Internet companies should promote truthful information about voters and how their votes are counted, rather than the kind of baseless allegations, falsehoods, and election sabotage that the Arizona sham review fuels.

I. THE PARTISAN REVIEW WAS FUNDAMENTALLY FLAWED FROM THE START

The Arizona Senate’s partisan election review of the November 2020 election was conceived and executed by people who were and are the subject of pressure from former President Trump and his supporters. Because they are predisposed to cast doubt on a legitimate election outcome, the shoddy job that followed came as no surprise to impartial observers who followed these events.

A. After the November Election, the Arizona Senate Was Pressured by Trump Supporters to Find Fraud

Many expected the 2020 presidential election in Arizona to be close, but when the Associated Press called the state for Biden—the first Democrat to win the state in a presidential election in more than 20 years—it came as a shock to a number of Arizona Republicans.¹⁶ In the days following the election, pro-Trump protesters gathered at the Maricopa County elections office. Well-known conspiracy theorist Alex Jones made a “surprise appearance”¹⁷ and declared through a megaphone, “Resistance is victory. You are victory! I salute you!”¹⁸ He instructed the protesters, some of whom were armed: “Everyone who can needs to go and surround the White

¹⁴ Freedom to Vote Act, S.2747, § 1704, 117th Cong. (2021).

¹⁵ Freedom to Vote Act, S.2747, § 3401-03, 117th Cong. (2021).

¹⁶ Laurie Roberts, “Biden, Kelly Wins in Arizona are a Surprise to No One ... Other than the Republican Party,” *Arizona Republic*, November 4, 2020, <https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2020/11/04/biden-mcsally-wins-arizona-shouldnt-surprise/6158059002/>; and Domenico Montanaro, “AP Explains Calling Arizona For Biden Early, Before It Got Very Close,” National Public Radio, November 19, 2020, <https://www.npr.org/2020/11/19/936739072/ap-explains-calling-arizona-for-biden-early-before-it-got-very-close>.

¹⁷ Richard Ruelas and Jen Fifield, “‘The Audit is the Great Awakening’: How QAnon Lives on in Arizona’s Election Audit,” *Arizona Republic*, June 13, 2021, <https://www.azcentral.com/story/news/politics/elections/2021/06/13/qanon-movement-clings-to-arizona-election-audit-as-next-hope/7594834002/>, (“Q has been in the background in the aftermath of Election Day, when devotees joined the crowd who rallied outside Maricopa County’s election headquarters, aiming to stop the stealing of the election they were certain was happening inside.”); For additional information about Alex Jones’ career as a conspiracy theorist, see Frontline, *United States of Conspiracy*, July 28, 2020, <https://www.pbs.org/wgbh/frontline/film/united-states-of-conspiracy/>; and Arizona’s Family Digital News Staff, “Crowd of Protesters in Phoenix Fired Up by Conspiracy Theorist Alex Jones,” Arizona’s Family, November 5, 2020, https://www.azfamily.com/news/politics/election_headquarters/crowd-of-protesters-in-phoenix-fired-up-by-conspiracy-theorist-alex-jones/article_dea394d0-1fe3-11eb-9a4b-93fa25a8ddc1.html.

¹⁸ Arizona’s Family Digital News Staff, “Crowd of Protesters in Phoenix Fired Up by Conspiracy Theorist Alex Jones.”

House and support the President.... I'm going to Washington, D.C. myself to defend the President. Come with me to Washington, D.C.”¹⁹

As the days passed and it became clear that numerous lawsuits would fail to alter the outcome of the election,²⁰ Trump supporters including Rudy Giuliani shifted their focus to the GOP-controlled legislature. While Governor Doug Ducey (R), Secretary of State Hobbs (D), Attorney General Mark Brnovich (R) and Supreme Court Chief Justice Robert Brutinel signed the official election results identifying Biden as the winner at the state certification ceremony, Republican Arizona lawmakers held a public meeting with Rudy Giuliani to discuss “concerns about the 2020 election.”²¹ Several hundred Trump supporters filled the street outside the meeting venue, and some used a microphone to “alleg[e] fraud in the election, human trafficking cover-ups by Democrats, and denounc[e] the McCain family,” as Giuliani and other Trump-affiliated participants made wild speculations that were broadcast on large screens outside the meeting room.²² Local reporters noted that “[t]he goal of the Trump team’s effort seem[ed] to be to persuade Arizona’s Legislature to intercede with the state’s election results.”²³

And in mid-December, the Republican chair of the Senate judiciary committee, with the approval of Republican Senate President Fann, took an unprecedented step and issued two subpoenas demanding Maricopa County election materials in pursuit of a “forensic audit.”²⁴ After the Republican-controlled Maricopa County Board of Supervisors voted to fight the subpoena, Giuliani and Trump pushed President Fann “to prove any fraud,” and she increased pressure on the Republican supervisors, telling Supervisor Clint Hickman that he should expect a

¹⁹ Jemima McEvoy, “Alex Jones Calls on Pro-Trump Protesters To ‘Surround the White House and Support the President’,” *Forbes*, November 6, 2020, <https://www.forbes.com/sites/jemimamcevoy/2020/11/06/alex-jones-calls-on-pro-trump-protesters-to-surround-the-white-house-and-support-the-president/?sh=577976333023>. (“Jones added that Trump will ‘not concede.’”).

²⁰ Jacques Billeaud, “8th Lawsuit Fails to Overturn Presidential Voting in Arizona,” Associated Press, December 15, 2020, <https://apnews.com/article/election-2020-joe-biden-donald-trump-arizona-lawsuits-a2b1f7771e4cf85af32a13eb9d634a83>.

²¹ Andrew Oxford, “Arizona Secretary of State Certifies Election Results with Biden Winning State’s 11 Electoral Votes,” *Arizona Republic*, November 30, 2020, <https://www.azcentral.com/story/news/politics/elections/2020/11/30/arizona-secretary-state-certify-election-results-monday/6444577002/>.

²² Ryan Randazzo and Maria Polletta, “Arizona GOP lawmakers hold meeting on election outcome with Trump lawyer Rudy Giuliani,” *Arizona Republic*, November 30, 2020, <https://www.azcentral.com/story/news/politics/elections/2020/11/30/republican-lawmakers-arizona-hold-meeting-rudy-giuliani/6468171002/>.

²³ Randazzo and Polletta, “Arizona GOP Lawmakers Hold Meeting on Election Outcome with Trump Lawyer Rudy Giuliani.”

²⁴ Their testimony also included “repeatedly sho[oting] down questions from senators based on conspiracy theories.” Jim Small and Laura Gómez, “Arizona Senate will Subpoena Maricopa County for Election Audit,” *Arizona Mirror*, December 14, 2020, <https://www.azmirror.com/2020/12/14/arizona-senate-will-subpoena-maricopa-county-for-election-audit/>; Karen Fann, “Statement from Senate President Fann on Subpoenas Issued to Maricopa County Board of Supervisors,” press release, December 15, 2020, <https://www.azsenaterepublicans.com/post/statement-from-senate-president-fann-on-subpoenas-issued-to-maricopa-county-board-of-supervisors>, December 15, 2020 subpoena embedded; Laura Gómez, “Senate Issues Subpoenas for All Ballots, Voting Machines to Audit Maricopa County Election,” *Arizona Mirror*, December 15, 2020, <https://www.azmirror.com/2020/12/15/senate-issues-subpoenas-for-all-ballots-voting-machines-to-audit-maricopa-county-election/>.

call from President Trump.²⁵ On New Year's Eve night, Hickman received a voicemail from the White House switchboard requesting that he "call back so could talk to the president," which he did not do.²⁶ A few days later, on January 3rd, Hickman opted against answering a call from a Washington, DC area code and received another voicemail from the White House switchboard, which, again, he did not return.²⁷

B. The Arizona Senate Chose Biased, Incompetent, and Secretive Contractors

Despite the fact that Maricopa County had already conducted a routine, statutorily required audit in which representatives from the three local political parties participated and found zero discrepancies,²⁸ the Arizona Senate continued to insist on its own partisan review, even after President Biden's inauguration. On February 26, the Maricopa County Superior Court ruled that the Senate could obtain access to the materials requested in the subpoena.²⁹

But the review was doomed to fail from the start because instead of conducting a process that met basic standards and would promote public confidence in the effort, the Senate chose contractors that lacked the necessary objectivity, transparency, and competence.

Generally accepted governmental auditing standards (GAGAS), also known as The Yellow Book, identify an auditor's objectivity, defined to include "independence of mind and appearance when conducting engagements, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest," as "the basis for the credibility of auditing in the government sector." These minimum standards are echoed in the Information Systems Auditing Association's IS Auditing Standards, which require members serving as auditors to "[p]erform their duties with objectivity, due diligence, and professional care, in accordance with professional standards and best practices."³⁰

²⁵ Jeremy Duda, "Maricopa County Will Fight Legislature's Election Subpoenas in Court," *Arizona Mirror*, December 18, 2020, <https://www.azmirror.com/2020/12/18/maricopa-county-will-fight-legislatures-election-subpoenas-in-court/>; and Martin Pengelly and Victoria Bekiempis, "Trump Set to Return to Public Arena as Emails Reveal How He Pushed Election Lie," *Guardian*, June 5, 2021, <https://www.theguardian.com/us-news/2021/jun/05/arizona-emails-donald-trump-rudy-giuliani-maricopa-audit>; Yvonne Wingett Sanchez, "'We Need You to Stop the Counting': Records Detail Intense Efforts by Trump Allies to Pressure Maricopa County Supervisors," *Arizona Republic*, last updated July 5, 2021, <https://www.azcentral.com/story/news/politics/elections/2021/07/02/records-show-trump-allies-kelli-ward-rudy-giuliani-pressured-county-officials-over-election-results/7813304002/>.

²⁶ Wingett Sanchez, "'We Need You to Stop the Counting': Records Detail Intense Efforts by Trump Allies to Pressure Maricopa County Supervisors."

²⁷ Sanchez, "'We Need You to Stop the Counting': Records Detail Intense Efforts by Trump Allies to Pressure Maricopa County Supervisors."

²⁸ Maricopa County, Arizona, *General Election Hand County/Audit Report*, 2021, https://azsos.gov/sites/default/files/2020_General_Maricopa_Hand_Count.pdf.

²⁹ Bob Christie, "Judge Rules Arizona Senate an Access 2020 Election Ballots," *Associated Press*, February 26, 2021, <https://apnews.com/article/joe-biden-legislature-senate-elections-arizona-phoenix-811a189f9e6416a554e4f399f3c94c4e>.

³⁰ Certified Information Systems Auditor Exam Cram 2, "ISACA IS Auditing Standards and Guidelines and Code of Professional Ethics," Macmillan Computer Pub, April 13, 2005, <https://flylib.com/books/en/2.383.1.28/1/>.

1. It was Clear All Along that the Cyber Ninjas Lacked Objectivity

Yet, on March 31, Arizona Senate President Fann announced that she had selected a cybersecurity company called Cyber Ninjas to conduct the partisan review.³¹ Cyber Ninjas CEO Doug Logan had been an active participant in Trump's Stop the Steal conspiracy movement and had authored a "document for U.S. senators who planned to object to the certification of the election results on [January] 6 promoting various disproven or baseless conspiracy theories about the election, including claims against the company whose ballot tabulation machines [his company is] tasked with inspecting."³²

Furthermore, the staff counting the ballots were not adequately screened for lack of bias. Former State Representative Anthony Kern, who was on the ballot in 2020 as a candidate and as an elector for Trump, and who was on the steps of the U.S. Capitol during the January 6 insurrection, was staffing the audit as a ballot counter, which was a violation of Cyber Ninjas' contract with the Senate to conduct the audit. The journalist who first reported this was removed from the building.³³

Other contractors that the Arizona Senate chose had a similar history of pushing conspiracy theories and election lies. Shiva Ayyadurai, the Senate's choice to review ballot envelope images from Maricopa County, falsely claimed that Massachusetts election officials destroyed over 1 million ballots after he lost a primary election there last year.³⁴ He has also misled his social media followers about the virus that causes Covid-19.³⁵

2. The Cyber Ninjas Resist Transparency Standards at Every Turn

In addition to biased contractors, the Arizona Senate's "audit" fails to uphold the procedural transparency that is necessary to provide public confidence. Cyber Ninjas fought to prevent the disclosure of written audit procedures and Ken Bennett, the "Senate Liaison" for the

³¹ Jeremy Duda and Jim Small, "Arizona Senate Hires a 'Stop the Steal' Advocate to Lead 2020 Election Audit," Arizona Mirror, March 31, 2021, <https://www.azmirror.com/2021/03/31/arizona-senate-hires-a-stop-the-steal-advocate-to-lead-2020-election-audit/>.

³² Jeremy Duda, "Election Auditor Wrote 'Election Fraud Facts' Report for GOP Senators Who Tried to Overturn the 2020 Election," Arizona Mirror, April 9, 2021, <https://www.azmirror.com/2021/04/09/arizona-audit-leader-doug-logan-wrote-fraud-claims-on-kraken-lawyers-website/>.

³³ Andrew Oxford, "Republic Reporter Kicked Out of Arizona Audit Site After Tweet about Former State Lawmaker Tallying Votes," Arizona Republic, April 30, 2021, <https://www.azcentral.com/story/news/politics/arizona/2021/04/30/ryan-randazzo-escorted-from-arizona-audit-site-after-tweet-former-state-rep-anthony-kern/4892470001/>.

³⁴ Reuters Staff, "Fact Check: Massachusetts Election Officials Have Not Destroyed Ballots or Committed Election Fraud," Reuters, October 2, 2020, <https://www.reuters.com/article/uk-factcheck-election-ballot-massachuset/fact-check-massachusetts-election-officials-have-not-destroyed-ballots-or-committed-election-fraud-idUSKBN26N2AF>; and Grace Bannasch (@GraceBannasch), "Every time Shiva claims that Massachusetts deleted ballot images, remember that at least 351 Town and City Clerks have explained to him on multiple occasions that we don't create ballot images in MA in the first place. He. Knows. It's. A. Lie.," Twitter, October 2, 2021, 1:53 p.m., <https://twitter.com/GraceBannasch/status/1444359900541374469>.

³⁵ Daniel Funke and Tom Kertscher, "Fact-Checking Hoaxes and Conspiracies about the Coronavirus," PolitiFact, January 24, 2020, <https://www.politifact.com/article/2020/jan/24/fact-checking-hoaxes-and-conspiracies-about-corona/>.

review, refused to grant observer credentials to experts and severely limited press access.³⁶ Only after extensive coverage of the security failures at the site of the review, and in response to litigation, Secretary of State Hobbs was authorized to designate observers.³⁷

Moreover, Cyber Ninjas' efforts to prevent public access to information continued when they forced volunteer audit observers to sign a non-disclosure agreement.³⁸ This is a significant departure from routine audit procedures implemented by election officials across the country. Records associated with routine election audits by election officials are subject to open records laws.³⁹ Even after losing a court battle in which it claimed it was not subject to Arizona public records laws, Cyber Ninjas did not comply with a court order to turn over the records.⁴⁰

Moreover, there is minimal transparency about who is funding the audit. What little information has been disclosed by Cyber Ninjas is troubling: millions of dollars of funding from organizations headed by Trump supporters, Stop the Steal conspiracy theorists, and an anchor of a media outlet peddling in conspiracy theories.⁴¹ One of the Trump supporters providing funding, Patrick Byrne, appears to have conducted background checks and volunteer agreements for the staff conducting the audit as well, helping to determine who counts the ballots.⁴²

In another departure from standard election audit practice, the "Official Account" of the Senate liaison for the audit on Twitter has attacked journalists and made false accusations about

³⁶ Democracy Docket, "Cyber Ninjas Publish Arizona Audit Procedures," April 30, 2021, <https://www.democracymirror.com/alerts/cyber-ninjas-publish-arizona-audit-procedures/>; See Jen Fifield, "Journalists Gain Access to Arizona Election Audit; About 2M Ballots Still to Count," *Arizona Republic*, last updated April 28, 2021, <https://www.azcentral.com/story/news/politics/elections/2021/04/27/journalists-gain-access-arizona-senate-ordered-election-audit-2-million-ballots-still-to-count/4858480001/>; See Ken Bennett (Senate Liaison, Arizona) and Julie Fischer (Deputy Liaison, Arizona), email message to Jennifer Morrell (Partner, The Elections Group), April 20, 2021 (stating that "only registered voters from Maricopa County are eligible to apply as observers.").

³⁷ Mark Phillips, "Secretary of State Gets Observers Inside Maricopa County Election Audit, Cyber Ninjas has to Reveal Methods," ABC 15 Arizona, last updated May 18, 2021, <https://www.abc15.com/news/state/secretary-of-state-gets-observers-inside-maricopa-county-election-audit-cyber-ninjas-has-to-reveal-methods>.

³⁸ Nicole Valdes, "Maricopa County Senate Audit Observers Forced to Sign Non-Disclosure Agreements," ABC 15 Arizona, May 4, 2021, <https://www.abc15.com/news/state/maricopa-county-senate-audit-observers-forced-to-sign-non-disclosure-agreements>.

³⁹ Bob Christie, "Arizona Supreme Court Allows Release of Senate Audit Records," Associated Press, September 14, 2021, <https://apnews.com/article/elections-arizona-phoenix-election-recounts-arizona-supreme-court-632b0570a3d1198be213de7dc8fced93>; and see also A.R.S. § 39-121.01.

⁴⁰ Howard Fischer, "Cyber Ninjas can be Sued Under Arizona's Public Records Law, Judge Rules," *Tucson.com*, last updated September 24, 2021, https://tucson.com/news/local/cyber-ninjas-can-be-sued-under-arizonas-public-records-law-judge-rules/article_9a787940-1a35-11ec-9859-fb6edd4186a5.html.

⁴¹ Jerod MacDonald-Evoy, "Everything We Know about Who is Funding the Arizona Election Audit," *Arizona Mirror*, May 3, 2021, <https://www.azmirror.com/2021/05/03/everything-we-know-about-who-is-funding-the-arizona-election-audit/>; Jeremy Duda, "Election Conspiracy Theorist Groups Paid \$5.7 Million for the Arizona 'Audit'," *Arizona Mirror*, July 28, 2021, <https://www.azmirror.com/2021/07/28/election-conspiracy-theorist-groups-paid-5-7-million-for-the-arizona-audit/>.

⁴² Jerod MacDonald-Evoy, "Auditors Promised to Screen Workers, But QAnon Promoters and Capitol Rioters were Hired," *Arizona Mirror*, June 17, 2021, <https://www.azmirror.com/2021/06/17/auditors-promised-to-screen-workers-but-qanon-promoters-and-capitol-rioters-were-hired/>.

election system security, such as asserting that Maricopa County officials deleted important elections databases before handing over computers to Senate’s contractors.⁴³

3. The Cyber Ninjas Lacked Any Experience Auditing Elections

At the time the Senate selected Cyber Ninjas, the company had no experience auditing elections, and it showed: The company did not implement basic security measures to protect the integrity of the ballots and other election materials after Maricopa County election officials were forced to remove the ballots from the secure vault in which they were stored. Local reporters documented multiple security failures at the audit venue, the Arizona Veterans Memorial Coliseum, including unlocked doors and unchecked access to the ballots and other election materials transferred to the control of the Senate.⁴⁴ Reporters also notified Cyber Ninjas of the risks to the ballots posed by the use of black and blue pens on the floor.⁴⁵ Nonpartisan observers documented struggles with basic chain of custody procedures and practices.⁴⁶ Despite efforts by Cyber Ninjas and the Senate to keep policy and procedural details secret, a Maricopa County Superior Court ruled that the documents must be available to the public.⁴⁷ Metadata associated with the policies and procedures appear to indicate that the policies were created after the audit had already begun.⁴⁸

In addition, the Senate review included a “physical examination” of the ballots using “kinematic artifact’ detection technology” to look at the folds in ballots as a purported sign of fraud. That method of review was developed by Jovan Hutton Pulitzer, a conspiracy theorist, and “an icon among election fraud believers.”⁴⁹ “Pulitzer does not appear to have any background in elections-related work. It’s unclear whether Pulitzer’s alleged technology has ever been used on ballots,” prior to its use in Arizona, “or whether anyone has confirmed that it works.”⁵⁰ Not only

⁴³See Reuters Fact Check, “Fact Check-Maricopa County Database Was Not Deleted,” Reuters, May 21, 2021, <https://www.reuters.com/article/factcheck-maricopa-database/fact-check-maricopa-county-database-was-not-deleted-idUSL2N2N8266>.

⁴⁴ Jerod MacDonald-Evoy, “Senate Won’t Say Who is Funding the Election Audit or Allow Media Access,” Arizona Mirror, April 23, 2021, <https://www.azmirror.com/2021/04/23/senate-wont-say-who-is-funding-the-election-audit-or-allow-media-access/>.

⁴⁵ Laurie Roberts, “Trump Ninjas Don’t Know What Ink Color to Use on Ballots. And They’re Auditing Our Election?,” *Arizona Republic*, April 23, 2021, <https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2021/04/23/cyber-ninjas-have-no-idea-how-secure-arizona-election-audit/7354216002/>.

⁴⁶ See also Jane C. Timm, “Maricopa County will Need New Voting Machines after GOP’s Audit, Arizona Secretary of State Says,” NBC News, May 20, 2021, <https://www.nbcnews.com/politics/elections/maricopa-county-will-need-new-voting-machines-after-gop-s-n1268090>.

⁴⁷ ABC15.com Staff, “Cyber Ninjas Releases Documents Describing Maricopa County Audit Procedures After Court Ruling,” ABC 15 Arizona, last updated May 18, 2021, <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/cyber-ninjas-releases-documents-describing-audit-procedures-after-court-ruling>.

⁴⁸ Stephen Richer, *Dear Arizona Republicans: Let’s Do This Right. Let’s Build Confidence. Let’s Move Forward*, Maricopa County, Arizona Recorder, August 19, 2021, 25, <https://www.politico.com/f/?id=0000017b-6062-d290-a57b-ee62cfa80000>; and Jeremy Duda (@JeremyDuda), “The metadata on the CyFIR document that was copied from DOJ shows that it was created on April 24, the day after the audit began and the day after a judge ordered Cyber Ninjas to provide its policies and procedures for the audit,” Twitter, April 30, 2021, 2:48 p.m., <https://twitter.com/jeremyduda/status/1388203505203040260>.

⁴⁹ Jeremy Duda, “Jovan Pulitzer, an Icon Among Election Fraud Believers, Will Play a Role in the Arizona Election Audit,” Arizona Mirror, April 19, 2021, <https://www.azmirror.com/2021/04/19/jovan-pulitzer-an-icon-among-election-fraud-believers-will-play-a-role-in-the-arizona-election-audit/>.

⁵⁰ Duda, “Jovan Pulitzer, an Icon Among Election Fraud Believers, Will Play a Role in the Arizona Election Audit.”

did this process potentially damage the ballots, it further demonstrated Cyber Ninjas' lack of election administration or auditing expertise. Those with experience know that a lack of folds in a mail-in ballot is not suspicious, since administrators must sometimes duplicate ballots of military and overseas voters who use non-standard paper in order to run them through a scanner.

Moreover, according to John Brakey, assistant Senate liaison, this dubious process was being used in support of another already debunked conspiracy theory: to “look[] for bamboo fibers because of a baseless accusation that [40,000] ballots from Asia were smuggled here.”⁵¹

II. UNSURPRISINGLY, THE ARIZONA SENATE CONTRACTORS PRODUCED REPORTS FILLED WITH MISLEADING INNUENDO

Less than two weeks ago, the company Cyber Ninjas released a report on its partisan review of the 2020 presidential election in Maricopa County, Arizona. They alleged no conspiracy to steal the election and found that Biden did, indeed, receive the most votes. But the report remains full of incendiary and misleading “findings” that even a cursory effort by a non-expert would have revealed to be baseless innuendo.

The firm's top three findings, according to its own ranking of importance, are textbook examples of how purveyors of voter fraud myths misunderstand data — if there were a textbook about data *i*lliteracy.

A. Cyber Ninjas Ignored Basic Probability to Raise Groundless Suspicions About Repeat Voting

The most facially naïve of these findings is the one titled “Voters That Potentially Voted in Multiple Counties” — labelled as one of two findings of “high” importance, just below the so-called “Critical” finding of “Mail in Ballots Voted from Prior Address.”⁵² It even went so far as to claim “5,295 ballots impacted.”⁵³

But it turns out that this “finding,” and the attendant recommendation that a list of 10,342 voters be “fully reviewed,” is based on failure to comprehend basic probability and patterns of name popularity.⁵⁴ Cyber Ninjas simply looked for Arizona voters who shared a first, middle, and last name and birth year with another voter in the 2020 election, and it found 10,342 of them.

⁵¹ Dennis Welch (@Dennis_Welch), “John Brakey, an official helping oversee the audit of the 2020 election, says auditors are looking for bamboo fibers...,” Twitter, May 5, 2021, 2:44 p.m., https://twitter.com/dennis_welch/status/1390014544890658819?lang=en.

⁵² Cyber Ninjas, *Maricopa County Forensic Election Audit: Volume III: Result Details*, September 24, 2021, 5, https://c692f527-da75-4c86-b5d1-8b3d5d4d5b43.filesusr.com/ugd/2f3470_d36cb5eaca56435d84171b4fe7ee6919.pdf

⁵³ Cyber Ninjas, *Maricopa County Forensic Election Audit: Volume III: Result Details*, 10.

⁵⁴ Ali Swenson and Angelo Fichera, “FACT FOCUS: AZ Election Review Spurs False Claims Online,” Associated Press, September 27, 2021, <https://apnews.com/article/joe-biden-media-social-media-arizona-presidential-elections-9a68234adab79b0f8a55e189af5a16e4>.

The Cyber Ninjas report goes so far as to claim these people may represent the same person, voting more than once in the election. But this suspicion is completely baseless, and just evidence that they are ignorant of the “Birthday Problem,” a basic statistical concept.⁵⁵

Within groups of people who have a common name, such as Robert Smith, it is expected that some of them will share a birthday,⁵⁶ as the list of persons with that name is large. Many people initially find this counterintuitive, leading to the name “Birthday Problem,” or sometimes “Birthday Paradox.”

But Cyber Ninjas’ decision to cast aspersions on thousands of Arizona voters is particularly ignorant, as they only checked for birth *year* matches among Arizona voters who share a full name and participated in 2020. It is even more common to share a birth year with someone than to share a full birthdate including the month and day.

If one assumes that any group of voters who share a full name contains people evenly distributed from 18 to 75, the group only has to be 10 voters for the odds of a birth year match to be over 50 percent. A match among just 16 voters would be expected 90 percent of the time.⁵⁷ In reality, the frequency of these matches is even more common than these probabilities indicate because there are variations in birth rates and popular baby names over time.

The Brennan Center analyzed Texas’s voter file, and we found 41 people named “David Alan Smith.” More than two-thirds were born before the 1970s, when the baby boom was over and the popularity of the name “David” began to decline. In the 1950s, we found 10 “David Alan Smiths” who share the same birth year as another David Alan Smith. In the 1960s we found seven. But by the 1970s, there were just two.

When we analyzed Arizona’s registered voter file, with over 4 million registered voters, we found that nearly 30,000 voters share a full name (first middle and last) and birth year with another.⁵⁸ That is consistent with what basic statistics predicts, not a sign of election misconduct.

B. Cyber Ninjas Ignored Widely Known Definitions of Permanent Residence to Cast Doubt About Arizona Voters’ Eligibility to Vote

In another example of the Cyber Ninjas’ lack of experience with voter data and election law, their report labels one finding as “critical,” supposedly “impact[ing]” 23,344 ballots.⁵⁹ This

⁵⁵ Wikipedia, “Birthday Problem,” accessed October 5, 2021, https://en.wikipedia.org/wiki/Birthday_problem.

⁵⁶ Brennan Center for Justice, *Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General*, December 2005, 1, <https://www.brennancenter.org/sites/default/files/analysis/Analysis%20of%20the%209-15-05%20Voter%20Fraud%20Report.pdf>.

⁵⁷ If we assume birth years are distributed evenly across the 57 years spanning 18 to 75-year-olds, the odds of a match within ten people can be calculated as the inverse of the odds that *no* birth years match in the group, or, $1 - (57! / (47! * (57^10))) = 56.7\%$. Within sixteen people, it is $1 - (57! / (41! * (57^16))) = 90.2\%$.

⁵⁸ Gowri Ramachandran, “The Arizona Senate’s Contractors Fail to Understand Basic Probability and Voter Data,” Brennan Center for Justice, October 1, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/arizona-senates-contractors-fail-understand-basic-probability-and-voter>.

⁵⁹ Swenson and Fichera, “FACT FOCUS: AZ Election Review Spurs False Claims Online.”

is the number of people who Cyber Ninjas believes voted in the 2020 election in Arizona but also showed up on a list of people who had moved provided by a commercial address verification service. This service is used by companies that want to find customers, so it would not have reason to distinguish between a temporary move and a permanent one, as business who are seeking to market their services and goods in a particular area would be interested in contacting both temporary and permanent residents.⁶⁰ But temporary moves do not change a voter's eligibility to vote in the jurisdiction of their permanent residence, a fact that was explained by multiple entities before the November election answering frequently asked questions that voters had during the pandemic, such as mainstream media outlets and the Federal Voting Assistance Program.⁶¹

C. Cyber Ninjas Ignored Election Administration Processes Used in at least Twenty-Three States

Another finding of “high” importance according to Cyber Ninjas is the misleading claim that in thousands of cases, “More Ballots Returned by Voter Than Received.” But when Maricopa County records that a ballot envelope was returned, this does not mean the ballot inside is necessarily going to be verified and counted—a fact that Cyber Ninjas concedes when it assumes that only one ballot is counted for each voter, despite making the claim that the number of “ballots impacted” is 9,041.⁶²

Officials may not open an envelope and count a ballot because the voter has forgotten to sign the envelope, or the signature does not seem to match the one on file. If this happens, election officials will contact the voter to “cure” the problem, after which the envelope can be processed, opened, and the ballot inside counted. County officials have confirmed that this is the most common reason for a voter to appear multiple times in the file that Cyber Ninjas looked at.⁶³

This notice and cure procedure is required by Arizona law,⁶⁴ and it is a best practice in mail ballot security, allowing election officials to distinguish rare instances that truly warrant investigation from the numerous innocent issues that may impact the ability to verify a mail ballot envelope signature. These issues can include a broken wrist that leads to a messy signature, two members of a household mixing up their envelopes, or simple failure to remember

⁶⁰ “Mailing Lists & Sales Leads,” Melissa.com, accessed October 5, 2021, <https://www.melissa.com/direct/mailling-lists-sales-leads/>.

⁶¹ Bryan Pietsch, “So You Moved During the Pandemic. Now How Do You Vote?,” *New York Times*, September 16, 2020, <https://www.nytimes.com/2020/09/16/us/politics/how-to-vote-moved.html>; Grace Panetta, “How to Vote and Make Sure it Counts if You’ve Moved or Relocated in the Past 6 Months,” Business Insider, September 22, 2020, <https://www.businessinsider.com/how-to-vote-after-moving-relocating-2020-9>; and Federal Voting Assistance Program, “How to Determine Your Voting Residency,” accessed October 5, 2021, <https://www.fvap.gov/info/laws/voting-residence>.

⁶² Cyber Ninjas, *Maricopa County Forensic Election Audit: Volume III: Result Details*, 8.

⁶³ Maricopa County (@MaricopaCounty), “The most common reasons for a single voter having multiple entries in the EV 33 file are: -a voter sent back an envelope unsigned -there’s a signature discrepancy,” Twitter, September 24, 2021, 2:32 p.m., <https://twitter.com/maricopacounty/status/1441470647918493697?s=20>.

⁶⁴ A.R.S. § 16-550.

to sign the envelope.⁶⁵ Notice and cure for missing or mismatched signatures, or both, was used in at least twenty-three states as of February 2021, including Florida.⁶⁶

D. Shiva Ayyadurai Conflated Ballot Envelope Images and Ballots

Another of the Senate’s contractors, Shiva Ayyadurai, similarly failed to understand (or acknowledge) this common notice and cure procedure, when, in a rambling presentation before the Arizona Senate, he raised suspicion about duplicate envelope images from the 2020 election and at one point erroneously described the duplicate envelope images as “two ballots.”⁶⁷ The report was then amplified by elected officials and candidates in Arizona who falsely called them “duplicate votes” and “duplicate ballots.”⁶⁸ But there is nothing suspicious about an envelope being processed twice if the first time, the signature can’t be verified. Once the problem has been fixed, the envelope is ready to be rescanned and the ballot inside removed and counted.

Ayyadurai has a history of conflating images and “ballots” with highly misleading results. After a failed run for Senate in Massachusetts, he claimed on social media that election officials in that state had destroyed “over 1 million ballots,” when they informed him that tabulators in the State are set not to capture ballot images.⁶⁹

III. SOLUTIONS

A. Protect Election Officials from Retaliation for Doing Their Job

Honest election officials must be protected from retaliation merely for doing their job, which is to ensure eligible voters can vote and have their votes properly counted. Retaliation on this basis threatens to push out election officials who carry out their duties fairly, and we should all be concerned about who would wish to replace them in those circumstances. Just this week, the South Carolina State Elections Director left her position three months earlier than planned, after elected officials became frustrated with her requests to make voting safer and easier during the pandemic.⁷⁰

⁶⁵ Lisa Danetz, “Mail Ballot Security Features: A Primer,” Brennan Center for Justice, October 16, 2020, <https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer>.

⁶⁶ Brennan Center for Justice, “Preparing Your State for an Election Under Pandemic Conditions,” last updated February 1, 2021, <https://www.brennancenter.org/our-work/research-reports/preparing-your-state-election-under-pandemic-conditions#t4>.

⁶⁷ Jeremy Duda, “‘Audit’ Expert Shiva Ayyadurai Didn’t Understand Election Procedures. He Made a Number of False Signature Claims,” Arizona Mirror, October 1, 2021, <https://www.azmirror.com/2021/10/01/audit-expert-shiva-ayyadurai-didnt-understand-election-procedures-he-made-a-number-of-false-signature-claims/>.

⁶⁸ Garrett Archer, “Arizona Election Audit Fact Check: Were There 17,322 duplicate ballots?,” ABC 15 Arizona, September 29, 2021, <https://www.abc15.com/news/arizona-election-audit/arizona-election-audit-fact-check-were-there-17-322-duplicate-ballots>.

⁶⁹ Reuters Staff, “Fact Check: Massachusetts Election Officials Have Not Destroyed Ballots or Committed Election Fraud.”

⁷⁰ Joseph Bustos, “SC’s Elections Director Steps Down Three Months Earlier than Planned. Here’s Why,” *State*, October 4, 2021, <https://www.thestate.com/news/politics-government/article254744292.html>.

B. Provide Resources to Help Election Officials Combat Disinformation Stemming from Partisan Reviews

Maricopa County is the second largest election jurisdiction in the United States.⁷¹ The County has a tentative budget of over \$3 billion dollars for the fiscal year 2022. The revised budget for Elections in the county, in fiscal year 2021, was over \$42 million dollars.⁷² Most election officials, who serve in jurisdictions with 5,000 or fewer voters,⁷³ do not have the staff and resources to run fact check operations and publish press releases to push back on false claims about elections. Congress should assist with resources for election officials to combat disinformation campaigns.

C. Protect Tabulation, Post-Election Audits, and Election Records

Many of the provisions in the Freedom to Vote Act would help protect our elections against attempted sabotage because it would improve election integrity and transparency, while protecting the workers who carry out those functions. For instance, the Act would protect election workers from intimidation during the vote tabulation process,⁷⁴ and it would mandate legitimate risk-limiting audits,⁷⁵ which provide a high level of statistical confidence that tabulator tallies reflect the true outcome.

D. Protect Elections from Attempts to Overturn the Will of the Voters

The Freedom to Vote Act also creates a private right of action that would let voters bring a lawsuit if their right to vote, including their right to have that vote counted, has been infringed in a federal election.⁷⁶ This provision would provide a remedy in the worst-case scenario where a state legislature or election official gives in to pressure to overturn an outcome.

E. Amplify Accurate Information About Elections

The private sector must also play a role in combatting the disinformation campaigns that these partisan reviews are sourcing. Prominent spreaders of conspiracy theories should not be subject to a more lenient set of rules than other users. If anything, they have a greater capacity to cause harm, including to our democracy itself, than do other users.⁷⁷

And those who have accurate information to share should be promoted. With the creation of a trusted directory of the more than 8,000 election officials in the United States, including

⁷¹ Maricopa County, Arizona, “Maricopa County Election Facts,” accessed October 5, 2021, <https://www.maricopa.gov/5539/Voting-Equipment-Facts>.

⁷² Maricopa County, Arizona, *FY 2022 Tentative Budget*, 2021, <https://www.maricopa.gov/ArchiveCenter/ViewFile/Item/5247>.

⁷³ Paul Gronke et al., “Amplifying the Perspectives of Officials at the Front Lines of Elections,” Democracy Fund, April 19, 2021, <https://democracyfund.org/idea/amplifying-the-perspectives-of-officials-at-the-front-lines-of-elections/>.

⁷⁴ Freedom to Vote Act, S.2747, § 3206, 117th Cong. (2021).

⁷⁵ Freedom to Vote Act, S.2747, § 303B, 117th Cong. (2021).

⁷⁶ Freedom to Vote Act, S.2747, § 1704, 117th Cong. (2021).

⁷⁷ Brennan Center for Justice and Bipartisan Policy Center, *Election Officials Under Attack*, 12.

their official social media handles and websites, social media companies could choose to promote truthful information from these officials over attention-grabbing conspiracy theories that do tremendous damage.⁷⁸

IV. CONCLUSION

The Arizona Senate’s partisan review, and specifically the contractors who are conducting the review, fail to meet any of the basic standards that legitimate election audits should meet in order to earn confidence from the public: objectivity, transparency, and competence. Instead, the contractors’ most attention-grabbing findings fit the pattern that purveyors of voter fraud myths have long followed; They remain ignorant of basic probability, common election laws, and common election administration procedures.⁷⁹ They then raise baseless suspicions about their fellow citizens⁸⁰ and the dedicated public servants who administer elections.⁸¹

By seeding disinformation campaigns about elections, these partisan reviewers are laying the groundwork for future sabotage of our democracy. Recent efforts to pass laws that would permit state legislatures to overturn election results have failed,⁸² but the continued spread of lies about elections set the stage for legitimating these efforts in the future. And these partisan reviews that continue to fuel the “Stop the Steal” movement have been spreading.⁸³ Political actors in other states have proposed conducting their own partisan reviews, and many are treating the Arizona Senate’s venture as a model.⁸⁴

Congress should provide resources to help and should protect election officials from retaliation for ensuring eligible voters can exercise their rights. Through the Freedom to Vote Act, it should protect election workers during the vote tabulation process and require (and fund) legitimate post-election tabulation audits. Finally, by providing voters a remedy if their right to vote (and have that vote counted) in a federal election is infringed, the Act would protect against the danger of a state legislature or election official succumbing to future attempts to sabotage an election.

⁷⁸ Brennan Center for Justice and Bipartisan Policy Center, *Election Officials Under Attack*, 11.

⁷⁹ Brennan Center for Justice, *Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General*,” 1.

⁸⁰ Brennan Center for Justice, *Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General*,” 1.

⁸¹ Reuters Staff, “Fact Check: Massachusetts Election Officials Have Not Destroyed Ballots or Committed Election Fraud.”

⁸² H.B. 2720, 55th Leg., Reg. Sess. (Ariz. 2021).

⁸³ Kate Brumback and Nicholas Riccardi, “It’s Not Just Arizona: Push To Review 2020 Ballots Spreads,” AP News, May 25, 2021, <https://apnews.com/article/donald-trump-arizona-election-2020-election-recounts-government-and-politics-4d5038b2bea05d2132cb4ada43516f67>.

⁸⁴ Bydlak et al., *Partisan Election Review Efforts in Five States*, 11.