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THE ELECTORAL COUNT ACT: THE NEED FOR REFORM

HEARING

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

WEDNESDAY, AUGUST 3, 2022

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SECOND SESSION

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QUESTIONS SUBMITTED FOR THE RECORD:

THE ELECTORAL COUNT ACT: THE NEED FOR REFORM

WEDNESDAY, AUGUST 3, 2022

UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION
Washington, DC

The Committee met, pursuant to notice, at 10:34 a.m., in Room 301, Russell Senate Office Building, Hon. Amy Klobuchar, Chairwoman of the Committee, presiding.

Present: Senators Klobuchar, Blunt, Warner, King, Padilla, Ossoff, Cruz, Capito, Wicker, and Fischer.

OPENING STATEMENT OF HONORABLE AMY KLOBUCHAR, CHAIRWOMAN, A UNITED STATES SENATOR FROM THE STATE OF MINNESOTA

Chairwoman KLOBUCHAR. All right. Well, thank you so much, everyone. I wanted to wait for Senator Blunt and not much waiting at all, but I did that just because we have chaired this Committee together. We are good friends. Certainly as we approach this important bill, the Electoral Count Act, it is really important that this spirit of bipartisanship gets us through and gets this thing passed.

I want to thank Roy Blunt and our colleagues who will be here shortly. I want to mention Senator King, who we are going to hear from this morning, who has been a major leader in this area, and worked with me and Senator Durbin on our bill that we presented to the group that came together to work on this.

I want to thank Senator Capito, who was part of the bipartisan group and is a valued Member of our Committee. I know Senator Warner was also part of the group, who is a Member of our Committee. We thank him. We are joined by the former Secretary of State, Senator Padilla, a very valued Member of our Committee, as well as Senator Fischer, who we may be seeing up here at some point in the coming Congress.

I thank all of you. I want to welcome Senator Collins and Senator Manchin to this beautiful hearing room. Welcome. You can look at the ships. I know you like to sail, Senator Manchin, and they will remind you of Maine, Senator Collins, while you hear Senator Blunt and I give our opening remarks.

The Electoral Count Act was passed in 1887, as I noted, in response to the disputed election between Rutherford Hayes and Samuel Tilden. Just something that just comes off the lips of everyone at this hearing today. I point this out because it was long ago, and that bill was put in place to govern how Congress at that time counted electoral votes for President.

While it has not gotten much attention in the next 130 years, it became the cornerstone, sadly, of a plan hatched by President Trump and his allies that led to an insurrection at the Capitol, where there was a possibility, Senator Blunt and I remember that day well, where the will of the American people could have been overturned. It culminated in a violent mob desecrating our Nation's Capitol.

On that dark day, enemies of our democracy sought to exploit the provisions of this antiquated law to subvert the results of a free and fair election. I remember this day well because Senator Blunt and I were the ones at 3:30 in the morning with Vice President Pence that were walking through the broken glass.

We had done that walk 13 hours before. It was celebratory. It was amazing. It was a big ceremony. We had a big procession. At the end of the day, it was just us, closed doors, broken windows, glass all over the place, spray painted columns. But our democracy rose again, the inauguration, and we went forward. Part of that is working together to make sure that laws cannot be used by anyone of any party, any political persuasion in a way that undercuts the will of the people.

Number one, the claim was made that the Electoral Count Act as it exists would allow the Vice President to refuse to accept electoral votes that were lawfully cast. We watched in horror as a mob stormed the Capitol, chanting "hang Mike Pence," and got within 40 feet of the Vice President of the United States. We know these claims about the Vice President's authority were false. But in the proposals that we have put forward, Senator King and the group, the bipartisan group, make it absolutely clear that the Vice President does not have this power.

In the days and weeks before the insurrection, they claimed that the law allows the state legislatures to appoint their own electors if they declared a failed election. State representatives in Wisconsin and Michigan were pressured to do just that. They claimed the law allowed so-called rogue electors to substitute their own views for the will of the voters. They recruited people in multiple states to send in fraudulent votes and slates.

My proposal here and the bipartisan work that you have done would guard against efforts like those by ensuring that candidates can go to Federal court to stop rogue Governors from sending invalid electoral votes. They also planned to force debate and votes on objections to six states' electoral votes.

That is when I think everyone learned just one Senator and one Congressman, if joined together, can actually gum up the proceeding. I remember Senator Blunt and I realized it was going to take at least 24 hours before we even knew the insurrection was coming our way. As Senator Collins just pointed out to me, and as history has shown us, there have been other objections over the years, regardless of party.

People can make objections. No one is suggesting we stop them from speaking out. It is just that there has got to be a minimum that makes sense before Congress would step in and delay the counting of the electoral vote. I will never forget, as I said, what happened that day. I do not think any of us will.

It is time to make sure that we reform this law. As I noted, Senators King, Durbin, and I released draft legislation. This great bipartisan group was led by Senator Collins and Senator Manchin. Senator Blunt and I have met with the bipartisan group. We have engaged with them multiple times, including with our staffs' assistance, and they worked for months to get consensus. They did.

As these discussions have progressed, consensus has emerged that any reforms to the Electoral Count Act must address at least four key issues, which I have already mentioned, the Vice President issue, the number of people objecting, the threshold the way the slates could be picked at the last minute after an election is done, and then finally the process of making sure you can head into court if necessary.

I want to make clear that since the 2020 election, when more Americans voted than ever before during a global pandemic, we have seen a tidal wave of voter suppression laws. I appreciate the work Senator Manchin and a group of us did together trying to fix that. I still hope we can get some of those reforms done in the future.

With that, I want to turn it over to my friend and colleague, Senator Blunt, and again, thank him for his bipartisan work on this. It is our job to ensure this never happens again, no matter who is in charge or what happens. We are focused on the future.

OPENING STATEMENT OF HONORABLE ROY BLUNT, A UNITED STATES SENATOR FROM THE STATE OF MISSOURI

Senator BLUNT. Well, thank you, Chairwoman Klobuchar. We have worked together on these issues for a long time, and hopefully is an example of the importance of coming together and making things happen. I am glad to get a chance to talk while Senator Manchin and Senator Collins, both good friends of mine who are here, and talk about some of the reasons for the hearing today.

As you pointed out, the Electoral Count Act of 1887 just turned out to be more troublesome potentially than anybody had thought. What happened in 1876 was that tightly contested race you talked about between Tilden and Hayes, and four states, Florida, Louisiana, South Carolina, and Oregon all had two different groups meet on December the 6th of 1876, and each of those groups sent in a competing set of electoral count.

There was no way really to deal with that issue at that point in our history. The Congress passed the Electoral Commission Act, which really did not work very well either and was—and ended with a compromise that put Hayes in the White House and largely ended reconstruction in the South at the same time. After really a decade of fairly great progress was eliminated as part of the result of that compromise.

One of the darker decisions, I think, in the history of the country. In the next decade, there were two more really close elections and Congress contemplated that whole time, okay, how would we deal with this if it ever happened again? While it took a decade, they did come up with the idea of the bill that became the Electoral Count Act.

By the way, during that same period of time, they also eliminated the legislative leaders from the line of succession to the pres-

idency. That is another topic that, frankly, I think we ought to think about a little more closely than we have, though probably not today. Those legislative leaders from the 1880's until the Truman presidency were not included in the line of succession to the presidency. They were put back in under President Truman and reversed.

Under the early days of the country, it was the President pro tem first and then the speaker, and partly because of President Truman's great respect for Speaker Rayburn, they put the speaker first and then the President pro tem. But there is a long period of time when legislative leaders, because of how many these really close elections, were taken out of the line of succession. The Electoral Count Act of 1887 seemed to do the job.

While it was not perfect, as we will no doubt hear today, it governed our counting process since then. Written in a different age, the language of 1887 is really outdated and vague in so many ways, and so both sides of the aisle want to update this Act. Recent polling indicates that almost everybody that has thought about this wants to update this Act.

Questions like, what is the proper role of Congress? What is the proper role of the Vice President? How should elections—objections to electors and electoral votes be levied? What are—what is the appropriate threshold for that process to start? What is the role of the Federal Government in this process? Should the timelines be altered? More.

We are going to hear about that at the hearing today. It provides us an opportunity, it is Senator Klobuchar's decision to have this hearing, and provides us with an opportunity to further explore all of those questions, hopefully come to the right conclusions, and get this bill passed and get it done this year.

I want to thank Senator Collins and Senator Manchin for being here today. I applaud their efforts, along with Senator Capito and Senator Warner, who worked on that bipartisan effort to come up with a reform bill. Also, I want to thank Chair Klobuchar and Senator King for putting together, along with Senator Durbin, a proposal that I understand the bipartisan group looked into and considered while they were drafting their legislation.

The cooperation we have seen here, hopefully, will be the spirit of cooperation that we move forward, come up with a process that everyone is more comfortable with, and will stand the test of time. I want to thank all of you for being here today, and I look forward to hearing from our witnesses and moving this process forward.

Chairwoman KLOBUCHAR. Okay, very good. We have been joined by Senator Warner, a Member of the bipartisan group. We have mentioned you several times. Thank you. Let's start out with Senator Collins, Senator Manchin, and we are going to hear from Senator King, and then we will call up our witnesses. Thank you.

OPENING STATEMENT OF HONORABLE SUSAN COLLINS, A UNITED STATES SENATOR FROM THE STATE OF MAINE

Senator COLLINS. Thank you very much. Chairwoman Klobuchar, Ranking Member Blunt, Members of this distinguished Committee, with a special recognition of my Maine colleague, Senator King, and Members of our bipartisan group, Senator Capito and Senator

Warner, all the Members of this Committee, it is a great pleasure to join you this morning to testify on the legislation that a bipartisan group of Senators has written to reform the 135 year old Electoral Count Act, the archaic and ambiguous law that governs how Congress tallies each state's electoral votes for President and Vice President.

In four out of the past six presidential elections, the Electoral Count Act's process for counting electoral votes has been abused, with frivolous objections being raised by Members of both parties. But it took the violent breach of the Capitol on January 6th to really shine a spotlight on how urgent the need for reform was.

Over the past several months, a dedicated, bipartisan group of Senators has worked very hard to craft the legislation before you, united in our determination to prevent the flaws in this 1887 law from being used to undermine future presidential elections. I would like to acknowledge the contributions of our co-sponsors, two Members of this Committee, Senator Capito and Senator Warner, Senators Romney, Sinema, Portman, Shaheen, Murkowski, Tillis, Murphy, Young, Cardin, Sasse, Coons, and Graham all played a role.

I want to especially thank the Chairwoman and Ranking Member for their advice and insight throughout this process. The bill that we have introduced, the Electoral Count Reform and Presidential Transition Improvement Act, will help ensure that electoral votes totaled by Congress accurately reflect each state's popular vote for President and Vice President.

It includes a number of important reforms. Let me highlight just a few. First, it reasserts that the Constitutional role of the Vice President counting electoral votes is strictly and solely ministerial. The idea that any Vice President could have the power to unilaterally accept, reject, change, or halt the counting of electoral votes is antithetical to our Constitutional structure and basic democratic principles.

Second, our bill raises the threshold to lodge an objection to electors to a minimum of one-fifth of the duly chosen and sworn Members of both the House and the Senate. Now, this 20 percent threshold was not just plucked out of the air. It mirrors the threshold under Article 1 of the Constitution to call for the yeas and nays on a vote in Congress. Currently, only a single Member in both houses, as the Chairwoman indicated, is required to object to an elector or a slate of electors.

Third, and perhaps most significant, our legislation ensures that Congress can identify a single conclusive slate of electors submitted by each state. It does so by the following. It clearly identifies a single state official who is responsible for certifying a state's electors. It also ensures that a state's electors are certified and appointed pursuant to state law that was in effect prior to Election Day.

Fourth, it provides aggrieved presidential candidates with an expedited judicial review of federal claims related to a state certificate of electors. This does not create a new course of action. Instead, it will ensure prompt and efficient adjudication of disputes.

Fifth, it would require Congress to defer to the state of electors submitted by a state pursuant to the judgment of state or Federal courts. Finally, our bill strikes a provision of another outdated law enacted in 1845 that could be used by state legislatures to override

their popular vote by declaring a failed election. That is a term that is undefined in that 1845 law.

Our bill permits a state to modify the period of its election only in extraordinary and catastrophic circumstances, and also only as provided under that state's law enacted prior to Election Day. Our legislation is supported by numerous election law experts and Constitutional scholars with whom we have consulted throughout our deliberations.

I am so grateful for their advice, and I ask unanimous consent that several of those statements of endorsement be included in the record of this hearing.

Chairwoman KLOBUCHAR. They will be included.

[The information referred to was submitted for the record.]

Senator COLLINS. Chairwoman Klobuchar, Ranking Member Blunt, Members of this Committee, we have before us an historic opportunity to modernize and strengthen our system of certifying and counting the electoral votes for President and Vice President.

Nothing is more essential to the survival of a democracy than the orderly transfer of power. There is nothing more essential to the orderly transfer of power than clear rules for effecting it. I urge my colleagues in the Senate and the House to seize this opportunity to enact these sensible and much needed reforms before the end of this Congress. Thank you so much.

Chairwoman KLOBUCHAR. Thank you very much, Senator Collins. I also know we have been joined by Senator Ossoff, who hosted a field hearing in Georgia. Thank you. Senator Wicker. Next up, Senator Manchin. Thank you.

OPENING STATEMENT OF HONORABLE JOE MANCHIN, A UNITED STATES SENATOR FROM THE STATE OF WEST VIRGINIA

Senator MANCHIN. Chairwoman Klobuchar, Ranking Member Blunt, my colleague from West Virginia, Senator Capito, and all the Members, thank you so much for giving me the opportunity to present some brief remarks which have been stated so eloquently before the Electoral Count Reform Act, which I think is one of the most important things we have before us in Congress today along with so many others.

As has been said, the Electoral Count Act was originally passed into law in 1887 and was a valiant but clumsy effort, very clumsy effort to ensure that another presidential election like the 1876 contest between Rutherford B. Hayes and Samuel J. Tilden never happened again.

As Members of this Committee know, the 1876 election was a disaster. It was absolutely disastrous. Neither candidate received an electoral majority and multiple states presented serious controversies by submitting dueling slates of electors.

To add to the confusion, following an informal deal that was struck with Southern Democrats, the Southern Democrats that effectively ended reconstruction, Hayes was eventually named President.

But the vulnerability of our democracy was truly revealed. Following two other close elections in 1880 and 1884, and numerous failed attempts at reform, Congress finally passed the Electoral

Count Act of 1887. But as we saw on January 6, 2021, a lot of the fixes established by the original Electoral Count Act are not merely outdated, but actually serve as the very mechanisms that bad actors have zeroed in on, as a way to potentially invalidate presidential election results.

As I am sure you will hear from the panel of distinguished experts who will testify before you today, the time to reform the ECA is way past due, way past due. The time for Congress to act is now. As Senator Collins just said, before this Congress adjourns. I am proud of the bipartisan bill produced by Senator Collins, myself, and my colleagues last month, the Electoral Count Reform and Presidential Transition Improvement Act of 2022.

I am particularly thankful to Senator Collins for her leadership throughout the process and for the valuable input from all my colleagues in the working group on both sides of the aisle.

I think it is worth mentioning all of them because they have worked so hard, Senator Portman, Senator Murphy, Senator Romney, Senator Shaheen, Senator Murkowski, Senator Warner, Senator Tillis, Senator Sinema, Senator Capito, Senator Cardin, Senator Young, Senator Coons, Senator Sasse, Senator Graham, all of whom are co-sponsors. That is tremendous.

While I will be among the first to acknowledge that the bill is not perfect, it represents many months of hard work and compromise, and would serve as a tremendous improvement over the current ECA. As Senator Collins just mentioned in her remarks, the bill addresses what the bipartisan group identified as the most concerning problems of the ECA.

It unambiguously clarifies that the Vice President is prohibited, and I repeat, it clarifies that the Vice President, whoever he or she may be, is prohibited from interfering with electoral votes. It raises the objection threshold by 20 percent that would mark a shift from a single representative under the current ECA to 87 House Members, 87 from 1.

It also improves on basically only 1 Member of the Senate to 20 that must ratify, 20. It sets a hard deadline for state Governors to certify their respective states' electoral results. They just cannot wait until after the election before they decide who will send their electoral results. That cannot be done.

If they fail to do so or submit a slate that does not match with the electoral results from the state, it creates an expedited judicial process to resolve. On that last point, the expedited judicial procedure, I briefly would like to take a moment to discuss the reform proposed by our bill and explain why we propose revising the ECA as we did.

Our group decided to rewrite Section 5 regarding the certificate of ascertainment of electors, not to create any new causes of action, but to provide for expedited review of an action that a Presidential and Vice Presidential candidate can already bring.

Under existing law, it does so in a way that carefully limits the parties who can avail themselves of this expedited procedure and ensures that the slate of electors in Congress tallies are those certified and appointed pursuant to laws in effect prior, and I remind you, prior to Election Day.

While the group is open to some technical fixes to address timing concerns, for example, striking the 5-day notice typically required under Section 2284 of Title 28, we stand by this provision as a way to quickly and efficiently determine a single lawful slate of electors. In closing, I would like to remind you we were all there on January 6th. That happened. That was for real.

It was not just a visit by friends from back home. We have a duty and responsibility to make sure it never happens again. The Electoral Count Reform and Presidential Transition Improvement Act of 2022 is something that our country desperately needs, and a correction that needs to happen now.

I just want to thank you for the attention, for taking this up right now, and working in such an expeditious way. You are going to have some great, great presenters behind us here and have all the knowledge that we really used for the sources that we did to make this—make this piece of legislation happen. I want to thank Senator Collins and all those of the Members that worked on it so diligently. Thank you.

Chairwoman KLOBUCHAR. Thank you. Senator King.

OPENING STATEMENT OF HONORABLE ANGUS KING, A UNITED STATES SENATOR FROM THE STATE OF MAINE

Senator KING. Thank you, Madam Chair. The first thing I want to do is thank our two Senators and the group that worked so hard on this bill. It is an example of how this place can and should work.

It involves, I know, compromise and a great deal of discussion, a great deal of research. I really want to compliment you on that work. It gives us a really good piece of legislation that we can then work forward in this Committee, and hopefully, as Senator Collins suggests, act on this within this Congress. I think that is very important. A couple of points.

This is not a partisan issue. This is a mechanical issue. This is a rules issue that involves how our Government should work no matter who is in charge. This coming January 6th of 2025, a Democratic Vice President will be in that Chair. I just think that what we have to emphasize, that we should not try to game this out on a partisan basis and think that this favors one side or the other.

I do not think it does, because there is no telling what the circumstances will be in particular states or here in the Congress in future years. The very first class I took in Government in college, the very first class, and I do not know why I remember this, because it was a hell of a long time ago, the professor said, "the thing that America has achieved that has been rarely achieved in world history is the peaceful transfer of power that is unusual in world history."

The way we have achieved that is by having a written Constitution and a set of rules that have guided us. As Senator Collins said, if you have ambiguity and confusion, that opens the way to conflict and ultimately violence as we saw on January 6th. The core concept is the peaceful transfer of power.

Underlying that is a clear set of rules and principles that people can all understand and accept in advance, and then it is a mechanical process of counting the votes, determining who gets the electoral votes in a particular state, and then having Congress meet

and count those votes, as has been done in the past, more or less routinely. Again, I just want to thank you all particularly for your leadership on this issue.

My colleague from Maine played an indispensable role, I know, and you have really given us a solid basis upon which to proceed. I do not think there is a more important matter before us in this Congress.

It is one that I hope that we can resolve quickly. Again, it should be on an entirely bipartisan basis. It is a fundamental issue that goes to the heart of our democratic system. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Thank you very much. Thank you, Senator King. I want to thank our two Senators. There is just a few other things going on that you may be involved in. Thank you for your good work. I am going to call up our witnesses, and Senator Blunt and I will introduce them, and then we will swear you in.

A few of them are remote. Before I introduce our panel, come on up, I would like to ask for unanimous consent to enter a few statements and letters into the record from democracy reform groups, including elected officials and others, Minnesota Secretary of State Steve Simon, the Campaign Legal Center, Protect Democracy, the New York City Bar Association, the Project on Government Oversight, Democracy 21, and Citizens United, and the Cato Institute. Without objections, the documents will be entered into the record.

[The information referred to was submitted for the record.]

Chairwoman KLOBUCHAR. I will now introduce our witnesses. First, Bob Bauer, who I understand is with us remotely. He is a Professor of Practice and Distinguished Scholar in Residence at New York University School of Law, where he also co-directs the Legislative and Regulatory Process Clinic.

Previously, Mr. Bauer served as President Obama's White House Counsel from 2009 to 2011, and in 2013, President Obama appointed him as co-chair of the President's Commission on Election Administration. He holds an undergraduate degree from Harvard and a law degree from the University of Virginia, Senator Warner.

Next up, Ambassador Norman Eisen, who is with us today, a Senior Fellow in Governance Studies at the Brookings Institution. Ambassador Eisen has studied and written extensively on election law, ethics, and anti-corruption.

He served as Special Counsel to the House Judiciary Committee, as United States Ambassador to the Czech Republic, and as President Obama's Special Counsel for Ethics and Government Reform. He has an undergraduate degree from Brown and a law degree from Harvard.

Next up, Mrs. Janai Nelson, who serves—and she is going to be remote—as President and Director-Counsel of the NAACP Legal Defense and Educational Fund since March 2022. She previously served as Associate Director Counsel at LDF for eight years.

Earlier in her career, she was an Associate Dean and Associate Director of the Ronald H. Brown Center for Civil Rights and Economic Development at Saint John School of Law. She holds a bachelor's degree from NYU and a law degree from the University of California, Los Angeles. Senator Blunt.

Senator BLUNT. Thank you, Senator Klobuchar. I want to thank all of our witnesses for being here today. I have two witnesses that I am able to introduce. First is John Gore. Mr. Gore is currently a partner in the Government relations practice at Jones Day in Washington, where his practice focuses on voting, elections, and regulatory litigation.

His broad experience includes litigating numerous voting and election cases in 16 different states and at all levels of the state and federal judiciary, including the United States Supreme Court. Mr. Gore previously served as the Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for the Civil Rights Division of the United States Department of Justice from 2017 to 2019. In that role, he led the Department's enforcement of the federal civil rights laws nationwide.

Next, we have Professor Derek Muller, a tenured Professor of Law at the University of Iowa College of Law. He is nationally recognized as a scholar in the field of election law. His research has focused on the roles of states and the administration of federal elections, the Constitutional contours of voting and election administration, the limits of judicial power in the domain of elections, and the Electoral College.

As the bipartisan working group worked on their bill, he provided them with expert guidance and advice. I want to thank all five of our witnesses for joining us today and look forward to your testimony.

Chairwoman KLOBUCHAR. Very good. If you would all stand, including our witnesses at home, raise your right hand. Do you swear that the testimony you will give before the Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BAUER. I do.

Mr. GORE. I do.

Mr. EISEN. I do.

Mr. MULLER. I do.

Mrs. NELSON. I do.

Chairwoman KLOBUCHAR. Very good. You can all be seated. Mr. Bauer, you are now recognized for your testimony for 5 minutes.

OPENING STATEMENT OF BOB BAUER, PROFESSOR OF PRACTICE AND DISTINGUISHED SCHOLAR IN RESIDENCE AT NEW YORK UNIVERSITY, SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. BAUER. Thank you very much. Thank you very much, Chair Klobuchar, Ranking Member Blunt, and Members of the Committee for this invitation to testify. I have submitted, of course, a full written statement for the record. I come to this testimony as a Member and co-chair with Professor Jack Goldsmith of the bipartisan group convened by the American Law Institute to consider reform of the Electoral Count Act.

Unanimously produced a statement of principles that has shaped my views, but I want to emphasize that I am here today in my individual capacity. Unlike so many areas of contested political reform, there is widespread agreement across the political and ideological divide that the ECA requires revision.

Legal scholars have long been calling for reform for most of its 135 year old history. The statutes' obvious weaknesses and dangers have not erupted into controversy over the outcome of a presidential election.

But those dangers now face us all, and reform is now clearly and urgently needed. The business of reforming this statute poses complexities and tradeoffs, and yet the proposals before this Committee navigate these difficulties with considerable effectiveness. They set us on a path to reform that represents an extraordinary bipartisan achievement.

The core aim of the Electoral Count Act reform is to ensure that the popular judgment rendered on Election Day under the election law rules then in place in the state, is respected and then protected from being cast aside by state executive officials or by political majorities that happen to be in control of the Congress or of state legislatures.

Under the Constitution, state legislators, of course, determine the manner of appointing electors. For those states that choose popular elections, as all now do, Congress fixes the date that an election takes place. As a matter of due process the rules, in effect on the date of the election are the ones that must determine the outcome. This is basic stuff. In our democracy, we do not change the rules of competition after the game is played and the results are known. ECA reform as a matter of fundamental design vindicates the central tenet of our democratic life.

It respects state law, a process for setting the rules of an election, from the casting of ballots through canvassing, recount and contest processes. But it requires that states honor those results when transmitting to Congress the ascertainment of electors whose votes should be included in the January 6th tally.

It also clarifies Congress's role, which is to receive the lawful certificates so that it can count the correct electors votes, not to second guess the state's lawful popular vote count. As tested in state post-election recount and contests, and in federal and state litigation, the Electoral Count Act and the Electoral Count Reform Act shows that this can be done without creating any new legal claims or causes of action, merely assuring that when Presidential and Vice Presidential candidates challenge the lawfulness of certificates at a state legislature or state executive official might send Congress ways.

Those claims, as brought under existing law, are expedited. The tight timetable for the resolution of those issues before January 6th requires expeditious resolution. ECA reform proposals before this Committee can also clarify Congress's role in the conduct of the Joint Session proceedings.

Here there are large areas of consensus, strict limitations on the role of the presiding officer, raising the threshold, and charting the nature of permissible objections, and other mechanisms and rules for the conduct of this Constitutional process in which the public can have confidence. I will close by saying that the proposals before the Committee represent a vast improvement over existing law.

There can be no question about that, none whatsoever. As I have noted in my written statement and as will emerge, I hope in the time for questions and answers, there have been calls for clarifica-

tion and tightening. In one respect or another, all merit consideration. Some might well address concerns about ambiguities and misreadings.

But, and I emphasize this fortunately, none of those calls for clarification or technical correction go to the basic and very effectively designed reform that we have in front of us today. Thank you very much, Chair Klobuchar, and Ranking Member Blunt, and Members of this Committee.

[The prepared statement of Mr. Bauer was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much. Next up, Mr. Gore.

OPENING STATEMENT OF JOHN M. GORE, PARTNER, JONES DAY, WASHINGTON, DC

Mr. GORE. Good morning, Chairwoman Klobuchar, Ranking Member Blunt, and distinguished Members of the Committee. I first want to commend the Committee for taking up this crucial topic and for its commitment to a commonsense and bipartisan approach to reforming the Electoral Count Act.

Today's witnesses are distinguished experts and thought leaders from across the political spectrum. I am honored to be included in today's hearing, and I thank the Committee for inviting me to testify today. The Electoral Count Act governs a vital moment in our American democracy, the moment when states pass the baton of presidential elections to Congress.

The Constitution itself prescribes the roles of states and Congress in our presidential elections. The Constitution's Electors Clause vests in state legislatures the authority to direct the manner in which each state's electors are chosen. The Constitution vests in Congress the responsibility to count each state's electoral votes, and to certify and ascertain the winner of the Presidency and the Vice Presidency.

Since 1887, the Electoral Count Act has laid out a procedure for states to certify their electors, and it has directed Congress's discharge of its duty to collect, count, and compile electoral votes.

The states in Congress have performed admirably well under the Act, but the Act contains numerous gaps and ambiguities that could impede Congress's ability to count electors accurately in a future presidential election.

Reforming the Act is necessary and appropriate. Congress should take the opportunity to safeguard the integrity of our presidential elections now before future disputes arise. Several of the current Act's shortcomings reflected silence on judicial review. For example, the current Act does not address federal judicial review in this scenario.

When a Governor fails to certify a slate of electors or certifies the wrong slate of electors, the current Act also does not address how Congress should handle a revised certificate issued by a Governor under the order of a state or Federal court.

The Bipartisan Electoral Count Reform Act preserves the precedent and practices in our presidential elections that have served states, Congress, and the American people for decades. At the same

time, the Reform Act offers several key improvements for the benefit of states, Congress, and the American people.

Four of the main provisions of the Reform Act address judicial review and clarify the role of courts in adjudicating presidential election disputes. First, the Reform Act reiterates that the laws that govern presidential elections are the state laws adopted by state legislatures prior to the election.

This provision will help preserve, protect, and promote free and fair elections on behalf of all Americans. The American people can have faith and confidence in the integrity of our elections only when the rules are set before the election are followed, during the election, and upheld after the election.

The Reform Act is a key bulwark against efforts to change the rules of the game after a presidential election has been held. Second, the Reform Act leaves states and their voters in charge of choosing presidential electors as the Constitution directs.

Accordingly, the Reform Act preserves existing state laws for contesting or challenging the results of an election. States have adopted a variety of judicial and administrative procedures for adjudicating election disputes, and the Reform Act keeps all of those procedures in place.

Third, the Reform Act addresses and fills a statutory gap by addressing judicial review in a scenario when a Governor fails to certify the correct slate of electors. A provision in the Reform Act guarantees that expedited federal judicial review is available in such cases. Under that provision, Federal, Constitutional, or legal challenges brought by a Presidential or Vice Presidential candidate will be heard by a three judge Federal district court on an expedited basis.

Any appeals would go directly to the United States Supreme Court on expedited review. Finally, the Reform Act fills another statutory gap by addressing how Congress should handle revised certificates issued by a Governor under the order of a state or Federal court.

The Reform Act made it clear that Congress will accept such a certificate. This provision modernizes federal law and Congress's process for counting electoral votes. I thank the Committee once again for its time and attention on this matter and look forward to the Committee's questions.

[The prepared statement of Mr. Gore was submitted for the record.]

Chairwoman KLOBUCHAR. Very good. Thank you so much, Mr. Gore. Next up, Ambassador Eisen.

OPENING STATEMENT OF AMBASSADOR [RETIRED] NORMAN EISEN, SENIOR FELLOW, GOVERNANCE STUDIES, THE BROOKINGS INSTITUTION, WASHINGTON, DC

Mr. EISEN. Thank you, Chairwoman Klobuchar, Ranking Member Blunt, and the very distinguished Members of this Committee for inviting me and all of my colleagues to testify today on the Electoral Count Act and on the need for reform, and for your bipartisan attention to these critically important questions.

The need for reform is profound. The flaws in the ECA were on stark display during the attempted overthrow of the 2020 election

results, an effort which United States District Court Judge David Carter described as a coup in search of a legal theory.

As we now know, including from the work of the House January 6 Committee, when former President Trump and his allies crafted that flawed legal theory that resulted in the insurrection, they exploited the flaws and ambiguities in the ECA. January 6th has passed, but the danger has not, as this Committee well recognizes.

Many of those who supported the 2020 coup attempt remain active in the election denial movement. Donald Trump has inspired over 100 election denying candidates from coast to coast running for key positions, overseeing elections. Indeed, several more won primaries just last night.

As the Vice Chair of the House January 6 Committee, Liz Cheney, has warned, this is an ongoing threat. Reforming the ECA is therefore essential to protect our democracy against future attacks.

The ECRA is a significant step forward toward addressing that threat. In fact, it represents multiple, significant steps forward. But the improvements the ECRA makes are not the sole matters that this Committee should focus upon.

We must ask, does the initial form of the ECRA effectively respond to all the critical weaknesses in the ECA that the campaign to overthrow the 2020 election revealed? If not, then it may actually invite unwelcomed manipulation. In my view, the Committee should focus its attention on improving four key provisions.

First, the "extraordinary and catastrophic events" that would allow for the extension of Election Day should be better defined. Leaving these terms entirely up to state law without guardrails presents an opportunity for mischief by election denying officials who are at risk of proliferating.

Second, the federal litigation provisions should be further developed as written. The scant six day window for federal litigation in the ECRA is insufficient, particularly in the event that Governors or others wrongly certify or refuse to certify electors, or otherwise abuse the process. It just does not work.

The elector meeting date should be back to expand the period for judicial review, and the 5-day notice requirement for convening three judge panels should be waived altogether. If I may say on this point, it is critically important that the Governors and other stakeholders in the states that this Committee and the Senate so deeply respect be consulted on how the process will work, and the complex interactions of state and federal law litigation and processes.

Third, to strengthen safeguards surrounding the process once it reaches Congress, the Committee should consider clarifying the grounds for objection by replacing lawfully certified and regularly given with more precise definitions. Those terms have been a source of abuse in the past. They need to be addressed.

Fourth, and finally, we must provide clear procedural rules for the congressional counts so that gaps and ambiguities are not used to foment chaos. Thank you very much for having me today.

[The prepared statement of Mr. Eisen was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you. Next up, Professor Muller.

OPENING STATEMENT OF DEREK T. MULLER, PROFESSOR OF LAW, UNIVERSITY OF IOWA, COLLEGE OF LAW, IOWA CITY, IOWA

Mr. MULLER. Chairwoman Klobuchar, Ranking Member Blunt, Members of the Committee, thank you for the kind invitation to testify today. It is a particular honor to speak to two of the tellers, Senator Klobuchar, Senator Blunt, who in the Joint Session on January 6th, served admirably in the face of great scrutiny and danger. Thank you.

My name is Derek Muller. I am a Professor at the University of Iowa College of Law. I teach election law and Federal courts. These views are my own and do not reflect those of the university or any other organization.

My written testimony makes five principal points. Broad bipartisan consensus is essential to reform the Electoral Count Act to ensure that future Congresses have the confidence to abide by the rules. The Electoral Count Reform Act of 2022 fits comfortably within Congress's Constitutional authority.

This bill has seven important components which are useful and practical ways of handling future disputes. The updates to the Presidential Transition Act of 1963 are laudable. Finally, there are some small technical corrections that could further improve clarity. In the interest of time, I will focus on a few of these points, then rely on my written testimony and respond any questions.

In amending statutes like the Electoral Count Act of 1887, Congress must develop neutral, sensible rules well before any dispute arises in a contested election. That Act was enacted with bipartisan consensus. It took too long.

A series of significant problems in the election of 1872 left unanswered questions, and they remained unanswered ahead of the contested election of 1876, which threw the United States into a catastrophic election crisis. Even after that, Congress could not find consensus until 1887, with Democrats and Republicans joining together to develop a bill that they could agree would govern future counting.

Despite its problems, it served well for over 100 years. The Electoral Count Reform Act of 2022 does seven important things. First, it clarifies the scope of Election Day.

Second, it abolishes the failed to make a choice provision and substitutes a simpler rule for election emergencies.

Third, it ensures that Congress receives timely, accurate electoral appointments from the states.

Fourth, it raises the objection threshold in Congress.

Fifth, clarifies the narrow role of the President of the Senate when Congress counts votes.

Sixth, it enacts new counting rules to define Congress's role of the count.

Seventh, it clarifies the denominator in determining whether a candidate has reached a majority. These objectives are hardly random. They have their legacy in the same kinds of reforms proposed by Members of this Committee and others in Congress. These goals are all advanced in the discussion draft of the Electoral Count Modernization Act, which was released in February.

These seven are also all goals which were advanced in the Committee on House Administration Majority Staff report released in January. The mechanisms may differ from proposal to proposal, but all serve in the same ends, often quite similarly.

I am confident that the bipartisan working group that fashioned the Electoral Count Reform Act of 2022 owes a great debt of gratitude for the work in Congress and the work of Members of this esteemed Committee, improving the work that has been done so far. The bill works within the scope of Congress's power under the Constitution to fix the times of elections and of concluding them, to expedite resolution of disputes and to constrain discretion in the Joint Session when it comes to counting votes.

It does not inhibit the states from resolving disputes in state courts, but it does require Congress to treat as conclusive the results that come out of states of the courts upon the resolution of any election dispute.

There is wisdom in the specific approach of the bill and the things that it does not do, which are just as important as the things it does in the event of an election dispute. The very last thing anyone wants is uncertainty. Novel mechanisms may face scrutiny and judicial skepticism at the very moment they are most needed, at a time when they must serve as reliable guardrails.

The bill does not invite new avenues of litigation that could create tension with existing stable litigation. It does not offer novel mechanisms for counting in Congress that may face future challenges. Importantly, in some places, the bill retains useful, long standing language from the Electoral Count Act to reduce uncertainty that new or different language may provide.

At every turn, the bill offers more clarity, more precision, and more stability. The specific text of this bill has significant and broad bipartisan consensus. It is neither a partisan effort nor a token bipartisan effort. While many speak generically about reform, specific language and mechanics matter and securing consensus on these topics is not easy.

The risks of failing to enact the Electoral Count Reform Act of 2022 are significant. Some have attempted to exploit ambiguities over the years, most significantly in 2020. To leave those in place ahead of the 2024 election is to invite serious mischief.

No law can prevent all mischief, but the bill significantly strengthens several important things. I have been pleased to see such bipartisan consensus on it and there has been very little opposition to the heart of the bill. Rare concerns are mostly misunderstandings or technical problems. I thank you and look forward to answering any questions you have and thank you for participating today.

[The prepared statement of Mr. Muller was submitted for the record.]

Chairwoman KLOBUCHAR. Very good. Thank you very much. Mrs. Nelson. Last but not least, remote. Thank you.

OPENING STATEMENT OF JANAI NELSON, PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC, NEW YORK, NEW YORK

Mrs. NELSON. Thank you. Good morning, Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Committee. My name is Janai Nelson, and I am President and Director Counsel of the NAACP Legal Defense and Educational Fund, or LDF. I join my colleagues in commending the work of this Committee and celebrating the unanimity of support on the need for reform of the ECA on this panel.

I thank you for the opportunity to testify on the perils facing our democracy, and on the urgent need to enact responsive and expansive federal legislation that prevents the sabotage of our elections, sabotage that can happen through discriminatory barriers to the ballot and the manipulation of election results in ways that disproportionately target communities of color.

Historians will study the period between 2020 and 2025 for decades to come as they seek to explain the next century of American life. They will ask the question, did we act when we had the chance, or did we squander our last, best hope to protect the freedom to vote and save our democracy?

The answer to that question lies in part in the actions of this Committee. I come before you today to sound a piercing alarm. Longstanding voting discrimination is intensifying at the same time that efforts at election sabotage through manipulation have again come to the fore, accompanied by the normalization of political violence.

Voters of color face the greatest assault on our voting rights since Jim Crow. United States democracy is in crisis because of a deep-seated, irrational, and discriminatory fear of the truly inclusive, multiracial, multi-ethnic democracy that our Nation has never been, but our increasingly diverse electorate holds the promise to deliver.

Those who reject and fear that vision of democracy have proven that they are willing to sabotage our elections to avoid its fruition, and to destroy our democracy in the process.

To prevent another January 6th, and to bring our democracy back from the brink, Congress must act swiftly and expansively to address the full range of these challenges, including rampant voting discrimination that has for centuries impeded the equal voice and power of voters of color. We also need urgent action to resolve ambiguities and curb opportunities for abuse in the electoral process. As the other panelists have explained, in other words, strengthening the Electoral Count Act must be the start of this Committee's and this Congress's work, but not the end. We are encouraged by and commend the bipartisan working group's thoughtful progress on the ECRA for all the reasons I noted. Shoring up the ECA is both a democracy issue and a racial justice issue. We also believe the ECA can be strengthened further, and I offer the following principles as a guide.

First, any reform should eliminate both ambiguities in the law and opportunities for manipulation, while preserving voters' ability to enforce their rights under existing law.

Next, any judicial process to determine the official slate of presidential electors for Congress to count should be conducted according to established and clear guidelines, and be fair and unbiased, both in fact and in appearance.

That process must yield a single, definitive, and final result that is not subject to competing outcomes prior to the meeting of the Electoral College. In addition, this process must not intrude on voters' prerogative to seek relief against discrimination, undue burdens, or due process violations in state or Federal court.

Finally, we recommend clarifying the ECRA's language so there is no ambiguity that Congress is conclusively bound by an ascertainment as affirmed or revised by a state court, a Federal court for statutory or Constitutional reasons, or the particular federal judicial review process described in the ECRA.

My written testimony contains more detailed suggestions for this Committee's consideration, including ways to improve the bipartisan working group's companion legislation so that it fulfills its potential as a complement to the ECRA.

At bottom, however, is this most important point: protections against voting discrimination and voter suppression, and protections against election manipulation and subversion, are distinct yet mutually reinforcing ways to prevent election sabotage. Both are necessary to ensure that the votes and voices in our increasingly diverse electorate are equally heard, counted, and honored. Congress must act now to root out voting discrimination and prevent election subversion. That all important work begins with this Committee, and I look forward to your questions.

[The prepared statement of Mrs. Nelson was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much, Mrs. Nelson. Appreciate your testimony, and the spirit of your suggestions I feel the vibes from all of our witnesses that we want to move on this. I thought I would start with this bipartisan panel of witnesses, just with yes or no questions.

Quick, we know this is a complex area of law and we all want to get it right. Do you agree that it is important for Congress to update the Electoral Count Act to ensure the will of the voters prevails in presidential elections, whatever that will may be? Mr. Bauer, just yes, no.

Mr. BAUER. Absolutely.

Chairwoman KLOBUCHAR. Okay. Mr. Gore.

Mr. GORE. Yes.

Chairwoman KLOBUCHAR. Mr. Eisen.

Mr. EISEN. Yes.

Chairwoman KLOBUCHAR. Mr. Mueller.

Mr. MULLER. Yes.

Chairwoman KLOBUCHAR. Thank you. Then last up Mrs. Nelson.

Mrs. NELSON. Yes.

Chairwoman KLOBUCHAR. Okay. Do you agree that under existing law, the Vice President has no authority to decide which electoral votes to count? Do you support efforts to update the law to make it crystal clear that the Vice President has no authority to accept or reject electoral votes? Mr. Bauer.

Mr. BAUER. Yes.

Chairwoman KLOBUCHAR. Gore.
Mr. GORE. Yes.
Chairwoman KLOBUCHAR. Eisen.
Mr. EISEN. I agree.
Chairwoman KLOBUCHAR. Muller.
Mr. MULLER. Yes.
Chairwoman KLOBUCHAR. Mrs. Nelson.
Mrs. NELSON. Yes.

Chairwoman KLOBUCHAR. Okay, last. Under existing law, it only takes one representative and one Senator to force each chamber to debate and vote on an objection to a state's electoral votes. Do you support raising the threshold for these objections to require, suggested in this bill, the one-fifth of each chamber to sign an objection before it can be debated, as suggested in the bipartisan bill? Mr. BAUER. Yes.
Chairwoman KLOBUCHAR. Mr. Gore.
Mr. GORE. Yes.
Chairwoman KLOBUCHAR. Mr. Eisen.
Mr. EISEN. Yes.
Chairwoman KLOBUCHAR. Mr. Muller.
Mr. MULLER. Yes.
Chairwoman KLOBUCHAR. Mrs. Nelson.
Mrs. NELSON. Yes.

Chairwoman KLOBUCHAR. Okay. That is a first. All right, good. I just thought it was really important, as we look at even some of our questions will be about details, that we agree that on the main parts of this bill there is agreement, and we can always make improvements. I am sure there will be discussions about that.

One area that has received a lot of attention is the role of the Federal courts in ensuring state officials comply with their federal duty to certify electors who reflect the outcome of the election.

Mr. Eisen, briefly. You have expressed some concern on the judicial review procedures and the timing of them, that there should be enough timing to resolve the disputes before the Electoral College meet. Can you talk about that very briefly, and what you think would be helpful?

Mr. EISEN. In the 6-day window, you have got to get through briefing, argument, decision, appeal, first with the three court panel, then with the Supreme Court. All of this is happening in the context of possible state ongoing proceedings, and it will put a burden on the Governors, the AGs, and the Secretaries of State who are engaged. It simply is not workable to do it in six days.

I recognize that on the one hand, the states are going to be pushing for more time. On the other hand, the parliamentarians and all of you and those in the House who must handle this are going to want—pushing in the opposite direction for enough time to get ready. But I think getting it right——

Chairwoman KLOBUCHAR. Getting that time right. That seems like something. Okay. Mr. Bauer, you want to respond to that?

Mr. BAUER. Yes. I do not share the acuteness of Norm's expressed concern on this point. I think, first of all, it is very likely that lawsuits to challenge, if you will, questionable certifications are likely to arise well before that six day period. I do not think is going to occur right at the beginning of the 6-day period.

Also, I think it has been clear over time that courts have the mechanism and recognize the duty to expedite as necessary the resolution of these claims.

Thirdly, I do want to stress again that under the Electoral Count Reform Act, we are talking about claims that are very narrowly drawn, brought by Presidential and Vice Presidential candidates to address the apparent submission or refusal to provide a certificate in accordance with state laws.

I think that, again, that will focus the court's attention and enable these matters to be addressed expeditiously, even within a 6-day period. If, in fact, it would help the passage of the bill to add a few days, and it was possible to accommodate those additional times without pressure on the other end as Congress prepares for the Joint Session, of course, you know, that certainly can be considered.

Chairwoman KLOBUCHAR. Okay. There is widespread concern about a provision in the current law—the current law—that would allow state legislatures to declare a failed election, and appoint their own electors, which would be appointing their own electors but ignoring the votes in their states. Mr. Bauer, quickly explain how the bipartisan bill solved this problem.

Mr. BAUER. It solves this problem, in my view, very effectively by providing that states may, pursuant to laws in effect before Election Day, determine that extraordinary and catastrophic events have occurred that necessitate a modification in the period of voting. That is key.

The remedy here is a modification in the period of voting. It does not allow the states to use the excuse, and that is what was most of the concern, about the failed election provision under the current ECA to redo the election, to throw the old one out, and conduct another one.

I think that it very effectively addresses the concerns that we have over legitimate problems that may arise with cyberattacks, power outages, natural disasters, while at the same time preserving this fundamental principle that laws are that due process requires us to honor the results of elections that reflect the popular vote under the rules in effect, on Election Day.

Chairwoman KLOBUCHAR. Okay. Ambassador, you have expressed some concern that the language in the bipartisan bill allowing states to extend Election Day during an extraordinary and catastrophic emergency, is vague? I mean, I am glad that they had an exception, and something we had in our bill, Senator King, and presented for these catastrophes. You can have weather catastrophes, right. Do you have anything you can suggest then that you think could make this more defined?

Mr. EISEN. Chairwoman, if this Committee were in charge, solely in charge of administering extraordinary and catastrophic, the anxiety that many of us feel in looking at the election denier landscape and the brazenness and the willing to go to the very—the willingness to go to the very limits, that alarm would not occur.

But I think given that Congress has defined this term, extraordinary and catastrophic, you can put some guardrails around that to prevent the bizarre idea which can be done before Election Day

by an election denying Governor, particularly if there is a trifecta, if they have both houses.

Chairwoman KLOBUCHAR. Okay. Just, if you could—any specific language and you can give it to the Committee later?

Mr. EISEN. Force majeure—the guardrails could be force majeure—that would be another one.

Chairwoman KLOBUCHAR. Okay, I have one last question, Mrs. Nelson. You testified that reforming the Electoral Count Act is only one step in protecting our democracy. I know you would like to see some changes. We can go over those later. But could you speak to why additional legislation like the Freedom to Vote Act and John Lewis Bill would complement the work that we have done here? Mrs. Nelson.

Mrs. NELSON. Yes, because election sabotage happens not just after ballots are cast and votes are tabulated. It can happen in the way that the electorate is shaped through voter suppression laws and through laws that erect barriers to the ballot.

The John Lewis Voting Rights Advancement Act is critical to restoring and strengthening core protections against voting discrimination that we lost in the Voting Rights Act of 1965 when the Supreme Court struck down the preclearance provision and disabled it.

We also need the Freedom to Vote Act to set minimum standards for access to the polls so that voters in Florida and Georgia and Texas can benefit from same day voter registration, for example, or robust vote by mail and ballot return procedures, just like voters in California and Colorado and other states. The uniformity of those voting measures will restore and bring greater confidence to our electoral system and will complement the work of the ECRA.

Chairwoman KLOBUCHAR. Thank you very much. Senator Blunt.

Senator BLUNT. Thank you, Chair. Mr. Gore, Professor Muller, and Professor Bauer, you all in each of your testimonies, you highlighted the importance of—that bill had it in clarifying that states must use laws enacted before Election Day. Let me put two or three thoughts out there and you can all three respond to this.

What potential problems would that provision solve? How does that provision help maintain the integrity of the elections? Does the provision still uphold the rights of states to actually craft their own laws regarding elections? Let's just start with Mr. Gore here, right in front of me. We will go, Mr. Gore, Mr. Muller, and Mr. Bauer.

Mr. GORE. Thank you, Senator Blunt. That is a key provision of the Reform Act, because it leaves the people and the people's representatives in the state legislature in charge of prescribing the rules for presidential elections as the Constitution directs.

It would prevent efforts to change the rules of the election after the game has been played. It is a fundamental premise of our elections that they are held in a free and fair manner under rules that are set in advance, followed during the election, and are not changed after the election.

The Reform Act is a key provision that would prevent efforts to change the rules after votes have been cast, counted, and compiled. It would leave state legislatures in charge of setting those rules as the Constitution directs and would ultimately empower state legis-

latures to set those rules in the manner that they deemed best in each individual state.

Senator BLUNT. Okay. Mr. Muller.

Mr. MULLER. Thank you. That provision works well in tandem with abolishing the failed to make a choice provision. The goal is that there is one Election Day, the first Tuesday after the first Monday in November. All the rules are going to be in place then and we are going to follow those rules and adhere to them.

There were some concerns that arose in 2020 that Legislatures could show up in December or January and appoint a slate of electors under rules that did not exist at the time. There was a lot of conversation about this in Florida in 2000, Louisiana in 1960. This was a problem in 1876 as well.

Making sure that we have stable rules up front, that we know we are having a popular election, and all of those rules are going to control and govern the recount and other processes that happen after Election Day is crucial to ensure that the votes and the voices of the people will be represented when that certificate gets to Congress.

Senator BLUNT. Mr. Bauer.

Mr. BAUER. I completely associate with the comments just made by Mr. Gore and Professor Muller. I think that this is a crucial part of Electoral Count Act reform and well reflected in the Electoral Count Reform Act. The Congress fixes the date under the Constitution of the election.

Due process requires that those—that congressional authority be respected, and that state legislatures do not attempt after the fact, once the results are known, to change the rules that were in place and on which the voters relied. It is essential for that reason within our Constitutional framework and for the additional points that were made by Mr. Gore and Professor Muller.

Senator BLUNT. Thank you. Ambassador Eisen, does anything in the bipartisan proposal displace any of the existing federal or state claims that are available? Now, it does seem like there are plenty of places to go to court, and as others have pointed out, to challenge problems that are perceived or real immediately after the Election Day itself. Is there anything that prevents all of those options from continuing to be available?

Mr. EISEN. Options do remain available. I will note, and I am going to the place in the bill, that at the end of the 6-day period, for recon—in order that the, here we are, in order that the certificate have a binding effect here in Congress, that the subsequent state or federal judicial relief, this is in 5(c)(1), has the effect of—in order for that to have effect, it will cutoff the state review.

We are establishing a cutoff here. I know there is some concern by those who actually have to administer this that—with the length of that period. That is why we would like to have more time in order that state and federal procedures can run their course.

Senator BLUNT. Mr. Gore, do you think more time is a helpful thing where you have all of these current remedies in law?

Mr. GORE. I do not believe that more time is necessary to allow the courts to adjudicate any disputes in presidential elections in the future for several reasons.

First, the Reform Act preserves all of the existing state procedures for adjudicating those disputes. The federal claim or the federal suit would be filed in most cases, if not all cases, after a state process already has played out.

Second, it is going to be a very unlikely case that would be resolved within only six days. Most states certify the results of their elections well before that six day period would begin. For example, in 2020, Delaware certified its election results on November 18th, nearly a full month before the Electoral College convened.

Third, the issues presented in any kind of federal suit would be very narrow. The issue would only be whether the Governor had failed to certify the correct slate of electors as required by state law in existence prior to Election Day.

Fourth, as I think Mr. Bauer may have mentioned before, the states have proven and the courts have proven very adept at adjudicating these disputes in a very quick manner.

That includes not just state courts that deal with election contests and challenges, but also Federal courts, including the United States Supreme Court, which in many cases has resolved election disputes very, very quickly.

Senator BLUNT. Thank you. Thank you, Chairwoman. I may have other questions later or for the record, but we have got a number of Members here so we can move on.

Chairwoman KLOBUCHAR. Yes, we can do some later. Senator Warner.

Senator WARNER. Thank you, Chair Klobuchar. Let me thank you and Senator Blunt for giving the bipartisan group the time and space to try to put this together. I would point out, I know this is not the popular perception that Americans have, we have had a pretty good run of bipartisan activity in the Senate, the Infrastructure bill. There was a group that came together, the Chips bill.

There was a group that came together on the guns legislation, the budget, the Veterans bill that was passed yesterday, and now the ECRA. I know this is again not popularly held by the public, but there are a group of reasonable Senators in both parties that actually try to get to yes.

I also want to quickly point out that while we are on the Electoral Count Act today, there was a lot of good work done by this group as well on issues around postal reform, in terms of elections, making sure that absentee ballots would be swept and counted in an appropriate way, that there would not be changes before an election inappropriately by any kind of postmaster general that might be political. I would urge the Committee take a look at those.

We also, I think, did some good work on efforts around voting machines. For example, we already have in the law making sure that voting machines do accurate counts. We also have appropriate in the law that voting machines can withstand environmental challenges if they get rained on, flooded, wet.

One of the things we have not done and that I think is very appropriate for this Committee to take up, would be making sure that we have *de minimis* security standards and cybersecurity standards in voting machines.

Senator Blunt and I, Senator King are on the Intelligence Committee, and we have seen efforts in the past to use cyberattacks on our voting systems and putting in a voluntary *de minimis* cyber standards for our voting machines, I think, just makes an enormous amount of sense. I also want to compliment Professor Muller.

You have a series of technical amendments to the legislation that we put together. I am going to tell you, from my standpoint, I think all four of your technical amendments dramatically improve the bill and clarify some of the misreadings. While I am not going to get in my 2 minutes and 50 seconds a chance to go through all of them, I hope, and——

Chairwoman KLOBUCHAR. We will give you an extra minute, Senator Warner.

Senator WARNER. Or a more adept Committee Member may point to those, but I also think Professor Muller, Senator Blunt, as you know, has a Republican background. I just want to say his improvements would get my support. I do not want to speak for Senator Collins and Senator Manchin, but I have run it by them as well. I think you do some very good work.

I do want to get to a question, though, and that is that Mr. Bauer, I want to thank you and your colleague, Jack Goldsmith, as well as all the other law professors, for your help in drafting the ECRA. As probably Senator Capito will indicate, one of the things that we wrestled with the most was determining the role that the Federal courts might have in resolving a disputed election.

I think some of the commentary out there, frankly, is off base. One of the reasons why I think Professor Muller's corrections may help. Let's, Bob, if we could go through a lightning round in my last minute and 50 seconds, does the ECRA create a new cause of action?

Mr. BAUER. No, it does not.

Senator WARNER. Does the ECRA expand the jurisdiction of the Federal courts?

Mr. BAUER. No. It only provides for expedited reviews of cases that would be brought under existing law.

Senator WARNER. Does the ECRA in any way diminish the power of state courts?

Mr. BAUER. No, it does not.

Senator WARNER. Now, you have said that the ECRA simply clarifies the role of Federal courts under existing law. Now, we spent a lot of time going back and forth on this and had lots and lots of good work. Can you go ahead and describe that role of the Federal courts in this process?

Mr. BAUER. The point that I was making was that the sort of claim that we are talking about here that might be brought by a Presidential and Vice Presidential candidate challenging the lawfulness of a certificate that either a state executive official might put forward or a state legislature might put forward, is an action that could be brought today under existing law, under extant law by the Presidential and Vice Presidential candidates.

What the Electoral Count Reform Act does, and I think quite effectively, is simply provide on this very unforgiving timetable we face in any event, for expedited review. It establishes venues and

procedures for expedited review, review by a three judge court, and then review by the United States Supreme Court.

But it does not alter existing law, it does not, as your question earlier suggested or asked me to respond to, it does not create any new causes of action. It is a procedural provision to allow this narrow kind of claim brought by these particular plaintiffs to receive expedited treatment.

Senator WARNER. That is the position not only of you, but Mr. Goldsmith and the series of law professors who worked with the group?

Mr. BAUER. To my knowledge, speaking, of course, for myself and I know this to be also the position of Professor Goldsmith, the answer is yes. I know of nobody who has argued to the contrary that I have discussed this with in the law professors' community.

Senator WARNER. There was probably no issue that we spent more time on, and maybe Senator Capito will want to comment on this. I think some of the critiques maybe have been misguided. I have got a whole bunch of folks in my office where I go through those great corrections that Professor Muller has to the legislation.

But I think if there was any ambiguity, some of his technical fixes make some sense. I, again, thank the Chair and the Ranking Member for giving this gang a chance to do some work, and would welcome other gang members in future endeavors. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Senator Capito.

Senator WARNER. The tats that we brought in the ECRA gang tats, do not—we should not show those off?

Senator CAPITO. I am not getting into this one. Thank you, Madam Chair, and also Ranking Member Blunt for having this hearing today. To my colleagues, Senator Manchin and Senator Collins, for testifying,

I want to thank Senator Warner, as well as Members of the groups/gang, whatever we are calling ourselves, and everybody else in this Committee. We have had several hearings on this issue. I am going to make a statement in what time I have left. I hope I have time to ask one question, but I want to thank the witnesses today, not just for what you are doing here today, but what your lending of support and expertise throughout this entire process.

We did labor back and forth on the best way and I am really encouraged by what I hear. I would also like to submit for the record a letter of support from the R Street Institute, who is in support of the ECA reform efforts. Without objection, I will put that in there.

[The information referred to was submitted for the record.]

Senator CAPITO. One of the most important duties of Members of Congress is to certify the winner of presidential elections. It is not our job to adjudicate lawfully cast ballots or overturn the will of the American voters. I remain a strong supporter of our electoral system, which provides power to the states to tailor their election laws to the specific needs of their citizens.

As federally elected officials, we must respect the Constitutional role reserved for the states and not abuse our oversight powers, which I think this bill lines out. I am proud to have joined 15 of

my colleagues from both sides of the aisle in introducing the Electoral Count Reform and Presidential Transition Improvement Act.

This legislation is the only bipartisan bill that would amend the Electoral Count Act of 1887. January 6th was a dark day here in our Capitol and for our democracy. But the politicization of the counting of electoral votes has been a problem for decades, predating the most recent presidential certification.

Members of Congress have objected to certified electoral results as a means of changing political outcomes of electoral results that they do not like. Despite then George Bush's—President George Bush's clear win over then Senator John Kerry, the concurrence with several House Members of a single Senator forced a vote in both chambers over whether to overturn Ohio's electoral results because of the rules set by the Electoral Count Act with just a single member.

I am glad to see that we have on record that we all believe that that is a flawed proposition. Senator Barbara Boxer's objection forced Congress to deliberate on whether to discredit the popular vote in the State of Ohio. This resulted in a vote of 1 to 74 in the Senate, and 31 to 267 in the House of Representatives.

In 2017, House Democrats tried to object to results in nine states, to contest President Trump's electoral victory. Had a single Senator had the bad sense to sign these objections, we would have been required by law to vote on these frivolous objections. These precedents, along with efforts to pressure Vice President Pence to discredit the lawfully cast ballots of certain voters, demonstrates a clear need for reform in this certification.

Over the course of seven months, we have worked on this, and I am proud that we have put together a package that I think can use improvements and tweaks, as we have talked about, but also hits at the core issues.

The legislation solely solves efforts to subvert lawfully given electoral results in our presidential elections, and provide clear guidelines, I think clarity is sort of the word of the day—clarity is what we have been missing for over those hundred years. It is not a partisan power grab to federalize our elections or use Congressional levers of power to dictate what outcomes a single party might prefer.

These efforts, these legislative reforms, offer common sense solution to a recurring problem. In consultation with many of you, I am hoping that this bill can gain enough support to pass both chambers and be signed into law by the President. I would like to ask in my remaining short period of time, I feel quite honestly, and I do not know what the Chair feels about this, that we have a sense of urgency here.

Let's be real. We are in it. We are several months away from a midterm election, but as soon as we turn the corner into January or into another lengthy two year presidential election, my personal feeling is we need to button this up before the end of the year because that will then set the clarity to move forward for the next election.

I know I might get the answer that none of you think that you can tell Congress when they should and how they should pass things, but since you are all here in your personal capacities, I would like to know if you have an opinion on the urgency to get

this wrapped up by the end of the year. Mr. Gore, I will start with you.

Mr. GORE. Thank you, Senator. I would not presume to tell Congress——

Senator CAPITO. I knew you would say that——

Mr. GORE [continuing]. but I certainly agree that now is the time to act. The Reform Act is a beneficial piece of legislation and makes a number of improvements. It is pending before the Congress now, and the moment is here for Congress to act and adopt these important reforms.

Senator CAPITO. Thank you. Ambassador Eisen. I would like to say on a point of personal privilege, I enjoyed visiting you when you were the Ambassador. Thank you for your hospitality. It is nice to see you again.

Mr. EISEN. I was thinking back to the nice and bipartisan time that we had in Prague. I think it is urgent. We must seize the moment. But we must seize it correctly, taking account, and I know no one feels more strongly than you do, Senator Moore Capito, taking account of the needs of those state officials who actually are going to have to deal with all of this. They need more time.

Senator CAPITO. Right. Mr. Muller.

Mr. MULLER. I want to echo the point on the states, because the more lead time you give them saying these are the rules, these are the deadlines, this is what your courts have to resolve in a speedy time, this is when the certifications have to take place. There is so much that has to happen behind the scenes in the 50 states. The more lead time we give our hardworking election officials in the states, the better.

Senator CAPITO. Thank you. Mr. Bauer.

Mr. BAUER. I share the expression of humility about weighing in on when Congress should act, but I could not agree more that is urgent, and I would certainly be, I will put it this way, delighted to see and I think it would be good to see Congress act before the presidential election cycle begins.

Senator CAPITO. Thank you. Mrs. Nelson.

Mrs. NELSON. Yes, I concur with my colleagues. This is urgent reform that is needed. By Congress advancing this as soon as possible, it frees Congress up to do more to protect our elections and to enact other legislation that will complement and enhance the ECRA.

Senator CAPITO. Thank you. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Well, thank you very much, Senator Capito, and thanks for your work. I strongly agree with you on the timing issue. Next up, Senator King and then Senator Padilla, I believe. I do not think we have anyone else. Everybody has been patiently waiting. Senator King.

Senator KING. I want to raise an issue that has not been discussed. All of you very comfortably asserted that this was Constitutional, that the ECRA was Constitutional. Mr. Muller, I think you used the term "well within Constitutional bounds." I am worried about the implications of the so-called independent Legislature theory. The theory basically holds that the there is a difference, there is a subtle difference between the election clause as a clause in Article 1 and the election clause in Article 2.

Which Article 1 says, Legislatures and the states shall set election rules, but then semicolon, Congress may amend or override those rules. In the election clause for the President, it talks about the states shall select electors in a manner the Legislature shall direct. There is no provision for congressional, express provision as there is in Article 1.

There are those who assert, and apparently we now have three justices—Thomas, Alito and Gorsuch—who appear to accept this independent Legislature theory that nothing can override, and they can do anything they want whenever they want.

Mr. Bauer, let me start with you. Since you are a graduate of the same law school that I am, I will give you that, I will give you the privilege of beginning. What do you think of this theory, and is this a concern in the context of what we are discussing here today?

Mr. BAUER. No, I do not believe it is. There has been a lot of different meanings assigned to the term independence, state legislative doctrine, but I think one thing is very clear, which is whatever state legislatures may do in the manner of appointing electors, they cannot violate other Constitutional provisions.

They are still faced with the requirement that their actions be consistent with the due process and equal protection clause with the right to vote under the First Amendment. There are constraints, and I do not think in the most extreme form that somebody might suggest that one might understand dependent state legislature doctrine.

I do not think that would be an accurate statement of what is available to state legislatures under our Constitution.

Senator KING. Mr. Muller, your thoughts.

Mr. MULLER. Congress has the power to choose or to define the time of choosing electors. One of the really important things this bill does is by eliminating the failed to make a choice provision and saying all of the rules have to be in place as of Election Day, then it puts in place that if you are going to hold a popular election, we are going to follow those rules.

There is no opportunity to show up later and do something else. While there might be in the most aggrandized theory of the independent state legislature to say the Legislature can do whatever it wants, perhaps that is true, but it has to do it on the first Tuesday after the first Monday in November, and it has to have laws in place well before that election.

Senator KING. The power in the Congress to set the date is a constraint on the Legislature acting retroactive.

Mr. MULLER. Correct.

Senator KING. That is reassuring. Mr. Gore, do you agree?

Mr. GORE. I do agree that the independent state legislature doctrine is not implicated by the Reform Act, and I agree with Professor Muller's reasons for that. I will just add that this provision that clarifies that the governing law for presidential elections is state law enacted by state legislatures prior to Election Day, further allays any concern that there might be under that doctrine.

Senator KING. Do you feel that the Electoral Reform Act adequately deals with the rogue Governor problem of a Governor who basically refuses to certify? Because we have got people running for Governor who are saying, I would not have certified in 2020. Is

that addressed in these bills? That was something we tried to address in our draft bill. Mr. Gore.

Mr. GORE. Existing law already contains mechanisms to address the scenario of a Governor failing to certify a slate of electors or certifying the incorrect slate of electors. As I mentioned before, state laws have robust procedures for adjudicating election disputes, including that kind of dispute. The Reform Act does not displace any of that. It preserves all of those processes and procedures. To do that——

Senator KING. Do you think the current procedures are adequate and the Reform Act does not need to address this subject?

Mr. GORE. I think the Reform Act does not need to address this subject because there are legal remedies in place at the state level, and to the extent there are also Federal, Constitutional, or statutory challenges that could be brought, the Reform Act also leaves those mechanisms in place.

Senator KING. Mr. Bauer, do you agree with that conclusion? That the rogue Governor issue is adequately dealt with in existing law. It does not need to be addressed in the Reform Act?

Mr. BAUER. Well, certainly it is addressed under existing law. I think there are remedies available under existing law. But I would also point out, again, that it is very effectively addressed as a procedural matter through the expedited judicial review provisions that apply to the lawsuits we discussed previously. That Presidential and Vice Presidential candidates can bring to the challenge a certificate that a state executive or state legislature wrongfully puts forward, is the correct one. It does touch on that, certainly by expediting relief available under existing law.

Senator KING. Mr. Muller, one final question. We have got the voting period potentially modified by, "extraordinary and catastrophic events." Is that an adequate definition? Do you feel that it provides reasonable guidance that can be litigated? Or does it create an opening and an ambiguity?

Mr. MULLER. In my judgment, first we have to think about the status quo, which right now is that if there is—failed to make a choice, the Legislature can do whatever it wants, essentially. By abolishing that and replacing it with this provision is a dramatic improvement. The only remedy that can happen is a modification of the voting period, not suspending or delaying the election.

Senator KING. But what if a Legislature says, we had widespread fraud in the city of Philadelphia. That is an extraordinary event, and we have to throw out the results.

Mr. MULLER. Right. Extraordinary and catastrophic, I think are understood not to include allegations of voter fraud. As an independent constraint of federal law, I think it would prohibit states from enacting laws like that.

States already have emergency election laws on the books. To my knowledge, none of them define voter fraud as a basis for an emergency invocation of executive authority. It offers an independent federal constraint while relying on the stable existing state mechanisms for handling catastrophes and emergencies in elections.

Senator KING. Mr. Gore, are you satisfied with extraordinary and catastrophic?

Mr. GORE. I think that that is another issue that is best left to the states to decide again before Election Day for the reasons that Professor Muller has laid out.

Senator KING. Thank you. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Thank you. Senator Padilla. Senator Cruz is willing to have you go next, even though he is next, and appreciate that. Thank you. Senator Padilla.

Senator PADILLA. Thank you very much. He shares my pain, going back and forth to Judiciary Committee. Same day, same time. Thank you for the indulgence. Now, thank the three for your in-person testimony and our two witnesses that are participating virtually. I agree that it is critical that we modernize and clarify the Electoral Count Act.

I am grateful for that bipartisan group of Senators that have come together to work on this issue. But I do have some questions for our witnesses, and not just how we can best fix this law, but for a moment, I think it is also important for this Committee and for this hearing to focus on two other related points about the Electoral Count Act reform.

First, while the ambiguous text of the current Electoral Count Act left room for exploitation on January 6th, the text did not exploit itself, people did. The former President did. Senators, Members of Congress did. An army of lawyers all had to give up on our democracy, enough to give in to the big lie and use it to fuel a baseless challenge to the 2020 election.

While fixing the ECA is important, I think it is also important to remember why we need to do so in the first place. Because bad faith actors stand waiting in the wings to try again to exploit the text again for their own cynical ends.

Second, fixing the ECA would not do anything to remedy the significant barriers to ballot access that far too many voters across the country continue to face.

Fixing the ECA might make it harder to cheat in our elections. We hear that a lot from our colleagues, and we should absolutely do that. But I hope that we can soon find our way back to make it easier to vote as well. My first question is for Mrs. Nelson.

I know she is participating virtually but let me ask Mrs. Nelson to elaborate on the second point I just raised. Can you please expand on your testimony regarding the barriers to access that voters across the country will continue to face, regardless of whether or not we reform the Electoral Count Act?

Mrs. NELSON. Yes. Thank you, Senator Padilla, for that question. As I said, both orally and in written testimony, election sabotage does not occur only once a ballot is cast. It is also determined by who gets to cast a ballot in the first place and under what conditions. We know that voter discrimination and voter suppression are still rampant in our electoral system.

We know that there have been hundreds of bills proposed and many passed in states across the country that limit access to the ballot and that particularly have a disproportionate impact or were directly targeted at black and brown and other marginalized voters.

What the Electoral Count Reform Act will do is to resolve many of the ambiguities concerning how votes are counted and what certifies an election and ascertainment, and to shore up so many ways

that the exploitation of election results might occur. But it does not deal with the process of inputs of who gets to vote and under what conditions.

That is why it must be complemented by legislation that protects the right to vote and restores the Voting Rights Act to its full capacity and creates uniform standards across the country for voters that cannot be manipulated so that voters cannot be discriminated against based on race or another protected characteristic.

Senator PADILLA. Thank you so very much. My second question is more of a speed round for all the witnesses, is as follows. Now, the bipartisan group of Senators that engaged in a serious effort to address some of the major vulnerabilities of the current ECA text, I appreciate their work. Now, the bill takes serious steps toward reducing, excuse me, the likelihood that the law can be exploited again as it was on January 6th. But the Committee——

Chairwoman KLOBUCHAR. You can take a second. We are fine. We will give some extra time. We are all in a good mood here today.

Senator PADILLA [continuing]. but the Committee has jurisdiction on elections. I would like to hear just briefly from each of you. We know what is in the bill. Is there anything else that you would suggest to this Committee that be added to the bill to make it even better? Let's start with Mr. Gore and work our way down the table, then to the witnesses participating virtually.

Mr. GORE. Thank you, Senator. I do believe that some of the technical corrections that have been suggested to the bill by Professor Muller and others are appropriate. We had a back and forth earlier about the time period for bringing challenges under the Reform Act and this question of whether six days is sufficient.

I do believe that the 5-day notice provision in 28 U.S.C. 2284 for actions brought before a three judge court involving a state officer or a state official should be waived for these kinds of cases just to ensure that there is as much time as possible to resolve any Federal, Constitutional, or statutory claims.

Senator PADILLA. Ambassador.

Mr. EISEN. Thank you, Senator. I think extraordinary and catastrophic should be defined. I think the timing should be extended. We still had state led litigation going in 2020 during these—after the so-called state harbor and after the Electoral College met. I think that lawfully certified and regularly given needs to be defined better to prevent mischief here in Congress.

There—in my testimony, I have laid out some procedural specifications that I think is important to put in. If you call those clarifications and technical corrections, I am all for them. I do appreciate the huge bipartisan effort.

Senator PADILLA. Mr. Muller.

Mr. MULLER. With Senator Warner's endorsement, I think I will rest on the four recommendations I put in my written testimony.

Senator PADILLA. Thank you very much. Mr. Bauer.

Mr. BAUER. I do not think there is a gaping hole in the statute. I do think that there are technical corrections of the kind that I understand Professor Muller has advanced clarifications that could well be in order and could help to secure answer questions and secure bipartisan passage. I would contrast that with any glaring

weakness in the design. I do not think there is any glaring weakness in the design, but those technical corrections and clarifications, it seems to me, are appropriately considered.

Senator PADILLA. Thank you. Mrs. Nelson.

Mrs. NELSON. Yes. I shared some principles that we hope will guide this Committee's consideration of any tweaks to the ECRA. But I will state some more specific recommendations. We think that with respect to the timing, while we are not promoting a particular time period or expansion, that the 6-days for litigation is rather tight as we consider what needs to happen within that time period. We urge the Committee to think about some expansion of time for litigation and to ensure that there are not any unintended consequences.

We have also raised some issues concerning the assignment of judges for the judicial process to ensure that there is no actual, and more importantly, no appearance of bias that may undermine public confidence in the process.

We also believe that the right to a mandatory appeal to the Supreme Court is something that this panel should reconsider and think about ensuring the best process for the Supreme Court's review of these all important issues when they arise through the federal judicial process outlined in the ECRA.

Then also to make it very clear that the process in the ECRA does not supplant or supersede any state or Federal court avenues. I think that we have articulated that several times in this discussion today, but we do want to reiterate that point, because it is very important that voters still have an opportunity to vindicate their rights under state and federal law outside of that process.

Senator PADILLA. Thank you. Thank you all. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Okay. Thank you. Good question, Senator Padilla. Senator Cruz.

Senator CRUZ. Thank you, Madam Chair. Welcome to each of the witnesses. Professor Muller, Article 2, Section 1, Clause 3 of the Constitution provides that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.

The 12th Amendment likewise provides the very same text, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. Why, in your judgment, do you believe the framers gave that responsibility to the President of the Senate and to the House and Senate?

Mr. MULLER. Thank you, Senator. I think in terms of considering the separation of powers, there was understandably the goal of not to have Congress choose the President. But there also had to be some resolution of who was the President and some determination of the counting.

I think as far as I recall from Madison's debates of the convention, the notion was that this would largely be a ministerial task. To the extent that any disputes arose, it was not something that was on the minds of those at the convention. But undoubtedly very early on, it was recognized that there was going to have to be these actors that were involved.

By the time the 12th Amendment was enacted, it fell to the presiding officer of this Joint Session, which was the President of the Senate, to sort of handle the ministerial tasks. By 1804 it was recognized, Congress counted the votes. It was not until the mid–19th century that we started to have real problems about resolving those disputes.

But at the very least, to the extent that Congress was this body, this federal body that would typically handle political questions for its own members, it seems like an appropriate analog that to the extent there were disputes about the election, it would handle them in that Joint Session together, to the extent that any disputes arose.

Senator CRUZ. Do you believe that there was any judgment or discretion expected of either Congress or the Vice President in that process?

Mr. MULLER. There was—in my judgment, there was no discretion for the Vice President, the President of the Senate. There were suggestions in a debate that happened in Congress in 1800 that there might have to be some questions about what happened during the counting of electoral votes and some discretion that Congress might have.

That has been a pretty narrowly defined role, and especially over the years as we trust the state courts in the states to resolve the process, very rarely has Congress been involved in relitigating those questions, and so it has had a role and recognized the role in the past, but a narrow one when it comes to resolving those controversies that come to Congress.

Senator CRUZ. As everyone here knows, the election of 2020 was extraordinary in many respects. As I analyzed what the best approach for Congress should be to that situation, I look to history, and I look to precedent.

To my mind, the most applicable precedent is the election of 1876. As you know, in the election of 1876, that was the race between Rutherford B. Hayes and Samuel Tilden, and that, much like 2020, was a hotly contested race. There were serious disagreements, and in particular, there were serious allegations of voter fraud from three different states, from Florida, from Louisiana, and South Carolina. A total of four states, Florida, Louisiana, South Carolina, and Oregon submitted two slates of electors.

Congress, exercising what you just described as the judgment and discretion given it by the framers, had to resolve what to do in that instance. In 1876, Congress did not throw its hands in the air and say, well, there are serious allegations of voter fraud, but we are helpless, we are simply ministerial clerks, so we cannot assess this.

Instead, Congress did something very different. Congress, as you know, appointed what it called an Election Commission. This Election Commission was a unique creature in Constitutional law and in our Nation's electoral history, in that it consisted of five Senators, five House Members, and five Supreme Court justices.

That Election Commission, in turn, was empowered to assess the evidence of voter fraud, to make conclusive determinations that in turn would go forward and determine who would be the next President. Do you believe Congress made the right decision in 1876 es-

tablishing the Election Commission to assess the claims of voter fraud?

Mr. MULLER. It is a very hard question. I think, in that era, there was no Electoral Count Act, and Congress did not know how to resolve a dispute between the chambers which was going to arise. This was their tie breaking mechanism, to create this Commission.

At the end of the day, the Commission actually said and actually concluded by an 8–7 vote that it was not in its purview to go behind the returns, as the framing was, to investigate the alleged fraud that happened in places like Florida.

The goal was to say, what is the true result that comes out of the state. After that, Congress enacted the Electoral Count Act and has abided by it every four years. On January 3rd, with unanimous consent, a concurring resolution from Congress said, we are going to abide by these procedures.

In my judgment, that is the much more sensible approach since 1876 was not the best approach, and it was the approach that should have guided what Congress was doing on January 6, 2021.

Senator CRUZ. Well, and I agree that the 1876 election was the predicate and in many ways the impetus for the Electoral Count Act in attempting to codify a process for dealing with disputed elections. I continue to believe it would have been a better approach for Congress in the 2020 election to have followed the precedent from 1876 and to have appointed an Election Commission.

There are a large percentage of Americans who still have deep doubts about the veracity of the election, and I think it would behoove both parties to have a serious, substantive examination on the merits of the facts of those claims.

Congress did not go down that role, and one of the consequences of that now is we continue to have deep divisions in this country.

Chairwoman KLOBUCHAR. Okay. Thank you, Senator Cruz. Thank you for allowing Senator Padilla to go first. I am not a big fan of the 1876 election. I would not have been able to vote for one thing, and I think——

Senator CRUZ. I am going to be pretty sure you were not alive then.

Chairwoman KLOBUCHAR. That is true, but I am just trying to put it in, you know, some, a bit of perspective. I am going to fast forward to the present and just ask Senator King his final questions. This has been an incredibly productive hearing and thoughtful hearing, and good questions on everyone's part.

Mr. Gore, some experts have argued that because a bipartisan bill describes the Governors' certification of electoral votes as conclusive, a court could not review evidence that the Governor's certification was incorrect in order a revision.

Do you agree that state and Federal courts should have authority to review the Governor's certification and that any court orders amending the certification should be conclusive when Congress counts electoral votes?

Mr. GORE. Yes.

Chairwoman KLOBUCHAR. Okay. You want to say anything more?

Mr. GORE. I am happy to elaborate on that, Senator. Those mechanisms already do exist, as I have mentioned before, for state

courts and Federal courts to conduct judicial review of a Governor's action or inaction with respect to a certificate. The Reform Act modernizes that practice by creating the expedited federal judicial review provision and also clarifying that Congress will accept a revised certificate issued under the order of a state or Federal court.

Chairwoman KLOBUCHAR. Okay. Thank you. Mr. Bauer, do you agree with that?

Mr. BAUER. Yes, I do.

Chairwoman KLOBUCHAR. Okay. Ambassador, you have expressed concerns that mandatory appeal of election related claims from a three judge panel directly to the Supreme Court could force the court to decide cases that it would just otherwise not take up. Can you elaborate on why you think that mandatory Supreme Court review could be problematic?

Mr. EISEN. Reasonable minds can disagree on——

Chairwoman KLOBUCHAR. As you have seen on this Committee.

Mr. EISEN. I wish every American could see both what goes on this Committee and the bipartisan start that we have here. Now it is up to the Committee in a bipartisan way to move it forward. I think reasonable minds can disagree on the mandatory requirement for appeal. I know some feel very strongly about this.

The case for mandatory appeal includes having the closure of the Supreme Court resolving things, not letting it linger on the docket. Those who feel otherwise believe that there is an adequate judicial review mechanism here. As is typically the case with the Supreme Court, it is for them to decide whether to grant cert or not.

I think this is one, as we work through all of the necessary and kind of boil down to what we have to have to feel really good about the bipartisan compromise, this is one where folks see it both ways, Senator.

Chairwoman KLOBUCHAR. Okay. Mr. Muller, you have said in most cases related to presidential elections, whether or not the Supreme Court has discretion to hear a case would not impact whether it ultimately rules in cases that have merit. Can you elaborate on why you think that?

Mr. MULLER. Sure. The sort of mandatory appeals is a little confusing, right. First off, the party has to appeal, the aggrieved party has to appeal to the Supreme Court.

Then from a three judge panel, which already happens in some campaign finance cases and redistricting cases, the Supreme Court cannot refuse to adjudicate the case on the merits if it has jurisdiction, but it can summarily affirm, which it does, it does not have to give reasons, just summarily affirms what happens below.

That functions very much like the court refusing to grant certiorari, just denying certiorari. Or if it says that if there is something wrong, they are going to grant certiorari just as what they would grant and hear the appeal that comes from a three judge panel.

I think at the end of the day, as a practical matter, there is very little difference in how the Supreme Court is going to handle these matters regardless of the mechanism.

Chairwoman KLOBUCHAR. Mrs. Nelson, we have heard some concern that the process for assigning judges to three judge panels, you have mentioned this, which is usually done by a Chief Judge for the Circuit Court, where the courts sits might lead to partisan

bias. Do you agree that random assignment of judges to three judge panels in cases involving presidential elections would reduce the risk, or at least the perception of partisan decision making?

Mrs. NELSON. Yes. The emphasis is really on the perception and the fact that these controversies are highly fraught, and to ensure that there is public confidence in the outcome of the results. A random selection would eliminate any sense that there has been a finger placed on the scale in favor of one party or the other.

This is not to suggest that federal judges are in any way automatically biased by the party or the President who nominated them, but rather to just remove any doubt from the process when we are dealing with such a consequential electoral dispute.

Chairwoman KLOBUCHAR. Okay. Thanks. Mr. Gore, you want to respond at all?

Mr. GORE. I would just note that with respect to the appointment of three judge courts for redistricting cases, that is already handled by the Chief Judge of the Circuit Court, and there has been no implication that that is done in a way that is unfair or biased. I think the existing mechanism is sufficient for these cases as well.

Chairwoman KLOBUCHAR. Okay. Anyone else want to chime in? Mr. Eisen.

Mr. EISEN. Given the extraordinary stakes, perhaps not everyone on the panel has an equally happy reaction to recent redistricting jurisprudence.

Chairwoman KLOBUCHAR. Okay. All right.

Mr. MULLER. I want to add briefly, there can be some flexibility that might be beneficial if a judge from Alaska is randomly assigned the case happening in Phoenix in a very short span. If it is not a hearing on Zoom, there can be some logistical problems that the Chief Judge could have the flexibility to resolve in such cases. But again, technical issue to think about.

Chairwoman KLOBUCHAR. Okay. Well, I think that is a good way to end because people are being very practical, which I appreciate. We have had witnesses that come from different political perspectives, just like this Committee has come together on a number of issues and just like the bipartisan group has.

I want to, first of all, thank my friend, Senator Blunt and the Members of the Committee for an incredibly productive hearing. I also want to thank Senators Collins and Manchin for their work in bringing a group together. I want to thank Senator King, who has been out front on this issue from the very beginning, and the two of us worked together on it, and his expertise on this. I do not think we would be where we are without him. I want to thank Senators Warner and Capito as part of the group as well.

We have heard today about the ambiguous provisions in that old 1887 law that were actually exploited. I mean, you can use more dramatic words, but exploited in the last election and underscore the need to update this antiquated law.

I also think it is just a recipe for future problems as people have now contemplated how they could mess around with it in various ways, including just kind of practical delays, objecting to multiple states. I do not think I am telling anyone a secret. They could go on and on and Senator Blunt and I before the insurrection contemplated in the range of 24 hours but it could even go longer.

If any of those Senators just kind of, you know, gets sick or something and cannot be there—you start having all kinds of issues come up. That is why I think that practically looking at it, no matter where you come from politically, there needs to be changes. We heard bipartisan agreement that we need to reform the Electoral Count Act to secure the peaceful transfer of power.

We have talked today about the role of the Vice President, which cannot be used to overturn the will of the people. We have talked about how you can certify a slate and make sure it is the actual electors and not something that is added fraudulently at the end.

We have talked about this appeals process and how we can get that set so that makes sense. I appreciate, again, this work on this bill to provide much needed clarity to the Electoral Count Act.

I would just add with Mrs. Nelson there in the distance on the screen, just that there are a number of us that are still devoted to putting some sensible federal rules into place to make it easier for people to vote, because that is what we should be doing in a democracy. That is what the Freedom to Vote Act is about.

Senator Blunt, do you want to say a few words here at the end?

Senator BLUNT. Well, thank you, Chair. I do think we need to move forward with the clarifications that are so obviously needed, and I think uniformly accepted here. Certainly the suggestions today about technical corrections and other suggestions are going to be helpful in that.

But this is clearly something that we should not let carry over into another election cycle and get this done this year. I look forward to working with you and the rest of the Committee to markup a bill and get it to the floor and get it passed.

Chairwoman KLOBUCHAR. Okay, Senator King? No. Very good. All right. That is it. The hearing record will remain open for one week because we are speedy, and we are adjourned. It could not have gone better. Thank you, everyone.

[Whereupon, at 12:34 p.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

Testimony of Senator Susan Collins
"The Electoral Count Reform Act: The Need for Reform"
Senate Rules Committee Hearing
August 3, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee, thank you for inviting Senator Manchin and me to testify on the legislation that a bipartisan group of Senators has written to reform the 135-year old Electoral Count Act – the archaic and ambiguous law that governs how Congress tallies each state's electoral votes for President and Vice President.

In four of the past six presidential elections, the Electoral Count Act's process for counting electoral votes has been abused, with members of both parties raising frivolous objections. But it took the violent breach of the Capitol on January 6th of 2021 to really shine a spotlight on the urgent need for reform.

Over the past several months, a dedicated, bipartisan group of Senators have worked hard to craft the legislation before you, united in our determination to prevent the flaws in this 1887 law from being used to undermine future presidential elections. I'd like to acknowledge the contributions of our cosponsors, Senators Romney, Sinema, Portman, Shaheen, Murkowski, Tillis, Warner, Capito, Murphy, Young, Cardin, Sasse, Coons and Graham. I also want to thank Chairwoman Klobuchar and Ranking Member Blunt for their advice and counsel throughout this process.

The bill that we have introduced - the *Electoral Count Reform and Presidential Transition Improvement Act* – will help ensure that electoral votes totaled by Congress accurately reflect each state's popular vote for President and Vice President.

It includes a number of important reforms, but I want to highlight just a few.

First, it reasserts that the constitutional role of the Vice President in counting electoral votes is strictly and solely ministerial. The idea that any Vice President would have the power to unilaterally accept, reject, change, or halt the counting of electoral votes is antithetical to our Constitutional structure and basic democratic principles.

Second, our bill raises the threshold to lodge an objection to electors to a minimum of one-fifth of the duly chosen and sworn members of both the House of Representatives and the Senate. This mirrors the threshold under Article I of the Constitution to call for the yeas and nays on a vote in Congress. Currently, only a single member in both Houses is required to object to an elector or a slate of electors.

Third, and perhaps most significant, our legislation ensures that Congress can identify a single, conclusive slate of electors submitted by each state. It does so by—

- Clearly identifying a single state official who is responsible for certifying a state's electors;

- Ensuring that a state's electors are certified and appointed pursuant to state law in effect prior to election day;

- Providing aggrieved presidential candidates with an expedited judicial review of federal claims related to a state's certificate of electors. This does not create a new cause of action. Instead, it will ensure prompt and efficient adjudication of disputes; and

- Requiring Congress to defer to the slates of electors submitted by a state pursuant to the judgment of state or federal courts.

Finally, our bill strikes a provision of an outdated 1845 law that could be used by state legislatures to override their state's popular vote by declaring a "failed election" – a term that is not defined in that law. The bill permits a state to modify the period of its election only in "extraordinary and catastrophic" circumstances, and also only as provided for under the state's law enacted prior to election day.

Our legislation is supported by numerous election law experts and constitutional scholars with whom we consulted throughout our deliberations. I am grateful for their advice, and I ask unanimous consent that several of those statements be included in the record of this hearing.

We have before us an historic opportunity to modernize and strengthen our system of certifying and counting the electoral votes for President and Vice President. Nothing is more essential to the survival of a democracy than the orderly transfer of power. And there is nothing more essential to the orderly transfer of power than clear rules for effecting it.

I ask my colleagues in the Senate and the House to seize this opportunity to enact these sensible and much-needed reforms before the end of this Congress.

Remarks of Senator Joe Manchin III Before the U.S. Senate Committee on Rules & Administration

August 3, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee. Thank you for the opportunity to present some brief remarks on the importance of reforming the Electoral Count Act.

The Electoral Count Act was originally passed into law in 1887 and was a valiant—albeit clumsy—effort to ensure that another presidential election like that of the 1876 contest between Rutherford B. Hayes and Samuel J. Tilden never happened again.

As the members of this Committee know, the 1876 election was a disaster. Neither candidate received an electoral majority and multiple states presented serious controversies by submitting dueling slates of electors. Following an informal deal that was struck with Southern Democrats, that effectively ended Reconstruction, Hayes was eventually named President.

But the vulnerability of our democracy was revealed.

Following two other close elections in 1880 and 1884 and numerous failed attempts at reform, Congress finally passed the Electoral Count Act in 1887.

But, as we saw on January 6, 2021, a lot of the "fixes" established by the original Electoral Count Act are not merely outdated, but actually serve as the very mechanisms that bad actors have zeroed in on as a way to potentially invalidate presidential election results.

As I am sure you will hear from the panel of distinguished experts who will testify before you today - **the time to reform the ECA is long overdue. The time for Congress to act is now.**

To that end, I am proud of the bipartisan bill introduced by Senator Collins, myself, and my colleagues last month: **The Electoral Count Reform and Presidential Transition Improvement Act**.

I am particularly thankful to Senator Collins for her leadership throughout the process and for the valuable input from all of my colleagues in the working group on both sides of the aisle, including

Senators Portman,
Murphy,
Romney,
Shaheen,
Murkowski,
Warner,
Tillis,
Sinema,
Capito,
Cardin,
Young,
Coons,
Sasse and
Graham - all of whom co-sponsored this important bill.

While I will be among the first to acknowledge that the bill is not perfect, it represents many months of hard work and compromise and would serve as tremendous improvement over the current ECA.

As Senator Collins mentioned in her remarks, the bill addresses what the bipartisan group identified as the most concerning problems with ECA:

(1) **It unambiguously clarifies that the Vice President is prohibited from interfering with the electoral votes;**

(2) **It raises the objection threshold** from a single Representative and a single Senator to 20% of the members of both the House of Representatives and the Senate; and

(3) **It sets a hard deadline for state governors to certify their respective states' electoral results** – and if they fail to do so or submit a slate that does not match with the electoral results from the state, it creates an expedited judicial process to resolve.

On this last point, the expedited judicial procedure, I'd briefly like to take a moment to discuss the reform proposed by our bill, and explain why we proposed revising the ECA as we did.

Our group decided to rewrite Section 5 regarding the certificate of ascertainment of electors, not to create any new causes of action, but to provide for expedited review of an action that a Presidential and Vice-Presidential candidate can already bring under existing law. It does so in a way that carefully limits the parties who can avail themselves of this expedited procedure and ensures that the slates of electors that Congress tallies are those certified and appointed pursuant to laws in effect prior to Election Day. While the group is open to some technical fixes to address timing concerns, for example striking the 5-day notice typically required under section 2284 of title 28, we stand by this provision as a way to quickly and efficiently determine a single lawful slate of electors.

In closing, I would, again, like to thank the Committee for holding this hearing and for amplifying the need to reform the Electoral Count Act—and for allowing me to speak about the **Electoral Count Reform and Presidential Transition Improvement Act**. I look forward to continuing to work with you to make these reforms a reality.

Testimony before the Senate Rules Committee on Electoral Count Act Reform

Bob Bauer

August 3, 2022

Chair Klobuchar, Ranking Member Blunt, and members of this Rules Committee: I want to thank you very much for the opportunity to testify on reform of the Electoral Count Act (ECA).

Introduction

My remarks today are shaped by study of the statute and the basic principles that should guide reform in collaboration with other members of a bi-partisan group convened for this purpose by the American Law Institute. I co-chaired this group with Professor Jack Goldsmith of Harvard Law, a former Assistant Attorney General in the Administration of President George W. Bush. I came to this project after a long career of representing Democratic Party institutions and candidates, and a period of service to the Administration of President Barack Obama as White House Counsel.

Today, I am testifying in my personal capacity and the views expressed on particular issues are mine alone. I will, however, refer to the consensus Statement of Principles that our American Law Institute group produced, with reference to how these affect my approach to the proposals now under consideration. I also note for the record a piece that Professor Goldsmith and I recently coauthored to address certain misconceptions about ECA reform.[1]

Before proceeding with specific comments, I note that ECA reform is unusual because it rests on broad agreement on the flaws of the Electoral Count Act and the considerable need for non- or bi-partisan reform

Political reform invariably involves numerous complexities and trade-offs. But one suspicion always looming in the background is that any proposed "reform" may have been put forward with the primary purpose of favoring one party or political interest, or that, regardless of intent, it will have that effect. Political reform becomes itself the source of political controversy, if not a flash point in partisan conflict. This has been my experience of over four decades with these kinds of debates.

Not so in the case of the Electoral Count Act. Practically everyone agrees that this 1887 statute is in urgent need of reform. And that agreement includes the general understanding that ECA reform need not, and would not, serve one party or interest. As it exists now, the statute is poorly conceived and badly drafted: it has been described as "turgid" and "repetitious" by some, and

[1] Bob Bauer & Jack Goldsmith, "Correcting Misconceptions About the Electoral Count Reform Act," *Lawfare* (Jul. 24, 2009), available at https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act.

condemned as largely unintelligible by others. It is famous for one sentence that runs for 275 words—and is none the clearer for all that.

The ECA's odd structure and obscure language also undercut what should be the statute's core purpose: a dependable and enforceable framework to allow Congress to receive and count accurate tallies of electoral votes, properly certified by each state. Instead, in all the time that ECA has been on the books, it has lain simmering, in the words of one scholar, as "an explosive formula for legal and partisan warfare..."[2] We recently averted a full explosion.

In this testimony, I will address what I believe to be the key proposals and questions that have surfaced in the contemporary consideration of ECA reform. My aim is to engage with the basic architecture of bipartisan ECA reform, consistent with the ALI Statement of Principles, and then to engage with the following major issues, the resolution of which is necessary to achieve that architecture: 1) the role of the federal and state courts; 2) the question of when an external catastrophe, such as a natural disaster, may require a modified period of voting beyond Election Day; and 3) certain of the internal rules Congress would follow in conducting the final tally of electors' votes at the January 6 joint session.

Basic Architecture of ECA Reform

The major bills under review—the Electoral Count Modernization Act and the Electoral Count Reform Act (hereafter, "ECRA")—are organized around a core reform principle of utmost importance: our presidential elections should be run according to rules set in advance and in effect on Election Day. These rules must not be subject to change after the fact based on dissatisfaction with the result by the controlling party in a particular state or in Congress. As I have written elsewhere, in the piece that I co-authored with Jack Goldsmith, the central concern of ECA reform before this Committee is properly "to ensure that the popular vote is respected, in accordance with state and federal law."[3]

This proposition seems beyond reasonable objection. It is grounded in basic understandings of how our democracy functions—understandings anchored in constitutional Due Process. As one constitutional scholar recently noted, the guarantee of Due Process resides at "the heart of constitutional democracy,"[4] and ECA reform to enforce that guarantee is an appropriate exercise of Congress' legislative authority under section 5 of the Fourteenth Amendment. Beyond these formal, fundamental constitutional precepts, this concern with Due Process comports with our deepest intuitions of what it means to have a "right to vote" in free and fair elections.

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[2] Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004), available at https://www.floridalawreview.com/wp-content/uploads/2010/01/Siegel-BOOK.pdf.

[3] Bauer & Goldsmith, *supra* n. 1.

[4] Pam Karlan, "The Virtues of the Electoral Count Reform Act," *Election Law Blog* (Aug. 1, 2022), available at: https://electionlawblog.org/?p=131097.

Although Article II, Section 1 of the Constitution provides for state legislatures to choose the manner of appointment of electors, every state has chosen to appoint electors by popular vote. Once that choice is made, and after the polls have closed and the ballots have been cast, the popular verdict cannot be overridden, consistent with our constitutional structure, simply because the outcome did not prove acceptable to state executives or legislative majorities. This Due Process protection prevents state executives from undermining the lawfully determined outcome of the election—whether they might do so independently of a state legislature or in collusion with it.

As the Supreme Court made clear in *Bush v. Gore*, "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental .... Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[5]

These Due Process guarantees are bolstered by and interact with Congress' constitutional power to fix the date of the presidential election: to "determine the Time of chusing Electors, and the Day on which they shall give their votes." Due Process requires that the rules in place on that day shall govern the outcome—not rules devised after the results from that day are known and partisans at the federal or state level— may be motivated to devise schemes to undermine them.

In addressing this key feature of ECA reform, the complexities and trade-offs of reform design come into play. The answer to the problem of election subversion at the state level does not lie in leaving Congress to engage in vote counting of its own after the fact. The Twelfth Amendment, which governs Congress' role in the final tally of electoral votes, does not contain any suggestion that this body is charged with deciding which votes cast by eligible voters should be counted, and which not. Instead, the Constitution recognizes that states generally set the rules for participating in federal elections. Accordingly, state law provides the framework for the counting—and, if necessary, recounting—of ballots, as well as any election contests. As appropriate, federal and state constitutional guarantees of Due Process, Equal Protection, and free and fair elections may be enforced in state and federal court, as well. But nothing in the Constitution supports Congress' displacement of the states' voting counting and re-counting function in presidential elections.

The leading proposals all take as their departure point that Congress should not perform that function. This is the best constitutional understanding of the Congressional role, bolstered by the deep and broadly held concern that a majority in the Congress could in the worst of cases sweep aside the outcome of a popular election for no reason other than distaste for the results. Both political parties and voters not affiliated with either party would share revulsion at this prospect.

Because Congress should not be in the business of vote counting, it must ensure that it receives certificates from the states that accurately reflect which electors were chosen by the voters, pursuant to state law in place on Election Day. ECA reform should require states to comply with their state legal processes and to transmit to the Congress the lawful—not politically engineered or revised—certificate. Congress then has one valid certificate of electors from each state to include in its count.

The ECA as we have it now has a complex, impracticable series of provisions for managing the "multiple" slate scenario, with various related provisions such as a "safe harbor" that ostensibly treats

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[5] *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (per curiam).

as conclusive any slate that the state submitted within a specified period before the meeting of electors. But apart from the unintelligibility of this construction, there remains the reading of the ECA, which some members of Congress have advanced in the past, that Congress can ultimately do what it wishes on its own assessment of the vote count. The two Houses need only agree to sustain any baseless objection that a state's certified results should be disregarded because of falsely alleged fraud or irregularity. Similarly, there is a reading of the ECA that, unless two Houses specifically concur that it should not do so, Congress could accept a certificate that federal and state courts had previously held to be unlawful. This is untenable.

The leading reform proposals would attack the problem with a three-pronged approach:

- Congress provides that states must give effect to the votes counted under rules established before and in effect on Election Day, consistent with Congress' constitutional power to determine the date of the election.
- Congress establishes a procedure for ensuring that, for purposes of its Twelfth Amendment elector vote count, it is in receipt of the lawful certificates of electors reflecting the outcome of state legal process for vote counting, including any recounts, contests, or other post-election federal and state legal challenges.
- Congress then gives full effect to the outcome of this process for clarifying the certificates it should accept and include in the final tally.

The Role of the Courts

The ALI Statement of Principles proposed the establishment of a federal cause of action authorizing a presidential and vice-presidential candidate to challenge the failure of a state executive to transmit to Congress the lawful certificate of electors as established by state legal process. A court could issue relief in the form of a declaratory judgment and an injunction compelling the state executive's transmission of the lawful certificate. In this way Congress could establish with clarity the one certificate reflecting the popular vote selection of electors, in order that it may fulfill its Twelfth Amendment responsibilities.

The ECRA would not create a new cause of action but would instead provide for expedited review of an action that a presidential and vice-presidential candidates may bring under existing law. It would establish venue and three judge district court review in the first instance, subject to mandatory Supreme Court review. The court's judgment would be given "conclusive" effect for Congress' Twelfth Amendment purposes.

In my view, this is an example of a well-crafted compromise built around the same core reform principle: the state is held to compliance with legal processes in effect on Election Day, while Congress can ensure that it is tallying the votes from lawful certificates but stays out of the business of popular vote counting and recounting. And these expedited procedures apply only to this type of cause of action, filed for a narrowly defined purpose by a limited and defined class of plaintiffs—presidential or vice-presidential candidates.

This provision has attracted certain criticisms. Some are puzzling and clearly wrong: they suggest that this expedited review procedure may operate to supplant other avenues of litigation and judicial

review, especially at the state court level. It does nothing of the sort. Nothing in the pending proposals, including the ECRA, forecloses any current avenue of federal or state post-election litigation. There has also been the suggestion that the ECRA is not as clear as it could be about the conclusive effect to be given to any judicial determination resulting from this expedited process. I do not view the language as unclear but, regardless, Congress could decide to add language that would leave no doubt on this basic point to any reader approaching the reading in good faith

On this and other points of clarification, Congress should not hesitate to make full use of legislative history to accompany the ECRA. While the Supreme Court has made clear its skepticism of the use of legislative history in discerning the meaning of statutory terms in certain circumstances, ECA reform is distinctive. Congress is, after all, legislating to give effect to its constitutional responsibilities under the Twelfth Amendment. Congress's stated views of what key provisions of the bill mean could well receive respectful attention from the Court.

Another concern expressed in relation to the role of the courts in ECA reform is the proposed provision for mandatory Supreme Court review. The case for mandatory review is strong: the Court is likely to take any such case regardless, and there is an interest in finality—a decision by the highest court—which is well served by this approach. Imagine, for example, a petition for certiorari by these plaintiffs that the Court denies, but with strong dissents. This could cause some consternation that the issues at stake were left unresolved and, in our deeply polarized politics, encourage fevered speculation about the reasons. This would not serve the goal of a resolution that stands the best chance of drawing the widest possible acceptance.

However, this concern need not hold things up because little hinges in these circumstances on the difference between mandatory and discretionary review. With the possible exception of a challenge that is evidently frivolous on its face, the Court will almost certainly grant review of the lower court ruling on narrowly defined presidential challenges involving the transmission of the lawful certificates of ascertainment. Accordingly, if bipartisan support for ECA reform would be more effectively secured by adopting discretionary review, then this seems an altogether reasonable and appropriate "fix." Moreover, there is an advantage to discretionary review that is appropriately taken into account in considering this change. It allows the Court to deny review of obviously trivial cases and thus disincentivizes strategic use of multiple filings of such cases to slow things down.

A last concern I would note is the time available for the filing and disposition of this action, which is subject to expedited treatment under the current legislative text.

First, it has been pointed out that the 5-day notice of an action against a state official would consume the entire review period. See 28 U.S.C. § 2284(b)(2). This is, again, easy to address.—Congress can eliminate this notice requirement for a presidential (or vice presidential) candidate challenge involving elector certification.

Second, there is the question of whether 6 days is enough time for the expedited review. As a general proposition, federal courts have demonstrated their willingness and ability to adjust their schedules to resolve this type of time-sensitive lawsuit of overriding national interest. Especially given the narrow scope of this kind of action—an action to secure vindication of state legal process, not a fact-intensive inquiry into the accuracy or integrity of the popular vote count—it would seem certain that they would do so in this case as well. Moreover, it is highly likely that the controversies over state

executive action involving a certificate will ripen well before the last day for formal state executive action or inaction such that the time for these suits likely would be longer than 6 days.

Here, too, any concern could be addressed by a slight revision. Congress could consider adding a few days to the process, though I understand that there are considerations on the other side, involving the time required for parliamentarians and other officials to prepare for the January 6 joint session.

The "Failed Election" Question

A second major proposed reform bears on the imperative that presidential elections be decided on rules set in advance and protected against rogue or pre-textual behavior to overturn unwanted popular vote results. This proposed reform addresses problems with provisions of the ECA that reference a "failed election" potentially allowing state legislatures to proceed to appoint electors in place of the voters should they consider an election to have "failed."

"Failed election" is not defined in the current law. This is dangerous, and the ALI Statement of Principles endorsed the position that this provision be amended to define failed election to include "extraordinary (catastrophic) events, such as a natural disaster," but "exclude[] the pendency of legal challenges brought against the outcome of the popular vote..." The leading legislative proposals would also amend the provision, though in different ways, to this effect. They would also provide that, in the event of such extraordinary events, the remedy is an extended period of voting, not *post hoc* state legislative intervention to "redo" the election.

The ECRA would allow a state to extend a period of voting, only when "necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to such day." A line of criticism suggests that this language is unnecessarily vague, giving rise to the possibility for rogue legislative conduct, and that grounds for extended voting periods should be catalogued in the bill's text. However, states may proceed to legislate in response to this type of amendment, and their determination as to what is, and is not, extraordinary and catastrophic circumstances may vary. The ECRA limits any potential abuse in three ways: any such definition must be established by the state before election day; the remedy for any such circumstances is an extended period of voting, not a legislative appointment of new electors; and, even then, an extended voting period is available only in response to "extraordinary and catastrophic events."

However, should strengthening or clarifying amendments be deemed appropriate, it seems that these could focus on two key elements:

- That what the state does *not* allow within the meaning of "extraordinary and catastrophic events" is more important for purposes of this bill than what it *does* allow. Congress should not try to specify all the "catastrophic and extraordinary" events that could prevent a vote from being completed on the designated day. But it should erect barriers to block pre-textual behavior, in the name of "extraordinary and catastrophic events," to discard unwanted popular vote outcomes.

- To this end, the reform might specify that a state-ordered modification of the period of voting must occur prior to the close of polls, before results begin to come in and there is the danger that the state is motivated to modify the voting period for political reasons.

Rules for the Conduct of the Joint Session

Finally, ECA reform provides a clear and practical framework for the Joint Session, reflecting widespread consensus that the ministerial role of the Vice President should be stated expressly and that objections should become materially more difficult to lodge. The ECRA, for example, establishes that the Vice President's role is in the opening, and not the counting, of electoral votes, just as the Twelfth Amendment provides. In addition, given the processes set forth elsewhere in the ECRA to ensure that Congress receives the appropriate certification of electoral votes from each state, the ECRA increases the threshold for objection, requiring 20% of each chamber to sign on to an objection before it is to be considered.

There is one comment on the procedures for the Joint Session with which I would like to close. The ALI Statement of Principles provided that objections should be sharply limited: Those "grounded in explicit constitutional requirements [such as] the eligibility of candidates or electors, the time for the selection of electors, and the time by which electors must cast their votes…" The proposed ECRA would retain language from the current ECA, which allows for the rejection of elector votes not "regularly given." One criticism now being leveled is that this language reopens the door to popular vote re-counting in Congress, by inviting an objection that an elector's vote is not "regularly given" because the vote by which the elector was chosen was fraudulent or irregular.

There is comfort to be had on this point from the best constitutional scholarship available, and one of the witnesses before the Committee today is a national authority on the constitutional history and appropriate reading of "regularly given."[6] Properly understood, the term applies to the action of the electors themselves– not any defect in the underlying popular vote. A reform that retains the language against this background, and with perhaps some elucidation in the legislative history, should allay any concerns about its breath and potential misuse.

More generally, any ambiguity in the basis for permissible objections is largely addressed by the combination of other signal features of proposed reform: the results of state and federal court litigation, including the conclusive effect given to federal court determination of the lawful certificate required from a state, and the increased thresholds for the making and sustaining of objections.

Conclusion

It is heartening that bipartisan support has developed for ECA reform. It is urgent: we should not risk another presidential election cycle under current law. And the pathway to this reform is now clearly illuminated. In considering reform, Congress cannot, as the ALI Statement acknowledged, "address every issue that may arise in the presidential selection process." But if it adopts the architecture for this reform of the kind now before the Committee, Congress will have accomplished a great deal.

Thank you very much again for the invitation to testify. I look forward to answering your questions or assisting the committee and staff in any other way and at any other time.

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[6] *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GEORGIA L. REV. 1529 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3875509.

Testimony Of The Honorable John M. Gore
Senate Committee On Rules And Administration
"The Electoral Count Act: The Need For Reform"
August 3, 2022

Good morning, Chairwoman Klobuchar, Ranking Member Blunt, and distinguished members of the Committee. I commend the Committee for taking up this crucial topic and for its commitment to a commonsense and bipartisan approach to reforming the Electoral Count Act. Today's witnesses are distinguished experts and thought leaders from across the political spectrum. I am honored to be included in this hearing and thank the Committee for inviting me to testify today.

The Electoral Count Act regulates a vital moment in our American democracy: the moment when states pass the baton of presidential elections to Congress. The Constitution itself prescribes the roles of states and Congress in presidential elections. The Constitution's Electors Clause vests in the state legislature the authority to direct the manner in which a state's presidential electors are chosen. The Constitution vests in Congress the duty to count each state's electoral votes and to declare the winner of the Presidency and the Vice Presidency.

Since 1887, the Electoral Count Act has laid out the procedure for states to certify their electoral votes and directed Congress's discharge of its duty to collect, count, and compile the Electoral College vote. For decades, the states and Congress have performed admirably under the Act. But the Act contains numerous gaps and ambiguities that could impede Congress's ability to count electoral votes in a future presidential election. Reforming the Act is necessary and appropriate: Congress should take the opportunity to safeguard the integrity of our presidential elections now, before future disputes arise.

Several of the current Act's shortcomings stem from its silence on judicial review. For example, the current version of the Act does not spell out a procedure for seeking judicial review if a governor fails to certify a slate of electors or certifies the wrong slate of electors. The current Act also does not address how Congress should handle certifications submitted by a governor under the judgment of a state or federal court.

The bipartisan Electoral Count Reform Act preserves the precedent and practice in presidential elections that have served the country and Congress for decades. At the same time, the Reform Act remedies defects in the current Act to the benefit of states, Congress, and the American people. Four of the Reform Act's main features fill the statutory silence on judicial review and clarify the role of courts in adjudicating disputed presidential elections.

First, the Reform Act clarifies that the laws governing presidential elections are the state laws enacted by state legislatures prior to election day. This vital provision will help to preserve, promote, and protect free and fair elections for all Americans. The American people can have trust and confidence in our elections only when the rules are set before the election, are followed during the election, and are upheld after the election. The Reform Act is a major check on any efforts to change the rules after a presidential election has been held.

Second, the Reform Act leaves states—and their voters—in charge of choosing their presidential electors, as the Constitution directs. Accordingly, the Reform Act preserves existing state laws for challenging or contesting the result of an election. States have adopted a variety of judicial and administrative procedures to resolve election disputes—and the Reform Act keeps all of those procedures in place.

Third, the Reform Act fills a statutory gap by addressing federal judicial review in the scenario when a governor either fails to certify a slate of electors or certifies the wrong slate of electors. The Reform Act wisely avoids creating any new causes of action. Such novel causes of action are unnecessary—and they might even be harmful. At a minimum, new causes of action would interject new uncertainty into election disputes, could lead to an increase in litigation, and could upend decades of precedent and practice in this area.

Instead, a new provision of the Reform Act guarantees expedited federal judicial review in cases challenging a governor's failure to certify the correct slate of electors. Under that provision, federal constitutional or legal claims brought by a presidential or vice-presidential candidate will be heard by a three-judge federal district court on an expedited basis. Any appeals will go directly to the U.S. Supreme Court for expedited review.

Finally, the Reform Act fills another statutory gap by addressing the scenario of a governor issuing a revised certificate under an order from a state or federal court. The Reform Act makes clear that Congress will accept such a certificate. This statutory update modernizes federal law and the rules for counting electoral votes.

I thank the Committee for its time and welcome the Committee's questions.

TESTIMONY OF
AMBASSADOR NORMAN L. EISEN (RET.)

HEARING ON
THE ELECTORAL COUNT ACT: THE NEED FOR REFORM

UNITED STATES SENATE COMMITTEE ON RULES AND ADMINISTRATION

AUGUST 3, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Committee:

Thank you for inviting me to testify today on the Electoral Count Act of 1887 ("ECA") and the need for reform.

That need is profound. The flaws in the ECA were on stark display in the attempted overthrow of the 2020 election results. Indeed, as I will discuss, their exploitation was a central part of the alleged conspiracy now under criminal investigation by federal and state authorities. The U.S. previously had a long record of peacefully transferring presidential power. That ended on January 6, 2021. The ECA's flaws played a role in that breach—and the risk of undemocratic or violent efforts to seize power has not ended. As Vice Chair of the Select Committee to Investigate the January 6th Attack on the United States Capitol, Liz Cheney, warned, "it's an ongoing threat," and Americans "must understand how easily our democratic system can unravel if we don't defend it."[1] Reforming the ECA is essential to preventing a recurrence of the chaos we saw on January 6, 2021—or worse.

S. 4573, the *Electoral Count Reform and Presidential Transition Improvement Act of 2022* ("ECRA")[2] is a significant effort to make badly-needed reforms. Introduced on July 20, 2022 by Senators Susan Collins and Joe Manchin, the ECRA is the result of thoughtful bipartisan negotiations. It is a good thing when leaders in both parties work together to find solutions to our nation's most pressing concerns.

The result of their labor is a step forward on fixing the ECA—indeed, several steps forward. The ECRA makes key improvements such as striking the vague and dangerous failed election provision, clarifying that the role of the Vice President during the counting of electoral votes in Congress is purely ministerial, and raising the threshold for objections in Congress.[3]

These improvements, however, are not the sole matters that this Committee should confront, particularly at the first stage of the legislative process. We must also ask, does the initial form of the ECRA effectively respond to the many weaknesses in the ECA that were revealed in the campaign to overthrow the 2020 election—and to the ongoing risk of such attacks in 2024 and beyond.

In that regard, it is my view the Committee should build upon the foundation that the bipartisan negotiators have laid. As I detail below, there is room for improvement of a number of the provisions in the ECRA. Otherwise, we may actually create greater uncertainty in key aspects of counting electoral votes and invite unwelcome manipulation.

I believe that the Committee should focus its attention on the following four areas.

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[1] *Liz Cheney: Jan. 6 'conspiracy' was 'extremely broad... well-organized,'* CBS Sunday Morning (June 5, 2022), https://www.cbsnews.com/news/liz-cheney-january-6-insurrection-conspiracy-to-overturn-election-was-extremely-broad-well-organized/.

[2] *Electoral Count Reform and Presidential Transition Improvement Act of 2022*, S. 4573, 117th Cong., 2nd Sess. (2022) ("ECRA").

[3] ECRA makes key improvements such as striking the failed election provision, clarifying that the role of the vice president is purely ministerial and raising the threshold for objections in Congress. On this latter change, ECRA sets the threshold at one-fifth of each chamber. The exact number is art not science but to intensify protections against manipulation attempts. I would set the level even higher, at one-fourth or one-third of each chamber.

First, there is the provision in section 102 of the ECRA that allows the extension of election day due to "extraordinary and catastrophic events." The phrase "extraordinary and catastrophic events" should be better defined to avoid manipulation by the election denying officials now running to take control of the electoral process. As of July 28 of this year, there are still 26 election deniers running for governor, 15 running for attorney general, and 20 running for secretary of state.[4]

Second, adjustments must be made to the scant six-day window for federal litigation under the ECRA. There must be adequate time for any federal litigation should governors or others wrongly certify or refuse to certify electors or otherwise abuse the process. Six days is insufficient.

Third, to strengthen safeguards when the process moves to Congress, the Committee should consider clarifying the grounds for objection by replacing undefined and malleable terms preserved from the current ECA such as "lawfully certified" and "regularly given"—terms which have been a proven source of abuse in the past.[5]

Fourth and finally, we must provide clear procedural rules for the Congressional electoral count so that gaps and ambiguities that are carried over in the ECRA are not used to foment the kinds of chaos we saw on January 6, 2021.

These or similar concerns are shared by others, including two of our nation's most distinguished constitutional scholars, Professor Laurence Tribe and Professor Erwin Chemerinsky, as well as by the dean of Washington reformers, Fred Wertheimer of Democracy 21, and by the constitutional scholar Thomas Berry of the libertarian Cato Institute.[6]

Before discussing the changes that I believe are needed to the ECRA, I think it is important to analyze the risks we face. I now turn to the events of January 6, its run up, and its aftermath.

The 2020 Election and the Fire Next Time

U.S. District Court Judge David Carter has described the actions that led to the January 6 attack on the Capitol as "a coup in search of a legal theory."[7] And when those responsible for January 6 started crafting that legal theory, they turned in part to the Electoral Count Act.

In his March 2022 ruling, Judge Carter sketched out the lines of that attempted coup, which the January 6 Committee has since developed over the course of its public hearings.[8] Led by former President Donald Trump, the plotters engaged in a sweeping effort to block the recognition of the

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[4] *See* Replacing the Refs, States United Democracy Center (July 29, 2022), https://statesuniteddemocracy.org/resources/replacingtherefs/.

[5] *See Counting Electoral Votes--Joint Session Of The House And Senate Held Pursuant To The Provisions Of Senate Concurrent Resolution 1,* 117th Cong. (2021).

[6] Laurence H. Tribe, Erwin Chemerinsky, & Dennis Aftergut, *The Electoral Count Act must be fixed. A new proposal doesn't go far enough*, The Washington Post (Aug. 1, 2022), https://www.washingtonpost.com/opinions/2022/08/01/electoral-count-reform-act-suggested-changes/; *See also* Fred Wertheimer, *Collins-Manchin Bill Repairs Flawed 19th-Century Presidential Election Laws, But Important Changes In Bill Are Needed*, Democracy21 (July 28, 2022); Thomas A. Berry, *Some Potential Improvements to the Electoral Count Reform Act*, Cato at Liberty (July 27, 2022, 2:11 P.M.), https://www.cato.org/blog/some-potential-improvements-electoral-count-reform-act.

[7] Order Re: Privilege of Documents Dated January 4-7, 2021 at 44, *Eastman v. Thompson*, No. 8:22-cv-00099-DOC-DFM (C.D. Cal. Mar. 28, 2022), ECF No. 260.

[8] *Id. See also 06/16/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

legitimate electors of his opponent, Joe Biden. That included advancing a pernicious campaign of lies and disinformation about the election,[9] filing or encouraging over 60 baseless lawsuits (all but one of which were dismissed and none of which established electoral fraud),[10] pressuring governors, secretaries of state and state legislative leaders to betray their duties under applicable law,[11] and urging members of the federal government, including at the United States Department of Justice[12] and in Congress,[13] to do the same.

A central part of this plan was an attack on the electoral certification process by exploiting the ambiguities or gaps in the ECA. The former president and those associated with him sought to advance competing slates of false Trump electors in seven key states that President Biden had legitimately won. This scheme has not only featured prominently in the January 6 Committee hearings[14] but also is at the center of both the federal and state criminal investigations.[15]

Those electors met on December 14 and advanced certificates that falsely proclaimed Trump the winner of the vote.[16] The gatherings were often surreptitious,[17] and one plotter admitted in writing that these were "fake" electors.[18]

All of these efforts were to set up the second step in an effort to exploit the ECA. The goal was for Vice President Pence to utilize the false slates to impede the January 6th meeting of Congress and frustrate the recognition of the electors of the genuine winner.[19]

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[9] *See, e.g.,* Daniel Dale, *10 Trump election lies his own officials called false*, CNN Politics (June 16, 2022), https://www.cnn.com/2022/06/16/politics/fact-check-trump-officials-testimony-debunking-election-lies/index.html.

[10] *See, e.g.*,William Cummings et al., *By the numbers: President Donald Trump's failed efforts to overturn the election,* USA Today News (Jan. 6, 2021), https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/.

[11] *See 06/21/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

[12] *See 06/23/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

[13] *See, e.g.*, Rachael Bade et al.,*Trump pressures congressional Republicans to help in his fight to overturn the election,* The Washington Post (Dec. 10, 2020), https://www.washingtonpost.com/politics/trump-republicans-biden-election/2020/12/09/abd596ea-3a4e-11eb-9276-ae0ca72729be_story.html.

[14] *See 06/16/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022). *See also 06/23/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

[15] *See, e.g.,* Alan Feuer & Maggie Haberman, *Justice Dept. Issues More Subpoenas in Trump Electors Investigation,* The New York Times (June 22, 2022), https://www.nytimes.com/2022/06/22/us/politics/justice-dept-jan-6-subpoenas.html; Zachary Cohen, *Georgia prosecutors say all 16 fake electors are targets in criminal probe,* CNN (July 19, 2022), https://www.cnn.com/2022/07/19/politics/georgia-grand-jury-trump-electors/index.html.

[16] *See, e.g.*, Aaron Blake, *The significance of Trump's fake electors, explained*, The Washington Post (June 7, 2022), https://www.washingtonpost.com/politics/2022/06/07/significance-trumps-fake-electors-explained/.

[17] See, e.g., Amy Gardner, Beth Reinhard, Rosalind S. Helderman, & Jacqueline Alemany, *Fake Trump electors in Ga. told to shroud plans in 'secrecy,' email shows*, The Washington Post (June 6, 2022), https://www.washingtonpost.com/politics/2022/06/06/fake-trump-electors-ga-told-shroud-plans-secrecy-email-shows/.

[18] Maggie Haberman & Luke Broadwater, *'Kind of Wild/Creative': Emails Shed Light on Trump Fake Electors Plan*, The New York Times (July 26, 2022), https://www.nytimes.com/2022/07/26/us/politics/trump-fake-electors-emails.html.

[19] *See, e.g.*, Aaron Blake, *An intriguing new detail on Trump's 'fake' electors,* The Washington Post (July 26, 2022), https://www.washingtonpost.com/politics/2022/07/26/trump-fake-electors-arizona/.

As it became clear on January 6 that the Vice President would refuse to go along and would, instead, perform his duty under the constitution and the ECA, the former president incited a mob he knew to be armed to attack the Capitol.[20] Indeed, the January 6 Committee has presented evidence that he wanted to march with them, erupted in anger when he could not, agreed with their chants to "hang Mike Pence," targeted his Vice President with an inflammatory 2:24 pm tweet that was read to the mob on a bullhorn, and failed to take affirmative steps to stop the violence for 187 minutes.[21]

Only the heroic efforts of law enforcement officers and the bravery of the Vice President, our elected representatives and other government officials prevented this horrific explosion of violence from doing even more damage to the very core of the American democratic system. Despite all that, 147 Members of Congress voted to reject one or more slates of legitimate electors.[22]

January 6 has passed but the danger has not. Trump continues to attack the 2020 election and threaten future ones.[23] Many of those who supported the 2020 coup attempt remain active in the election denial movement.[24] Trump has inspired hundreds of election-denying candidates and bills from coast to coast.[25] They make no secret of their plan for future elections, including the 2024 presidential one: change the referees and change the rules so they can change the results.[26] In the words of Republican Congressman and January 6 Committee Member Adam Kinzinger, "the forces Donald Trump ignited that day [January 6] have not gone away. The militant, intolerant ideologies—the militias, the alienation, and the disaffection—the weird fantasies and disinformation. They're all still out there, ready to go."[27] In that sense, the coup has not ended, only gone into hibernation, ready to reemerge.

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[20] *See* Martin Pengelly, *Trump knew crowd at rally was armed yet demanded they be allowed to march,* The Guardian (June 28, 2022), https://www.theguardian.com/us-news/2022/jun/28/trump-jan-6-rally-guns-capitol-attack. *See also* Philip Bump, *Trump put Pence in more danger than we knew,* The Washington Post (June 16, 2022), https://www.washingtonpost.com/politics/2022/06/16/trump-put-pence-more-danger-than-we-knew/.

[21] *06/28/22 Select Committee Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022). *See also 07/21/22 Select Committee Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

[22] *See* Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results,* The New York Times (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html.

[23] *See, e.g.,* Jill Colvin, *Trump repeats false election fraud claims during speech in Washington,* PBS (July 26, 2022), https://www.pbs.org/newshour/politics/trump-repeats-false-election-fraud-claims-during-speech-in-washington.

[24] *See, e.g.,* Heidi Przybyla, *Despite rebukes, Trump's legal brigade is thriving,* Politico (July 5, 2022), https://www.politico.com/news/2022/07/05/trump-maga-lawyers-00043917.

[25] *See Replacing the Refs,* States United Democracy Center (July 29, 2022), https://statesuniteddemocracy.org/resources/replacingtherefs/. *See also Voting Laws Roundup: May 2022*, Brennan Ctr. for Just. (May 26, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022.

[26] *Id.*

[27] *07/21/22 Select Committee Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022) (statement of Adam Kinzinger, Minority Member, The Select Comm. to Investigate the January 6th Attack on the United States Capitol).

The Solution: Building on the Reforms

We must measure the reforms the ECRA proposes against that ongoing threat to our democracy—considering the threat next time, not just the threat last time. As that noted strategist Wayne Gretzky once said, "skate to where the puck is going to be, not where it has been." If 2020 showed us anything, anti-democratic forces can and will try to exploit any and every ambiguity in the law. We should assume future efforts will be even more intense.

Bearing that in mind, I will now detail four areas of ECRA revisions that would help remove textual ambiguity, curtail opportunities for mischief and manipulation, and resolve additional problems. This limited list of changes should not be construed as exhaustive. There are several other issues—large and small—identified by a cross-partisan array of scholars and observers that merit further consideration.[28] I have elected to focus on the four discrete issues which, if resolved, would make measurable improvements in the bill.

(1) "Extraordinary and catastrophic events" must be defined

In the case of a "failed" election, current federal law allows states broad, and even frightening, leeway in selecting presidential electors. Specifically, 3 U.S.C. § 2 provides that:

> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

But the ECA fails entirely to define the term "failed to make a choice."[29] We saw how the ambiguity of the "failed" election provision could be exploited in the aftermath of the 2020 election when Trump and his allies tried to pressure legislatures in states won by President Biden to throw out their state's votes and overturn the 2020 election.[30] To this day, the North Carolina state legislature still has in place a law that grants it unfettered authority to replace electors in the event that a certification is not issued by the governor prior to the safe harbor date outlined in the ECA.[31]

Left unchanged, this loophole could allow a state legislature to usurp the will of voters and replace the presidential electors they selected with electors chosen after the election by the legislature. That would be possible in the event that the legislature determined, on whatever arbitrary grounds they chose, that the voters "failed to make a choice."[32]

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[28] *See, e.g.*, Berry, *supra* note 6; Wertheimer, *supra* note 6: Tribe, Chemerinsky, & Aftergut, *supra* note 6.

[29] 3 U.S.C. § 2. This provision was originally codified as part of the Presidential Election Day Act of 1845.

[30] *See, e.g.*, The Electoral Count Act of 1887: Proposals for Reform, Comm. on House Admin. at 18 (Jan. 2022, 117th Cong., 2nd Sess.) (citing Trip Gabriel & Stephanie Saul, *Could State Legislatures Pick Electors to Vote for Trump? Not Likely*, N.Y. Times (Jan. 5, 2021), https://www.nytimes.com/article/electors-vote.html). *See also Petition for Writ of Certiorari* at 23, *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451, 209 L. Ed. 2d 172 (2021) (citing 3 U.S.C. § 2).

[31] *See* the Electoral Count Act of 1887: Proposals for Reform, Comm. on House Admin. at 18 (Jan. 2022, 117th Cong., 2nd Sess.) (citing N.C. Gen. Stat. Ann. § 163-213(a)).

[32] 3 U.S.C. § 2.

The legislative history of this section indicates that it aimed to provide guidelines for states wherein a sudden natural disaster potentially necessitated a runoff.[33] A clarification of the provision's scope would help avoid future controversies. The ECRA attempts to provide that clarification by striking the existing language of 3 U.S.C. §§ 1 and 2 and replacing both with newly drafted language:

> (1) 'election day' means the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President held in each State, except, in the case of a State that appoints electors by popular vote, if the State modifies the period of voting as necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to such day, 'election day' shall include the modified period of voting.[34]

By narrowing 3 U.S.C. § 2 to capture only genuine "catastrophic events" and by striking the language empowering state legislatures to appoint electors in the event of a "failure to make a choice," the ECRA works to fetter state legislatures' authority. On that score, this new language is an important improvement over current law.

Although the ECRA solves an important problem in this area, the proposal creates another. As Fred Wertheimer has pointed out,[35] the bill undercuts its attempt to narrow the failed election provision by relying upon a new set of vague terms and leaving them to be defined, presumably, by state law. The ECRA does so by connecting the definition of "extraordinary and catastrophic events" to a definition "provided under laws of the state enacted prior to such day." States are unlikely to adopt the exact same definitions for these terms. Consequently, a number of obvious practical issues will likely ensue. In one state, for example, a large hurricane could trigger an extension of the election. But in a neighboring state that has codified a different definition for "catastrophic event," that same hurricane might not trigger the extension of the election. Or, in this same scenario, the first state may say the election is extended for twenty days, while the other might only allow for a five or even no-day extension. Practical issues such as these will not only cause confusion. They may also nefariously impact the results of presidential elections.

The capacious language may invite the very same type of exploitation by bad-faith state legislatures the ECRA's drafters sought to resolve—that is, their unlawful interference in the election. Given the creativity and brazenness of anti-democracy actors, we should all be alert to how this new provision could be exploited. For example, the relevant state law might say that extensive voter fraud (or even mere suspicions about it) can count as a "catastrophic" event." Or state legislatures may not provide the narrowing definitions that the bill's drafters expect them to, instead codifying their own vague definitions to provide partisan state actors leeway to manipulate election outcomes in real time.

As the bill is currently written, Congress has no power to prevent bad actors from extending their state's election under the guise of baseless fraud allegations or from prohibiting the extension of

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[33] *See* Michael T. Morley, *Postponing Federal Elections Due to Election Emergencies*, 77 Wash. & Lee L. Rev. Online 179, 185-191 (2020).
[34] ECRA § 102 (emphasis added).
[35] Wertheimer, *supra* note 6.

an election only in certain precincts in order to maximize partisan outcomes. The bill, in sum, presents the opportunity for mischief.

But this issue is not without a remedy. Congress can use its constitutional authority to set the timing of presidential elections to craft the applicable definitions for these new standards in the statute.[36]

I respectfully disagree with commentators who assert that "extraordinary and catastrophic events" is too limiting a term to encompass "'fraud' and related ideas as a triggering event to alter the outcome of the vote."[37] I wish there were a basis in the bill to be so confident. But the phrase "extraordinary and catastrophic events" is only limited to the extent "provided under laws of the State." And, critically, the bill does not limit what those state laws should provide. The risk of abuse must be better addressed.

These concerns are not hypothetical. The recent wave of state legislation aimed at suppressing or interfering with the voting process should convince us of this. Indeed, since the 2020 election state legislatures across the country have introduced and passed a slew of "election interference" laws. These laws target local elections officials and the rules they rely upon to govern elections administration and enforcement and to ensure the will of the people is reflected. According to a States United report, by the end of the first quarter of this year 229 bills that would allow legislatures to "politicize, criminalize, or interfere with elections" had been introduced in 33 states.[38] Eighteen of those have already been enacted or adopted. The agenda of partisan election-denier state actors—which has been evidenced by the proliferation of election-interfering bills—poses a risk given the ECRA's configuration basing the election-extension trigger on state law.

This section of the ECRA should reflect Congress' intent when it was originally drafted in the ECA[39] to ensure the franchise is not hindered by natural disasters, terror attacks, and similar force majeure events. Without question, the definitions of those extension-triggering events will need to be carefully drafted. Without those revisions, the current bill presents a serious opportunity for manipulation.[40]

(2) The ECRA-related federal litigation provision should be further developed

The current ECA allows for the possibility that a state submits "dueling slates" of electors. The plan to interfere with the elector count on January 6, 2021, hinged upon this dueling slates concept.

The ECRA attempts to close the dueling slates loophole (among others) by: (1) creating a deadline for the "executive of each state"—in most cases, the governor—to issue and transmit the certificate

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[36] *See* U.S. Const. art. II, § 1, cl. 4 ("The Congress may determine the **Time** of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.") (emphasis added).
[37] Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, Lawfare (July 24, 2022, 4:09 P.M.), https://www.lawfareblog.com/correcting-misconceptions-about-electoral-count-reform-act.
[38] *A Democracy Crisis in the Making,* States United Democracy Center (May 2022), https://statesuniteddemocracy.org/wp-content/uploads/2022/05/DCITM_2022.pdf.
[39] *See* Morley, *supra* note 33 at 183 ("The legislative history of the federal Election Day statute for presidential electors demonstrates that Congress specifically intended to allow legislatures to hold such elections at a later date when necessary to respond to unexpected emergencies and natural disasters"). *See also* Thomas Berry & Genevieve Nadeau, *Here's What Electoral Count Act Reform Should Look Like*, Lawfare (Apr. 4, 2022), https://www.lawfareblog.com/heres-what-electoral-count-act-reform-should-look.
[40] Wertheimer, *supra* note 6.

of ascertainment appointing electors, (2) giving that certificate conclusive status at the electoral count, and (3) providing a judicial remedy in case the governor (or other applicable authority) fails to fulfill this duty in a lawful manner.[41] The governor's obligation to issue and transmit the certificates under the ECRA thus attempts to ensure that each state submits timely, accurate electoral appointments to Congress and removes the possibility of a "dueling slate." Congress, theoretically, would only receive one, accurate certificate of appointment from each state and would not need to consider competing or "alternate" electoral appointments or votes submitted by any other person or body.

In the process of attempting to eliminate the "dueling slates" vulnerability, however, the ECRA also inadvertently opens up other issues related to any potential judicial review.

My primary concerns arise from the truncated period for resolving governor-related litigation, as well as how the bill determines which certificates are given conclusive authority at the electoral count. The relevant language is as follows:

> (A) the certificate of ascertainment of appointment of electors issued pursuant to this section shall be treated as conclusive with respect to the determination of electors appointed by the State; and
>
> (B) any certificate of ascertainment of appointment of electors as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.[42]

Accordingly, the governor-issued certificate will be given conclusive status at the count unless there has been a federal judicial remedy prior to the meeting of the electors, in which case the court-ordered certificate stands.

The problem is one of timing. Alongside these conclusivity provisions, the bill sets the deadline for the governors to submit their certificates six days prior to the meeting of the electors—at which point those certificates are locked in. It is very likely that germane federal and/or state court litigation involving the canvass, certification, or a contest/recount will have begun well in advance of this six-day period. For any ECRA governor-related litigation, however, this could give candidates and courts as few as six days to resolve a dispute. This opens up an opportunity for so-called "rogue governors" to interfere with the elector certification process.

Imagine that a governor waits until the ECRA deadline and issues certificates that do not reflect the results of the popular vote. The candidates would only have six days to seek injunctive relief before the certificates are locked in on elector balloting day. The ECRA provides for an expedited federal review process, through which candidates can convene a three-judge panel pursuant to 28

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[41] ECRA § 104(a) ("Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.") (emphasis added); *Id.* ("Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to" a few discrete rules).

[42] *Id.*

U.S.C. § 2284. The bill failed to exempt such claims from the five-day notice requirement of 28 U.S.C. § 2284, however, leaving parties as little as one day to resolve all governor-related disputes.[43] That essentially precludes the possibility of a Supreme Court appeal.

Because only certificates that have been revised by court order before elector balloting day are deemed conclusive, a rogue governor's unlawful certificates may stand as the "lawful" certificates for the final elector count on January 6th. That's a problem.

Under certain circumstances, the unnecessarily truncated timeline set out by the ECRA could also hinder good faith governors from issuing legitimate certificates. In the event of a serious election contest, that contest may not have been resolved before the ECRA deadline for elector certificate submissions. The governor would then face an agonizing decision: either they do not issue the certificates (and thus fail to comply with federal law) or they knowingly issue possibly inaccurate certificates. Both outcomes are arguably worse than under current law, which builds in a "safe harbor" provision tied to meeting certain requirements six days before elector balloting day. Note that while the "safe harbor" has been viewed as an important mechanism for resolving electoral contests and certifying results, it is also widely misunderstood. It is only a safe harbor, not a deadline. Unnecessarily imposing a new conclusivity cut-off under the ECRA could create a situation in which a state cannot finish its legitimate canvasses and certification processes in time for the governor to fulfill their legal obligations. This also burdens state election officials, who would be forced to manage the canvass and certification processes on an extremely expedited timeline.

Two fixes are immediately obvious. First, bump back the electoral count day to expand the period for judicial review, bearing in mind the deadline for governors to submit the certificates. Second, exempt panels convened under the ECRA from the five-day notice requirement.

Let me add that although this is my own reaction to this provision, it is critically important that the governors and other stakeholders who will be charged with operating under this new scheme be extensively consulted. They navigated the ECA last time and did so well under extremely adverse circumstances. I cannot emphasize strongly enough that their views be taken into account. With their help, all the permutations that could unspool from this new expedited federal review system should be carefully thought out.

(3) The grounds for Congressional objections should be clarified

At present, the grounds upon which Congress may issue an objection to the states' electoral votes that the ECRA provides mirror those outlined in the current ECA. Under the current ECA, there are two permissible grounds for rejecting the votes: (1) the electors' appointments were not "lawfully certified"; or (2) the electors' votes were not "regularly given."[44]

The ECA does not provide explicit definitions for these terms. Historically, "lawfully certified" has been understood to require that the issuance of the certificate of electors conform with the

[43] 22 U.S.C. § 2284(b)(2) ("If the action is against a State, or officer or agency thereof, at least *five days'* notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.") (emphasis added).
[44] 3 U.S.C. § 15.

ECA's rules and not otherwise be unconstitutional.[45] "[R]egularly given," by contrast, refers to the casting of electoral votes. The phrase has been interpreted to prohibit votes that are constitutionally defective or are cast corruptly, though its exact scope is unknown.[46]

I agree with the sentiments of the Cato Institute's Thomas Berry that: the decision to leave section 15's definitions unclear is puzzling.[47] "[L]awfully certified" and "regularly given" are undefined by the text of the ECRA. Preserving these specific objection grounds without more will not deter bad-faith objections. Indeed, the retention of these ambiguous terms carries forward these oft-abused provisions of the ECA into the new bill.

On the first ground for objection, Cato's Berry rightly observes that electors who were not "lawfully certified" by a state executive "should not be counted under the final counting rules *anyway,* whether objected to or not, because such electors would presumably not be 'appointed under a [governor's certificate] issued pursuant to section 5.'"[48] Moreover, he aptly adds, "it's not obvious from the text of the ECRA when there could be an electoral vote that should rightfully be objected to under this standard *but* that would otherwise be counted at the final tabulation under the counting rules." And, as Berry points out, "some such scenario must exist, or else this ground for objection would be entirely superfluous."[49] An updated ECA should not contain superfluous provisions, especially ones involving the scope of Congressional authority to object at the electoral count.

Instead, Congress should enact new, clear, counting rules that fall squarely within Congress's constitutional power at the vote count. Prompting unguided speculation about whether one of the two grounds for objecting applies is not clear.

On the second ground for objection, commentators have agreed that providing a definition for "regularly given" would similarly clarify the ambiguity latent in this retained ECA term. While some[50] have sought to exhume the original meaning of this term, Cato's Berry rightly notes that "it should not be necessary to refer to complex historical research to understand the meaning of a law enacted in 2022."[51]

Unless we do more, we can count on the fact that these provisions will not effectively safeguard against bad actors in Congress. If there is anything the attack on the 2020 election has taught us, it is that Members seeking to manipulate the count will exploit any ambiguity in federal law. After all, these are the exact same objection grounds that were used on January 6, 2021. Providing

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[45] *See* L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 Dick. L. Rev. 321, 338 (1961) ("[V]otes 'lawfully certified to' would seem to be votes certified to in accordance with the terms of the [ECA].").

[46] *See id.* ("Presumably votes "regularly given" are given in accordance with the requirements of the Constitution as to time and form. The language undoubtedly also means that the electors have acted without mistake or fraud. Does it have the further meaning that they have voted for an eligible candidate?"); Stephen A. Siegel, *The Conscientious Congressman's Guide to the ECA of 1887*, 56 U. Fla. L. Rev. 542, 619 n.474 (2004) ("regularly given" covers defects including "failing to comply with constitutional requisites for elector voting, such as not voting on the correct day, voting for a constitutionally disqualified candidate, or corruption in office.").

[47] Berry, *supra* note 6.

[48] *Id.*

[49] *Id.*

[50] Derek T. Muller, *Electoral Votes Regularly Given*, 55 Ga. L. Rev. 1529 (2021).

[51] Berry, *supra* note 6.

Members of Congress who are intent on manipulating the count a plausible basis to object—superficial as it may be—presents a serious risk. It will cloak coup attempts.

We saw this kind of attempt to mask lawlessness when, after the Justice Department announced that there had been no evidence of widespread voter fraud in the 2020 election, President Trump attempted to pressure the Acting Attorney General, Jeffrey Rosen, and the Deputy Attorney General, Richard Donoghue, to declare that the election was "illegal" and "corrupt." According to Donoghue's recollection of the phone call during which this exchange occurred, Trump told him and Attorney General Rosen in plain terms, "Just say that the election was corrupt" and "leave the rest to me and the R[epublican] Congressmen."[52]

A reformed ECA cannot leave key blanks for bad actors to fill in. Both Cato's Berry and the Committee on House Administration's Staff Report are instructive on drafting objection grounds that are founded in the Constitution and not susceptible to partisan manipulation.[53]

(4) Clear procedural rules for the Congressional electoral count should be provided

While the ECRA significantly clarifies muddles in the counting rules within the ECA[54], the new language still contains significant ambiguities and omits a number of decisions related to the actual process for running the joint session.

Let's start with the ambiguities. The updated section 15 requires the Vice President to:

> [O]pen the certificates and papers purporting to be certificates of the votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors issued pursuant to section 5.[55]

As in the current ECA, the ECRA then calls for all such papers to be read and presented to Congress for potential objections in the alphabetical order of the states.

Several commentators have voiced criticisms of the choice to retain the phrase "purporting" in the updated rules.[56] When the ECA was enacted in 1887, its drafters were focused on the possibility of receiving multiple competing slates of electors supported by different state officials, a particularly salient concern during the post-Civil War period. The ECRA rightly moves away from accepting multiple slates as previously discussed—which then raises the question, why retain "purporting"?

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[52] Jeremy Herb, *Trump to DOJ last December: 'Just say that the election was corrupt + leave the rest to me'*, CNN (July 31, 2021), https://www.cnn.com/2021/07/30/politics/trump-election-justice/index.html.

[53] Berry, *supra* note 6; Andy Craig, Pol'y Analysis No. 931, *How to Pick a President: A Guide to Electoral Count Act Reform*, Cato Inst. (June 28, 2022), https://www.cato.org/policy-analysis/how-pick-president-guide-electoral-count-act-reform; The Electoral Count Act of 1887: Proposals for Reform, *supra* note 30 at 25.

[54] Edward B. Foley, *How John Kasich Could End Up Picking the Next President*, Politico Magazine (Mar. 20, 2016), https://www.politico.com/magazine/story/2016/03/the-bizarre-130-year-old-law-that-could-determine-our-next-president-213645/.

[55] ECRA § 109(a).

[56] I advanced this concept in my initial and informal reactions to the ECRA. *See* Norm Eisen (@NormEisen), Twitter (July 21. 2022, 11:37 A.M.), https://mobile.twitter.com/NormEisen/status/1550142956350410753; Berry, *supra* note 6.

There are several possible readings of the phrase.[57] In my view, the continued use of "purporting" directly contradicts the new ECRA provisions that would exclude alternate elector slates. Leaving that phrase in place only invites mischief. We've already glimpsed the possible consequences. On January 6, 2021, a senior aide to a Republican Senator attempted to arrange for the transmission to Vice President Pence of an alternate slate of electors—or, in the language of the ECA and ECRA, papers arguably "purporting to be certificates."[58] We ought not leave that provision in place where it is ripe for exploitation. To truly rule out the possibility of dueling slates, as the ECRA is clearly designed to do, this malleable language must be removed.

The updated counting rules also fall short of establishing a clear process for running the joint session. For example, the ECRA does not adequately explain how to recess. In the absence of clear guidelines, a chamber could in theory continuously delay the count by recessing time and time again. Then there is the question of who can appeal a decision of the presiding officer. How many Members does it take to trigger a debate on an appeal? How long is that debate? These choices should be made now. Members will have opinions about voting thresholds and how powerful the presiding officer, in this case the Vice President, is in handling appeals.

Without clarifying these procedures, Members intent on manipulating the count may step in and twist them for their own purposes. We already saw this risk on January 6, 2021, when President Trump and his allies pressured Members of Congress to delay the electoral count. As the January 6 Committee hearings revealed, lawyer and top Trump advisor Rudy Giuliani tried to call Senator Tommy Tuberville and left a voicemail for another Senator imploring them and their Republican colleagues to "just slow [the count] down."[59]

Stopping short of specifying these procedural provisions will give Members of Congress more tools with which they can attempt to usurp a valid presidential victory. Failing to get this reform right could empower bad-faith manipulation of the count and procedural chicanery.

Conclusion

We face a dangerous time for our democracy. The flaws in the ECA provided cover for President Trump's and his allies' unlawful plan to overturn the 2020 presidential election. The bill before us seeks to shore up those weaknesses, and indeed many of the conceptual changes will do just that. But as this Committee and Congress move forward, getting the details right matters. We must do more in anticipating future threats—threats that remain all too clear and present.

My mother came to the United States after experiencing the dissolution of democratic order in Central Europe and the terrible consequences that followed. I later returned to the land of her birth as a diplomat. A lesson she taught me as a child is one that I heard over and over again during my

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[57] Berry, *supra* note 6 ("It's genuinely unclear to me whether this language means, for example, that the vice president must present: 1. Any paper claiming to be the true votes of a state, even if its certificate does not match the single correct governor's certificate; 2. Any paper attached to a certificate that appears on its face to be the true governor's certificate, even if more than one is received and all but one is a forgery, or 3. Only the single paper that appears most likely to be the true list of votes accompanied by the true governor's certificate. The bill's language could arguably direct the vice president to take any one of these three courses, or perhaps more.").

[58] *Ron Johnson says the alternate slate of pro-Trump electors that his top aide tried to get to Mike Pence on Jan. 6 came from Mike Kelly's office. Kelly strongly denies that*, Politico (June 23, 2022, 4:35 P.M.), https://www.politico.com/minutes/congress/06-23-2022/johnsons-latest-16-story/.

[59] *See 07/21/22 Select Comm. Hearing: Before the Select Comm. to Investigate the January 6th Attack on the United States Capitol*, 117th Cong. (2022).

service and since from hundreds of other survivors and students of that tragic past: It can happen anywhere.

We Americans cannot afford to risk another attempted coup that twists our laws and institutions to serve its purposes. No democracy can be taken for granted, and it is only through careful and ongoing work that we can protect ours for generations to come. I thank the bipartisan negotiators of the ECRA for commencing that effort and the Chair, Ranking Member, the Committee and its staff for considering my suggestions for four key areas of improvement. We must assure that the ECRA does what it sets out to do and prevents future attempts to wrongly overturn a presidential election. Few things could be more important for our nation.

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Testimony before the U.S. Senate Committee on Rules & Administration

"The Electoral Count Act: The Need for Reform"

August 3, 2022

Professor Derek T. Muller

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Chairwoman Klobuchar, Ranking Member Blunt, Members of the Committee: thank you for the kind invitation to testify before you today. It is a particular honor to speak to two of the tellers in the joint session on January 6, 2021, who served ably and admirably in the face of great scrutiny and danger. Thank you, Senator Klobuchar and Senator Blunt.

My name is Derek Muller. I am the Bouma Fellow in Law and a tenured Professor of Law at the University of Iowa College of Law.[1] I teach election law, federal courts, civil procedure, and evidence—in a nutshell, I teach the law of elections and of litigation. I've had the privilege of reading and writing about federal rules concerning elections, state administration of federal elections, presidential elections, the Electoral College, the Electoral Count Act, and litigation surrounding them.

There has been overwhelming support for the Electoral Count Reform Act of 2022, in this form, from the public. A bipartisan group of law professors (in a statement that I joined), a bipartisan working group at the American Law Institute,

[1] My remarks are my personal views and do not represent those of the University of Iowa or any other organization. I am here at the request of the Committee, on my own behalf and no one else. Special thanks to William Jordan and Elias Wunderlich for their help in researching and editing this testimony. I lightly revised this testimony August 8, 2022, for a few typos and to give additional attribution.

endorsements from writers in publications across the political spectrum, and a bevy of public interest groups (right, left, and center) have all expressed tremendous enthusiasm for the Electoral Count Reform Act of 2022. There has been notably little public opposition to the heart of the bill, and the bulk of that rare concern rests largely on misunderstandings of the text or technical problems that can be readily corrected.

My testimony today makes five principal points. First, broad bipartisan support is essential to address any efforts to reform the Electoral Count Act to ensure that futures Congresses have the confidence to abide by the rules. Crucially, it is not simply a bipartisan effort, but an effort that increases clarity in each area it touches. It does not introduce new complexity or novel mechanisms that could increase uncertainty. Second, the bill fits comfortably within the constitutional authority of Congress, and I examine some of the questions that have arisen on this topic. Third, the Electoral Count Reform Act of 2022 has seven important components, which I identify as useful and practical ways of handling future presidential election disputes. Fourth, the efforts to update the Presidential Transition Act of 1963 are laudable. And fifth, there are some small technical corrections that could further improve clarity and precision, and I share those at the end of this testimony as a starting point for some conversation.

I. A bipartisan legislative effort is essential to address Electoral Count Act reform.

In amending statutes like the Electoral Count Act of 1887 ("ECA"), Congress aspires to develop neutral, sensible rules well before any dispute arises from a contested election. And it is essential that bipartisan consensus arise to ensure that everyone is on board before those rules govern the next contested election.

The ECA was enacted with bipartisan consensus.[2] Truth be told, it took too long to get there. A series of problems in the election of 1872 left a number of unanswered questions, which remained unanswered ahead of the contested election of 1876. Even after that miserable experience, Congress could not find consensus ahead of 1880 or 1884, despite some close shaves. Congress reached that consensus in 1887, with Democrats and Republicans developing a bill that they could agree should govern future counting of electoral votes in Congress.

[2] *See* L. Kinvin Wroth, *Election Contests and the Electoral Votes*, 65 DICK. L. REV. 321, 334 (1961) ("Finally, in 1887, when the passions of Reconstruction had cooled, the Republican Senate and Democratic House of the 49th Congress were able to pass a compromise measure in an atmosphere relatively free of partisan pressures."); EDWARD B. FOLEY., BALLOT BATTLES 154–57 (2016) (describing bipartisan negotiations to secure enactment of the Electoral Count Act of 1887).

The Electoral Count Reform Act of 2022 ("ECRA") does seven important things.[3] First, it clarifies the scope of Election Day. Second, it abolishes the "failed to make a choice" provision and substitutes a simpler rule for election emergencies. Third, it ensures that Congress receives timely, accurate electoral appointments from the states. Fourth, it raises the objection threshold in Congress. Fifth, it clarifies the narrow role of the President of the Senate when Congress counts votes. Sixth, it enacts new counting rules to define Congress's role at the count. Seventh, it clarifies the denominator in determining whether a candidate has reached a majority of votes cast.

These seven objectives are hardly random. They have their legacy in the same kinds of reforms proposed by members of this Committee and others in Congress. These seven goals are all advanced in the "discussion draft" of the "Electoral Count Modernization Act," which was released in February 2022. They are also all goals advanced in the Committee on House Administration Majority Staff Report, "The Electoral Count Act of 1887: Proposals for Reform," which was released in January 2022. The mechanisms may differ from proposal to proposal, but all are in service of the same objectives, often in quite similar ways. I am confident that the bipartisan working group that fashioned the ECRA owes a debt of gratitude for the work in Congress that was done earlier this year.

There is wisdom in the specific approach of the ECRA, and, in many ways, the things it does not do are just about as important as the things it does. In the event of an election dispute, the very last thing anyone wants is uncertainty. Novel mechanisms may face renewed scrutiny, and even judicial skepticism, at the very moment they are most needed, at a time when they must serve as reliable guardrails.

The ECRA avoids those perils. It does not invite new avenues of litigation that could create tension with the existing, and more stable, litigation. It does not offer novel mechanisms for counting or resolving disputes in Congress that may face future challenges. It does not stretch the bounds of Congress's constitutional authority in ways that might yield more uncertainty at a time when stability is most needed. The ECRA offers no device that would increase uncertainty in an election. Importantly, in some places, the ECRA retains useful, longstanding language from the present ECA, an effort to reduce disputes over

[3] This portion of the bill amends both the Electoral Count Act of 1887 and the Presidential Election Day Act of 1845. These provisions appear seamlessly at the beginning of Title 3 of the United States Code and have important interplay with one another. For simplicity, I discuss them together under the heading of the Electoral Count Act.

new or different language in the decades ahead. At every turn, the ECRA offers more clarity, more precision, and more stability.

The specific text of the ECRA has significant and broad bipartisan buy-in. It is neither a partisan effort nor a token bipartisan effort. While many may speak generically about reforming the ECA, the specific language and mechanics matter, and securing consensus on these topics is not easy. The ECRA is impressive for that effort alone.

The bottom line is that this is a good bill. It is an impressive amount of clarity and sophistication in a mere 19 pages of statutory text. And it is sufficient to handle the pressing challenges in presidential elections, for this moment and for the future. It takes a nineteenth century law into the twenty-first century.

The risks of failing to enact the ECRA are, in my judgment, significant. Some have attempted to exploit ambiguities in the ECA over the years, most significantly in the 2020 election. To leave those ambiguities in place ahead of the 2024 election is to invite serious mischief. No law can prevent all mischief. But the ECRA significantly strengthens several important areas of the ECA and offers greater confidence.

II. The Electoral Count Reform Act of 2022 rests on sound constitutional authority.

Presidential elections are principally matters left to the states. States have the power to appoint electors in such manner as the Legislature thereof may direct.[4] But Congress has important responsibilities in presidential elections, three of which bear special emphasis when considering the ECRA.

First, "The Congress may determine the time of chusing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."[5] Second, ". . . The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted . . . ."[6] Finally, "The Congress shall have power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."[7]

[4] U.S. CONST. art. II, § 1, cl. 2.
[5] U.S. CONST. art. II, § 1, cl. 4.
[6] U.S. CONST. amend. XII.
[7] U.S. CONST. art. I, § 8, cl. 18.

The Time of Choosing Clause, the Counting Clause, and the Necessary and Proper Clause provide the constitutional authority for Congress to enact this legislation.

The Time of Choosing Clause certainly empowers Congress to fix the date of holding a presidential election. In conjunction with the Necessary and Proper Clause, it empowers Congress to specify that the rules for choosing electors must also be in place by that date, and that Congress can require conclusion of the canvass and any contests by a date certain. A firm ending date ensure the timely transmission of a certificate of ascertainment of appointment of electors.

The original public meaning of the Counting Clause provides unusually strong support for the scope of congressional authority. Congress proposed the Twelfth Amendment in 1803, and it was ratified in 1804. The heart of the amendment required presidential electors to vote for a president and a vice president on separate ballots, as opposed to listing two preferred presidential candidates at once. But the amendment also restated the Counting Clause, which had been a part of the original Constitution. By 1804, it was accepted that Congress counted electoral votes in the joint session.[8] In a 1792 law, Congress had instructed state executives to certify presidential election results and transmit certificates of election to electors[9] and set some rules for Congress to be in session for the counting of votes.[10] Upon ratification of the Twelfth Amendment, Congress enacted an updated statute in 1804.[11] Congress's behavior before and leading up to the Twelfth Amendment provides valuable context that strengthens this understanding of the scope of Congress's power.

In 2020 in particular, the argument arose that the President of the Senate counts electoral votes, but that argument is weak. First, a textual argument. An active verb follows the "President of the Senate" in the Twelfth Amendment:

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[8] *See, e.g.*, Annals of Congress, 4th Cong., 2d Sess., 1538–40, 1542–45 (1797) (describing the joint committee of the House of Representatives and the Senate on the mode for examining votes, including the appointment of tellers from each chamber, followed by the acts of the tellers who "examined and ascertained the number of votes").

[9] An Act relative to the Election of a President and Vice President of the United States, and declaring the Office who shall act as President in case of Vacancies in the offices both of President and Vice President, § 3, 1 Stat. 239, 240 (Mar. 1, 1792) ("That the executive authority of each state shall cause three lists of the name of the electors of such state to be made and certified and to be delivered to the electors . . . .").

[10] *Id.* § 5 ("That Congress shall be in session . . . and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared, agreeably to the constitution.").

[11] An Act supplementary to the act intituled [*sic*] "An act relative to the election of a President and Vice President of the United States, and declaring the office who shall act as President, in case of vacancies in the offices both of President and Vice President," § 3, 2 Stat. 295, 296 (Mar. 26, 1804) (". . . the executive authority of such state shall cause six lists of the names of the electors for the state, to be made and certified, and to be delivered to the said electors . . . .").

"The President of the Senate shall . . . open all the certificates." The clause then switches to the passive voice: "and the votes shall then be counted." It is an unusual inference to claim the same subject counts votes when the voice of the verb changes in that very sentence.

Second, a structural argument. To be sure, there is strong evidence that the Framers of the Constitution did not want Congress to choose the President, and that its limited role in a contingent election was to choose among the top vote-getters from the Electoral College. But the inference that it should be left to the President of the Senate to adjudicate disputes about the counting of electoral votes is even worse from the perspective of the separation of powers. At the Founding, the Vice President (who usually serves as the President of the Senate) was the runner-up in the previous presidential election. The notion that the Framers intended to empower this individual with the power to count electoral votes strains credulity. Furthermore, if the office of Vice President were vacant (a relatively common if infrequent occurrence until enactment of the Twenty-Fifth Amendment), or if the Vice President were simply away from the Capitol during the counting of electoral votes, the President Pro Tempore of the Senate would act as President of the Senate.[12] That would mean *one* Senator would have the power in a circumstance where the *entirety* of Congress would not. It is an even greater absurdity.

Third, an original public meaning argument. Again, consider the practices of Congress ahead of ratification of the Twelfth Amendment.[13] Beginning in 1793, and in every presidential election ever since, the Senate and the House have appointed "tellers" to count the electoral votes. These tellers actually tally the votes and deliver the totals to the President of the Senate, who reads the totals aloud before the two houses after the tellers, acting on behalf of Congress, have "ascertained" the vote totals.

Some scholarship has suggested that John Adams and Thomas Jefferson, acting in their roles as President of the Senate, resolved some disputed electoral votes.[14] But it is strange to say that they "resolved" disputed votes, as unanimous consent of Congress (or the failure to object) is a weak basis to say that they resolved anything. Indeed, the record, if anything, demonstrates the opposite. Tellers "ascertained the number of votes" in 1797 and 1801, to use the language in the Annals of Congress. That is, Congress understood that it was doing the counting. If its tellers wanted to refuse to count votes, they freely could. And many members of Congress in 1800 had an open and aggressive

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[12] U.S. CONST. art. I, § 3, cl. 5.
[13] *See supra* note 8 and accompanying text.
[14] For a brief critique of this view, see FOLEY, *supra* note 2, 397–98 n. 100 (2016).

debate about how far it could go in counting electoral votes and resolving disputes, with myriad views on the subject voiced in Congress.[15] It is a strange suggestion that they would *all* sit on their hands if they disputed what Jefferson would do months later.

Importantly, the Twelfth Amendment was enacted after these counting practices of Congress in 1793, 1797, and 1801. It is the rare amendment where the contemporaneous practice of Congress can be traced to re-enacted language that, I think, best reflects the original public meaning of the provision. That is, Congress was in the business of counting electoral votes when it enacted a provision that said, in part, "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." Yes, it is identical to language that already existed in the Constitution—supplanting it. But it seems natural for Congress to enact a provision that would be best understood as ratifying its existing practices.

Arguments that Congress cannot enact rules for counting are likewise weak. True, these rules would bind future Congresses. But this has been no impediment to following the rules of the Electoral Count Act of 1887 every four years. Days before convening, Congress approves a concurrent resolution providing for the counting of electoral votes, adopting the same procedures in the Act.[16] There must be *some* set of default rules when Congress meets. The ECA has served well for 135 years. The ECRA will serve well for the indefinite future.

III. The mechanisms at work in the Electoral Count Reform Act of 2022 strengthen presidential elections, from popular elections in the states to the counting of electoral votes in Congress.

The ECRA offers specific mechanics that work with one another to streamline the processes from Election Day to the convening of Congress to count electoral votes. The ECRA packs significant sophistication in relatively simple proposals. This next Part walks through the seven major components of this bill, and why they will work well with one another.

A. Clarifying the scope of Election Day.

One of the simplest and strongest reforms is clarifying the scope of Election Day. The bill clarifies that the choice of electors must occur "in accordance with the laws of the State enacted prior to election day." It also provides that there is

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[15] *See, e.g.*, TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT 80–82 (1994)

[16] *See, e.g.*, S. Con. Res. 1, A concurrent resolution to provide for the counting on January 6, 2021, of the electoral votes for President and Vice President of the United States, 117th Cong., 1st Session, January 3, 2021.

a single day for an election with no opportunity for a subsequent day of choosing electors.

Recent controversies over the power of states to make decisions after Election Day would be disappear. The bedrock principle that the rules for an election should be set before the election would be codified into federal law. There would be no opportunity for some later choice of electors or any colorable argument that the state could alter the rules for an election after the fact. A related and important corollary is eliminating the "failed to make a choice" provision.

B. Abolishing the "failed to make a choice" provision.

Section 2 of Title 3 currently provides, "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." Since its enactment in 1845, 3 U.S.C. § 2 has never been used for an election emergency in a presidential election. That is, in nearly 200 years, there has never been an occasion where a state has had a disaster of the type that required a subsequent election.

But the provision has been invoked in other times of uncertainty. In 2000, it was suggested in Florida that the inability to resolve the election in a timely fashion might mean the state had "failed to make a choice," and that the legislature needed to choose the slate of electors presumed to be the winning slate. In 2020, it was suggested that a state legislature could self-determine that the popular election it held had failed, and the legislature could instead step in to appoint electors.

It would be possible to conceive of a universe where there was no "election emergency" provision under the statute. Election Day is on Election Day, no exception. But the fact that September 11, 2001, arose on a primary election day in New York offers special hesitation to any such efforts.

The ECRA offers a clever, practical, and minimally-intrusive way of addressing election emergencies. Rather than define the entire scope of emergencies, it defers to state determinations about when to "modif[y]" the period of voting, with a caveat that such emergencies must be "extraordinary and catastrophic." This approach offers several benefits.

First, it permits states to implement existing mechanisms for addressing election emergencies. In Utah, for instance, the lieutenant governor is given the power to designate a "different" "method, time, or location" for voting in the

event of an emergency.[17] States have different preexisting mechanisms in place to address election emergencies.

But the ECRA does not allow states to self-define "emergency." There might be a risk that a legislature may define "suspicion of voter fraud" or "any amount of rainfall" as an "emergency," which requires a modification of the time for voting. The ECRA conditions that state emergencies must be "extraordinary and catastrophic." There is a federal constraint on state law.

The ECRA also would not allow a state to suspend or delay an election. The state does not have the power to *cancel* an election. Instead, the election can, in limited cases, be "modified" for a period of time. This mechanism allows absentee ballots, including military and overseas personnel, to be counted in the election, rather than a new election being held.

It is worth repeating that the existing mechanism has never been used for a catastrophic emergency in a presidential election. Any invocation of this provision would arise only in the rarest of circumstances. The decision to rely on preexisting state law is a wise and practical one. The conditions in the bill constrain the discretion of states while giving them the flexibility to respond to emergencies.

The fact that disaster rules can look different in different states is unremarkable. In presidential elections, the same candidates are not always on the ballot from state to state. The conditions to send absentee ballots, or the deadlines to receive ballots, can vary. Because each state chooses how to administer its election, a rule that includes some potential variance in local election administration relies on stable, preexisting rules. And given how rarely one expects this provision to be invoked, deferring to a preexisting body of state law is preferable.

The ECRA's mechanism is also superior to other ECA amendment proposals. It does not rely on cumbersome, novel federal litigation that would be first tested at the very moment of the greatest crisis. It would not upset state law that would simultaneously work for state offices. It relies on existing, sound state law doctrines (limited in some respects by federal guardrails), including states' reliance on the swift ability of executive actors to respond to a developing crisis. This rule would be invoked in only the rarest of circumstances but allows the most stable solution in those rare circumstances.

C. Ensuring timely, accurate electoral appointments.

[17] UTAH CODE § 20A-1-308.

Section 5 does five important things to ensure that Congress receives timely, accurate electoral appointments from the states.

First, the ECRA creates a date certain for a state to certify the winner of the election: six days before the electors meet. In the past, there was a presumption of conclusiveness of a state's election if the state met the "safe harbor" deadline. That has sown confusion in 2000, 2004, 2016, and 2020.[18] It was a deadline ignored in 1960. It has suggested that election results can change up until the date that Congress meets to count electoral votes. No longer. The results will be completed in each state in a timely fashion.

Second, it places an obligation on the state to submit accurate certificates of election. As early as 1792, Congress has placed an obligation on state executives to submit presidential election results. The ECRA continues that longstanding obligation.

Third, the ECRA anticipates that there will be only one true set of election results from a state under the rules of the ECRA. The rules would no longer anticipate potential competing or alternate slates of electors, as anticipated after the election of 1876 and as happened in 1960. (In 2020, there was an attempt to create such a situation.) The results certified by the state executive, "under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day," will be the true results. (This language draws from the original ECA while adding clarity that the laws must be in place before Election Day.)

Fourth, it recognizes the importance of the role of the state executive in certifying election results and provides safeguards for this process. If the executive delays signing a certificate, refuses to sign the true certificate of election, or issues an incorrect one, that action undermines Congress's ability to rely on those results. Such an action is already currently subject to state or federal judicial review to ensure that the executive has complied with the law. And any certificate that is required to be issued or modified due to state or federal judicial relief will be recognized in Congress. If courts need to enter the picture, they will have the final word.

Fifth, in the event that problems arise with the executive's issuance of a certificate or the transmission of certificates to the electors or to Congress, and if an aggrieved candidate for President or Vice President brings a claim about a federal issue that lands in federal courts, it receives expedited judicial review. It goes to a three-judge panel and may be appealed directly to the United States

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[18] *See, e.g.*, Derek T. Muller, *Restraining Judicial Application of the "Safe Harbor" Provision in the Electoral Count Act*, 81 OHIO ST. L.J. ONLINE 221 (2020).

Supreme Court. That ensures swift, prompt federal judicial review of the last state's act—the certificate of ascertainment of appointment of electors.

All of these measures serve important objectives: a timely completion of the election, accurate certificates of election from the states, single returns of results with clear rules of priority, and deference to judicial relief where appropriate. And all of this gives Congress confidence when it counts the electoral votes it will receive. That's why Section 5 instructs Congress to treat as "conclusive" a certificate of ascertainment it receives from a state; to prefer a certificate that was subject to judicial relief; and to defer to federal courts on interpretations of federal law.

Some concerns have been raised about the word "conclusive" in Section 5. It is worth noting that the word "conclusive" is currently a part of the Electoral Count Act and has been since 1887.[19] In 135 years, the word has never been construed by any court, at any time, to deprive it of jurisdiction or of any power to review any legal or factual question. It has never been used to create, define, or limit a judicial standard of review. Additionally, the word "conclusive" unambiguously applies to "Section 15," which pertains to the counting of electoral votes in Congress.

The bill does not oust any state court of jurisdiction over state claims or alter any state cause of action. Myriad important federal or state causes of action may be filed before and after Election Day. State laws relating to the canvass, recount, administrative audit, or election contest remain in full force. So, too, does the important remedy of mandamus, available for recalcitrant election officials who refuse to comply with their ministerial obligations under the state election code.

Some have misunderstood the timing, venue, and expedited review mechanisms in the ECRA. It's worth spending some time clarifying these misimpressions.

If candidates, voters, or civic organizations have challenges to raise under the canvass, recount, administrative audit, or election contest statutes under state law, or other state law claims, they may readily to do in state courts, both before and after certification. There are several weeks for such challenges, including robust opportunities for factual development. Nothing truncates that process. All ordinary avenues for state court litigation remain open.

[19] 3 U.S.C. § 5.

If a candidate has challenges to raise under federal law before the executive certifies the results, again, she may do so, under the preexisting causes of action and avenues for relief. The same holds true for voters or civic organizations.

But there is a narrow "venue and expedited procedure" identified in Section 5(d) that can apply in some limited cases. I'll break it down into its component parts.

First, "[a]ny action . . . that arises under the Constitution or laws of the United States." It applies only to federal claims. It does not apply to any state claims.

Second, "brought by an aggrieved candidate for President or Vice President." It is narrowly limited to those aggrieved (*i.e.*, a candidate who believes the certificate of election has not been issued to identify that candidate's electoral slate as the winner). It does not exclude others who may bring suit elsewhere on other claims.

Third, "with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b)." It is limited to a fixed universe of claims: the issuance (or lack thereof) as required under this provision of the ECRA, or the transmission of it.

The timing could arise at different times. In *most* cases, it will arise well before six days before the electors meet. States each set their own deadlines for certifying election results. To my knowledge, no state has a deadline for certification that is as late as six days before the electors meet. An executive's failure to certify by the legislatively-set deadline would violate state law, which would then yield a state judicial basis for challenging the executive's actions. Once the executive issues a certificate of ascertainment of appointment of electors, this venue and expedited procedure would be appropriate—again, *assuming* it was a claim arising under the Constitution or laws of the United States, brought by an aggrieved candidate for President or Vice President, with respect to the issuance of the certification required under section (a)(1) or the transmission of such certification as required under subsection (b). In 2020, for instance, Delaware certified its appointment on November 18.[20] That would yield about 30 days, not six days, for such challenges that meet the component parts identified above. And any other claims—a state election contest claim that might arise under state law after a certificate of ascertainment was issued, for instance—would not be subject to this process.

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[20] Certificate of Ascertainment of the State of Delaware, https://www.archives.gov/files/electoral-college/2020/ascertainment-delaware.pdf.

In the *rare* case, the executive will not have issued any certificate of ascertainment six days before the electors meet, and litigation will be appropriate to ensure the executive complies with this obligation. At this stage, the canvass would be complete in a state, and any factual development arising out of the recount, administrative audit, contest, or other state and federal litigation could be complete. The only remaining questions are essentially ministerial in nature. Such cases can be handled quite quickly.[21] In either case, expedited review is appropriate to handle the narrow questions at hand.[22]

Another question has arisen about the three-judge district court. The mechanism allows immediate appeal to the United States Supreme Court for a swift resolution of any federal issues with respect to the issuance or transmission of certification. But one must be careful in describing the "mandatory" jurisdiction of the Court to hear cases like these. True, assuming the Court has jurisdiction, the Court has no discretion to refuse adjudication of the case on its merits.[23] But in such appeals, the Court "may dispose summarily of the appeal."[24] As a former Chief Justice of the Court has explained, "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached."[25] It allows the Court to avoid complicated questions when appropriate, if it agrees that the lower court has reached the right result. It has done so in the past.[26]

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[21] Consider a recent dispute in New Mexico, in which a county board refused to certify an election, a petition for writ of mandamus was filed, and the New Mexico Supreme Court issued an order granting the writ of mandamus, all in a period of about 48 hours. See Derek Muller, *New Mexico Secretary of State seeks mandamus against county commission that refused to certify primary election results*, ELECTION LAW BLOG, June 15, 2022, https://electionlawblog.org/?p=129945.

[22] An analogy in a different federal election may be useful to distinguish the ordinary recount or contest claims, and the narrow claims related to the issuance of a certificate of election. A recount and an election contest took place in Minnesota after the 2008 United States Senate election. As the election contest was pending in state court, a separate action was filed to order the Governor and the Secretary of State to sign a certificate of election. Franken v. Pawlenty, 762 N.W.2d 558 (Minn. 2009). The Minnesota Supreme Court refused to issue the order while the contest was pending, as the petitioner had no right to the issuance of a certificate at that time. *Id.* at 560. The election contest played out pursuant to state law, and at the conclusion of the contest the Governor issued the certificate. In the Matter of Contest of General Election Held on November 4, 2008, 767 N.W.2d 453 (Minn. June 30, 2009); Monica Davey & Carl Hulse, Franken's Win Bolsters Democratic Grip in Senate, N.Y. Times, June 30, 2009 ("Gov. Tim Pawlenty, a Republican, signed Mr. Franken's election certificate early Tuesday evening."). In short, these two types of issues are distinct and can be litigated in different places.

[23] *See, e.g.*, McCutcheon v. Federal Election Comm'n, 572 U.S. 185, 196 (2014).

[24] Sup. Ct. R. 18.12.

[25] Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, J., concurring).

[26] *See, e.g.*, Republican Party of La. v. Federal Election Comm'n, 137 S.Ct. 2178 (2017) (summarily affirming Republican Party of La. v. Federal Election Comm'n, 219 F. Supp. 3d 86 (D.D.C. 2016); Cox

Existing appellate mechanisms have been little barrier to the Court choosing to exercise discretion in such disputes. The Court heard cases where it had "discretionary" review in the disputed presidential election 2000;[27] the Court refused to hear an election case where it had "original, exclusive" jurisdiction in 2020.[28] The typical "discretionary" process (the writ of certiorari) would proceed from a federal district court, to a three-judge court of appeals, then to a petition for certiorari, which four justices could vote to grant. It is not much of a barrier for a Court interested in hearing the merits. If most justices agree with the outcome of the decision below, the Court is likely to deny certiorari. That denial is effectively the same result as a summary affirmance (with the caveat that a summary affirmance is technically a decision on the merits).

The appeal from a three-judge panel gives the Court sufficient flexibility in its summary affirmance mechanism to avoid protracted litigation. If the Court chooses to summarily affirm, it is likely that it would have chosen to deny certiorari; and if the Court chooses to hear the case because it intends to reverse, it is likely it would have chosen to grant certiorari to hear the case. The three-judge court with an appeal to the Supreme Court means little in the practical effect it will have on the litigants, except, and importantly, that it moves more quickly.

The three-judge panel offers a stable, preexisting mechanism that is widely used in other election cases (today, mostly redistricting and campaign finance cases).[29] The major legal and factual disputes will be resolved in the weeks after the elections, often in State court, before certification. But this mechanism is designed to ensure that Congress has the true results of the election from a State, with a definitive resolution in the federal courts if such controversies arise there.

D. Raising the objection threshold.

In 1887, the ECA raised the objection threshold from one member of Congress to two, one from each house. That modest change alone served as a

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v. Larios, 542 U.S. 947 (2004) (mem.) (summarily affirming Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004)).

[27] *See, e.g.*, Bush v. Palm Beach Canvassing Bd., 531 U.S. 70, 73 (per curiam) ("We granted certiorari on two of the questions presented by the petitioner . . . .").

[28] *See* Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (mem.); 28 U.S.C. § 1251 (a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

[29] See 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); Bipartisan Campaign Reform Act of 2002, § 403, Pub. L. 107-155, 116 Stat. 81.

valuable check on potential objections in 2001, 2017, and 2021. But it has not been enough to weed out insufficiently meritorious objections in recent years.

The ECRA increases that threshold to "at least one-fifth of the Senators duly chosen and sworn and one-fifth of the Members of the House of Representatives duly chose and sworn." One-fifth is a dramatic increase. The objections heard in 2005 and 2021 likely never would have secured the requisite number of members of Congress.[30]

One-fifth has convenient analogs in existing law. The Constitution requires the yeas and nays of the members of a House of Congress will be entered into the journal "at the desire of one fifth of those present."[31] The Rules of the Senate routinely require actions taken upon a percentage of the votes of the Members "duly chosen and sworn."[32] This qualification ("duly chosen and sworn" instead of "present") eliminates the chance that a small group attending an otherwise sparsely-attended counting session could force debate on an objection.

The convening to count electoral votes should not be a forum to air grievances about the past election. This procedural threshold alone will reduce the opportunity for political grandstanding during the counting of electoral votes.

E. Clarifying the narrow role of the President of the Senate.

The ECRA updates language to match the assignment of responsibilities under the Twelfth Amendment. It also clarifies that the Act offers no other role to the President of the Senate beyond that which it expressly authorizes. While Congress could always overrule the decision of the President of the Senate, the clarification places important guardrails to deter future misuse.

In one sense, it clarifies what is already known. The President of the Senate has no power, under either the Twelfth Amendment or under the ECA, to unilaterally determine whether to count electoral votes. But clarification is important to repudiate any lingering questions that have arisen or may arise. Unambiguous statutory language is appropriate.

Additionally, some have already suggested the existing ECA contains ambiguities that a future President of the Senate might exploit, apart from those

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[30] It is possible the objection in 1969 over a faithless elector who cast a vote for George Wallace instead of Richard Nixon would have proceeded to debate. The ultimate votes on the objection were 170-228 (32 not voting, 4 not sworn) in the House, and 33-58 (7 not voting) in the Senate. *See* 115 CONG. REC. 170, 246 (1969). While it is possible some minds were changed during the debate, it is likely that at least one-fifth (and even one-third) of each chamber would have signed an objection.
[31] U.S. CONST., art. I, § 5, cl. 3.
[32] *See, e.g.*, Rules of the Senate XXVIII(6)(b).

raised around the 2020 election.[33] The ECRA clarifies that, "Except as otherwise provided in this chapter," the President of the Senate performs "solely ministerial duties." The President of the Senate's role is clearly defined, and the role is not one of discretion or judgment.

F. Improving counting rules in Congress.

Raising the threshold for objections and clarifying the role of the President of the Senate are two ways to improve counting rules in Congress. It expedites counting and reduces discretion. But other issues arise when Congress counts votes. And the counting rules are better, given the amendments to Section 5 and the restrictions in Section 15.

Recall that Section 5 requires Congress to accept as "conclusive" the certificates that come from a State, a certificate issued under and pursuant to State law enacted before Election Day. Recall, too, that certificates of election required to be issued or modified by judicial relief receive priority in Congress.

The ECRA enumerates two specific grounds for objections. First, that the electors are not lawfully certified under a certificate of ascertainment of appointment of electors under Section 5. But given the safeguards in place to ensure that there is just one certificate, with a priority for certificates subject to judicial relief, this objection is limited to ensuring that the strictures of Section 5 have been met. Second, the vote of one or more electors has not been regularly given, a known commodity and limited objection.[34] By offering greater confidence in the state's election results, greater precision in the articulation of the types of objections allowed, and a higher threshold for objections, it becomes more difficult for members of Congress to depart from the statutory text in raising or sustaining objections. And it takes a majority vote in both chambers to sustain any such objection.

The ECRA's philosophy will help close avenues of partisan politicians who may want to contravene the results of an election based on their unhappiness with how the state or the legal system has played out. Were the statute to attempt to add complicated enumeration of objections, it would raise separate concerns, including whether such enumeration is sufficiently comprehensive, or whether it would impede objecting members of Congress in the first place. And because the President of the Senate is not in a place to adjudicate the propriety of objections, the rules are designed to constrain Congress itself. Future

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[33] *See, e.g.*, Russell Berman, *Kamala Harris Might Have to Stop the Steal*, THE ATLANTIC, Oct. 6, 2021 (quoting a law professor, "I don't think we can argue that Kamala Harris has absolute authority . . . . On the other hand, she is not simply a figurehead. . . . I don't want to lay out a complete road map for the other side . . . .").

[34] *See* Derek T. Muller, *Electoral Votes Regularly Given*, 55 GA. L. REV. 1529 (2021).

Congresses faithful to the text of the statute will not seek to negate the result of state elections.

G. Clarifying the denominator in determining a majority.

The "denominator" problem in presidential elections is a 200-year-old question. The ECRA offers important clarity on the topic.

The Twelfth Amendment provides that "the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed."[35] In the rare event that Congress sustains an objection to counting electoral votes, how should it determine whether a candidate has received a "majority"?

If a state fails to appoint all of the electors it is entitled to receive, or if it has not validly appointed electors under state law, then those electors are not "appointed" for purposes of the Twelfth Amendment. That means the denominator is reduced. It makes it less likely that a candidate will fail to receive a majority of the votes. And that means it is less likely that the election will be thrown to the House in a "contingent" election.

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These seven major areas of the ECRA offer impressive but simple bipartisan solutions that can be easily administered and heeded by future states, courts, and Congresses. I wholeheartedly endorse passage of the bill.

IV. The Presidential Transition Improvement Act also include worthwhile improvements to present law.

A brief word on the Presidential Transition Improvement Act. My area of expertise is not in presidential transitions, but presidential transitions undoubtedly face challenges in times of contested elections. In 2020, the Administrator of the General Services Administration called upon Congress to consider amendments to the Presidential Transition Act of 1963.[36] Additionally, the 9/11 Commission Report recognized that improving presidential transitions was crucial to improve national security.[37] It acknowledged that disputed presidential elections can delay transitions at a significant cost to, among other

[35] U.S. CONST. amend. XII.
[36] Letter of Emily W. Murphy, Administrator, U.S. General Services Administration, November 23, 2020.
[37] THE 9/11 COMMISSION REPORT 422 (2004).

things, national security.[38] The proposed amendments offer helpful clarity in times of contested elections and ensure a more reliable transfer of power.

V. Some technical improvements may strengthen the Electoral Count Reform Act of 2022.

In light of public comments and commentary about the bill, some technical corrections could improve clarity and precision. I offer my own tentative suggestions here.[39]

1. Revise Section 104(a) (specifically, the text for Section 5(c)) as follows:

> (c) TREATMENT OF CERTIFICATE AS CONCLUSIVE.—
>
> (1) IN GENERAL.—For purposes of section 15—
>
> (A) the certificate of ascertainment of appointment of electors issued pursuant to ~~this~~ section (a)(1) shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State, unless replaced and superseded by a certificate submitted pursuant to subparagraph (B), which shall instead be treated as conclusive in Congress; and
>
> (B) any certificate of ascertainment of appointment of electors as required to be issued or revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.
>
> (2) DETERMINATION OF FEDERAL QUESTIONS.—~~T~~For purposes of section 15, the determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors shall be conclusive in Congress.

Explanation: The revisions increase precision. Section 15 governs the counting of electoral votes in Congress, and the revisions emphasize that "conclusive" governs how Congress must treat certificates of ascertainment of appointment of electors

[38] *See id.* at 198 ("The dispute over the election and the 36-day delay cut in half the normal transition period. Given that a presidential election in the United States brings wholesale change in personnel, this loss of time hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees.").

[39] I am grateful to many for their thoughts on this statutory language, particularly G. Michael Parsons, Program Affiliate Scholar at New York University School of Law and Senior Legal Fellow at FairVote, for his input on Section 5(c)(1)(A), and to independent scholar Michael L. Rosin for his input on Section 15(e)(2).

from the states. It also clarifies that part (A) can be "replaced and superseded" by part (B), as it appears that there may be some disconnect between the two rules. It also clarifies that sometimes relief may require the issuance of a certificate (in the event of a failure to issue one), as well as a revision of a certificate.

2. Revise Section 104(a) (specifically, the text for Section 5(d)(1)(B)) as follows:

> (B) 3-JUDGE PANEL.—Such action shall be heard by a district court of three judges, convened pursuant to section 2284 of title 28, United States Code, except that the court shall be comprised of two judges of the circuit court of appeals in which the district court lies and one judge of the district court in which the action is brought, and section 2284(b)(2) of title 28 shall not apply.

Explanation: 28 U.S.C. § 2284(b)(2) provides, "If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State." Given the time-sensitive nature of these claims and the narrow scope of the claims subject to this provision, eliminating the notice of hearing is appropriate.

3. Revise Section 104(a) (specifically, the text for Section 5(d)(2)) as follows:

> (2) RULE OF CONSTRUCTION.—This subsection shall be construed solely to establish venue and expedited procedures in any action brought by an aggrieved candidate for President or Vice President as specified in this subsection that arises under the Constitution or laws of the United States and shall not be construed to preempt or displace any State cause of action.

Explanation: The rule of construction expressly provides that it shall be construed "*solely* to establish venue and expedited procedures" for actions brought under this section (emphasis added). But some have worried that it might be construed to preempt or displace the important role that State courts play in resolving election disputes. Out of an abundance of caution, an additional rule of construction is added.

4. Revise Section 109(a) (specifically, the text for Section 15(e)(2)) as follows:

> (2) DETERMINATION OF MAJORITY.—If the number of electors lawfully appointed by any State pursuant to a certificate of ascertainment of appointment of electors that is issued under section 5 is ~~less~~fewer than the number of electors to which the State is entitled pursuant to section 3~~al votes entitled to be cast by the State~~, or if an objection the grounds for which are described in subsection (d)(2)(B)(ii)(I) has been sustained-, the total number of electors appointed for the purpose of determining a majority of the whole

> number of electors appointed as required by the Twelfth Amendment to the Constitution shall be reduced by the number of electors whom the State has failed to appoint or as to whom the objection was sustained.

Explanation: The provision as currently written offers a small asymmetry, speaking of "electors" and "electoral votes" in a pair. The revision provides symmetry by speaking about "electors" in both parts. 3 U.S.C. § 3 provides the number of electors to which the State is entitled.

* * *

I thank you again for the opportunity to testify before you. It is a distinct privilege to speak with you about such an important topic. I look forward to answering any questions you may have.

Written Testimony of Janai Nelson
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.

Submitted to the
United States Senate Committee on Rules & Administration

In connection with its August 3, 2022 hearing entitled

"The Electoral Count Act: The Need for Reform"

LDF

I. INTRODUCTION

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

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

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

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

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

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

A. Statement of Purpose

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

B. LDF and Our Work

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

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

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

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

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

[2] 347 U.S. 483 (1954).

[3] 321 U.S. 649 (1944).

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

II. THE PRESENT PERIL FOR OUR DEMOCRACY

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

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

RECOMMENDATIONS FROM THE 2020 GENERAL ELECTION (2021), https://static1.squarespace.com/static/5e70e52c7e72720ed714313f/t/600192b45103a7521617d636/1610715829231/ElectionTF-Report_2021.pdf.

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

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

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

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

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

A. Discriminatory Voter Suppression is a Longstanding and Increasing Harm

Suppression of Black citizens' right to vote was at the very heart of the Jim Crow project to enforce strict racial segregation and oppression throughout the U.S., and especially in the South. The Reconstruction Amendments[11] gave Congress not just the clear authority but also the affirmative obligation to act to protect civil and voting rights. Yet, for nearly 100 years, Congress failed to live up to its sacred obligation to fully enforce these constitutional provisions as State and private actors blatantly obstructed the collective promise of equality for Black Americans. Post-

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

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

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

[11] U.S. CONST. amend. XIII, XIV, XV.

Reconstruction, undermined by the courts[12] and ignored by Congress, Black Americans were left susceptible to racial violence and flagrant discrimination in all areas of life. With a clear understanding of the power of the franchise, white supremacists focused their most intensive campaigns of State sanctioned racial terrorism on Black citizens who attempted to vote.[13]

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

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

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

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

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

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

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

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

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

Almost a century after the Reconstruction Amendments were ratified, Congress—compelled by the Civil Rights Movement generally, and the violent events of Bloody Sunday in Selma, Alabama, specifically[20]—exercised its constitutional authority and obligation by passing the Voting Rights Act of 1965 ("VRA").[21] The VRA took a significant step towards making the promise of the Civil Rights Amendments a reality and shaping our country into a true democracy for the first time in our history.[22] The passage and enforcement of the VRA has traditionally been a bipartisan enterprise, as many Republicans and Democrats alike historically have recognized that voting rights for Black and Brown Americans is fundamental to our aspirations to an equal, just, and racially and ethnically inclusive democracy.[23]

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

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

[21] 52 U.S.C. § 10301 *et. seq.*

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

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

[24] 570 U.S. 529 (2013).

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

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

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

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

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

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

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

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

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

be repeated. Notably, many of these laws are directly targeted at blocking pathways to the ballot box that Black and Brown voters used successfully in 2020.[31]

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

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

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

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

[33] *Id.*

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

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

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

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

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

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

[36] *Id.*

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

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

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

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

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

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

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

[40] *Id.* at 3.

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

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

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

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

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

B. Election Manipulation is a Renewed Urgent Threat

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

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

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

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

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

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

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

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

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

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

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

[51] ISSACHAROFF, *supra* note 49.

[52] 92 U.S. 214, 215 (1876).

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

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

[55] 189 U.S. 475 (1903).

January 6th Insurrection

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

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

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

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

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

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

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

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

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

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

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

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

[63] *Id.* at ¶ 27.

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

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

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

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

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

Partisan Election Interference

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

[66] *Id.*

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

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

[69] *Id.*

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

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

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

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

[71] *Id.*

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

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

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

[75] Tex. Elec. Code § 33.058.

Harassment and Intimidation of Election Officials

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

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

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

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

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

[79] *Id.* at 7.

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

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

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

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

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

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

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

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

[84] Wines & Fawcett, *supra* note 77.

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

Undermining Elections from the Inside

The effort to subvert elections from the inside has picked up even more steam in 2022. With Black and Latino election workers such as Shaye Moss[87] pushed out of the picture, those who embrace false claims of voter fraud are waiting in the wings to infiltrate the system. According to a December 2021 *New York Times* article, "[i]n races for state and county-level offices with direct oversight of elections, Republican candidates coming out of the Stop the Steal movement are running competitive campaigns, in which they enjoy a first-mover advantage in electoral contests that few partisans from either party thought much about before last November."[88]

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

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

[86] Shivaram, *supra* note 83.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONGRESS'S OBLIGATION TO ACT

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

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[92] *Id.*

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

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

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

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

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

IV. THE BIPARTISAN WORKING GROUP'S REFORM PACKAGE

In response to Congress's clear obligation to address the present democratic crisis, the bipartisan Senate working group has produced two pieces of legislation: the Electoral Count Reform and Presidential Transition Improvement Act of 2022[98] and the Enhanced Election Security and Protection Act.[99] These bills contain updates to the ECA; revise the presidential transition process; and address some aspects of election administration.

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

A. Electoral Count Reform Act

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

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

[98] S. 4573, 117th Cong. (2022).

[99] S. 4574, 117th Cong. (2022).

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

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

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

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

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

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

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

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

[104] *Id.* at § 109.

[105] *Id.* at § § 102, 103, 104, 106.

[106] 3 U.S.C. § 2.

that the available remedy is to extend voting, not discard the election results or set an entirely new election;[107]

- Clarifies which state official is responsible for apprising federal officials of the certified slate of electors to reduce or eliminate the possibility of Congress needing to choose between multiple purportedly legal slates;[108]
- Increases the threshold for congressional objections to electors or votes from one member of each chamber to one-fifth of each chamber to reduce the chances that frivolous objections delay or derail the electoral count;[109]
- Ensures that any electors eliminated from the count by a sustained objection are removed from the denominator when calculating the majority of Electoral College votes required to win the presidency, reducing the chances that an election will be thrown to the House of Representatives;[110] and
- Eliminates the confusing and unenforceable "safe harbor" provision in the existing ECA in favor of an expedited federal judicial process to conclusively resolve, prior to the meeting of the Electoral College, the narrow question of whether the election results certified under state law were lawfully ascertained and delivered by the state to federal officials.[111]

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

Judicial Review Process

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

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

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

[109] *Id.* at § 109.

[110] *Id.*

[111] *Id.* at § 104.

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

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

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

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

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

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[112] *Id.*

[113] *Id.*

[114] 22 U.S.C. § 2284.

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

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

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

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

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

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

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

2024, the Electoral College would meet on December 17 according to the current draft[119]—42 days after Election Day, and 20 days before January 6th. Pushing this date to December 23, by way of example, would still provide two full weeks between the Electoral College vote and Congress's official count. Alternatively, the Committee may determine that it is more prudent to push up the deadline for ascertainment to 12 days prior to the meeting of the electors or to pursue another avenue that would permit litigation to be adjudicated more fully.

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

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

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

0fd036cd3a95/principles_for_eca_reform.pdf.

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

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

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

Opportunities for Further Clarifications

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

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

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

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

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

[123] 3 U.S.C. § 2.

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

[125] *Id.*

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

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

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

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

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[126] 3 U.S.C. § 2.

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

[128] 3 U.S.C. § 15.

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

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

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

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

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

[132] *Id.* at 1537-540.

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

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

When State Rules Should be Locked in Place

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

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

B. Companion Election Administration Legislation

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

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

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

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

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

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

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

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

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

Protecting Election Workers

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

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

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

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

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

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

United States Postal Service

The 2020 elections took place amid a global pandemic that prompted record numbers of Americans to vote by mail.[141] Forty-three percent of votes were cast by mail in 2020, compared to just 21% in 2016.[142] The increase in mailed ballots elevated the U.S. Postal Service (USPS)'s role as critical election infrastructure, responsible for ensuring that vote-by-mail ballot applications, blank ballots, and voted ballots reached voters and election officials by strict (and often tight) deadlines. Yet, the USPS in the summer of 2020 instituted operational changes (notably including changes to transportation policy) that slowed delivery times and threatened to impede timely delivery of ballots in the critical weeks surrounding Election Day.[143] The NAACP—represented by LDF and Public Citizen Litigation Group—sued the USPS and secured a court order requiring it to take "extraordinary measures" to ensure timely ballot delivery in 2020,[144] and subsequently negotiated an historic settlement requiring USPS to maintain these or similar measures through the 2028 elections.[145]

Title II of the EESPA, the Postal Service Election Improvement Act (PSEIA), contains some helpful provisions, such as prohibiting the USPS from making operational changes that jeopardize election mail services within 90 days of an election[146] and encouraging standardized ballot envelope design to encourage

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

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

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

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

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

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

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

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

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

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

[147] *Id.* at § 205.

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

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

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

the USPS to continue to deliver ballots without postage, and consider providing funding to enable the USPS to absorb the cost of these deliveries rather than passing it on to elections officials with tight budgets.

- *Require the USPS to maintain "extraordinary measures" to prioritize, expedite, and monitor delivery of election-related mail in the weeks surrounding Election Day*. These procedures should be at least as robust as those required of the USPS for the 2020 election as a result of the NAACP vs. USPS settlement.
- *Provide states with the resources to facilitate effective tracking of mail pertaining to federal elections, and require them to do so*. Not all states or counties use Intelligent Mail Bar Codes or similar technology, which makes prevents comprehensive tracking of USPS election mail performance.[151]

V. THE PATH FORWARD

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

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

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

Submitted Statement for the Record of
Jonathan Bydlak, Policy Director, Governance Program
Matthew Germer, Resident Elections Fellow, Governance Program
Ryan Williamson, Resident Fellow, Governance Program
R Street Institute

Before the
Senate Committee on Rules & Administration
United States Senate

Hearing on
THE ELECTORAL COUNT ACT: THE NEED FOR REFORM

August 3, 2022

Chairwoman Klobuchar, Ranking Member Blunt and Members of the Subcommittee:

Thank you for holding a hearing on the Electoral Count Act of 1887 and the need for its reform. Our names are Jonathan Bydlak, Matthew Germer and Ryan Williamson, and we conduct research on election reform at the R Street Institute, a nonprofit, nonpartisan public policy organization dedicated to promoting free markets and limited, effective government across a variety of policy areas, including election reform. This is why the Electoral Count Act is of special interest to us.

The Electoral Count Act (ECA) has been in desperate need of reform since it was enacted in 1887. It was designed to resolve the crisis of the 1876 election, in which three states submitted multiple, competing slates of electors, and Congress had to decide which electoral votes to count.[1] Unfortunately, Congress provided "clarity" about this issue with just a single paragraph of language—800 words combined into a string of confusing, run-on sentences—now codified into 3 U.S.C. § 15.[2] This arcane statute largely stayed out of the public spotlight for over 130 years—until the 2020 election.[3]

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[1] Sheila Blackford, "Disputed Election of 1876," Miller Center, last accessed Aug. 2, 2022. https://millercenter.org/the-presidency/educational-resources/disputed-election-1876.
[2] 3 U.S.C. § 1 (2018). https://www.law.cornell.edu/uscode/text/3/1.
[3] Michael S. Schmidt, "Trump Says Pence Can Overturn His Loss in Congress. That's Not How It Works.," *New York Times*, Jan. 5, 2021. https://www.nytimes.com/2021/01/05/us/politics/pence-trump-election.html.

Fortunately, there now appears to be bipartisan support for reforming the ECA.[4]

While it is undoubtedly positive news that lawmakers are seeking to work across the aisle to fix a source of vulnerability in our electoral process, it is important to not just fight the last war. Instead, the law should be reformed with the future in mind, weighing trade-offs and preempting future difficulties in counting and certifying the electoral vote.

The first, and most important, component of meaningful ECA reform is limiting the power of the vice president in the counting and certifying of electoral votes. Politically motivated interpretations of the ECA have led to the rise of fringe theories that the vice president has the power to undermine the electoral college vote by unilaterally rejecting slates of electors and accepting alternatives.[5] Therefore, any ECA reform legislation must clarify the power of the vice president by formally defining the vice president's role in counting and certifying votes as purely ceremonial.

Additionally, ECA reform must also address when and how slates of electors may be rejected. Since the passage of the ECA, the certification of electoral slates has gone largely unchallenged, notwithstanding performative objections.[6] Even in 2020, despite the incumbent president pushing for key statehouses to submit alternate slates of electors, each state ultimately submitted just one formal slate.[7] However, such adherence to norms cannot be taken for granted. Partisan state actors cannot be permitted to defy the laws of their state because their preferred candidate did not win. Accordingly, ECA reform must provide clarity about how states certify, decertify and submit slates of electors.

Once the states have submitted their votes, Congress must have an effective and fair process for rejecting those votes when necessary. This is another area in which ECA reform legislation could provide more clarity. Currently, only one member from both the House of Representatives and the Senate are needed to object to certification, and it only takes a majority to affirm the objection. The combination of these thresholds for action is untenable. Lone attention-seeking members of Congress should not have the power to hold-up the certification of a legitimate election. Therefore, the threshold to lodge an objection must be raised.

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[4] Office of Senator Susan Collins, "Senators Introduce Reforms to the Electoral Count Act of 1887," U.S. Senate, July 20, 2022. https://www.collins.senate.gov/newsroom/senators-introduce-reforms-to-the-electoral-count-act-of-1887.

[5] "Read: Trump lawyer's memo on six-step plan for Pence to overturn the election," CNN, Sep. 21, 2021. https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html.

[6] "Democrats challenge Ohio electoral votes," CNN, Jan. 6, 2005. https://www.cnn.com/2005/ALLPOLITICS/01/06/electoral.vote.1718.

[7] Kyle Cheney, "Trump calls on GOP state legislatures to overturn election results," *Politico*, Nov. 21, 2020. https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031; Jacob Fischler, "How the Trump fake elector scheme fizzled in four states," *Missouri Independent*, June 23, 2022. https://missouriindependent.com/2022/06/23/how-the-trump-fake-elector-scheme-fizzled-in-four-states.

However, the threshold to affirm an objection should remain at a simple majority. If an objection requires a supermajority, it would open the door for resentful partisans to make frivolous arguments against certification, knowing the vote will almost certainly fail. Therefore, it is important that this bill still only requires a simple majority of each chamber to affirm an objection.

Reforming the ECA will not fix every problem related to federal elections, but it is an important step that would provide stability throughout a process that otherwise can be fraught with partisan gamesmanship and sour grapes. Congress should act now, before the 2024 presidential election cycle begins.

Thank you for holding this hearing on this important topic. If we can be of any assistance to members of the Committee, please feel free to contact us or our colleagues at the R Street Institute.

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Statement for the Record from Campaign Legal Center

United States Senate Committee on Rules and Administration

Hearing on "The Electoral Count Act: The Need for Reform"

August 3, 2022

Dear Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Committee:

Campaign Legal Center respectfully submits the attached position paper in strong support of S. 4573, the *Electoral Count Reform and Presidential Transition Improvement Act of 2022*, for the Committee's hearing of August 3, "The Electoral Count Act: The Need for Reform."

We thank Chairwoman Klobuchar and Ranking Member Blunt for holding this hearing on the urgent need to update the Electoral Count Act to strengthen the checks and balances that protect the will of the people in the Electoral College process. While we know that there is more work that needs to be done on other issues to safeguard elections and voters, this well-crafted bill would be a major step in dealing with the problems that have been identified concerning the Electoral Count Act, and we urge Congress to perfect and pass it without delay.

Sincerely,

/s/ Trevor Potter
Trevor Potter
Founder and President
Campaign Legal Center

CLC
ADVANCING DEMOCRACY THROUGH LAW

CLC URGES IMMEDIATE PASSAGE OF REFORMS TO THE ELECTORAL COUNT ACT

On July 20, 2022, Senators Susan Collins (R-ME), Joe Manchin (D-WV), and 14 bipartisan cosponsors introduced the Electoral Count Reform and Presidential Transition Improvement Act of 2022 (ECRA) (S. 4573). This vital legislation would update the Electoral Count Act of 1887 (ECA) and help prevent attempts to sabotage the results of presidential elections. Campaign Legal Center (CLC) urges Congress to modernize the ECA without further delay.

America's ability to elect a president fairly and peacefully every four years is a hallmark of our democracy. For more than a century, the ECA has provided the primary framework governing how presidential votes are cast and counted, including establishing procedures for how Congress counts each state's electoral votes. But recent events demonstrate the pressing need to update this archaic law to combat the ongoing threat of election sabotage.

The ECA has not been updated since it was first enacted more than 130 years ago, and it is rife with imprecise language, and ambiguities that partisan actors tried to exploit as part of an organized attempt to overturn the 2020 election. Although these efforts failed, the obscure language of the ECA unfortunately remains ripe for manipulation. As a result, interest in clarifying the ECA's language has grown, and members of Congress from both sides of the aisle are working together to protect the will of the people.

CLC believes, at a minimum, four essential changes must be made to update the ECA:

1) Prohibit state legislatures from overruling their own voters.
2) Resolve disputes about electors and electoral votes before they reach Congress.
3) Strictly limit opportunities for members of Congress to second-guess electors and electoral votes.
4) Clarify the vice president's ministerial role in the counting of electoral votes.

The ECRA would significantly improve the ECA to reduce opportunities for election sabotage in all four of these key areas. CLC commends the strong bipartisan effort to draft this legislation and encourages additional bipartisan consideration of technical amendments to further clarify its provisions.

The following summary outlines how the ECRA will specifically update the ECA:

Key Reform #1: Prohibit state legislatures from overruling their own voters.

Section 102 of the ECRA would update Section 1 of the ECA (3 U.S.C. § 1) to provide that each state's electors shall be appointed on election day, in accordance with the laws of that state enacted prior to election day. This section eliminates archaic language in the existing ECA that some have claimed could allow states to change their rules after election day. The ECRA makes clear that the only permissible modification would be for a state, as "necessitated by extraordinary and catastrophic events," to extend voting beyond election day as provided for under pre-existing state law.

This update to the ECA would bar a state legislature from changing the law after election day to overrule the results of the state's popular election.

Key Reform #2: Resolve disputes about electors and electoral votes before they reach Congress.

Section 104 of the ECRA would update Section 5 of the ECA (3 U.S.C. § 5) to establish a timeline under which each state shall issue a "certificate of ascertainment of appointment of electors" that designates and certifies the electors (and thereby the election results) from that state. This section also establishes a process for streamlined judicial review of legitimate lawsuits brought by a candidate to challenge the legality of a state's certification of (or failure to certify) its election. In addition, this section establishes that Congress shall treat any electors certified through this process--including any judicial review--as conclusive when Congress counts electoral votes.

This update to the ECA would provide a timeline and a mechanism to resolve disputes about electors and election certifications in the courts before those disputes reach Congress.

Key Reform #3: Strictly limit opportunities for members of Congress to second-guess electors and electoral votes.

Section 109 of the ECRA would update Section 15 of the ECA (3 U.S.C. § 15) to raise the numerical threshold for members of Congress to object to a state's appointment of electors or to electoral votes. Current law provides that an objection is recognized if it is signed by only one member from each chamber of Congress. This reform would raise that threshold for recognition to one-fifth of the Senate and one-fifth of the House. The ECRA also clarifies how to determine whether a candidate has achieved a majority of electoral votes (and thereby

been elected president), specifically by providing that electoral votes rejected by both chambers of Congress are not included in either the numerator or the denominator of the majority determination.

By requiring significantly larger thresholds for objections, this update to the ECA would help ensure that Congress accepts a state's certified election results in all but the most extraordinary circumstances. Addressing the denominator question also reduces the incentives for gamesmanship in objecting to electoral votes.

Key Reform #4: Clarify the vice president's ministerial role in the counting of electoral votes

Section 109 of the ECRA would update Section 15 of the ECA (3 U.S.C. § 15) to explicitly provide that the role of the vice president, serving as the President of the Senate, is "limited to performing solely ministerial duties" while Congress counts the electoral votes. This section also emphasizes the ministerial nature of the vice president's duties by noting that the vice president "shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors."

This update to the ECA would reinforce that the vice president does not decide election results.

The Electoral Count Reform and Presidential Transition Improvement Act addresses each of the ECA's major vulnerabilities. CLC supports these changes, which would provide significant protections to ensure that elections are decided by voters. CLC urges Congress to perfect and advance the ECRA as soon as possible.

If you have any questions, please contact Jo Deutsch (jdeutsch@campaignlegalcenter.org) and Eric Kashdan (ekashdan@campaignlegalcenter.org) on our legislative strategy team.

The law of politics and the politics of law

Why Congress should swiftly enact the Senate's bipartisan ECA reform bill

By **NED FOLEY** on July 20, 2022, 11:38 am

This post is jointly authored by Ned Foley, Michael McConnell, Derek Muller, Rick Pildes, and Brad Smith.

The bipartisan group of Senators, led by Senators Collins and Manchin, have released a draft bill for a revised Electoral Count Act (ECA). We want to state here why we, a bipartisan group of law professors, support it and urge Congress to enact it this summer.

Here are the main features of the draft, which are a vast improvement on the existing Act from 1887. These features appropriately respond to the need to update the Act to protect the integrity of future presidential elections.

First, and most importantly, in its revisions to the current provisions of U.S. Code, the draft bill reflects the philosophy that disputes over which presidential candidate won the popular vote in a state should be settled according to that state's law, adopted in advance of the popular vote, subject, as required by the Constitution, to the supremacy of applicable federal law. As revised by the draft bill, 3 U.S.C. § 1 would now read: "The electors of President and Vice President shall be appointed, in each State, on election day, *in accordance with the laws of the State enacted prior to election day*." The italicized language is new, and may not be a lot of words, but it embraces the key point that the appointment of electors must be pursuant to the rule of law, and not the partisan whim of state officials disgruntled with the outcome of the popular vote.

This blog post is not the place to indicate all the subsequent sections of the bill that reinforce this basic point. Suffice it to say here that this key principle would be suffused throughout the revised ECA if this draft bill is adopted.

Second, and relatedly, the draft bill would delete the existing so-called "failed election" provision in 3 U.S.C. § 2, which dangerously empowers state legislatures to choose a new method of appointing their state's electors if the election has "failed"–a term undefined in current law–in that

state. Instead, the draft bill would permit states to extend the period of holding the popular vote itself in very limited circumstances: "as necessitated by extraordinary and catastrophic events as provided under laws of the State enacted prior to such day." But state legislatures have no power whatsoever for changing the rules for appointing their electors after the congressionally designated Election Day in November. Given the concern about the possibility of state legislatures wanting to repudiate their state's popular vote after it has occurred, this revision is an especially salutary change in the relevant federal law.

Third, the bill eliminates uncertainty about the results of a state's election or the risk of competing slates of presidential electors. Under the bill, there is only one official outcome of a presidential election in each state, and the courts have a role in ensuring that only one certificate of election is sent to Congress. The bill clarifies who has the authority to certify a slate of electors for a state, and a certification according to that process is conclusive when presented to Congress. If a state delays or refuses to certify the results of a presidential election, the bill allows for a speedy federal court challenge. State and federal courts are already available to ensure that the certification of the vote count complies with state and federal law, and Congress agrees to bind itself to respect any such judicial determination when counting votes. The key part of the draft bill on this point is its revision of 3 U.S.C.§ 5, which would make unmistakably clear the obligation of Congress to accept as "conclusive" the certification of electors the judiciary, if involved in resolving disputes, requires.

Fourth, the bill repairs several procedural weaknesses in how the existing Electoral Count Act structures the joint session of Congress that occurs on January 6, two weeks before Inauguration Day. It clarifies that the President of the Senate (usually, the Vice President) has a ministerial role and no unilateral power to reject election results. The bill also raises the threshold for objecting to counting electoral votes. One-fifth of the members of each chamber must sign an objection to counting electoral votes, up from the present rule that just one member of each chamber can object. This reduces the likelihood of a small number of Representatives and Senators delaying the count or interfering in results. It also specifies and limits the kind of objections that members of Congress can raise, most especially to incorporate—as spelled out in 3 U.S.C § 5—that Congress is not permitted to second-guess the results of elections after states have certified the results.

If this bill is enacted and future Congresses are faithful to its philosophy when they meet in joint session to count electoral votes as required by the Twelfth Amendment, there should no longer be a threat of congressional efforts to negate the result of a state's popular vote that has been determined in accordance with the rule of law. Inevitably, in a bill of this size and scope, there are particular provisions that we might draft a bit differently. But the essential elements of this bill are what we believe a well-revised Electoral Count Act should accomplish.

In sum, the bipartisan bill would be a major improvement over the antiquated Electoral Count

Act. ECA reform has to be truly bipartisan and not merely to the barest extent needed to overcome a potential Senate filibuster. At the end of the day, the ECA is self-enforcing; the Act works only as long as Congress is willing to bind itself to the Act's terms. That makes buy-in from both sides of the aisle essential. The fact that the large group of bipartisan Senators has gotten this far is a

promising sign that Congress might well solidify the legal framework for future presidential elections.

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PRESS RELEASE

Statement from PRP Co-Chairs on the Senate's ECA Reform Proposal

July 20, 2022

Presidential Reform Project Co-Chairs Bob Bauer and Jack Goldsmith released the following statement on the release of the U.S. Senate's bipartisan working group proposal to reform the Electoral Count Act of 1887.

We are impressed with the draft Electoral Count Act reform legislation developed by a bipartisan Senate working group, including Senators Collins, Manchin, Romney, and Murphy. Our work on these reform issues, which has included co-chairing a group of experts convened by the American Law Institute (ALI), has convinced us that major improvements in the current law are both urgent and achievable.

The ALI Statement of Principles (https://www.ali.org/media/filer_public/31/27/312774df-88a5-4cbe-b6b0-0fd036cd3a95/principles_for_eca_reform.pdf) for ECA Reform that we endorsed differs in some respects. We note, in particular, that those Principles called for new authority for federal courts to hear challenges to ensure that state officials comply with the duty to transmit to the Congress lawful certificates of electors. The draft bill takes a different direction and provides only for courts to give expedited consideration to challenges of this kind that presidential candidates may file pursuant to existing law.

Nonetheless, we believe the legislation as proposed will help curtail threats to future presidential elections that would erode the foundational democratic principles of our country. It merits broad support.

LAWFARE

CONGRESS

Correcting Misconceptions About the Electoral Count Reform Act

By **Bob Bauer**, **Jack Goldsmith** Sunday, July 24, 2022, 4:09 PM

The Electoral Count Reform Act (ECRA) recently introduced by a bipartisan group of senators is an exceptionally promising development in our polarized era. It has been apparent for a long time that the Electoral Count Act (ECA)—the 1887 law designed to ensure that presidential elections operate with integrity, and that this bill would replace—is flawed. These flaws were on full display during the counting of electoral votes in 2020-2021, but all of the flaws had historical precursors.

The ECRA addresses and resolves these flaws in thoughtful ways that should—as they did within the group that produced the bill—attract bipartisan support in Congress. The bill gives full effect to state laws governing presidential elections that are in place on the date of the vote; eliminates (to the extent possible through legislation that rests on a strong constitutional foundation) the tools available to rogue actors to disregard the results of those elections after the fact; imposes duties on state officials and judicial review processes that serve as meaningful and effective checks should rogue actors nevertheless attempt to disregard or cast aside election results; and narrows congressional prerogatives to disregard legitimate electors chosen in state elections. In short, the bill helps to ensure that the president and vice president are chosen by the voters in accord with the state law that governed the election, and not via postelection manipulation—in Congress or the states—of the presidential elector process.

There will doubtless be reasonable proposals in the weeks ahead for changes to strengthen or clarify provisions of this draft. It will be important to distinguish those proposals from misguided criticisms of the core design. In the last days, amid the widely favorable reception of the bipartisan group draft, we have seen the emergence of such criticisms as well.

Of course, the bill could have been written differently. Our own proposal, developed with a group convened by the American Law Institute, differs in several respects from the bipartisan draft bill. Yet in the end, any ECA reform requires choices among alternative approaches that are constitutionally grounded, responsive to concerns on both sides of the aisle, and workable in the concrete context of future electoral conflict. The aim here should be to craft a well-constructed improvement over existing law that can pass. Against this standard, it is difficult to imagine a more skillfully designed answer to the basic design challenge of ECA reform than the one produced by the bipartisan group.

In what follows we list some criticisms of the bill to date and explain why we think they are overstated, misplaced, or can be addressed with minor tweaks to the bill. We first explain how the bill preserves state authority over the manner of presidential elections but prevents states and state officials from changing the rules of the game after the election. We then address the misconceptions about the bill's provisions for expedited federal court review. Finally, we analyze what the bill does for Congress's power in counting electoral votes.

(Our analysis builds on the excellent work in the past few days by (among others) Matthew Seligman (see here, here, here, and here); Protect Democracy; Andy Craig; Derek Muller; Ned Foley, Michael McConnell, Derek Muller, Brad Smith, and Rick Pildes; and Henry Olsen. We urge interested readers to consult these analyses for more detail and additional arguments.)

States

Article II of the Constitution gives each state the authority to determine the "Manner" for appointing presidential electors but also specifies that Congress has the authority to "determine the Time" for choosing electors. A major concern about the current ECA is that it would allow a "rogue governor" or other state official to manipulate or alter the electors chosen on Election Day by the voters. A major goal of the Electoral Count Reform Act is to prevent this illegitimate manipulation of the presidential election process.

Criticism: The ECRA would empower rather than curtail rogue state governors.

This is manifestly incorrect. One of the most important accomplishments of the ECRA is to make clear that the governor must certify electors "in accordance with the laws of the State enacted prior to election day." This core provision is respectful of the state's power over the manner of election, but also asserts Congress's power over timing by making clear that it is the state law in place on Election Day that counts and binds state actors. This timing proviso is a major check on state officials' manipulation of presidential electors chosen on Election Day.

The ECRA additionally provides that a "certificate of ascertainment" of a governor (or such other state official as identified as responsible for certifications by state constitutional or statutory law) is "conclusive with respect to the determination of electors appointed by the State." re two reasons for this provision.

under state law—who is subject to the federal law duty to issue and transmit the certificate of ascertainment. It prohibits that official (or any other state official) from certifying that the wrong candidates prevailed in the state's election since that outcome would not be consistent with state election law in place on the date of the election (including state laws governing the postelection process, as of the date of the election).

The ECRA also subjects these decisions to expedited judicial review. First, the governor or specified state official must answer to the state court system, where he or she would be subject to judicial remedies to enforce state law. (As discussed below, statements that the ECRA would displace or eliminate state court review are unfounded.) Second, the ECRA provides venue for a federal action to ensure compliance with the law in place at the time of the election (which is explained further below). In addition, unlike current law, the ECRA places deadlines on the governor or other executive official's behavior. Certification must occur six days before the Electoral College meets, not at some undefined time; and an expedited judicial process may occur thereafter, to ensure resolution before the Electoral College meets and electors cast their ballots.

In short, one of the core accomplishments of the ECRA is that it addresses the "rogue governor" scenario that so many people rightly worried was a serious possibility under the ECA. It is a misrepresentation of the ECRA to suggest that it would empower rather than curtail rogue governors.

Criticism: The "catastrophic event" provisions allow for rogue state legislative action.

Section 2 of the ECA provides: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." This provision, which authorizes the state legislature to appoint electors after Election Day based on an undefined failure "to make a choice" on Election Day, is an open invitation to all sorts of state legislative mischief in response to electoral vote outcomes that the state legislature dislikes. Indeed, this specific language in the ECA was a key part of efforts to persuade state legislatures to overrule the popular vote in their states in 2020.

The ECRA wisely eliminates this provision. In its place it defines "election day" to include a "modified period of voting" that is "necessitated by extraordinary and catastrophic events as provided under the laws of the State enacted prior to" Election Day. This is a significant improvement for two reasons. First, it removes any federal law authorization for a state legislature or any other state body to do anything new after Election Day to change the outcome of the popular vote. The ability of a state to extend or alter the time of voting is strictly limited in accordance with the state law in place at the time of the election.

Second, it provides relatively narrow grounds for extending or altering the time of the election to "extraordinary and catastrophic events" in accordance with state law on the date of the election. What that law is will differ from state to state. The ECRA is not the place to catalog what may be catastrophic events (e.g., a cyberattack, widespread power outages), which instead are properly left to state determination. The important point is that the combination of the limiting phrase "extraordinary and catastrophic," and the limitation of the remedy to modifying the voting period, means that states cannot sweep in "fraud" and related ideas as a triggering event to alter the outcome of the vote.

Federal Court Review

Another major innovative feature of the ECRA is to guarantee that a federal court can ensure that state officials send the proper slate of electors to Congress and, relatedly, that Congress only receives one slate of electors and that that slate will be lawful. The ECRA does this by establishing that "Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the" governor's issuance of a certificate of ascertainment of appointment, and the transmission of that certificate, is subject to special venue rules and expedited review. The venue rule provides that such action shall be heard by a three-judge panel in the federal district court in the state in question. The expedited procedure is that the court shall "expedite to the greatest possible extent the disposition of the action" and that any appeal "may be heard directly by the Supreme Court … on an expedited basis."

In addition to these provisions, the ECRA states that "any certificate of ascertainment of appointment of electors as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted" pursuant to the ECRA. In simpler terms, any certification that is revised by a state or federal court will take the place

The ECRA does not expressly state the grounds on which a certificate of ascertainment may be "required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors." Primarily, this is because a full articulation of the bases on which such a revision may be required would require the canvassing of 50 state laws.

The most likely reason why a certificate of ascertainment may be revised is because the governor issuing it has disregarded state law governing the postelection process. Any such illegality will be actionable in state court, though the precise nature of the illegality and the cause of action to remedy it will differ from state to state. In addition, the ECRA mentions actions brought under federal law "with respect to the issuance" or "transmission of such certificate." In such an action, rogue gubernatorial action would be measured against the ECRA's commands that the governor has a federal duty to issue a certificate of ascertainment in accordance with the state law at the time of the election, and with First and Fourteenth Amendment rights requiring the popular vote of the state to be given effect. As *Bush v. Gore* stated: "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental …. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."

Under current law, the effect of a judicial remedy on a rogue gubernatorial certification is unclear. The ECA assumes that the state executive will follow the "final determination of any controversy or contest" concerning the presidential election, but it provides no guidance as to what occurs if the state executive chooses not to do so. This assumption of good-faith conduct is no longer sound. And yet under the ECA, if a gubernatorial or other state executive certification is determined to be unlawful by a state or federal court, that determination may be given effect only if both houses of Congress agree. The ECRA fixes this problem by having a federal court identify the right slate conclusively and ensure that only the right slate reaches Congress. Against this background, the nonspecification of the bases for relief is a good thing. Specifying limited bases for relief might give rise to *expressio unius exclusio alterius* arguments—that is, unless the basis for relief is specified, it would not be available.

Criticism: The provision for special venue and expedited judicial process displaces state litigation over recounts and challenges, and requires them to be heard in federal court.

This is simply not true. The ECRA does not in any way displace state law processes for recounts, challenges, or postelection litigation. Quite the contrary: It locks in those processes, as of Election Day, and requires that they must be followed. Indeed, the ECRA's contemplation of revision of the certificate of ascertainment in light of state judicial relief expressly assumes that state law judicial processes will continue as before.

Nothing in the federal court review provisions affects this conclusion. Those provisions do not in any way affect state law election processes. Rather, they simply establish venue and expedited review for a very narrow lawsuit brought under extant law by the presidential and vice presidential candidates to challenge a governor who fails to issue a certification (or issues the wrong one). And the judicial review provision in the bill explicitly states—twice—that it is limited to actions brought by presidential and vice presidential candidates under federal law.

Criticism: The provision for special venue and expedited judicial process requires litigation to be completed over too short a time.

Under the ECRA, any federal claim concerning a governor's failure to certify or erroneous certification must be heard by a three-judge panel as expeditiously as possible, with an appeal resolved by the Supreme Court "on or before the day before the time fixed for the meeting of electors," that is, five days after the certification deadline. Critics say that this timeline is too short for the federal courts to complete their business.

These criticisms glide over the complexity of choices that any ECA reform must make in structuring postelection processes that operate on an unavoidably tight timeline. Experience shows that federal and state courts recognize the need to respond to legal claims over the compressed period from Election Day to the date that the electors meet. They will hear these cases and issue rulings on a highly expedited basis—in a matter of days, especially on a challenge to the legal basis for certification, which is narrow in nature. Moreover, in many cases, the controversy over certification will have arisen before the state executive has formally acted to issue a certificate subject to challenge or to refuse to issue one, and so the lawsuits may be ripe days before the final date for executive action (or inaction).

Congress certainly could, if it wishes, provide for a few additional days for these challenges to be brought and considered by, for example, moving the meeting of electors to a later date. A related issue is that the three-judge panel convened pursuant to 28 U.S.C. 2284, as the ECRA contemplates, requires five days' notice if a state official is a party to the suit (which is likely, as a rogue governor is a likely defendant) —*see* 28 U.S.C. 2284(b)(2). That delay would eat up the entire review period. Congress could simply shorten or eliminate this notice period for cases brought under the ECRA's special procedures. These changes, however, would be technical adjustments and the criticisms based on these timing issues do not put in question the basic design of the ECRA.

Criticism: Mandatory Supreme Court review is unwise because it requires the Court to decide "every future challenge that involves presidential certification."

This concern is misplaced for two reasons. First, the Supreme Court will not have to review "every future challenge that involves presidential certification." It will only have appellate review over the narrow type of action involving especially consequential certification issues for which the ECRA provides venue in federal court.

To put this in perspective: Contrary to the claim that under the ECRA's provisions the Supreme Court would have been required to hear most or all of the approximately 60 postelection lawsuits filed in 2020, only six of those suits could even potentially have been eligible for appeal under the ECRA, and only two of the suits actually reached a stage at which they could have been appealed. Even as to those two cases, the Supreme Court simply sat on them in 2020 until the election had passed, and nothing in the ECRA would preclude the same result in the future.

Second, if (unlike in 2020) a candidate were to file a meritorious and potentially outcome-determinative suit alleging illegal certification of an election by a state executive, it is inconceivable that the Court would decline to review this narrow but very important type of action in this high-stakes context in any event. So it makes sense for the ECRA to have the case expedited and resolved at the earlier possible date.

Congress

The final set of issues concerns reform to Congress's role in counting presidential electors chosen by the states.

Criticism: The bill does not adequately narrow Congress's discretion because it allows Congress to reject "true electors" if both houses agree and retains ill-defined grounds for congressional objections.

The ECRA allows both houses of Congress to reject electoral votes if "the electors … were not lawfully certified under a certificate of ascertainment of appointment of electors" under the provisions intended to ensure that the lawful slate, and only the lawful slate, is transmitted to Congress. This conforms the allowable grounds for objections to this core reform objective, and it connects directly to the "conclusive" effects of any federal court relief granted in response to a suit by presidential and vice presidential candidates under the expedited review procedure.

The ECRA also permits congressional objection if the "vote of one or more electors has not been *regularly given*" (emphasis added). Despite this continuity between the old law and the new bill, the ECRA is a significant improvement. The whole thrust of the ECRA is to ensure that the popular vote is respected in accordance with state and federal law. If there is any legitimate question about the proper slate that emerges from the state vote, state and federal courts will have sorted out the right one before it reaches Congress, and the new venue and expedited procedures in the ECRA will ensure, in any case where there is a question, that the proper slate is certified and transmitted to Congress with judicial imprimatur. Such imprimatur will make it harder for Congress to successfully second-guess the appointment of electors.

As for the term "regularly given," recent scholarship provides significant evidence that that phrase has a narrow and specific meaning. Any remaining ambiguity concerning the basis for permissible objections is mitigated by the combination of (i) the results of state and federal court litigation and, importantly, by (ii) the ECRA's increased thresholds for any objections. The ECRA requires 20 percent of the members of each house to sign on to an objection before it is heard, rather than one member from each house, as under the ECA.

***

Tags: Contested Election

Bob Bauer served as White House Counsel to President Obama. In 2013, the President named Bob to be Co-Chair of the Presidential Commission on Election Administration. He is a Professor of Practice and Distinguished Scholar in Residence at New York University School of Law, as well as the co-director of the university's Legislative and Regulatory Process Clinic. In 2020, he served as a senior advisor to the Biden campaign.

Jack Goldsmith is the Learned Hand Professor at Harvard Law School, co-founder of *Lawfare*, and a Senior Fellow at the Hoover Institution. Before coming to Harvard, Professor Goldsmith served as Assistant Attorney General, Office of Legal Counsel from 2003-2004, and Special Counsel to the Department of Defense from 2002-2003.

@jacklgoldsmith

The law of politics and the politics of law

Some thoughts on the judicial review mechanism in the Electoral Count Reform Act

By **DEREK MULLER** on July 22, 2022, 9:54 am electoral college

I was pleased to join a statement with Professors Foley, McConnell, Pildes, and Smith in support of the Electoral Count Reform Act. That statement includes a nice summary of the highlights of the legislation. I wanted to drill down on one feature of the Act (and there will be opportunity to drill down on many more elements!): the judicial review mechanism.

One prominent complexity of a previous "discussion draft" of ECA reform was considering how judicial review fit into the picture. Judicial review of election disputes looks very different in the 21st century than the 19th century, and the problems that might arise look different each election cycle. Florida 2000, Ohio 2004, myriad 2020 lawsuits, to name a few, each took different directions. So what would judicial review look like? I had a pretty good grasp on 3/4 of the "discussion draft's" judicial mechanisms and blogged through it, and I thought I'd do the same with what's happening in this bill, too.

There's been some discussion about this already. There's been some thoughts (across the spectrum!) from Marc Elias, Quin Hillyer at the *Washington Examiner*, Norm Eisen, and the *Wall Street Journal* editorial board expressing varying questions about the judicial review piece in the bill. Matthew Seligman offers his own thoughts in support.

I'll take a longer look here, about what it does and doesn't do–warning, some federal courts meandering ahead....

I.

[A.] Starting from the end of the process, the President of the Senate opens certificates of votes of electors appointed pursuant to a certificate of ascertainment of appointment of electors, and only those certificates are counted. This means, there's one certificate, and no opportunity to have "competing" certificates. It shall accept it as "conclusive."

[B.] Taking it back a step, where does the certificate of ascertainment of appointment of electors come from? The executive of each state issues it at least 6 days before the electors meet. (Many issue them earlier, of course.) Any such certificate "shall be treated as conclusive," and any certificate "as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates."

There is a recognition, then, that Congress should have just one certificate, and the rules have to set up a prioritization for certificates in the event there's some dispute. Here, any certificate revised by judicial relief ahead of when the electors meet gets priority. While Congress is instructed to accept a certificate (i.e., it is "conclusive"), then, it is not simply doing so based on what a state does; it is deferring to judicial determinations, too.

Let's draw in the text of the new 5(a)(1):

> Not later than the date that is 6 days before the time fixed for the meeting of the electors, the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election day.

This (1) explains that the executive has an obligation to send results "under and in pursuance of the laws of such State" and (2) qualifies that the rules have to be in place before Election Day. (Relatedly, Section 6 of the ECA today already has the language of "under and in pursuance of the laws of such state." This is not novel language but what has long been the instructions on the executive.) This language also ensures that Congress is compelled to treat as conclusive executive certificates that follow state law, an additional layer of assurance to Congress.

[C.] Plenty of litigation can and does happen after Election Day but before the executive is required to issue a certificate, recounts and contests among them. But let's again fixate on that date 6 days before the electors meet. What happens if the executive fails to issue a certificate, or sends the wrong certificate? Here's where the expedited provisions and venue kick in.

> Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to the following rules . . . .

That is, there are plenty of things that *could* happen well before the issuance of a certificate, under state or federal proceedings, in the recount or the canvass. Only if controversies arise, [1] *in federal court*, [2] *as filed by an aggrieved candidate*, in a [3] *narrow* band of disputes ("with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b)"), would such challenges face a new expedited process: a three-

judge panel with direct appeal to the Supreme Court.

Again, to the extent the goal is to strengthen the link in the chain of Congress's accepting one, genuine certificate of election to be "conclusive" in the counting of votes, this mechanism increases Congress's confidence by providing what might be described as a "federal judicial backstop." In the event some problem arises in the last link in the chain, the executive's certificate (or failure to issue) is subject to this expedited federal review.

[D.] Let me offer a very practical example from the 1960 election in Hawaii. (Let's set aside the very real timing issue, which this revision would, quite helpfully, end, by compelling recounts to wrap up earlier.)

The original certificate of ascertainment signed by the governor in 1960 determined that Richard Nixon's electors had won. On January 3, 1961, a state court ascertained that John F. Kennedy had won the recount.

For a 24-hour period, it was unclear what should happen next. There was a state court determination. So what? Would the governor sign a new certificate of ascertainment? If he didn't, what should Congress do? (I have some research on this topic in the future, stay tuned....)

One could promptly seek mandamus in state court, of course. But if one wanted to file in *federal* court to say there was a Due Process, Equal Protection, whatever federal claim one might have, issue that arose, here would be an expedited procedure to resolve that. (The dispute was moot, because the governor did sign a new certificate, pursuant to subsequent judicial relief.)

II.

Now, there are still some questions that have arisen (I linked to several of the critiques so far), which I'll try to summarize some of them to answer questions (and in some places quote).

Does this exclude state courts from the process? No. The rule of construction from *Tafflin v. Levitt* still applies. States are not expressly or implied excluded, and "State . . . judicial relief" is expressly anticipated. (And federal statutes, unsurprisingly, typically do not say much about how state courts go about their jobs.)

It is unclear what "as required to be revised by any subsequent State or federal judicial relief" means. Required by whom? Subsequent to what? Revised how? (I quote these questions from Elias's post.) Each is found within the text of this subsection of the statute. Required, by a state or federal court. Subsequent, to the issuance of a certificate of ascertainment. Revised, by means of state or federal judicial relief (e.g., an injunction subject to contempt).

Does this foreclose judicial challenges to election results until after the governor signs his or her certification six days before the Electoral College meets? No. First, the statute does not alter or strip any jurisdiction in existing cases or causes of action.

Second, note the limitation within the text of proposed amended 5(d)(1) (here I'll requote it):

> Any action brought by an aggrieved candidate for President or Vice President that arises under the Constitution or laws of the United States with respect to the issuance of the certification required under section (a)(1), or the transmission of such certification as required under subsection (b), shall be subject to the following rules . . . .

There are only two *types* of actions subject to this procedure: the "issuance of the certification" and the "transmission of such certification." It does not alter any cases or claims about the canvass, recount, audit, contest, or the like. It is designedly narrow.

Third, and relatedly, it can only arise, timing-wise, (a) once the executive has issued a certificate, or (b) if, by six days before the electors are supposed to meet, the executive has failed to issue a certificate [or failed to transmit expeditiously to the electors by the time they meet].

Is six days enough time? First, in many states, the executive issues a certificate well before six days before the electors meet (states set such deadlines). If there's a faulty certificate issued (e.g., the state procedures by the end of the canvass reveal X won but the certificate is issued quickly for Y), there is more time.

Second, if the executive is slow to issue a certificate under existing state law, relief can be sought in state court or in federal court, as typical. It's only once that governor has failed to do by six days before the electors meet that this special expedited procedure takes place.

Third, by the time we're at this stage, all the rest of the process–canvass, recount, audit, contest–should have played out in the state and federal courts. (One can ask whether 36-ish days is enough time from Election Day to this deadline, but these are the perils of the Twentieth Amendment, for one, and recent experience–Georgia conducted both a statewide recount and a statewide audit in plenty of time–suggest it's not a problem for more meritorious challenges.) By the time there's a dispute arising in the narrow circumstances of the *issuance* of the certificate, it is principally a ministerial matter.

Would this mean federal judges of a particular political party are more likely to hear the case in such matters? First, there's pretty strong partisan parity on the federal bench. Second, the mechanism of the chief judge of a circuit appointing two members to a three-judge panel has been in place for

decades, with little obvious partisan fault lines. There's a Republican-appointed chief judge in the circuit embracing Georgia and Florida, and a Democratic-appointed one in the circuit embracing Nevada and Arizona. It's not clear that in redistricting disputes (including a recent three-judge panel in Alabama, among others), which are also hotly partisan and where the three-judge panel has been a mainstay, there's been much if any partisan valence. And any such case is always

ultimately subject to the Supreme Court, anyway–it's just a question of the means by which it gets there.

Are there no standards for a federal court to review a "conclusive" election certificate? First, note that "conclusive" is binding on *Congress* (section 5(c)(1) says that it's conclusive "for purposes of Section 15"), not on courts. The opportunity to "revise," then, is speaking of another matter. Second, determinations of federal law–whether it's Due Process, Equal Protection, or other federal standards–are treated as "conclusive" in Congress when determined by federal courts (see section 5(c)(2)). So, a federal action filed in this federal tribunal (Due Process or otherwise) gets ordinary federal court review.

Does this prevent third-party groups from intervening? No. There's nothing in the statute that precludes Rule 24 from applying. It simply indicates that only an "aggrieved" candidate for president, in the timing and circumstances identified above, has a case put into this special venue.

Does this "require" the Supreme Court to hear the case? No. And it's not clear any congressional rule *can* compel the Court to accept a case to hear on the merits, either. Note that the Court declined to hear *Texas v. Pennsylvania* in 2020, despite a federal law vesting (with "shall") "original and exclusive jurisdiction" over such cases. But it certainly entitles direct appeal to the Supreme Court.

*

I imagine there are some who want more judicial involvement and others who may want less. But I think this mechanism (unsurprisingly, the result of extensive conversations and negotiations!) hits a sweet spot for the negotiating parties. I also think the advantages elsewhere in the bill can reduce litigation uncertainty–specifying that there is one Election Day and no "failure" alternative, requiring laws in effect before Election Day to govern, and the like. But, as I pointed out in the original statement in support of the bill signed with other distinguished academics, I think the bill is worth enacting. It strikes me that much of the commentary so far has not identified insurmountable barriers. I do think there will be some tweaks to be made (some questions have arisen about the timing mechanisms in 2284(b)(2) and how they interact with this bill, or whether other language or clarity could be improved), and we'll see what the hearings in the weeks to come yield.

Share this:

The law of politics and the politics of law

Norm Eisen's tweet-thread on bipartisan ECA reform bill

By **NED FOLEY** on July 21, 2022, 12:36 pm

Here's his thread. Solely in my capacity as ELB blogger this week, and not as co-author of the joint piece posted yesterday, I offer these thoughts in response to what Norm raises:

Norm is concerned about how the new bipartisan bill handles the "failed election" provision of the current 3 U.S.C. 2. I think his concern is based on a significant misunderstanding of why the new bipartisan bill's approach is so valuable. Current law would permit a state legislature to choose a new manner of appointing the state's electors upon the predicate that the popular vote held on Election Day "failed" to yield an outcome. The danger is that this existing provision could be used by a state legislature to assert, because it does not like the result of the popular vote and thus alleges fraud after Election Day, that it is entitled to appoint the state's electors directly and entirely repudiate the popular vote just held. This is obviously a serious defect in the existing law.

The new bipartisan bill, by contrast, would completely delete 3 U.S.C. 2, thereby entirely eliminating any capacity of a state legislature to choose a new manner of appointing the state's electors after the popular vote has been held. The state legislature would have no authority whatsoever to appoint electors directly based on a pretext (or even a good faith belief) of a "failed" popular vote. The state legislature would be bound by its prior determination to use a popular vote as the basis for appointing the state's electors for that specific year.

What the new bill does permit is for there to be an extension of the popular vote itself, beyond Election Day, if there have been "extraordinary and catastrophic events" that require the state to continue permitting the casting of ballots in the popular vote. The bill does this by providing that "election day", for the purposes of conducting the popular vote used to appoint the state's electors, "shall include the modified period of voting." This language clearly does not permit a state legislature to attempt to appoint electors directly itself, which is an extremely important aspect of this change.

Moreover, there can only be an extension of the voting period, even for "extraordinary and

catastrophic events" based on statutes that the state legislatures have "enacted prior to" Election Day. This explicit constraint prevents state legislatures after Election Day attempting to manipulate the period of balloting in the popular vote because of a partisan fear of losing the election. Moreover, even if we contemplate the possibility of a state legislature endeavoring in advance of Election Day to exploit the power to permit extensions of the balloting period for

"extraordinary and catastrophic events," such legislative abuse could not attempt to label "suspected voter fraud" as an "extraordinary" or "catastrophic" event, as Norm fears, in order to manipulate the process for partisan advantage. Suppose, for example, a state legislature identified in advance a cyberattack on the state's electoral system as the kind of "extraordinary" or "catastrophic" event that permissibly could trigger an extension of balloting in the popular vote beyond Election Day. It still would take an election official to invoke this previously enacted provision; the legislature would not be permitted to change the rules afterwards. Moreover, any extension of voting opportunities in the election would need to comply with basic equal protection principles, enforceable by federal courts (which also would have authority to enforce the meaning of the federal law terms "extraordinary" and "catastrophic" contained in the new ECA reform bill if adopted).

Simply put, Norm's concerns with this aspect of the bill are misplaced. Existing 3 U.S.C. 2 is far inferior, and much more dangerous, than what this bill would replace it with.

Furthermore, I think the comparison with existing law should be the baseline for evaluating the provisions of this new bill. For example, another of Norm's concerns is that the bill permits both houses of Congress to reject a state's submission of electoral votes. But this is true of the existing ECA as well, and yet the existing is ECA is also so much more problematic and dangerous on this point too. The current ECA would permit a rogue governor and a single chamber of Congress to act in combination to invalidate the electoral votes from a state that were based on an accurate count of the popular vote, as verified through administrative recounts and judicial review. By contrast, the new bipartisan bill would foreclose this kind of subversion of a valid election by the combination of a rogue governor and a single chamber of Congress. Instead, it would take both the Senate and the House to act in concert to repudiate a valid election, which is a much less likely scenario than (for example) a partisan governor acting in combination with a partisan House of Representatives.

Moreover, the bipartisan bill is written in a way–in sharp contrast to the existing ECA–to make it clear to the American public that the Senate and House would be acting lawlessly if they attempted to combine to nullify valid electoral votes from a state. It is abundantly clear from the text of the bipartisan bill that both the Senate and House are obligated to accept as "conclusive" electoral votes that reflect judicially reviewed tallies of a state's popular vote. The Senate and House, acting together, are entitled to reject a state's appointment of electors only when both chambers determine that a state's appointment of electors is not entitled to this "conclusive"

acceptance. As long as the courts have been involved in any disputation over the outcome of the popular vote in a state, it will not be possible for either chamber–let alone both–to say that there is not the kind of judicial resolution of the matter that would entitle the state's submission to "conclusive" acceptance. In this respect, the bipartisan bill is vastly superior to the current ECA,

which because of its convoluted and arcane language makes it much more difficult to perceive when a chamber of Congress is acting improperly in rejecting a state's electoral votes.

Thus, in sum, it would be a shame if Norm's concerns potentially endanger adoption of a bipartisan bill that would make the process of counting electoral votes in Congress much more secure, and at much less risk of election subversion that would negate a valid election, than the current law.

[This post has been slightly edited since its original version was posted.]

Share this:

The Honorable Amy Klobuchar
Chairwoman
Committee on Rules & Administration
United States Senate
Washington, D.C. 20510

The Honorable Roy Blunt
Ranking Member
Committee on Rules & Administration
United States Senate
Washington, D.C. 20510

August 2, 2022

Dear Chairwoman Klobuchar and Ranking Member Blunt:

On behalf of our more than 4 million members around the country, I write to express End Citizens United // Let America Vote Action Fund's support of efforts to reform the Electoral Count Act to ensure that duly cast votes are properly tallied by Congress to reflect the accurate presidential count.

In the wake of the 2020 election, our country saw a multipronged, all-out attempt to overturn the will of American voters. As the House January 6th Committee has demonstrated, one strategy to sabotage our election results was to illegally manipulate the Electoral Count Act of 1887 ("ECA"). The events of January 6th made clear that the ECA was outdated, dangerously ambiguous, and in need of reform.

We applaud the introduction of the bipartisan Electoral Count Reform Act of 2022, which would make significant improvements to the current procedures on how the states and federal governments select the president and vice president. The bill will help ensure the election of the president and vice president will be decided by voters under the state law governing the election, not post-election sabotage. This is an important first step and we're confident that the bill's sponsors can work with their colleagues to strengthen it and clarify certain provisions to ensure it offers the strongest possible protection against the dangerous tactics we've seen from those willing to overturn a free and fair election because their preferred candidate lost.

Reforming the ECA is a necessary, but not sufficient, step to protecting our democracy. In addition to reforming the ECA, Congress must pass comprehensive legislation to protect the freedom to vote and address discriminatory barriers to the ballot box, ensure every American has fair representation, and ensure that dark money megadonors are not buying our elections. We

urgently need to address each of these issues plaguing our elections in order to ensure that our democracy survives.

On behalf of End Citizens United // Let America Vote Action Fund and our members, we thank you for holding the upcoming hearing on reforming the ECA. We urge Congress to reform the ECA, but we must also stress the urgent need for comprehensive election reforms to protect the freedom to vote and make sure our democracy works for all of us, not just wealthy special interests.

Sincerely,

Tiffany Muller
President
End Citizens United // Let America Vote Action Fund

STATE OF MINNESOTA
Office of Minnesota Secretary of State
Steve Simon

August 1, 2022

Senator Amy Klobuchar
425 Dirksen Senate Building
Washington, DC 20510
VIA EMAIL

Dear Senator Klobuchar:

I applaud your efforts, and those of your Senate colleagues on a bipartisan basis, to reform the Electoral Count Act (ECA). Your upcoming Senate Rules Committee hearing scheduled for August 3rd will be an important step in providing much-needed clarity and stability to the process of certifying the winner of our presidential elections. I am confident that you will help lead the Senate in the right direction on ECA reform.

Having spoken with a number of election experts, I am persuaded by the suggestion of two small and seemingly non-controversial changes that would make the present ECA reform legislation even better. The changes would provide necessary speed for the transparency that the ECA requires. The legislation currently provides a six-day window for a presidential candidate to seek relief from a three-judge panel regarding a certificate issued by a governor. Naturally, a candidate would need to know what is in the certificate in order to decide whether to litigate. The two changes I would like to propose would ensure as much of this limited timeline is preserved for candidates to review the certificates and decide if a legal remedy is needed.

The first proposed change pertains to the certificate each Governor issues stating their state's electors. The Collins-Manchin version of the bill requires the Governor to transmit the certificate using "most expeditious method available," but does not specify any particular time for the Governor to start the transmission process. This loophole can be closed by adding "immediately after issuance" to §5(b)(1) so that it would read "transmit to the Archivist of the United States, immediately after issuance, by the most expeditious method available."

180 State Office Building | 100 Rev. Dr. Martin Luther King, Jr. Blvd. | Saint Paul, MN 55155-1299
Phone: 651-201-1324 or 1-877-600-8683 | Fax: 651-215-0682 | MN Relay Service: 711
E-mail: secretary.state.@state.mn.us | Web site: www.sos.state.mn.us

Finally, once these certificates arrive at the National Archives, the same expeditious action is required for these documents to be made available for public inspection. The suggested change would simply refine Sec. 105 on page 9 of the bill concerning "Duties of the Archivist," by changing subsection (3) to read "to be open to public inspection, and make publicly available within four hours of receipt on a website maintained by the Archivist a copy of the certificate." The change would have the benefit of compelling immediate transparency and public availability of the certificate – so as not to cause undue delay to a candidate making a determination within a very short window about whether to litigate.

Thanks for any consideration that you and your colleagues can give to these small suggested changes. I am grateful for your leadership. As always, I wish you the best.

Sincerely,

Steve Simon

Steve Simon
Minnesota Secretary of State

Leadership Now Project
Count Every Hero
Making Every Vote Count

August 2, 2022

The Honorable Amy Klobuchar
Senate Rules Committee, Chair
425 Dirksen Senate Building
Washington, DC 20510

The Honorable Roy Blunt
Senate Rules Committee, Ranking Member
260 Russell Senate Building
Washington, DC 20510

Dear Senators Klobuchar and Blunt:

We strongly support enactment of election integrity legislation that will be the subject of the Rules Committee's hearing on August 3. We commend the members of the Committee and the Bipartisan Senate Working Group for their in-depth assessments of the fundamental flaws in the antiquated Electoral Count Act of 1887 that became apparent in the aftermath of the most recent Presidential election. These analyses are reflected in the bills that have been developed to supplant the outdated 1887 provisions with a balanced framework and unambiguous terms.

Our three nonpartisan organizations are focused on the effective functioning of our democratic institutions in a 21st century America that must confront new governance challenges and create improved governance arrangements. Together we have deep experience in business activities dependent on a healthy and stable national economy and in military and national security matters.

In the past year, we have made it a priority to engage thoughtfully in reviewing the terms of possible remedial legislation to replace the 1887 Act. As a result, we are now able confidently to support a proposed Electoral Count Reform and Presidential Transition Improvement Act such as is being considered by the Rules Committee and to help evaluate possible improvements.

We recognize that a reformed Act would, first and foremost, provide a framework for resolving electoral disputes between presidential candidates in presidential elections. But a reformed Act would also help ensure the sound functioning of the Nation's domestic and international economic systems and protect our critical military and national security interests. Currently, these are threatened because the ill-conceived and confusing provisions of the 1887 Act can be manipulated by both domestic and foreign actors to empower our competitors, to discredit our political system and to open the door for catastrophic misunderstandings as to the employment of our military forces.

President Carter and former Secretary of State James Baker recently summarized in the Wall Street Journal the compelling case for bipartisan legislation that would clarify and bring up to date the provisions of the 1887 Act. Without such legislation, they concluded that the current Act could "wreak havoc" in future presidential elections, because the antiquated and muddled Act "allows uncertainty during a critical step in the peaceful transfer of [presidential] power."

Together we will work with the Rules Committee and the Bipartisan Senate Working Group to ensure that all of these interests--critical to the survival of our democracy-- are clearly served as definitive legislation moves to enactment by the Congress.

Respectfully submitted,
Leadership Now Project

Daniella Ballou-Aares, CEO

Count Every Hero
Approved by all Co-Chairs:

Steve Abbot,
Admiral, U.S. Navy (Ret)

Thad Allen,
Admiral, U.S. Coast Guard (Ret)

Louis Caldera,
Former U.S. Secretary of the Army

George Casey,
General, U.S. Army (Ret)

Debbie Lee James,
Former U.S. Secretary of the Air Force

John Jumper,
General, U.S. Air Force (Ret)

Craig McKinley,
General, U.S. Air Force (Ret)

Sean O'Keefe,
Former U.S. Secretary of the Navy

Tony Zinni,
General, U.S. Marine Corps (Ret)

Making Every Vote Count

Elizabeth Cavanagh, Chair/CEO

cc: Bipartisan Senate Working Group
c/o Senator Susan Collins; Senator Joe Manchin

Enclosure: Summary Description of Organizations

Enclosure To Letter
To
Senators Klobuchar and Blunt

August 2, 2022

LEADERSHIP NOW PROJECT: Leadership Now is a membership organization of business and thought leaders who are committed to high-impact solutions to renew American democracy. Leadership Now has four guiding principles that transcend political parties: to protect democracy while renewing it; to promote fact and evidence-based policymaking; to create an economy that works for all, and to embrace diversity as an asset. In 2021-2022, the organization is focused on

- Protecting elections in priority states in 2022 and 2024
- Informing & activating business leaders for democracy
- Supporting candidates and constituencies that re-inspire the exhausted majority.

See: leadershipnowproject.org

COUNT EVERY HERO: We are a cross-partisan initiative originally formed by veterans of US military services as a response to misinformation campaigns during the 2020 Presidential and Congressional elections that threatened service members' freedom to vote and have their votes counted. The events of January 6th and the subsequent push to pass anti-voter legislation across the country, however, underscored that misinformation continues to threaten military, veteran, and civilian access to the franchise. We are motivated by the Constitution, which created a republic where political power is vested in the American people. As veterans, our oath and devotion to the Constitution drives us to ensure that no policy or politician weakens that power.

See: counteveryhero.org

MAKING EVERY VOTE COUNT: MEVC is a nonpartisan, nonprofit organization with a simple mission: to ensure a truly democratic system for electing our country's President and Vice President. Today, not all votes count equally and the entire election process—choosing candidates, campaigning in the general election, and vote counting after the election—focuses on the electoral votes of four to ten swing states. Also, serious defects in our current system from Election Day to Inauguration Day, including in the Electoral Count Act of 1887, enable unacceptable threats to the integrity of our democratic processes. MEVC promotes reforms that help to ensure that (1) the candidate who receives the most votes nationwide will become President, and (2) the votes of all citizens matter equally and are counted fairly.

See: mevcaction.com

August 1, 2022

The Honorable Susan M. Collins
United States Senator
413 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Joe Manchin
United States Senator
306 Hart Senate Office Building
Washington, DC 20510

Dear Senators Collins and Manchin:

As the Executive Director of the Project On Government Oversight (POGO), I write to endorse your bipartisan legislation, the Electoral Count Reform and Presidential Transition Improvement Act of 2022 (S. 4573). This important piece of legislation would close several of the most important loopholes in the 19th century law that governs the official counting and certification of electoral votes and reduce the risk of politicians overturning a fair and democratic election.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. Your bill is such a reform.

POGO applauds the work you and your colleagues have done for the past several months to reach this consensus. We are encouraged that your bill would replace ambiguous provisions of the Electoral Count Act of 1887 with clear procedures that maintain appropriate state and federal roles in selecting the president and vice president of the United States as set forth in the U.S. Constitution. Before the bill's language was released, we wrote that "in order to be meaningful, Electoral Count Act reform must protect voters against attempts by state officials as well as federal officials to overturn the results of a presidential election."[1] We believe your bill makes crucial progress towards that goal.

In addition, your bill would also help to promote the orderly transfer of power by providing clear guidelines for when eligible candidates for president or vice president may receive federal resources to support their transition into office. As POGO highlighted following the 2020 election, the General Services Administration (GSA) dragged its feet when tasked with allowing the presidential transition process to begin, significantly delaying the start of the transition.[2] Your bill will help to ensure that this doesn't happen again and that candidates have the timely access they need to begin the long transition process.

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[1] Letter from Danielle Brian and Sarah Turberville to Senator Susan Collins and Senator Joe Manchin about Electoral Count Act reform, June 14, 2022. https://www.pogo.org/letter/2022/06/electoral-count-act-must-prevent-state-and-federal-officials-from-overturning-will-of-voters.

[2] Tim Stretton, "General Services Administration Must Recognize Biden as President-Elect," Project On Government Oversight, November 10, 2020. https://www.pogo.org/analysis/2020/11/general-services-administration-must-recognize-biden-as-president-elect.

We support its passage. But we believe the bill could be made stronger by adopting technical amendments to the text that could remove ambiguities and prevent misreading:

- Section 102(a) should specify that electors shall be appointed "in accordance with the laws and constitution of the State enacted prior to election day."
- Section 104 should clarify that:
  - State courts retain the authority to order the governor to follow state law (including the state constitution) in issuing and transmitting the certificate of ascertainment of appointment of electors.
  - Federal and state courts retain existing authority to hear election-related cases or controversies arising before the deadline for governors to transmit the certificates of ascertainment.
  - The five-day notice requirement for suits heard by a three-judge panel where a state official is a party under 28 U.S.C. § 2284 does not apply to suits brought under the expedited procedures created in this section.

While the Electoral Count Reform and Presidential Transition Improvement Act would reduce the risk of a stolen presidential election, it does not eliminate that risk because it fails to explicitly protect the right to vote and have one's vote fairly counted. We continue to believe that Congress has the clear constitutional authority — and the moral duty — to legislate on these fronts to protect our democracy.

Again, thank you for your leadership on this critical issue. By working together, you've demonstrated the Senate can still work in a bipartisan way to tackle some of the most pressing issues facing our democracy and the American people. I urge your colleagues to support this bill.

Sincerely,

Danielle Brian
Executive Director

cc:
Senator Rob Portman
Senator Kyrsten Sinema
Senator Mitt Romney
Senator Jeanne Shaheen
Senator Lisa Murkowski
Senator Mark Warner
Senator Thom Tillis
Senator Chris Murphy
Senator Shelley Moore Capito
Senator Ben Cardin
Senator Todd Young
Senator Chris Coons
Senator Ben Sasse
Senator Lindsey Graham

August 2, 2022

The Honorable Amy Klobuchar
Chairwoman
Committee on Rules & Administration
United States Senate
Washington, D.C. 20515

The Honorable Roy Blunt
Ranking Member
Committee on Rules & Administration
United States Senate
Washington, D.C. 20515

It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the government as the President of the United States.

Alexander Hamilton
Federalist no. 68, "The Mode of Electing the President"
March 12, 1788

Dear Chairwoman Klobuchar, Ranking Member Blunt, and distinguished Senators:

We would like to thank the committee for taking the time to address this important issue, and in particular all of the Senators and Representatives, their staff, and the scholars and organizations from across the political spectrum who have contributed to the ongoing discussions about reforming the Electoral Count Act of 1887.

We are Thomas A. Berry, a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the *Cato Supreme Court Review*, and Andy Craig, staff writer for the Cato Institute and associate editor of the *Cato Policy Report*. Founded in 1977, the Cato Institute is an independent, nonpartisan public policy research organization dedicated to advancing the principles of individual liberty, limited government, free markets, and peace.

Together with our colleagues, we have conducted in-depth research and analysis on the flaws of the Electoral Count Act and how it should be reformed.[1] We appreciate the opportunity to share our findings and recommendations with the committee.

ECRA Addresses Most Major Problems in the ECA

The legal architecture for electing a President of the United States has come under increasing strain. Ambiguous and outdated statutory language, conflicting interpretations, and partisan

[1] Walter Olson, "Cato Scholars on the Electoral Count Act," *Cato at Liberty* (blog), March 21, 2022. https://www.cato.org/blog/cato-scholars-electoral-count-act

pressures have combined to threaten the American people with presidential elections devolving into a quadrennial constitutional crisis.

This is unacceptable, and the draft Electoral Count Reform Act (ECRA) proposal from Sen. Collins, Sen. Manchin, and their colleagues in the bipartisan working group is a well-crafted starting point for fixing this problem. It reflects many of the ideas we and others have urged Congress to adopt. As it stands, the ECRA draft would be an immense improvement over the status quo and substantially reduce the risks of another disputed election.

The ECRA draft's reforms include: requiring states to set all of their election procedures by laws enacted prior to Election Day; an expedited judicial backstop to handle the risk of rogue actors obstructing the certification of electors; replacing the muddled "safe harbor" and "failed elections" sections of current law with clearer rules; a firmer commitment to respect the timely outcome of the state law process for appointing electors, including applicable court rulings; raising the number of cosponsors needed for congressional objections; reorganizing the notoriously confusing rules for the joint session in 3 USC §15; and a categorical repudiation of claims that the Vice President has any unilateral power over the electoral count.

Taken together, these provisions in the ECRA draft address the most dangerous flaws in the existing Electoral Count Act. Each of them reflects a consensus recommendation common to most analyses of ECA reform. Possible points of improvement will therefore relate mostly to technical drafting issues, or to other areas of concern that the ECRA draft does not yet address.

This law must stand the test of time, able to safely govern presidential elections for many years to come. It must be capable of being dusted off and taken off the shelf in circumstances where it has not been closely examined in decades, and its plain meaning must then be clear on its face. The outpouring of historical scholarship and legal commentary produced in the aftermath of the 2020 election has been of immense value, but it is no substitute for clear words on the page in the law itself.

In light of this, we feel it is critical to carefully scrutinize the details of the draft ECRA, and to ensure scrupulous compliance with all applicable requirements of the Constitution. To that end, we have several points of improvement we would like to recommend for your consideration as the legislative process moves forward, as well as responses to some criticisms of ECA reform that we feel are mistaken.[2]

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[2] For more discussion of the ECRA draft, *see*:
Andy Craig, "What's in the Collins-Manchin ECA Reform, and Where It Goes From Here," *Cato at Liberty* (blog), July 22, 2022. https://www.cato.org/blog/cato-scholars-electoral-count-act
Thomas A. Berry, "Some Potential Improvements to the Electoral Count Reform Act," *Cato at Liberty* (blog), July 27, 2022. https://www.cato.org/blog/some-potential-improvements-electoral-count-reform-act

Having an Electoral Count Act Is Constitutional and Necessary

Some have argued that having an Electoral Count Act at all is unconstitutional and that "the only real way to prevent future mischief is to repeal" the ECA.[3] This approach, though motivated by an appropriate desire to constrain Congress's role, is misguided. The Constitution's sparse language describing the electoral count leaves too many gaps for the count to function smoothly without some additional clarifications. *Some* law or joint rule is necessary to fill those gaps.

Defining and codifying Congress's power to discount invalid electoral votes permissibly fills these constitutional gaps. Making an accurate count requires somehow discounting votes that are *prima facie* invalid. Because the Constitution does not say or even imply who should make this judgment, assigning that power by statute to some group present at the count (such as to Congress itself) is permissible gap-filling and, within certain constitutional limits, is not an illegitimate aggrandizement of Congress's role.[4]

Nor is it unconstitutional for Congress to answer these questions via statute. The argument has been raised that the Constitution would require any regulation of the count to be by joint rule (passed by both houses but *not* signed by the president), since the Constitution allows each house to "determine the Rules of its Proceedings" by a vote of that house alone.[5]

This clause does likely mean that Congress *could* enact an ECA by joint rule, at least for those parts that only govern the procedures during the joint session. (Other parts of the law are addressed to actors outside of Congress, such as the states, and thus are not in the nature of a congressional rule). But that Congress can enact its own rules by a non-statutory resolution does not mean Congress *must* do so. Rather, as other scholars have suggested, the Constitution most likely gives the two houses the authority to change the ECA's rules for conducting the count by concurrent resolution without the need for a presidential signature.[6] But until the two houses actually exercise that option, the ECA stands as a valid exercise of their rulemaking power, since it was passed by both houses. A reformed ECA passed as a statute would stand on exactly the same footing.

To be sure, a congressional power to second-guess the conduct of the popular election in each state or to decide other disputes arising before the electors cast and seal their ballots would be on more questionable constitutional grounds. Since such questions can be resolved before the

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[3] *Wall Street Journal*, "Preventing Another Jan. 6," editorial, February 16, 2022. https://www.wsj.com/articles/preventing-another-jan-6-electoral-count-act-congress-11644342408

[4] Thomas A. Berry, "The Legitimate Role of Congress in the Electoral Count," Cato Briefing Paper no. 135, February 22, 2022. https://www.cato.org/briefing-paper/legitimate-role-congress-electoral-count

[5] *See, e.g.*, Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 North Carolina Law Review 1653, 1779–87 (2002).

[6] *See* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of the Proceedings Clause*, 19 Journal of Law and Politics 345, 407–08 (2003).

electoral votes are cast, they are not inherently part of the task of counting the votes transmitted to Congress.

But the fact that many have attempted to use the 1887 ECA to assert too much power for Congress is not a reason to discard *any* version of an ECA. Rather, it is a reason to make explicit that the valid grounds for rejecting an electoral vote are strictly limited to enforcing certain specific provisions of the Constitution.

Valid Grounds for "Regularly Given" Objections Should Be Defined

The Framers considered and very deliberately rejected letting Congress choose the President. That task is instead given to the Electoral College, a kind of pop-up fourth branch of government created for this purpose. Congress's role is simply to count the votes received from the electors duly appointed by the states in a manner of each state's choosing.[7]

In counting the votes, there are some narrow circumstances in which Congress might be called upon to make a decision as to what constitutes a valid electoral vote. Electors must follow certain constitutional procedures, such as meeting on the same day throughout the United States, and certain votes are not allowed, such as for presidential and vice-presidential candidates who both live in the same state as the elector.[8]

These rules do not concern *who* a state has appointed as its electors. On that question, the ECRA draft would properly have Congress defer to the "conclusive" certifications from the states, including any relevant court rulings. Rather, these rules relate to *how* and *for whom* the validly appointed electors have voted. Thus, they are not susceptible to review until after the Electoral College has met and the sealed vote certificates required by the Twelfth Amendment arrive in Congress.

The 1887 ECA permits objections of this sort on the basis that votes have not been "regularly given." This term of art was intended to solely refer to matters relating to the votes themselves, not to the validity of the appointment of the electors.[9]

Unfortunately, Congress has developed a bad habit of ignoring this limit and allowing "regularly given" objections beyond the scope of the term's actual meaning. This has fueled the mistaken perception that Congress has a blank check to reject a state's election results and appointment of

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[7] For a discussion of this bifurcation, *see*: Andy Craig, "What Changes Should Be Made to the Electoral Count Act?," *Cato at Liberty* (blog), January 12, 2022. https://www.cato.org/blog/what-changes-should-be-made-electoral-count-act

[8] U.S. Const. art. II, § 1; U.S. Const. amend. XII.

[9] *See generally* Derek T. Muller, *Electoral Votes Regularly Given*, 55 Georgia L. Rev. 1529 (2021).

its electors, even though the Constitution confers no such power and both the 1887 ECA and the ECRA draft attempt to repudiate it.

"Regularly given" objections were made in 2001, 2005, 2017, and 2021. Some failed due to the lack of a Senate cosponsor, but the objections in 2005 and 2021 forced Congress to debate and vote on the matter. However, none of these objections were properly within the scope of alleging that the votes had not been regularly given.

Instead, the procedure was used to raise objections that the electors had not been lawfully certified, based on complaints about how a state conducted its election, thus evading the ECA's commitment (strengthened in the ECRA draft) to respect timely and final state certifications on that question.

The draft ECRA retains the "regularly given" language without any elaboration, and in so doing it risks endorsing as valid precedent the erroneous no-limits interpretation Congress has adopted. As the Supreme Court has explained, "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it."[10] In this case, the "old soil" should be left behind.

Instead, the specific grounds for objections could be enumerated, each reflecting a specific constitutional rule.[11] Alternatively, and to keep things simpler, a categorical definition of regularly given could be added, requiring that objections must rely on a specific provision of the Constitution relating to how the electors meet and vote and for whom they may vote, but *not* how they were chosen because that question is already handled elsewhere. Additionally, a specific disclaimer disallowing objections to the outcome or conduct of a state's popular election could be inserted.

These improvements would not change the intent behind both the 1887 ECA and the ECRA draft. Instead, they would simply codify the proper and intended meaning of the 1887 law's unclear terminology. An explicit definition of "regularly given" would make the law much clearer on its face, without the need to refer to outside authorities on how to construe that term. And it would repudiate the constitutionally defective precedents Congress has attached to this language.

More explicit limits on the valid grounds for objection would, most importantly, ensure that the reformed statute and its interpretation in practice are both compliant with the Constitution. It would also provide members of Congress with a definitive rule to cite when resisting political pressure to make improper objections.

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[10] *George v. McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (internal quotation marks omitted).
[11] For a model example of such a list, *see*: Andy Craig, "How to Pick a President: A Guide to Electoral Count Act Reform," Policy Analysis no. 931, Cato Institute, June 28, 2022. https://www.cato.org/policy-analysis/how-pick-president-guide-electoral-count-act-reform#6-challenges

Members who wish to express their views on election disputes in the states can make floor speeches and other public statements, introduce legislation, and file amicus briefs. But Congress should not interrupt the electoral count for objections that cannot be acted upon except by violating the Constitution and breaking Congress's statutory promise to the states about when the state's certification "shall be conclusive."

Twentieth Amendment and Candidate Eligibility Objections

There is an additional wrinkle that must be addressed due to the often-overlooked effect of a constitutional amendment ratified after the 1887 ECA was adopted.

Even if interpreted narrowly and as originally understood, "regularly given" objections would likely encompass objections that a presidential or vice-presidential candidate is not constitutionally eligible due to age, residency, citizenship status, term limits, or death.[12] This is within the proper scope of Congress's power to decide, but such cases must be treated in a distinct manner pursuant to the Twentieth Amendment, adopted in 1933. In particular, votes for ineligible or deceased candidates must still be counted, rather than thrown out altogether, to both comply with the Constitution and to avoid a possible perverse result.

The Twentieth Amendment established a new rule that if by Inauguration Day "the President elect shall have died, the Vice President elect shall become President." The same principle and procedure likewise applies "if the President elect shall have failed to qualify" due to other kinds of ineligibility besides death. In this scenario, the constitutionally mandated result is that the Vice President-elect, the deceased or ineligible winner's running mate, should become President. In order to obtain this result, electoral votes cast for dead or ineligible candidates must still be counted.

Failing to observe this point could result in the presidency passing, not to the disqualified candidate's running mate as the Twentieth Amendment requires, but rather to that candidate's defeated opponent. This would be the case under either possible interpretation regarding the calculation of a winning majority: either the electors who voted for an ineligible candidate are not counted for that purpose, leaving the defeated party's candidate with an apparent majority, or the House must proceed to a contingent election, in which case only the defeated party's presidential candidate would be eligible for consideration.

In order to comply with the Twentieth Amendment, candidate eligibility objections must be distinguished from other sorts of objections. Instead of being removed from the count, the votes for ineligible candidates must still be counted, with the provisions of the Twentieth Amendment then applied if an ineligible candidate has received a winning majority. Likewise, if an ineligible candidate for Vice President receives a winning majority, this should be construed as creating a

[12] *See* Muller, *supra*, at 1537–38.

vacancy to be filled under the Twenty-fifth Amendment rather than a contingent election in the Senate where the only other candidate would be the disqualified candidate's defeated opponent.

Constitutional compliance on this point does not require creating any new or more complicated procedures. Eligibility objections can still be handled at the same time and in the same manner as other objections. A provision should simply be inserted clarifying the different *effect* of such objections if sustained: that the votes will still be counted, that a sustained eligibility objection will automatically apply to all other votes cast for the same person, and that the Twentieth Amendment's terms will apply if a deceased or ineligible candidate has received a winning majority of the votes.

"Failed Elections" Should Be Tightly Defined

One of the core purposes of the statutory provisions under discussion is to decide how Congress will use a power explicitly granted by the Constitution: "The Congress may determine the Time of chusing [sic] the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."[13]

Congress first narrowed that time of choosing electors to a single day in early November, what we now know as Election Day, in 1845. At the time, however, some states required an absolute majority for their popular election to be conclusive, otherwise sending the choice to a contingent election in the legislature. Later, for a time, some states also conducted runoff elections.[14]

To accommodate these variations, Congress adopted what is now codified in 3 U.S.C. § 2, which says that if a state's popular election "has failed to make a choice on the day prescribed," then the choice of electors may be made later in such manner as the legislature may direct. Over time, this has also come to be understood to encompass natural disasters and similar catastrophes interrupting Election Day.[15]

The ECRA draft narrows this provision in three ways. First, it scraps any idea of accommodating runoff or contingent elections, which no state has used in several decades. Second, it requires the state's emergency backup procedures to be set by law prior to Election Day, allowing only an extended use of the same method that the state was already using (i.e., an extended popular election, rather than switching to legislative selection of electors). Third, it limits the scope of when this provision may be invoked, to cover only "extraordinary and catastrophic" events.

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[13] U.S. Const. art. II, § 1.

[14] On this history, *see* Thomas A. Berry, "A Presidential-Election Runoff Would Be Legal for States to Adopt," National Review Online, April 14, 2016. https://www.nationalreview.com/2016/04/presidential-election-runoff-states/

[15] A notable non-presidential example of such an emergency occurred on September 11, 2001, when the primary elections for New York City's municipal offices were canceled and rescheduled.

This is a good step, but the language could be tighter to exclude arguments that allegations of fraud or protracted litigation could qualify as "extraordinary and catastrophic." One drafting option would be to explicitly invoke the legal concept of *force majeure*, which is well-defined and provides ample guidance for the courts. Another would be to specify that only actual disruptions to the administration of the election, impairing people's ability to cast their votes or the ability of those votes to be counted, can qualify.

This provision should also set a maximum permissible end date that states may set for their emergency procedure, such as the end of November or two weeks past Election Day, which is omitted in the current ECRA draft.

It would also be reasonable to set some guidelines for who can make the determination that a sufficient catastrophe has occurred and how that decision can be challenged, while still generally deferring to prior-enacted state law. The ECRA draft's provision for defining the executive of the state for elector certification purposes (that is, the governor by default unless the state designates somebody else ahead of time) might be useful for this purpose, as well. The possible role of state and federal courts in reviewing an emergency determination should also be carefully considered, especially if the intent is to make such determinations reviewable in federal court.

Judicial Procedures and Governor's Certification Drafting Concerns

Besides the retention of the "regularly given" objection without modification, there are other aspects of the ECRA draft that we believe could be improved with relatively small adjustments to the text. For ease of reference, we will refer to provisions in the current draft ECRA bill by the section number where they would appear in Title 3 of the U.S. Code, if enacted.

Ensuring That State Executives May Not Disenfranchise Their States

The ECRA mandates that a governor must issue a certificate ascertaining the winner of the state "[n]ot later than the date that is 6 days before the time fixed for the meeting of the electors[.]" Section 5(a)(1). But what if a governor misses this deadline and no certificate has been issued by this date? Would this failure automatically result in no electors being appointed by that state, thus disenfranchising the state? A literal reading of the ECRA draft's counting provision might suggest this result. It mandates that "only the votes of electors who have been appointed under a certificate ... issued pursuant to section 5" may be counted. Section 15(e)(1)(A)(i). And a certificate that has not met the deadline set in section 5 has arguably not been "issued *pursuant to* section 5" (emphasis added).

The solution is to clarify that if no certificate has been issued by the deadline, a subsequent certificate issued by court order would qualify and would allow the state's electoral votes to be

counted. Thus, if the failure to issue a certificate is challenged in court, a court may order the governor to issue a certificate.

We believe that this would be preferable to simply allowing the governor to issue a late certificate *without* a court order. If that were allowed, a governor could intentionally wait until the last possible moment before the electors meet to issue a certificate, and thus eliminate any possible time for judicial review.

We therefore suggest appending a sentence to this effect to the end of section 5(c)(1)(B): "If no certificate of ascertainment of appointment of electors has been issued by the date that is 6 days before the time fixed for the meeting of the electors, then a certificate of ascertainment of appointment of electors as required to be issued by State or Federal judicial relief granted prior to the date of the meeting of electors shall be treated as a certificate of ascertainment of appointment of electors issued pursuant to this section."

Providing for a State Executive's Refusal to Comply with a Court Order

The ECRA draft rightly allows for judicial review in case a governor does not follow the law in issuing a certificate. The bill makes clear that any certificate "as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section." Section 5(c)(1)(B). But when a judicial order does require the governor to revise a certificate, what happens if the governor simply refuses? If the governor simply refuses to issue a revised certificate until January 6 (even upon pain of contempt of court), does the original erroneous certificate still control?

The text of the ECRA could be read to allow a governor to attempt this harmful strategy. Under the text of the draft bill, it is not a judicial order *itself* that supersedes a certificate. Rather, it is a new certificate "as required to be revised" by judicial order that supersedes an old certificate. And the draft bill does not suggest that anyone other than the governor (or other statewide official previously designated under state law) may issue such a revised certificate.

To prevent the possibility of the governor (or some other single state official) standing in the way of judicial review, we suggest adding a clarification that a court may order *any* state official to issue a revised certification. This could be achieved by appending to the end of section 5(c)(1)(B) a sentence to this effect: "If the executive of a state refuses to promptly comply with a judicial order to issue a revised certificate of ascertainment of appointment of electors, any such revised certificate issued by any other official of that state upon order of that court shall replace and supersede any other certificates submitted pursuant to this section just as if that revised certificate were issued by the executive of that state."

In addition, the ECRA draft could account for the very unlikely but still possible contingency that *no* state official is willing to comply with a judicial order to issue a revised certificate. This could be achieved by further adding to section 5(c)(1)(B) a sentence to this effect: "In the event that, by the sixth day of January succeeding the meeting of electors, no state official has complied with a judicial order granted prior to the date of the meeting of the electors to issue a revised certificate of ascertainment of appointment of electors, that judicial order itself shall be treated for purposes of section 15 as if it were a revised certificate of ascertainment of appointment of electors issued on the date of the judicial order."

To make sure that such orders are verified in Congress, the bill's language could be further tweaked to ensure that judicial orders to issue revised certificates are themselves sent to both the electors and the Archivist, just as the certificates themselves are sent.

Ensuring that Expedited Federal Court Procedures May Be Utilized

The ECRA draft provides special venue rules and expedited procedures for actions brought by aggrieved candidates under federal law "with respect to the issuance of the certification" in Section 5(d)(1). Most notably, these rules provide for an initial hearing before a three-judge panel and then direct appeal to the Supreme Court. Section 5(d)(1)(B);(D). The ECRA draft stresses that in such an action it would be "the duty of the court to expedite to the greatest possible extent the disposition of the action[.]" Section 5(d)(1)(C).

This provision does *not*, however, establish a cause of action for an aggrieved candidate to bring such a suit. As the bill itself stresses, these rules only "establish venue and expedited procedures" in such an action; they do not establish a cause of action granting the right to bring such an action in the first place. Section 5(d)(1)(C).

If such a cause of action can be found somewhere else in federal law (perhaps under the Fourteenth Amendment's guarantees of due process and equal protection), then these expedited procedures can be utilized. But it is not *certain* that such a cause of action can be found elsewhere in federal law. And if it cannot be found elsewhere, then the expedited procedures cannot serve their intended purpose of providing a speedy resolution for challenges to certificates.

The solution is to provide, in the text of ECRA itself, a narrowly circumscribed cause of action to challenge a state executive's erroneous certificate or failure to issue a certificate. This is the only way to guarantee that the expedited procedures may be used as intended.

Preventing Unintended Uses of the Expedited Court Procedures

The ECRA draft limits the expedited procedures to actions brought "*with respect to* the issuance of the certification" (emphasis added). The clear intent is to limit these procedures to only the

situation when time is most of the essence: the period between a potentially erroneous certification and the meeting of the electors. But if that is indeed the intent, the choice of the term "with respect to" is not the best language to implement that intent.

The Supreme Court has explained that "[u]se of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject."[16] For example, the Court has held that for the purposes of the Bankruptcy Code, even "a statement about a single asset can be a 'statement respecting the debtor's financial condition'" because a "single asset has a direct relation to and impact on aggregate financial condition[.]"[17]

Applying this same canon of interpretation to the ECRA draft, courts could find that nearly any election-law challenge brought by an "aggrieved" presidential candidate is "with respect to" the issuance of a governor's certificate, since nearly any legal dispute related to the election could affect which candidate is ultimately certified as the winner. The use of the broad phrase "with respect to" may thus unintentionally result in the expedited procedures being invoked not just after a certificate is issued, but also in the bulk of presidential election litigation that occurs *before* the certificate is issued.

There is a simple solution to this drafting issue. In addition to the other limitations already included in section 5(d)(1), the bill could further limit the expedited procedures to actions brought either after the state's executive has issued a certificate or when there are fewer than six days before the date of the meeting of the electors, whichever comes first. This would properly limit the expedited procedure to the period when it is actually necessary.

Ensuring That Only One Correct Slate Is Read and Presented to Congress

Once Congress has assembled to count the electoral votes, the ECRA requires that the president of the Senate shall "open the certificates and papers *purporting to be* certificates of the votes of electors appointed pursuant to a [governor's certificate] issued pursuant to section 5" (emphasis added). Section 15(d)(1)(A).

The use of the equivocal phrase "purporting to be" is puzzling. As the ECRA later makes clear, "only the votes of electors who have been appointed under a certificate ... issued pursuant to section 5" may be counted. Section 15(e)(1)(A)(i). That means there is no reason to read a slate of votes merely *purporting* to be so appointed. The ECRA should instead make clear in section 15(d)(1)(A) that the president of the Senate shall only read those papers that *actually are* accompanied by the true and operable governor's certificate.

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[16] *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018).
[17] *Id.* at 1761.

Clarifying the Authority and Discretion of the Tellers

The ECRA draft, like the current ECA, establishes four tellers at the electoral count, two appointed by each house. Section 15(c). At the end of the counting process, the tellers "shall make a list of the votes ...; and the votes having been ascertained and counted according to the rules ..., the result of the same shall be delivered to the President of the Senate[.]" Section 15(e)(3).

This passive voice phrasing implies, but does not make explicit, that it is the tellers' duty to ascertain and count the electoral votes according to the ECRA's rules. The bill should make explicit that the tellers do indeed have this function, or else specify who else is to do it. And it would be preferable to establish a procedure in case the tellers should disagree on the application of any rule, such as a fifth teller appointed by the other four who shall break any ties.

Further, the bill should make clear just how much discretion the tellers have in applying the counting rules. For example, may the tellers decline to count a slate of electors on the tellers' view that the executive's certificate was not issued in pursuance of state law, and that the certificate was therefore not "issued pursuant to section 5"? Section 15(e)(1)(A)(i). Or may the electors decline to count a slate because the certificate was issued fewer than six days before the meeting of the electors? In our view, the former would be too much discretionary power to place in the hands of the tellers, while the latter would be appropriately within the tellers' purview to ensure a certificate *facially* complies with section 5. But in any event, the law should leave no doubt as to just how much authority the tellers have.

Clarifying the Scope of the "Lawfully Certified" Objection

The ECRA draft would permit Congress to reject electors who "were not lawfully certified under a certificate" according to section 5. Section 15(d)(2)(B)(ii)(I). But this does not clarify why this objection would ever be necessary, given the ECRA's vote tabulation rules. As previously noted, the vote tabulators (most likely the tellers) may only count votes that have been cast by electors appointed under a certificate "issued pursuant to section 5." Section 15(e)(1)(A)(i). This rule appears to be categorical, barring the counting of all votes that do not meet this requirement *whether or not* Congress sustained an objection to those votes. So what additional purpose does it serve to allow Congress to reject electors as not "lawfully certified"?

One option, in line with the apparent intent of this provision, is that "lawfully certified" objections would only apply in cases where the purported electors do not comport with the persons named in the certificate of appointment as determined under Section 5. This would give teeth to the conclusive nature of the certificates of appointment issued by the state, as modified by any relevant court rulings. Rather than challenging the contents of that certificate, "lawfully certified" objections would rely on it and be used to enforce it.

This would make the scope of the objection overlap with the requirement already in the vote tabulation rules, and thus it should be unnecessary to ever use it if those rules are being properly

followed. But it would allow Congress to reject the appointment of purported electors that the tellers have erroneously allowed to be presented, and serve to clarify in what respects a "conclusive" appointment certification is, in fact, conclusive.

The only other objection permitted under this category should be that an elector is constitutionally ineligible due to holding an impermissible federal office. This would allow the two categories of objections to fit neatly onto the terms for counting "the whole number of electors *appointed*" (emphasis added) for determining a winning majority. "Lawfully certified" objections would cover cases where the appointment of the elector was invalid, and thus no such elector was in fact appointed, while "regularly given" objections would cover cases of invalid votes cast by validly appointed electors. In the latter case, the electors have still been appointed, and so they should still count in determining the requisite majority as defined by the Constitution.

Parliamentary Procedure in the Joint Session

One problem bedeviling both the existing ECA and any attempt at reform is the lack of clarity for parliamentary procedure during the bicameral joint session. Though both houses of Congress might gather together to hear a speech, the electoral count is the only occasion when Congress must *act* as a body and conduct business during a joint session. And Congress has never sorted out exactly how that's supposed to work.

This presents a problem for any possible set of rules. Any specific procedural requirements set by the ECA must be enforced somehow. The problem is further compounded by the correct desire to avoid any discretionary authority for the Vice President as the presiding officer. In addition, any opportunity to challenge parliamentary rulings (such as that an objection is out of order) should not become a backdoor for debating and voting on impermissible objections. That would effectively defeat the purpose of requiring a minimum number of cosponsors and limiting the valid grounds for objections.

In tackling this problem, Congress must venture into more novel territory than with other aspects of ECA reform. But it is possible to square the circle without violating any fundamental principles, and that is a critical piece of the puzzle for a reformed ECA to work in practice.

One possibility would be to make use of the official House and Senate Parliamentarians, binding the Vice President to act on their advice (possibly with a third parliamentarian they have jointly selected, to avoid deadlock). Of course, while the House and Senate Parliamentarians are respected and trustworthy, they are not members of Congress and cannot be given the binding final say. To accommodate appeals of parliamentary rulings expeditiously and to limit frivolous appeals, the right to make an appeal should be vested solely in the constitutional officers and the majority and minority leaders of both houses. And these appeals should be put to an immediate

vote, without debate, with the concurrence of a majority of both houses necessary to overturn the ruling.[18]

A procedure along these lines, or something like it operating on similar principles (perhaps relying on the tellers as discussed above rather than the parliamentarians), would allow Congress to proceed confident that the rules mean something, that there is a way for them to be enforced, that there is no backdoor way to evade them, and that any final decision rests with Congress as a whole and not the Vice President alone.

Miscellaneous Other Provisions

Various other minor provisions merit brief consideration. One frequent topic of discussion has been the timeline between Election Day and Inauguration Day. We agree with others who have advocated moving the date of the Electoral College meeting back, from its current date in mid-December to late December or early January.

This would serve primarily to allow the courts the greatest possible amount of time to rule on any litigation concerning a state's election outcome and the appointment of its electors. In contrast, the time period after the Electoral College meeting until the joint session of Congress serves little purpose other than the physical transmission of the certificates to Washington, DC.

On that note, the ECRA draft makes one noteworthy improvement by allowing certificates to be sent by "the most expeditious method available." This change will obviate past concerns about certificates being delayed in the mail by allowing states to simply use couriers, a best practice which should be encouraged given the constitutional importance of these pieces of paper.

The ECRA draft would move the Electoral College meeting back a single day, from the Monday currently specified to the Tuesday after. Consideration should be given to moving it even later, so long as a few days are still provided prior to January 6 to ensure physical delivery of the vote certificates.

The ECRA draft is combined with another proposed piece of legislation, the Presidential Transition Improvement Act (PTIA), with reforms to the process for the General Services Administration to provide transition services to the "apparent" winner of the election. This determination does not implicate any legally binding process for deciding the outcome of the election, but relates solely to provisions for office space, materials, and related administrative support.

In the past, there has been controversy over issuing this GSA ascertainment, which the existing statute provides little guidance for. The common practice, until 2020, was to rely on national

[18] For model statutory language and further explanation, *see* Craig, "How to Pick a President," *supra*.

media outlets calling the election, but this is impossible to specify with any objective precision. One reasonable option, adopted by the PTIA draft, is to authorize the GSA to simply provide transition services to both candidates involved in a protracted dispute until it is resolved.

However, the PTIA draft attached to ECRA might rely too much on a complicated set of criteria, divided into three different timeline stages, which include at some points determining if all other candidates have conceded. A concession is a political statement without legal form or effect, so relying upon it in this way might be problematic. It is not difficult to imagine, and we have seen recent examples, how a defeated candidate might make an ambiguous statement that arguably does not qualify as a full concession. A related concern is that any reference to *all* other candidates must account for how such language, unless otherwise limited, would include many independent and third-party candidates.

The transition provisions are of less concern than the Electoral Count Act reforms, but one suggestion would be to focus less on trying to define objective criteria for something so intangible and informal as recognizing a presumptive president-elect. Instead, taking a cue from the drafters of the Twenty-fifth Amendment, the law could rely on specifying who is to decide the question. This might include, for example, a role for congressional leaders, or an independent commission appointed ahead of time for this narrow purpose, or designating the Federal Elections Commission to make the call. In any event, a judicial cause of action can serve as a fail-safe, as PTIA would provide.

Conclusion

The Cato Institute has distributed millions of copies of our pocket edition of the Declaration of Independence and the Constitution of the United States, "to encourage people everywhere to better understand and appreciate the principles of government that are set forth in America's founding documents."

Those principles have stood the test of time, and ensuring they last long into the future is at the heart of the matter this committee is considering: a government "deriving its just powers from the consent of the governed," under a supreme law of the land ordained and established by "We, the People," with fixed terms of office marked by free and fair elections.

These were radical new ideas at the time of the Framers, but today we rightly regard them as indispensable to "insure domestic Tranquility" and "secure the Blessings of Liberty to ourselves and our Posterity." Nobody should have any reason to think they can defeat these fundamental principles by force, fraud, or lawlessness.

Americans must have confidence that the Constitution will prevail in determining the occupant of our highest office. The Electoral Count Act as it stands is woefully inadequate to provide that

assurance. By reforming the Electoral Count Act, America's constitutional institutions can be put on a firmer foundation, with orderly, predictable, stable rules for how we translate the votes cast at the polls in November to the inauguration of a President in January.

This long-overdue and much-needed reform is about more than just cleaning up stylistic clutter and ambiguous word choices in a very old statute. It represents Congress's affirmation to the American people that we can all rely upon the Constitution's promises of individual liberty, representative government, and the rule of law.

Sincerely,

/s/
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Research Fellow, Robert A. Levy Center for Constitutional Studies
Cato Institute

/s/
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Staff Writer
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TESTIMONY OF THE NEW YORK CITY BAR ASSOCIATION
TASK FORCE ON THE RULE OF LAW AND
ELECTION LAW COMMITTEE

HEARING OF THE SENATE COMMITTEE ON RULES AND ADMINISTRATION

"THE ELECTORAL COUNT ACT: THE NEED FOR REFORM"

August 3, 2022

The Task Force on the Rule of Law and the Election Law Committee of the New York City Bar Association (the City Bar) appreciate the opportunity to provide testimony to the Senate Committee on Rules and Administration on the need for reforms to the Electoral Count Act.[1] The City Bar considers free and fair elections to be the foundation of our republican form of government, and, like so many others in America, is proud of its cornerstone feature – the peaceful transfer of power. As a result of the controversial procedures of the presidential election of 1876, the United States Congress sought to clarify the process of electing the president and vice-president of the United States by enacting the Electoral Count Act (the ECA) as a statutory companion to the Twelfth Amendment to the United States Constitution. Despite the statute's ambiguities and somewhat inconsistent provisions, our presidential elections have followed the rules it set without any meaningful controversy or challenge to outcomes. The 2020 election, however, brought into question certain provisions of the ECA – and the City Bar is supportive of Congress's work in attempting to clarify the procedures to be followed in presidential elections.

[1] The Task Force on the Rule of Law is comprised of members of diverse professional backgrounds in government, civil and criminal private practice, academia, non-governmental organizations and the judiciary, having a wealth of experience in promoting the rule of law domestically and internationally. The Task Force focuses on the framework for decision-making in a constitutional democracy that encompasses, among other things, due process of law, adherence to separation of powers and a system of checks and balances, the protection of fundamental rights, and the fair and equal administration of justice by an independent judiciary. The Election Law Committee focuses on election law, policy, and procedures including voter education and voting rights. It is composed of practitioners from law firms, good government groups, political parties, and government boards and agencies, many of whom have worked in this area for decades. A principal priority of the City Bar, through the work of these committees, has been the protection of voting rights as the foundation of American democracy. They have devoted attention to increasing threats to the franchise in both federal and state elections, by issuing reports, urging legislative reform and presenting educational programming for the bar and the public.

In response to the threats posed during the 2020 presidential election, the City Bar has supported a wide range of actions to secure our elections, enforce citizens' right to vote and protect our democratic processes. Our committees have offered recommendations for how Congress might clarify the ECA[2] and supported critical voting reforms, including the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act.[3] The City Bar remains equally committed to the rights of voters to participate in free and fair elections and continues to urge passage of both of those voting rights bills. However, with passage of those important bills uncertain, we urge Congress not to forgo the opportunity to make necessary reforms to the ECA.

The City Bar therefore supports the recently introduced bipartisan Electoral Count Reform and Presidential Transition Improvement Act (ECRA).[4] Critically, the ECRA clarifies the role of the vice-president, as presiding officer of Congress during the ratification of the Electoral College votes cast by the fifty states and Washington DC. The proposed Electoral Count Reform Act makes clear, correctly, that the vice-president's role during this process is ministerial. While this bill contains extremely important reforms of the ECA, we offer the following recommendations for clarifying key provisions that should be included in any final ECA reform legislation.

RECOMMENDATIONS

The proposed ECRA addresses Congress' role during this ratification process. Instead of the current provision, allowing for just one member of the House of Representatives and one Senator to object to a state's electoral slate, the legislation would require that one-fifth of each house object before Congress may consider the *bona fides* of that slate. We believe this requirement ought to be one-third of each house,[5] though either change is a marked improvement

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[2] "Statement on Reforming the Electoral Count Act," New York City Bar Association, Feb. 8, 2022, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/reforming-the-electoral-count-act. A copy of the report is appended to this testimony.

[3] "The Consent of the Governed: Enforcing Citizens' Right to Vote," New York City Bar Association, Sept. 16, 2021, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/american-right-to-vote-election-reform-laws. In addition to analyzing pending voting rights legislation, the report summarizes recent actions taken to suppress voting rights. A copy of the report is appended to this testimony.

[4] S.4573 (117th Congress), https://www.congress.gov/bill/117th-congress/senate-bill/4573.

[5] In its comprehensive report on needed reforms in the ECA, the House of Representatives' Committee on House Administration has recommended a threshold of one-third of the members of each house to trigger an objection, explaining:

> The increased threshold would ensure that objections are credible and enjoy substantial support in both chambers before the houses are forced to consider them. The increased threshold would also ensure a timely completion of the count, prevent individual Members from obstructing the count, and reduce the likelihood that Congress will reject a state's electoral votes.

Comm. on House Admin., *Report on The Electoral Count Act of 1887: Proposals for Reform*, at 19, (117th Cong., Second Sess. Jan. 2022), https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Electoral%20Count%20Act%20Staff%20Report_.pdf. (House Admin. Rept.) (citations omitted). The Committee observed that at the 2021 proceeding, a single objection took more than three hours to resolve. *Id.* at n. 132, citing 167 Cong. Rec. H98, H113 (2021) and

over existing law, which provides an incentive for frivolous or bad-faith objections. Sound public policy considerations suggest that objections to a state's electoral slate not be considered in the absence of substantial support in both houses.[6]

Equally important, the ECRA would clarify the objection process by requiring that both houses of Congress vote to sustain any objection, eliminating that provision of Section 15 of the ECA that permits a governor to choose between competing electoral slates. Because of the importance of such an action, we believe the vote sustaining an objection should be by a supermajority, such as two-thirds, of each house.

The proposed ECRA also attempts to tackle the issue of when an objection to an election is legitimate. Here we think the proposed ECRA can be improved. The proposed language states only that an objection is proper if an elector was not lawfully certified or his or her vote was not "regularly given." The first consideration is fairly straightforward; however, the requirement that a vote be "regularly given" offers, in our view, excessive opportunities for interpretation. We therefore suggest that an objection may only be made when (a) the elector in question voted in violation of constitutional or statutory requirements or voted fraudulently or corruptly; (b) the elector in question voted on an untimely basis; (c) the elector is constitutionally ineligible to serve;[7] (d) the elector voted for a constitutionally ineligible candidate; or (e) the state submitted electoral votes exceeding the number to which it is entitled. We urge the Congress to consider these or similarly well-defined and specific situations in drafting a provision that permits objections, rather than the open-ended language of the current proposal.

We further commend the drafters of the ECRA in emphasizing the importance of and respect for the voters of each state. We agree that once ballots have been cast and election day is passed, no new laws or regulations can be enacted to disturb the choice of the voters. This means, of course, that neither the legislature of a state nor a court or executive should be able to supersede in any way the will of the voters who have chosen a slate of electors pledged to a presidential candidate on the basis of laws and regulations in effect at the time of the election. That principle, clearly expressed in the pending legislation, is critical to the rule of law and to a free and fair procedure for electing the president and vice-president.

A related point on this issue deserves attention. Section 102(a) of the ECRA includes the catch-all phrase "extraordinary and catastrophic events" in describing conditions that would allow an extension of the period for voters to cast ballots after election day. This is an improvement over the highly problematic Section 2 of the current law, which permits the legislature to appoint electors if there is a "fail[ure] to make a choice" on election day. However, the parameters of such "extraordinary and catastrophic" circumstance are unspecified and could themselves give rise to

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commenting that both "houses withdrew from the joint session to begin debating Pennsylvania's votes at 12:20 a.m. and did not reassemble until 3:22 a.m.".

[6] *Id.*, at n.134.

[7] The House Admin. Rept. includes this recommendation as to the Constitution's sole requirement for presidential electors. *Id.* at 26 & n. 163, quoting U.S. Constit., art. II, sec. 1, cl. 2, which states:

> [N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

multiple interpretations that could undermine the integrity of election results either within a state or across multiple states experiencing the same conditions. We think it important, therefore, that the proposed legislation make clear that only highly specific circumstances, as determined by a court based on state law or election regulations in effect on election day, can provide a basis for extended voting and that any such extension be tailored closely to the time and place of the voting precincts affected by those conditions and recognize the importance of having all states certify their electoral college votes by the same date.

We commend the ECRA drafters for the reforms they have included designed to ensure that Congress is able to identify a single, conclusive slate of electors from each state that is submitted by the responsible executive official pursuant to state law or election regulations in effect as of election day, and including the requirement that Congress defer to slates of electors submitted by a state's executive pursuant to the judgment of federal or state courts, also based on such state law provisions. To clarify that the executive's decision shall only be conclusive if it is lawful, in Section 104 of the ECRA, amending ECA section 5, we would, at the end of the new section 5(c)(1)(A) (page 5, line 25 of bill), delete the word "and" immediately preceding the new section 5(c)(1)(B) and substitute the words "except that", as outlined below:

> (c) Treatment of certificate as conclusive.—
>
> (1) IN GENERAL.—For purposes of section 15—
>
> (A) the certificate of ascertainment of appointment of electors issued pursuant to this section shall be treated as conclusive with respect to the determination of electors appointed by the State; ~~and~~ except that
>
> (B) any certificate of ascertainment of appointment of electors as required to be revised by any subsequent State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section.

Finally, although we support the reforms of the ECRA, we think it unnecessary to engraft an unprecedented proceeding before a three-judge court onto an ECA reform proposal. State and federal courts have the experience and expertise to handle critical election matters efficiently and expeditiously, and have routinely done so in the normal course of their regular judicial processes. We need look no further for proof of that than the scores of cases which federal and state courts promptly and fairly adjudicated after the 2020 presidential election, and would prefer to continue our tradition of reliance on their doing so.

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We applaud the Senate Committee on Rules and Administration for holding this hearing, and congratulate the drafters for taking these important first steps, in a bipartisan nature, to clarify and strengthen the Electoral Count Act. While we continue to believe that it is critical that the Senate adopt comprehensive voting rights protections such as those proposed in the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act, we urge Congress to take this opportunity to enact essential reforms to the Electoral Count Act. We appreciate the Committee's consideration of our recommendations and would welcome the opportunity to answer any questions or to discuss the issue further.

Rule of Law Task Force
Marcy L. Kahn, Chair

Election Law Committee
Rachael A. Harding, Chair

STATEMENT ON REFORMING THE ELECTORAL COUNT ACT

I. Introduction

In 1887, in an effort to resolve the uncertainties occasioned by the disputed Hayes-Tilden presidential election of 1876, Congress enacted the statutes collectively termed the Electoral Count Act (3 USC Sec. 1 et seq.) ("ECA"). In doing so, Congress intended to clarify the procedure for the counting of electoral votes and determining the winner of the presidency. Rather than clarifying the procedure, however, the ambiguously worded ECA obfuscates the procedure. The ambiguous language of the ECA has resulted in widespread confusion, as evidenced in 2000 during the Bush-Gore election (relating to the implementation of its "safe harbor" provision) and in 2021 when former President Trump and his supporters attempted to transform the ministerial role of the Vice President into a discretionary act to overturn the election of President Biden. Although that effort failed, it brought to light the ambiguities and inconsistencies in the ECA. Thus the ongoing efforts by the Congress to reform the ECA is a welcome remedy to prevent its future use to undermine Presidential election results.

Article IV, Section 4 of the U.S. Constitution (the "Guarantee Clause") imposes upon the United States the responsibility to "guarantee to every State in this Union a Republican Form of Government." Although the Guarantee Clause did not historically require popular election of a state's presidential electors, all 50 states have for more than a century opted, either by statute or in their constitutions, for their electors to be chosen by popular vote, reflecting a fundamental belief that, in a republican form of government, the people choose their leadership through free and fair elections.

Consistent with this principle, the New York City Bar Association (the "City Bar") remains committed to the objectives expressed in its recent report, *The Consent of the Governed: Enforcing Citizens Right to Vote.*[1] Specifically, the City Bar strongly urges the prevention of all attempts to undermine the will of the people in any American state or jurisdiction, including the District of Columbia. We therefore urge clarification of the ECA along the lines set forth below.

The City Bar remains equally committed to the rights of voters to participate in free and fair elections. Accordingly, we continue to urge the passage of the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act. However, as the passage of both of these important bills is uncertain, the City Bar urges the drafters of any ECA reform legislation to

[1] New York City Bar Association, *The Consent of the Governed: Enforcing Citizens' Right to Vote*, Sept. 2021, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/american-right-to-vote-election-reform-laws. (All websites last visited Feb. 7, 2022.)

include key provisions of those two bills in the ECA reform legislation.

II. Clarification of ECA Provisions

In furtherance of the objectives stated above, the City Bar urges revision and clarification of the ECA in the following respects:

Clarify that the Vice President's role in receiving and counting electoral ballots is ministerial. Had former Vice President Pence accepted the fallacious argument advanced by some of the former President's supporters that the ECA confers upon the Vice President discretionary authority to reject a state's electoral delegation and refuse to count its votes, the results of the 2020 election would have been overturned. Although the former President's interpretation of the ECA was rejected in 2021 (as it was similarly rejected by the Congress in 1877 during the disputed election between Ruthorford Hayes and Samuel Tilden), a more precise drafting of this provision would prevent such future attempts to improperly overturn the will of the voters as reflected in the Electoral College results.

Clarify that the role of Congress in its January 6th joint session proceedings is ministerial. The existing provision of the ECA provides that, for the electors from a state to be inoculated from challenge in Congress during the vote counting process, the results of any election dispute within that state must be resolved, under the state law in effect on Election Day, at least six days before the date on which electors from all 50 states are required to meet. Under current law, that "safe harbor" date is during the second week of December. To permit more time for the resolution of such disputes, we suggest that both that "safe harbor" date and the date on which presidential electors from all states meet should be moved to later dates in December.

Clarify that any role that Congress plays in challenging the legitimacy of a state's electoral delegation in the course of the January 6th joint session proceedings is strictly limited to specified exceptional circumstances, as set forth below.

1. Any objections to a state's electoral delegation should require the support of at least one-third of each house of Congress in order to be cognizable, and a supermajority of both houses to be sustained.

2. Objections on the basis of the vague grounds of "fail[ure] to make a choice" (3 USC Sec. 2) and "failed election" as grounds for objection should be expressly disallowed. Rather, objections should be based upon one or more of a series of clearly defined and specified grounds, including the following:

Constitutional Objections

(a) The elector in question voted in violation of constitutional requirements or voted fraudulently or corruptly.

(b) The elector in question voted on an untimely basis.

(c) The elector in question is constitutionally ineligible to serve.

(d) The elector in question voted for a constitutionally ineligible candidate.

(e) A state submitted electoral votes exceeding the number to which it was entitled.

(f) A territory submitted electoral votes prior to achieving statehood.

(g) *True emergencies that prevent* Congress from counting electoral votes, including acts of terrorism and natural disasters.

We recognize that some potential disputes may be nonjusticiable. However, any resulting justiciable dispute between Congress and a state or jurisdiction submitting electoral votes should be resolved in federal court on an expedited basis.

III. The So-Called "Independent State Legislature" Theory

The City Bar continues to reject the validity of the "independent state legislature" theory, as explained in *The Consent of the Governed* report.[2] In order to avert attempts by state legislators or officials to overturn the results of the popular vote in a state's presidential election, any proposed ECA reform legislation should include a provision making clear that a state legislature may not substitute its judgment for that of the state's electorate. Rather, any dispute concerning the composition of an electoral delegation should be adjudicated in the state or federal courts, which are fully equipped to resolve such disputes. Further, the ECA should be amended to indicate clearly that the rules for selection of electors, and the selection of electors pursuant to those rules, cannot be changed after the popular vote has been cast. The only exception would be in the event of the post-election death or disability of an elector, in which case the state should be required to appoint a successor elector pledged to support the same presidential and vice presidential candidates as the deceased or disabled elector.

IV. Incorporate Key Provisions of the Proposed Freedom to Vote Act and the John Lewis Voting Rights Advancement Act into ECA Reform Legislation

In the interests of protecting voting rights and ensuring fair elections, the City Bar urges Congress to pass the proposed Freedom to Vote Act and the proposed John Lewis Voting Rights Advancement Act. As the passage of these two important bills may be unachievable at the present time, we urge Congress to incorporate into any proposed ECA legislation at least the following provisions of those bills, which are directly related to the purposes of the ECA amendments discussed above:

(a) Criminalizing intimidation and harassment of election officials.

(b) Blocking anti-democratic practices at the state level, such as substituting partisan election administrators for non-partisan administrators, purging voter rolls for partisan or other impermissible purposes (or with partisan or other impermissible effect),

[2] *Id.*, at 29-32.

eliminating polling places and adopting unfair voting practices.

(c) Making Election Day a federal holiday.

(d) Including the preclearance provisions of the John Lewis Voting Rights Advancement Act in any ECA reform legislation.

(e) Easing voter registration and identification requirements, including mandating automatic voter registration programs.

(f) Requiring that state legislatures may only remove non-partisan election administrators for cause (and making clear that any successor administrator must act in a non-partisan manner).

V. Conclusion

The City Bar believes that, once the selection of presidential electors is submitted to a state's voters, a republican form of government requires that the will of those voters in choosing their national leadership must be respected. We also believe that protecting the rights of eligible voters in each state to vote and to have their votes counted is equally important to a functioning democracy. Accordingly, the City Bar urges Congress to adopt the proposals outlined in this report in order to avoid subversion of future presidential elections and ensure that the composition of each state's electoral delegation accurately reflects the results of a free and fair election in that state.

Thank you for your consideration.

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February 2022

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NEW YORK CITY BAR

THE CONSENT OF THE GOVERNED: ENFORCING CITIZENS' RIGHT TO VOTE

REPORT BY
THE TASK FORCE ON THE RULE OF LAW
AND THE ELECTION LAW COMMITTEE

SEPTEMBER 2021

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Immediately after declaring the "unalienable rights" of "life, liberty and the pursuit of happiness," the Declaration of Independence states that "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." From our nation's beginning, it was the voters of the new American states who gave legitimacy to their state governments and, upon the ratification of the new Constitution, to their newly created federal government. Our nation's recognition of those entitled to vote – to grant "just powers" to elected leaders and representatives – has broadened over time to include former slaves, women, Native Americans, naturalized citizens and those who do not own property. This broadened commitment to the right to vote has reflected the critical role of the electoral process in securing "the consent of the governed" that is the very foundation of our democracy and the basis for its legitimacy.

Yet the "consent of the governed" has been put at risk by the extraordinary array of actions described below that threaten to undermine the legitimacy of the American electoral process in both state and federal elections. For the reasons set forth in this report – and as previously voiced by our Association[1] – we believe it is the duty of lawyers throughout our nation to speak loudly and to act effectively, both individually and through their professional associations, to oppose the current actions by state legislatures and executives to limit our citizens' right to vote or to disregard their votes if unfavorable to those who control the reins of government. As professionals pledged to uphold our state and federal Constitutions and the rule of law, we must not stand by as mere witnesses when the most fundamental principle of our democracy is undermined by representatives of any political party. Rather, we must use our professional standing and our roles in the communities we serve to remind our fellow citizens – on all sides of the political spectrum – of the critical role of our citizens' right to vote as the very foundation of our democracy and the rule of law in our nation. If we fail to do so, we too will bear responsibility for the erosion of the democratic social contract that binds our nation together.

In the following sections of this report, we briefly summarize the wave of actions in state legislatures, executive chambers and even courts that threaten democracy and the rule of law in our country. We then discuss two major federal legislative proposals — H.R.4 (the "John Lewis Voting Rights Advancement Act" which has recently been revised and passed by the House of

[1] Sheila S. Boston and Stephen Kass, *New York City Bar Association Calls on American Lawyers to Support the Rule of Law*, NEW YORK CITY BAR ASSOCIATION (Dec. 24, 2020), *available at:* https://www.nycbar.org/media-listing/media/detail/calling-american-lawyers-to-action-support-the-rule-of-law (all websites last visited on September 10, 2021).

Representatives as the "John R. Lewis Voting Rights Advancement Act of 2021") and H.R.1/S.1,[2] (the "For the People Act") — aimed at prohibiting and, where necessary, remedying state actions that have the intention or the effect of curtailing the voting rights of any group of citizens. (A modified version of the For the People Act, known as the "Freedom to Vote Act," was introduced in the Senate on September 14, 2021). We also address the importance of Senate action to reduce the paralyzing effect of its current "filibuster" rules so that these, and other, issues of supreme importance to our nation can be debated and acted upon in accordance with fair-minded and reasonable democratic procedures. Finally, we turn to the role of lawyers, bar associations and law schools throughout our country in resisting the erosion of democracy and rebuilding a sense of public trust in the impartiality of our electoral process.

I. STATE LEGISLATION SUPPRESSING VOTING RIGHTS

A. Laws Restricting Voting Access

In the first half of 2021, there has been legislation introduced in nearly every state to restrict access to voting. Some of these provisions are now enshrined in law, and others are bills in various stages of the legislative process.[3]

Specifically, the Legislatures of Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Nevada, Oklahoma, Texas, Utah, and Wyoming have all enacted laws restricting voting in a variety of ways. Some make it more difficult to vote by mail, by, for example: shortening the timeframe to request mail ballots; making it more difficult to automatically receive a mail ballot by culling absentee voting lists or prohibiting officials from sending ballots without affirmative requests for them; making it more challenging for voters to deliver their mail ballots by shortening delivery deadlines, prohibiting voter assistance

[2] The New York City Bar Association has consistently supported efforts towards voter reform in New York State that mirror H.R.1. The Association's Election Law Committee has, for example, long advocated for "no excuse" absentee voting. *See e.g.,* Report on Legislation by the Election Law Committee and Government Ethics and State Affairs Committee (updated and reissued May 2021), *available at:* https://s3.amazonaws.com/documents.nycbar.org/files/2017377-NoExcuseAbsenteeVoting.pdf ("A no-excuse absentee voting system is likely to reduce both poll lines and the administrative burden on election officials, thereby decreasing the total cost of administering elections…. [A "no-excuse" system also] removes the principal basis for challenging absentee ballots, therefore the number of challenged and litigated ballots will decrease"). The Election Law Committee has also advocated for early voting, noting that early voting would also ease the burden placed on election administrators during a high volume Election Day. *See e.g.,* "Support for Early Voting in New York State," (reissued Jan. 2019), *available at:* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-early-voting-in-new-york-state. And the Committee has strongly advocated for New York to permit election day registration. *See e.g.,* Assembly Hearing Testimony, "Improving Opportunities to Vote in New York State" (Nov. 2018), *available at:* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/assembly-hearing-changes-to-voting-in-new-york. Currently, state law provides that a new voter must register twenty-five days in advance of the election (even though the state constitution permits registration up until the tenth day prior to an election). The Committee has noted that these deadlines are restrictive and dissuade potential voters from exercising their rights to vote if they fail to act consistently with these arbitrary and extensive periods of time. Expanded voter registration and enrollment procedures would allow greater participation and have the potential to improve turnout. *See id.*

[3] *See* "Voting Laws Roundup: July 2021," BRENNAN CENTER FOR JUSTICE (July 22, 2021), *available at*: https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021.

in returning ballots, or limiting the availability of drop boxes; imposing stricter signature requirements for mail voting; or otherwise imposing stricter or new voter identification laws for mail voting.[4] The most recent legislature to take such action was Texas, which in a special legislative session in late August imposed highly restrictive requirements that combine many of these measures and together make Texas among the leaders in voter suppression.[5]

Some of the new laws also make in-person voting more difficult by, for example: imposing new or stricter voter identification requirements for voting in person; increasing the likelihood of voter roll purges; eliminating election day registration; limiting the availability of polling places; reducing polling location hours; shortening the early voting period, limiting election officials' discretion to offer additional early voting locations, and standardizing early voting dates and hours, and thus reducing the hours of many locations.[6] Some states have even banned "line warming," whereby food and water are provided to voters waiting in long lines to cast their ballots.[7]

B. Proposed Legislation Moving Through State Legislatures

In many other states, legislation to restrict voting has been introduced and is somewhere in the legislative process, but has not yet been enshrined into law. These states include Michigan, Minnesota, Pennsylvania, Rhode Island, Texas, and Wisconsin. Some of these bills would restrict voting by mail, make it more difficult to obtain absentee ballots, prohibit unsolicited mail ballots, and make it more difficult to obtain assistance in submitting ballots. Other pending bills would impose new or stricter voter identification requirements for voting by mail and/or in person. Some would expand voter purging practices, leading to the risk of improper removal of voters from the

[4] *See id.*

[5] *See* J. David Goodman, Nick Corasaniti, and Reid J. Epstein, "Texas GOP Passes Election Bill, Raising Voting Barriers Even Higher," THE NEW YORK TIMES (Aug. 31, 2021; updated Sept. 7, 2021), *available at:* https://nytimes.com/2021/08/31/us/politics/texas-voting-rights-bill.html.

[6] *See* "Voting Laws Roundup: May 2021," BRENNAN CENTER FOR JUSTICE (May 28, 2021), *available at*: https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.

[7] *See* "2021 Round-Up: Efforts to Restrict Voting in the States," Democracy Docket (May 21, 2021), *available at:* https://www.democracydocket.com/news/2021-round-up-efforts-to-restrict-voting-in-the-states/.

New York State Election Law does not prohibit giving food or water to voters waiting on line, within certain parameters. A provision added by Chapter 414 of the 1992 Session Laws allows an exception for items costing less than $1, as long as there is no identification of the person or entity providing the refreshment:

> § 17-140. Furnishing money or entertainment to induce attendance at polls. Any person who directly or indirectly by himself or through any other person in connection with or in respect of any election during the hours of voting on a day of a general, special or primary election gives or provides, or causes to be given or provided, or shall pay, wholly or in part, for any meat, drink, tobacco, refreshment or provision to or for any person, other than persons who are official representatives of the board of elections or political parties and committees and persons who are engaged as watchers, party representatives or workers assisting the candidate, ***except any such meat, drink, tobacco, refreshment or provision having a retail value of less than one dollar, which is given or provided to any person in a polling place without any identification of the person or entity supplying such provisions***, is guilty of a Class A misdemeanor.

ELN § 17-140 (emphasis added). So, for example, giving voters a cup of water or some pretzels or chips is permissible.

rolls, and others would increase barriers to voter registration. Some order reviews of voter registration databases in counties with large populations, targeting Democratic-leaning cities.[8, 9]

C. Undermining Election Results and the Electoral Process

Numerous states also have enacted laws that potentially undermine the integrity of election results, or that jeopardize the very existence of our electoral process. Some states, including Georgia, Iowa, and Montana, have enacted laws expanding the powers and/or access of poll watchers, which may lead to voter intimidation and harassment at the polls. Other new laws punish local election officials for technical mistakes, by imposing fines, stripping the officials of power, and creating new criminal laws applicable to election officials.[10]

In response to decisions by many election officials made during the Covid pandemic to make voting easier and safer, many states have proposed—and some have enacted—laws limiting executive and local power, for example by disallowing emergency actions without legislative approval, or by prohibiting local officials from any suspension or modification of election law whatsoever. For example, Georgia's recently passed law gives the legislature the ability to choose the members of the state board of elections, including removing the voting power of the elected secretary of state, and giving the board unprecedented power to remove and replace local election officials, and to allow unlimited challenges to voter eligibility that has the potential to significantly chill participation.[11] It now appears that the legislature has ordered a "performance review" of the election board in Fulton County, the first step under the new legislation in replacing election officials with partisans who would be selected by the legislative majority.[12]

Florida's sweeping law potentially gives the governor power to appoint partisans to the elections board.[13] Kansas legislators overrode the governor's veto to pass a law prohibiting the

[8] *See* "Voting Laws Roundup: May 2021," BRENNAN CENTER FOR JUSTICE (May 28, 2021), *available at*: https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021; *see also* Taylor Romine and Rachel Janfaza, "Michigan Senate passes 3 voting bills with new restrictions," CNN (June 16, 2021), *available at:* https://www.cnn.com/2021/06/16/politics/michigan-senate-passes-voting-bills/index.html; Marie Albiges and Jonathan Lai, "GOP's major election overhaul advances in Pa. House as Democrats call it a 'farce'" SPOTLIGHT PA (June 15, 2021), *available at:* https://www.spotlightpa.org/news/2021/06/pa-gop-election-law-overhaul-voter-id-advances-house/.

[9] It should also be noted that many laws expanding voting access have been introduced as well, and that legal challenges to certain of the restrictive voting laws are underway. *See* "Voting Laws Roundup: July 2021," BRENNAN CENTER FOR JUSTICE (July 22, 2021), *available at*: https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021.

[10] *See* "Voting Laws Roundup: May 2021," BRENNAN CENTER FOR JUSTICE (May 28, 2021), *available at*: https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021.

[11] *See* Anthony Izaguirre, "GOP lawmakers seek greater control over local elections," AP NEWS (Mar. 27, 20210, *available at:* https://apnews.com/article/donald-trump-politics-legislature-local-elections-bills-73b331234cec8c966bb2308f6ed1696e.

[12] *See* Nick Corasaniti, "Georgia Republicans edge toward a takeover of elections in Fulton County, the state's largest," THE NEW YORK TIMES (July 29, 2021), *available at:* https://www.nytimes.com/2021/07/29/us/politics/georgia-republicans-elections-fulton-county.html.

[13] *See* Nathaniel Rakich and Elena Mejia, "Where Republicans Have Made It Harder To Vote (So Far)," FIVETHIRTYEIGHT (May 11, 2021), *available at:* https://fivethirtyeight.com/features/republicans-have-made-it-

executive and judicial branches of government from altering election law, giving the legislature exclusive jurisdiction in that area.[14] In Arizona, the law now strips the Secretary of State's legal authority to oversee elections, giving that power instead to the attorney general. The legislation shifts the authority only through January 2023, when new elected officials would take office after the next election.[15] Arkansas has passed a law allowing the state board of elections to decertify elections results if they find violations of voter registration requirements or election laws and even, in "severe" cases, to take over county election operations.[16]

D. Legislative Restrictions on State Courts

Finally, years-long efforts in many states to undermine the independence of state courts reached an unfortunate crescendo in 2021. As of mid-May, 26 states had proposed 93 bills that would politicize or undermine the independence of state courts. At least some of these legislative efforts appeared to be directly responsive to the role of state courts in protecting voting during the 2020 election. For example, eight states' bills were proposed that weakened state courts' power in election-related cases, created new tribunals to hear such cases, or targeted individual judges for decisions they made in election cases. And in 21 states, proposed legislation would impact election cases (among others) by changing how judges are selected, which courts hear cases involving the state, or how judicial decisions get enforced.[17]

In our judgment, these new laws and legislative proposals collectively constitute a clear and present threat to our democracy, striking at the very heart of our nation's Constitutional government and treating the "consent of the governed" as an obstacle to be circumvented, overridden or ignored. They demand a Congressional remedy, as discussed below.

II. THE VOTING RIGHTS ACT OF 1965

When the Voting Rights Act[18] (VRA) was enacted in 1965, our nation appeared to have turned a corner in realizing the promise of democracy for all citizens under the Fourteenth and Fifteenth Amendments to the United States Constitution. Racially discriminatory voting suppressive policies and laws had been found to be "an insidious and pervasive evil" by an overwhelming majority of the Congress,[19] and states and localities which had historically pursued

harder-to-vote-in-11-states-so-far/.

[14] *See id.*

[15] *See* Michael Wines, "In Arizona, G.O.P. Lawmakers Strip Power From a Democrat," THE NEW YORK TIMES (June 25, 2021), *available at:* https://www.nytimes.com/2021/06/25/us/Arizona-Republicans-voting.html.

[16] *See* Michael R. Wickline and Rachel Herzog, "Bills to modify state's laws pertaining to elections pass," ARKANSAS ONLINE (Apr. 2, 2021), *available at:* https://www.arkansasonline.com/news/2021/apr/02/bills-to-modify-laws-pertaining-to-elections-pass/.

[17] *See* Patrick Berry, Alicia Bannon, and Douglas Keith, "Legislative Assaults on State Courts," BRENNAN CENTER FOR JUSTICE (May 19, 2021*), available at:* https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2021.

[18] Pub. L. 89-110, 79 Stat. 437, 52 USC §§ 10101, 10301-10314, 10501-10508, 10701-10702 (1965). Sections of the VRA will be referenced by their section of the act rather than their codification, for simplicity.

[19] The vote after conference committee review was 79-18 in the Senate and 328-74 in the House of Representatives.

them "through unremitting and ingenious defiance of the Constitution" were put on notice that such measures would no longer be tolerated.[20] In particular, under Section 4(b) of the VRA, jurisdictions with significant histories of racially discriminative voting laws and practices were designated "covered jurisdictions"[21] and required, under Section 5 of the VRA, to secure advance federal approval of any changes in their voting laws and policies prior to such laws going into effect. The failure of earlier case-by-case court adjudications to provide meaningful relief was widely recognized. For the next forty years, Congress continued this commitment to expanding and assuring the right to vote for racial and language minorities by reauthorizing the VRA without any substantial dissent, most recently doing so in 2006, with nearly unanimous support.

With demographic changes in the population, and after the election of President Obama in 2008 produced a dramatic increase in minority voter turnout, support for expansion of the right to vote began to wane.[22] In 2013, the United States Supreme Court, in a 5-to-4 ruling in *Shelby County, Alabama v. Holder*,[23] declared that the provisions of Section 4 of the VRA designating the covered jurisdictions subject to the preclearance requirement of Section 5 were unconstitutional. Since *Shelby*, the landscape for protection of minority voting rights has changed enormously. As discussed above, since the November 2020 election, legislation has been introduced in nearly every state to dilute or diminish the ability of vulnerable populations, including racial and language minorities, as well as seniors, youth and the disabled, to cast their ballots.[24] The long-held presumption of the right to vote and the need to protect it seems to be giving way to the pre-1965 notion that voters, especially those of color, must overcome various barriers before being entitled to exercise their franchise.[25]

In addition, in a decision at the end of its recent term, *Brnovich v. Democratic National Committee*,[26] the Supreme Court for the first time considered the application of VRA Section 2, the statute's residual operative provision after *Shelby County*, to two Arizona laws restricting the time, place and manner of voting. The 6-3 ruling dramatically lowered the threshold for restrictive state voting laws to pass muster under the VRA, significantly diminishing the statute's ability to protect minority voters' rights, even in after-the-fact litigation. Section III of this report describes the ways in which these two Supreme Court decisions have substantially weakened the protection afforded by the VRA.

[20] *See South Carolina v Katzenbach*, 383 US 301, 309 (1966).

[21] VRA §4(b).

[22] Remarks of Dale Ho, Esq., "Advocating for the Rule of Law," New York State Bar Association webinar, June 3, 2021.

[23] *Shelby County, Ala. v. Holder*, 570 US 529 (2013).

[24] The Brennan Center for Justice reports that after the unprecedented voter turnout in the November 2020 elections, more than 400 voter suppressive bills were introduced in 49 states during the 2021 legislative session, and that by July 22, 2021, legislators in 18 states had enacted 30 new restrictive voting laws, surpassing the most recent period of significant voter suppressive bills in 2011. *See* "Voting Laws Roundup: July 2021," BRENNAN CENTER FOR JUSTICE (July 22, 2021), *available at*: https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021.

[25] Remarks of Professor Ted Shaw, Esq., "Advocating for the Rule of Law," New York State Bar Association webinar, June 3, 2021.

[26] *Brnovich v. Democratic National Committee,* No. 19-1257, slip op., S.Ct., 2021 WL 2690267 (July 1, 2021).

The VRA was a landmark enactment designed to secure the voting rights guaranteed to all U.S. citizens by the Fourteenth and Fifteenth Amendments adopted after the Civil War. Both had given the Congress the power to enforce their guarantees "by appropriate legislation,"[27] but it took a century before this most momentous and effective voting rights provision was enacted to fulfill the constitutional promise that all Americans would be protected against racial discrimination at the ballot box. As explained by the U.S. Supreme Court in upholding the constitutionality of the VRA one year after its enactment, in considering passage of the act, Congress "explored with great care the problem of racial discrimination in voting. . . ." and concluded that it faced "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[28] Litigation under previous statutes had proven ineffectual in combating racially discriminatory voting laws, as case-by-case court remedies were expensive, time consuming and failed to prevent those jurisdictions bent on denying voting rights from adopting new restrictive requirements not previously covered by any court orders.[29] The Court observed that "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment,"[30] and adopted legal mechanisms which would afford no quarter to those seeking to suppress the vote.

The key provisions of the VRA included Section 2, which applied throughout the nation, prohibiting policies and practices which interfered with minority voters' exercise of the franchise. Under Section 2, any jurisdiction was subject to suit if it enacted any prerequisite to voting "to deny or abridge the right of any citizen of the United States to vote" on account of race, color or membership in a minority language group.[31] Section 2 requires the plaintiff to collect evidence, commence suit, endure litigation delays and carry the ultimate burden of demonstrating that the state or locality had engaged in a pattern or practice which had the intent or result[32] of denying members of a racial or language minority an equal opportunity to participate in the political process in violation of the Fifteenth Amendment.[33] However, the Section 2 process is generally too time-

[27] U.S. Const. Amends. XIV, §5; XV, §2.

[28] *Katzenbach*, 383 US at 308-09.

[29] *Id.* at 314.

[30] *Id.* at 309.

[31] VRA §2.

[32] Originally, the VRA required plaintiffs to prove an invidious *purpose* (discriminatory intent) to obtain relief under Section 2. As part of the 1982 reauthorization, Congress reviewed the history of litigation under that section and amended the VRA to permit plaintiffs to meet their burden by a showing that the jurisdiction's pattern or practice had the *result* of denying equal voting opportunities to racial minorities and minority language groups. *See* https://www.justice.gov/crt/section-2-voting-rights-act#enforce.

[33] VRA §2, as amended in 1982, currently provides in relevant part:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally

consuming and expensive to enable private citizens to successfully commence suit against an offending jurisdiction, and voters can suffer disenfranchisement in multiple voting cycles while a Section 2 suit brought by the Attorney General is pending.

In recognition of these shortcomings in the reactive litigation process which had been made evident by previous federal enactments, Congress also included in enacting the VRA a new proactive preclearance requirement. Certain states and localities having a history of racially discriminatory voting practices would be accorded special coverage under the new law[34] and would have to obtain advance federal approval prior to making any changes in their election laws. This provision was designed "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."[35] Section 5 of the VRA requires any "covered jurisdiction" specified in Section 4(b) that seeks to have its new law survive the preclearance process shall commence a declaratory judgment action before a three-judge federal district court[36] in the District of Columbia and carry the burden of persuading either the court or the United States Department of Justice (DOJ) that the proposed enactments were neither discriminatory in purpose nor in effect.[37] Until the covered jurisdiction does so, its proposed new voting law cannot go into effect.

The adoption of the preclearance provision had dramatic effects on restoring voting rights of racial minorities. As explained by Justice Ginsburg:

> After a century's failure to fulfill the promise of the Fourteenth and Fifteenth Amendments, passage of the VRA finally led to signal

open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

[34] VRA §4(b). The formula established a particular state or subdivision as a "covered jurisdiction" if it was one in which:

> "(1) the Attorney General determines maintained on November 1, 1964, any test or device [for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color], and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964."

[35] *Katzenbach*, 383 US at 328.

[36] *See* 28 USC §2284.

[37] VRA §5. The preclearance provision of Section 5 provides:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ."

> improvement on this front. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965." Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting 7, 21 (B. Grofman & C. Davidson eds. 1992). And in assessing the overall effects of the VRA in 2006, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (hereinafter 2006 Reauthorization), Section 2(b) (1), 120 Stat. 577.[38]

Although great progress had been made in increasing access to the ballot, chiefly through the preclearance process, and the end of poll taxes, literacy tests and similar "first generation" exclusionary devices, "second generation" measures designed to dilute the votes of minorities, such as racial gerrymandering and at-large voting in cities with large Black minority populations, were actively being used by some of the same jurisdictions which had been covered by the Section 4(b) formula in 1965.[39] Accordingly, when the VRA came up for reauthorization by Congress in 1970, 1975, 1982 and 2006, on each occasion it was overwhelmingly approved with bipartisan support, using the same Section 4(b) formula for covered jurisdictions as in the 1965 VRA.[40]

III. THE SUPREME COURT DECISIONS EVISCERATING THE VRA

Despite, or because of, the effectiveness of the VRA in reducing voting suppression aimed at minority voters, opponents continued to seek to dilute that statute's effectiveness by attacking its two principal provisions, the Sections 4 and 5 preclearance requirement and the Section 2 general prohibition on efforts to suppress minority voting. Unfortunately, two decisions by the Supreme Court have done exactly that, as discussed below.

[38] *Shelby County,* 570 US at 562-63 (Ginsburg, J., dissenting).

[39] *Id.*

[40] See note 34, *supra,* for the text of the statutory formula. *See* H. Rep. Comm. on the Judiciary, *Voting Rights Advancement Act of 2019,* H.Rep. 116-317 (Nov. 29, 2019) (2019 House Judiciary Committee Report), at 14. The jurisdictions that were covered changed to some degree over the 48 year history of the VRA, but initially included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 26 counties in North Carolina and one county in Arizona. 30 Fed. Reg. 9897 (August 6, 1965); *Katzenbach,* 383 U.S. at 318.

A. *Shelby County, Ala. v. Holder* (2013)

i. *Majority Opinion*

In 2013, the Supreme Court again had occasion to consider the constitutionality of the preclearance provision of the VRA, along with its formula for determining covered jurisdictions. In *Shelby County*, the Court struck down Section 4 of the VRA as unconstitutional and held that its formula could no longer be used as a basis for subjecting jurisdictions to preclearance.

The majority began its analysis by acknowledging that the Supremacy Clause of the Constitution made congressional enactments "the supreme Law of the Land,"[41] but noted that it gave Congress no power to invalidate state laws. Further, the Tenth Amendment granted states power to regulate their own elections, subject to Congress' power to determine the time and manner of state elections for the U.S. Senate and House of Representatives.[42] The focus of the majority was on the principle of "equal sovereignty," a concept the Court had discussed in its earlier VRA jurisprudence in a case called *Northwest Austin*,[43] and which it had there suggested might raise problems of federalism at some future point under the statute. In general, the Court explained, Congress was not free to differentiate among states in imposing extraordinary and disparate burdens, given the equal sovereignty of the states, absent exceptional conditions.[44] Citing *Northwest Austin*, the Court reiterated that the VRA "imposes current burdens and must be justified by current needs."[45] Continuing, the Court further opined that any departure from equal treatment of all states must be sufficiently related to *current* conditions to pass constitutional muster. It noted that that had been the case when it upheld the VRA's preclearance mechanism the year after its enactment in *Katzenbach,* citing the evidence Congress had found of the use of tests and devices and a low voting rate in the 1964 presidential election, rendering the original coverage formula of Section 4(b) "rational in both practice and theory" as its stringent remedies were directed to the jurisdictions where voting rights discrimination was most flagrant at that time.[46]

The Court then proceeded to cite statistics showing that both voter registration and turnout had improved in the six original covered states in the intervening 50 years, without any commensurate adjustment to the Section 4(b) formula for determining covered jurisdictions. The Court criticized the formula for determining which jurisdictions were covered as based on "decades old data and eradicated practices,"[47] in that the first generation tests and devices at issue in 1965, like literacy tests, had been banned for decades and racial disparity in turnout was no longer evident. Congress's reliance on second-generation barriers to voting, as opposed to the tests and devices which abridged access and the disproportionately low voter turn-out upon which

[41] *Shelby County,* 570 US at 542, *citing* US Const., Art. VI, cl. 2.

[42] US Const., Art I, §4.

[43] *See Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 US 193 (2009).

[44] *Shelby County*, 570 US at 545, *citing Katzenbach*, 383 US at 334.

[45] *Shelby County*, 570 US at 536, *citing Northwest Austin,* 557 US at 203.

[46] *Shelby County*, 570 US at 546, *citing Katzenbach*, 383 US at 330.

[47] *Shelby County*, 570 US at 551.

the original enactment had been based, merely further demonstrated the "irrationality" of continued reliance on the coverage formula of Section 4(b), the Court stated.[48]

The Court made a further substantive distinction between the discriminatory conduct which underlay the original coverage formula and the 2006 record of voting rights abridgement:

> Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the "pervasive," "flagrant," "widespread," and "rampant" discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.[49]

The Court then identified a "more fundamental" problem with the 2006 reauthorization.[50] To invoke its authority to act under the Fourteenth and Fifteenth Amendments, the Court held, "Congress–if it is to divide the States–must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past."[51] In contrast to *Katzenbach*, the Court found, the DOJ in *Shelby County* had not even attempted to demonstrate the continued relevance in practice or in theory of the formula to the current problems. While acknowledging that Congress had compiled an extensive record ("thousands of pages") in its hearings on reauthorization of the VRA in 2006, the Court concluded that it had failed to "shape a coverage formula grounded in current conditions"[52] but instead "reenacted a formula based on 40-year-old facts having no logical relation to the present day."[53] It did not opine on whether the 2006 record would have justified updating the coverage formula.

Citing Congress's failure to update the coverage formula to tie it to current conditions, the Court declared Section 4(b) unconstitutional and no longer available for use in subjecting jurisdictions to preclearance. The Court expressly stated that it was not invalidating the preclearance mechanism of Section 5 (nor the national ban on racial discrimination in voting of Section 2), just the formula on which preclearance would be applied, and invited Congress to draft a new formula, based on current conditions justifying such extraordinary relief.[54]

ii. *Dissenting Opinion*

Justice Ginsburg, writing for the four dissenting justices, noted the Court's recognition since *Katzenbach* that preclearance was crucial to effective enforcement of Fifteenth Amendment rights. Although significant progress had been made, the large numbers of proposed election law changes proposed by covered jurisdictions since 1965 and which had been rejected by the DOJ

[48] *Shelby County*, 570 US at 554.

[49] *Shelby County*, 570 US at 554.

[50] *Shelby County,* 570 US at 554.

[51] *Shelby County*, 570 US at 553.

[52] *Shelby County*, 570 US at 553-54.

[53] *Shelby County*, 570 US at 554.

[54] *Shelby County,* 570 US at 557.

demonstrated the continuing vitality of the original 4(b) formulation.[55] Noting that the House and Senate Judiciary Committees had held a combined 21 hearings and produced 15,000 pages of legislative record, Justice Ginsburg cited "countless examples of flagrant racial discrimination," including systematic evidence of continued intentional racial discrimination throughout covered jurisdictions establishing the continued need for preclearance based upon the original formulas.[56] She explained that second-generation barriers to voting, such as racial gerrymandering, at-large voting, and incorporating majority white suburbs into urban districts with majority black populations, significantly diluted the vote of racial minorities. While these tactics were more subtle than those which Congress had faced in 1965, they produced the same results, and had been recognized by the Court as doing so.[57] Moreover, the majority was ignoring the second-generation barriers which had been implemented in covered jurisdictions as replacements for the now-banished first generation laws which had originally prompted the preclearance regimen.[58]

The dissenters also criticized the majority for failing to consider the substantial deference given to Congress by the Fourteenth and Fifteenth Amendments to enforce voting rights by appropriate legislation, noting that this was the first time the Court had refused to respect Congress' chosen remedies.[59] The dissent argued that the majority had not changed the applicable standard of review from the rational basis test the Court had adopted in *Katzenbach*, i.e., that Congress could use any rational means to advance a legitimate objective, yet failed to apply that test.[60]

The dissent also took issue with the majority's reading of the equal sovereignty doctrine under *Katzenbach*, observing that the Court had there held that the doctrine "'applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared,'"[61] and that the majority's reliance on dictum in *Northwest Austin* to apply the doctrine in a wholly new context was misplaced. Justice Ginsburg also noted other instances in which federal law treats states disproportionately.[62]

Finally, reviewing the deep 2006 record before Congress, the dissent complained that the majority failed to consider that covered jurisdictions, such as Shelby County, had continued to display instances of intentional racial discrimination, showing the need for continued application of the existing preclearance formula.[63]

[55] *Shelby County*, 570 US at 562-63 (Ginsburg, J., dissenting), *citing City of Rome v United States*, 466 US 156, 181 (1980). The dissent noted that DOJ had raised more objections to proposed laws in covered states between 1982 and 2004 (646) than it had between 1965 and 1982 (490), and had blocked 700 voting changes due to discrimination from 1982 - 2006. *Id.* at 571.

[56] *Shelby County*, 570 US at 565 (Ginsburg, J., dissenting).

[57] *Shelby County*, 570 US at 563-64 (Ginsburg, J., dissenting), *citing, inter alia, Reynolds v Sims*, 377 US 533 (1964).

[58] *Shelby County*, 570 US at 592 (Ginsburg, J., dissenting).

[59] *Shelby County*, 570 US at 566, 569 (Ginsburg, J., dissenting).

[60] *Shelby County*, 570 US at 568-69 (Ginsburg, J., dissenting), *citing Katzenbach*, 3853.

[61] *Shelby County*, 570 US at 587 (Ginsburg, J., dissenting), *quoting Katzenbach*, 383 US at 328-29.

[62] *Shelby County*, 570 US at 587-88 (Ginsburg, J., dissenting).

[63] *Shelby County*, 570 US at 585, 591 (Ginsburg, J., dissenting).

B. *Brnovich v Democratic National Committee* (2021)

During the early years after its enactment, VRA Section 2 was infrequently invoked, and only in cases involving claims of voter dilution, generally involving districting.[64] After the Court's decision in *Shelby County,* however, it became the sole remaining operational provision available to protect minority voting rights, although that protection could only become available after the challenged legislation was already in effect. The *Brnovich* case was the Supreme Court's first opportunity to apply Section 2 to state laws involving the time, place and manner of voting.

The case involved a challenge under VRA Section 2 to two aspects of Arizona's voting scheme: the first, its policy of discarding any ballots cast in person on election day at a precinct voting location other than the one to which the voter has been assigned; and the second, its law making it a crime for any person other than a voter's family, household member or caregiver, or a postal worker or elections official, to collect an early ballot on behalf of the voter. Both provisions were challenged on the ground that they had an adverse and disparate effect on the state's American Indian, Hispanic and African-American citizens' ability to vote, in violation of VRA Section 2 and the Fifteenth Amendment. The Court upheld both restrictions, reversing an *en banc* decision of the 9th Circuit Court of Appeals.[65]

i. *Majority Opinion*

Justice Alito, writing for the six-justice majority, preliminarily declared that the Court would not be announcing a test to govern all VRA Section 2 challenges to election rules respecting time, place and manner of voting. Rather, it would identify certain "guideposts" useful for resolution of the controversies then before it.[66]

The Court began its analysis by examining the text of Section 2, as amended in 1982. The "core" requirement found in Section 2(b), it said, was that voting be "equally open" to all voters regardless of race, and that the language further defined violation of the section as occurring "only where 'the political processes leading to nomination or election' are not '*equally open* to participation' by members of the relevant protected group '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[67] While the majority acknowledged that an equal opportunity required a reviewing court to consider to some degree the minority voters' *ability to use* the equally open means, whether the *process* itself was "equally open" was the "touchstone" of the inquiry.[68] Further, it said that "any circumstance" having a bearing on whether the voting process was

[64] *Brnovich*, slip op. at 4, n. 2.

[65] *Democratic National Committee v Hobbs*, 948 F.3d 989 (9th Cir. 2020) (*en banc)*. The Ninth Circuit invalidated both the out-of-precinct policy and the third-party ballot collection rule under the results test of §2, and the ballot collection rule under the section's intent test as well as under the Fifteenth Amendment. *Id.* at 1046.

[66] *Brnovich*, slip op. at 12-13.

[67] *Brnovich,* slip op. at 14, quoting VRA §2(b).

[68] *Brnovich,* slip op. at 15.

"equally open" and afforded "equal opportunity" may be considered in the judicial analysis.[69] The Court adopted a dictionary definition of "opportunity" as "'a combination of circumstances, time, and place suitable or favorable for a particular activity or action.'"[70]

Justice Alito then offered a non-exhaustive list of the types of circumstances which would be appropriate for consideration in time, place and manner inquiries under Section 2: 1) the size of the burden being imposed; 2) the extent to which a rule departs from the standard practice at the time of the 1982 amendment to Section 2(b) and whether the rule has a long pedigree; 3) the extent of the disparate impact on the minority; 4) other opportunities for voting provided by the state's system; and 5) the strength of the state's interest in the rule.[71] Harkening back to the Court's first case construing the amended VRA Section 2, *Thornburg v Gingles,*[72] and its statement that "[t]he essence of a Section 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities" for minority and non-minority citizens to elect their chosen representatives, the Court discounted the relevance of the test factors announced in that vote dilution case. Those factors were derived from the Senate's contemporaneous report during the reauthorization process (known as the Senate or *Gingles* factors) and included historical discrimination and its persisting effects. The *Brnovich* majority found, however, that in cases involving time, place and manner restrictions, those effects were "much less direct" than the five it had just listed.[73] The opinion went on to reject application of the disparate impact models employed in Title VII and Fair Housing Act cases, saying that a showing of necessity would be inappropriate in the voting rights context because it would invalidate many "neutral" voting rules having long pedigrees and would transfer election regulation from the states to the federal courts.[74] It concluded that the text of Section 2 does not require the state to demonstrate either an absolute necessity for the provision or the absence of any less restrictive alternative.[75] The Court noted that the 1982 amendments to Section 2 focused on "blatant direct impediments to voting," and not "every facially neutral time, place and manner voting rule in existence," as it characterized the dissent as doing.[76] No mention was made of Congress' broad power to regulate time, place and manner of elections under the Elections Clause of the Constitution.[77]

[69] *Brnovich,* slip op. at 16.

[70] *Brnovich,* slip op. at 15 (citation omitted).

[71] *Brnovich,* slip op. at 15-19.

[72] *Thornburg v Gingles*, 478 US 30 (1986).

[73] *Brnovich,* slip op. at 20, citing *Gingles,* 478 US at 36-37.

[74] *Brnovich,* slip op. at 20-21.

[75] *Brnovich,* slip op. at 29.

[76] *Brnovich,* slip op. at 23, n. 15, quoting S. Rep. 97-417, at 10 (1982).

[77] U.S. Const., art I, §4, provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."

Analyzing the Arizona rules through its five-factored lens, the *Brnovich* Court held that neither Arizona policy violated VRA Section 2. Most notably, the majority upheld the state's out-of-precinct voting policy because even though it made it "marginally harder" for racial minorities in Arizona to find their assigned voting location and avoid having their entire ballot discarded, the state offered other "easy" ways to vote, and found the resulting disparate impact on minority voters to be small.[78] It noted that out-of-precinct rules had a long pedigree and rejecting ballots cast at the wrong location was a penalty in wide use nationally. It rejected the view of the Court of Appeals that the state had failed to show why the less restrictive alternative of counting the national and statewide contests on ballots cast in the wrong location would be detrimental to election integrity, opting instead to credit the state's claims that the rule reduced waiting time at the polls, affording closer polling locations to voters' homes, and reduced confusion by insuring voters only received ballots with contests on which they were eligible to vote.[79]

As for the third-party collection provision, the Court criticized the plaintiffs for failing to offer statistically supported evidence as to how much more likely minorities were to use third parties to return their ballots than were non-minorities, discounting both the anecdotal testimony presented at trial and the district court's observations about an actual disparate impact.[80] The Court again noted that Arizonans have a number of ways to submit their ballots early. With respect to the state's justifications for the measure, the majority criticized the Ninth Circuit's finding that the state had failed to meet its burden because it had offered no evidence of early ballot fraud by third-party collectors in Arizona, and found sufficient unrelated reporting by a federal election reform commission more than a decade earlier that absentee ballot collection *could* be susceptible to fraud and voter intimidation, and opined that the state was not obligated to wait for evidence of fraud before taking action to prevent it.[81] This analysis, the majority found, demonstrated that Arizona had shown a "compelling state interest" in enactment of the ballot collection measure, notwithstanding its disparate impact, which the majority characterized as "modest."[82]

ii. *Dissenting Opinion*

Justice Kagan, writing for the three dissenters, began by referencing the Court's observation in *Katzenbach* that the VRA was enacted "[b]ecause States and localities continually 'contriv[ed] new rules,' mostly neutral on their face but discriminatory in operation, to keep minority voters from the polls. . .[and] [b]ecause 'Congress had reason to suppose' that States would 'try similar maneuvers in the future' [by] 'pour[ing] old poison into new bottles' to suppress minority votes."[83] Much of the VRA's success in reducing discrimination was attributable to its flexibility in meeting new forms of discrimination, which Justice Kagan described as "whack-a-mole," by use of the preclearance process of Section 5.[84] She described the crudest and most direct

[78] *Brnovich,* slip op. at 27-28.

[79] *Brnovich,* slip op. at 29.

[80] *Brnovich,* slip op. at 31-32 & n. 19.

[81] *Brnovich,* slip op. at 32-34.

[82] *Brnovich,* slip op. at 34.

[83] *Brnovich,* dissenting op. at 2 (Kagan, J., dissenting).

[84] *Brnovich,* dissenting op. at 8 (Kagan, J., dissenting).

attempts at abridging minority voting rights in terms of the first generation literacy tests and poll taxes, which were eliminated in 1965. Since then, the second generation efforts of dilution of minority votes through discriminatory districting were before Congress in 1982 when it amended the standard to employ a results test. She noted that subsequent to *Shelby County*, voting discrimination has actually worsened, with the emergence of a new third generation of voter suppression laws.[85]

Justice Kagan explained the gravity of the majority's ruling in her own words:

> What is tragic here is that the Court has (yet again) rewritten–in order to weaken–a statute that stands as a monument to America's greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about "the end of discrimination in voting."[86]

The dissent recounted how in the first five years after enactment of the VRA, almost as many Blacks registered to vote in six Southern states as had done so in the entire century between the Fifteenth Amendment and the VRA.[87] And during the period from 1965 to 2006, using the Section 5 preclearance process, the Department of Justice stopped almost 1200 voting laws in covered jurisdictions from taking effect.[88] It was the success of Section 5 in blocking discriminatory laws from going into effect which enabled the majority in *Shelby County* to conclude that the Section 4 formulations for covered jurisdictions were no longer necessary, the dissenters opined.

Because of the preclearance regimen of the VRA, Justice Kagan observed, Section 2 was never meant to be the primary source of remediation from discriminatory voting laws. Instead it was designed merely as a backstop. After the *Shelby County* decision, however, it became the sole statutory means for obtaining redress.

Pointing to the 1982 Senate Report, Justice Kagan focused on the broad intent of the Congress in its amendment of Section 2 to bar all "'discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups.'"[89] As the equally broad language of Section 2 demonstrated, this broad mandate required the Court to give broad interpretation to the scope of the enactment. *Any* "voting qualification or prerequisite to voting or standard, practice, or procedure" is potentially covered by the section; when it "results" in a "denial or abridgement" of the right to vote based on race, meaning that a complete elimination of the franchise need not be found; regardless of the intent of the state actors; when, "based on the totality of the circumstances," the state's electoral system is "not equally open" to members of a certain racial group in terms of them

[85] *Brnovich*, dissenting op. at 7 (Kagan, J., dissenting).

[86] *Brnovich*, dissenting op. at 3 (Kagan, J., dissenting).

[87] *Brnovich*, dissenting op. at 7.

[88] *Brnovich*, dissenting op. at 8, citing *Shelby County*, 570 US at 571 (Ginsburg, J., dissenting).

[89] *Brnovich*, dissenting op. at 12, quoting S. Rep. 97-417, at 28.

having "less opportunity than other members of the electorate to participate in the political process."[90] The Senate Report had cautioned that a determination of whether the voting process is "equally open" necessarily """depends upon a searching practical evaluation of the past and present reality""" in the jurisdiction.[91] That was due to the finding by Congress at that time that "'since the adoption of the Voting Rights Act, [some] jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength.'"[92] Both the law and background conditions were encompassed in the totality of the circumstances test, reflecting the Supreme Court's earlier recognition both of the "'demonstrated ingenuity of state and local governments in hobbling minority voting power'"[93] and the obligation of the reviewing court to weigh the state's need for the challenged policy.[94]

Because of the ease with which states could advance facially racially neutral justifications for laws which, under the circumstances present in the jurisdiction, rendered the opportunity for minority participation in the electoral process less equal, and based upon their review of the legislative history and the Supreme Court's own jurisprudence, the dissenters concluded that a jurisdiction defending a challenged provision which threatens abridgement of minority voting rights must show that it is necessary to achieve its asserted goal. The plaintiffs would then have to carry the ultimate burden of persuasion to show that a less discriminatory law would be equally effective in achieving the state's purpose.[95] Put otherwise, Section 2 directs courts to strike down voting rules which unnecessarily create inequalities of access to the political process.[96] Because the majority had instead construed Section 2 to apply only to laws that "block or seriously hinder voting," it had effectively departed from the drafters' intent, from the statutory language and from the Supreme Court's own jurisprudence, creating a new standard of "serious abridgement."[97]

The dissenters then addressed each of the five factors newly established by the majority. They explained that "mere inconvenience" even for usual burdens of voting was objectively impossible to determine and not a part of the inquiry required by Section 2; that the existence of "multiple ways to vote" was irrelevant, if the minority had a lesser opportunity to participate even in a single means of voting; that the rules in place in 1982 were not a meaningful measure of equal openness, given that Section 2 was meant particularly to disrupt the status quo; and that the state's interest in the restriction had to be judged by a means-ends test, such that it had to be strictly

[90] *Brnovich*, dissenting op. at 13-15, quoting §2.

[91] *Brnovich*, dissenting op. at 26, quoting *Johnson v De Grandy*, 512 US 997, 1018 (1994), quoting *White v Regester*, 412 US 755, 766 (1973), quoting S. Rep. 97-417, at 30.

[92] *Johnson v De Grandy*, 512 US at 1018, quoting quoting S. Rep. 97-417, at 10 (discussing §5).

[93] *Brnovich*, dissenting op. at 16 (Kagan, J., dissenting), quoting *Johnson v De Grandy*, 512 US at 1018.

[94] *Brnovich*, dissenting op. at 17 (Kagan, J., dissenting), citing *Houston Lawyers' Ass'n v Attorney General of Texas*, 501 US 419, 427 (1991).

[95] *Brnovich*, dissenting op. (Kagan, J., dissenting), at 18 & n. 5.

[96] *Brnovich*, dissenting op. (Kagan, J., dissenting), at 20.

[97] *Brnovich*, dissenting op. (Kagan, J., dissenting), at 21 & n. 7 (internal citation omitted).

necessary to effectuate the state's stated interest, as is the case in other anti-discrimination regimes such as housing, employment and banking.[98]

The dissent reviewed the two Arizona policies before the Court and the majority's rationales for upholding them and found them violative of Section 2, in light of the evidence before the district court on the actual disparate impact of the provisions in diminishing voting opportunity for minority voters, given conditions on the ground. The majority had failed to conduct the searching practical evaluation of past and present reality as required under its own *Gingles* and *Regester* precedent in the totality of the circumstances test, adopted by the Senate and used by the Court of Appeals.[99] Justice Kagan noted particularly that the state had not shown the necessity of the discriminatory measures, nor pursued less restrictive alternatives to meet its stated goals.[100]

Rejecting the majority's denigration of the federal government's responsibility to protect voters against voting laws that are racially discriminatory *in practice*, the dissent explained that the VRA was intended to replace local rules that needlessly made it harder for minorities to vote. This, said the dissent, was not an issue of states' rights versus the federal government, but rather, the right guaranteed to every American by the Fifteenth Amendment and the VRA to vote equally.[101]

IV. CONGRESSIONAL RESPONSE TO SUPREME COURT VRA DECISIONS

There can be little doubt that Congress has the power to regulate federal elections. Specifically, the Elections Clause of the Constitution confers upon Congress very broad powers to regulate federal elections. That Clause provides as follows:

> The Times, Places and Manner of holding elections for Senators, and representatives, shall be prescribed in each [state] by the Legislature thereof, but the Congress may at times by Law make or alter such Regulations, except as Places of chusing [sic] Senators.

Although the text of the Elections Clause expressly refers to regulation of Congressional elections, it has been read expansively to include regulation of presidential elections as well.[102] The U.S. Supreme Court has also stated that Congress has "ultimate supervisory power" over federal elections.[103] Moreover, the Supreme Court has repeatedly upheld Congress' power to

[98] *Brnovich*, dissenting op. (Kagan, J., dissenting), at 22-25.

[99] *Brnovich*, dissenting op. (Kagan, J., dissenting), at 33, citing *Johnson v DeGandy*, 512 US 997, 1018 (1994).

[100] Justice Kagan noted that Arizona had originally enacted a ballot collection ban prior to *Shelby County*, but the DOJ in a §5 preclearance review had expressed skepticism about it and Arizona repealed the measure. Once *Shelby County* was decided, the state reenacted a ballot collection ban, ignoring the concerns raised by the DOJ in the preclearance process. *Brnovich*, dissenting op. (Kagan, J., dissenting), at 37.

[101] *Brnovich*, dissenting op. (Kagan, J., dissenting), at 28.

[102] Suman Malempati, *The Elections Clause Obligates Congress to Enact a Federal Plan to Secure U.S. Elections Against Foreign Cyberattacks*, 70 Emory L. J. 417 (2020). Available at: https://scholarlycommons.law.emory.edu/elj/vol70/iss2/4.

[103] *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970).

enforce its regulatory powers pursuant to Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, both of which grant Congress the power to enforce those amendments "by appropriate legislation."

This section of our report discusses how Congress can use this power to address both the Supreme Court decisions in *Shelby County* and *Brnovich* and the multiple new forms of voter suppression described in section I above.

A. Committee Hearings and Reports

Congress has taken seriously the need to respond to the Supreme Court's *Shelby County* admonition that the equal sovereignty principle required congressional enactments which did not treat every state similarly to be sufficiently related to current conditions to meet constitutional standards. Multiple subcommittees began inquiries early in the 116th Congress to investigate the status of minority voting and administration of elections subsequent to the *Shelby County* decision.[104] Together they received thousands of pages of testimony, documents from more than 126 sources and reports from government agencies, non-governmental organizations and private citizens, including state and local governments, tribal officials, attorneys, scholars and members of Congress.[105] The most wide ranging examination, however, was undertaken by the House Committee on Administration, which, following the 2018 Congressional elections, reconstituted its Subcommittee on Elections (Elections Subcommittee) after its dissolution six years earlier. Its new chair was then-Representative Marcia L. Fudge, who launched an intensive ten-month effort to gather the contemporaneous evidence that the *Shelby County* majority had found untethered to the 2006 reenactment of the Section 4(b) coverage scheme.[106]

In order to collect the required evidence, the Elections Subcommittee's investigation held hearings in Alabama, Arizona, Florida, Georgia, North Carolina, North Dakota, Ohio and Washington, D.C., as well as an inaugural listening session in Texas. The Subcommittee found widespread instances of persistent discrimination in voting law changes enacted subsequent to *Shelby County*, including the purging of voter registration rolls, reduction in early voting opportunities, polling place closures and movement, voter identification requirements, lack of language access, discriminatory gerrymandering, and disproportionate targeting and discriminatory impact on Native Americans living in Indian country.[107] Numerous witnesses testified as to the especially pernicious effect of the voting restrictive laws in impoverished

[104] The House Committee on the Judiciary and its Subcommittee on the Constitution, Civil Rights and Civil Liberties held hearings to investigate barriers to voting and voting discrimination and to consider options for remedial legislation. *See* Hearings Before the H. Comm. on the Judiciary and Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 116th Cong. (2019), cited in 2019 House Judiciary Rep., at 13 & n. 13. The House Committee on Oversight also examined the issue. *See* Protecting the Right to Vote: Best and Worst Practices: Hearing Before the Subcomm. on Civil Rights and Civil Liberties of the H. Comm. on Oversight and Reform, 116th Cong. (May 1, 2019). 2019 House Judiciary Comm. Report at 13, n. 14.

[105] 2019 House Judiciary Comm. Report at 13 & nn. 15 & 16.

[106] *See* 2019 House Judiciary Comm. Report at 11ff, and Appendix, 113ff (Comm. on House Administration, Subcomm. on Elections, *Report on Voting Rights and Election Administration in the United States of America* (Nov. 2019) (Fudge Report)).

[107] 2019 House Judiciary Comm. Report at 12, 113 & 114; Fudge Report at 2-3.

communities having inadequate public transportation. The Subcommittee heard testimony as to how VRA Section 2 was a poor substitute for the preclearance process, requiring a lengthy and expensive process not occurring until after the implementation of discriminatory legislation and placing the burden on the federal government and affected voters to show discriminatory impact (the test before the Supreme Court's *Brnovich* decision making it even harder to assert a Section 2 claim). In the absence of the Section 5 preclearance process, it was virtually impossible to be aware of, much less bring a challenge to, every discriminatory voting law.[108] The Fudge Report concluded that discriminatory voting policies were proliferating after *Shelby County*, and that renewed and robust federal oversight was required to remedy the situation.[109]

In addition to the Elections Subcommittee, the House Judiciary Committee reviewed the records and findings of the subcommittees and adopted the Fudge Report as part of its own record. In its report in November 2019 on H.R.4, the Judiciary Committee concluded that Section 2 (even prior to *Brnovich*) was ill-equipped to stem the tide of discriminatory legislation continuing to be enacted around the country and that Congress was required to accept the Supreme Court's invitation to create a new coverage formulation to be utilized in the Section 5 preclearance process. Doing so would permit the VRA "to operate as intended" by "stop[ping] discriminatory measures in certain jurisdictions with a recent history of discrimination *before* they can be enacted, as Congress had intended in passing the VRA."[110] The Judiciary Committee also found that "in the time leading up to the VRA's reenactment in 2006 and continuing into the present, discriminatory voting measures have been highly concentrated in jurisdictions that were previously subject to preclearance under Section 4(b)."[111] Citing the reports issued during 2019 by the three 116th Congress subcommittees, the Judiciary Committee found that as of the issuance of its own report in November 2019, 23 states had enacted restrictive voting laws in the wake of *Shelby County* having eliminated the Section 5 preclearance requirement.[112]

Addressing the report of the Committee on Administration's Subcommittee on Elections, the Judiciary Committee stated:

> The Subcommittee on Elections found an array of tactics in place used to suppress the votes of targeted communities and barriers that impede the free exercise of the right to vote. In the course of its investigation, the Subcommittee on Elections collected over 3,000 pages of wide-ranging testimony and evidence. Specifically, the Subcommittee on Elections found persistent discrimination in voting law changes such as purging voter registration rolls, cut backs to early voting, polling place closures and movement, voter ID requirements, implementation of exact match and signature match requirements, lack of language access and assistance, and

[108] Fudge Report, *passim.*

[109] 2019 House Judiciary Comm. Report at 241; Fudge Report at 130.

[110] 2019 House Judiciary Comm. Report at 52 (emphasis in original).

[111] 2019 House Judiciary Comm. Report at 52.

[112] 2019 House Judiciary Comm. Report at 29 & n. 118.

> discriminatory gerrymandering of legislative districts at the state, local, and federal level.[113]

The Judiciary Committee Report quoted at length from testimony given by Kristen Clarke, then the president and executive director of the Lawyers' Committee for Civil Rights Under Law and now Assistant Attorney General for Civil Rights of the United States, before the Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Civil Liberties, that her organization had received tens of thousands of discrimination complaints from voters since *Shelby County*. Many of the provisions complained of revealed systemic discrimination, Clarke testified, such as the consolidation of polling places, curtailment of early voting hours, purging of minority voters under the pretext of list maintenance, strict voter photo ID requirements and abuse of signature match rules to reject absentee ballots, and noted the preponderance of complaints came from jurisdictions previously subject to the preclearance requirement.[114] Clarke also spoke of the increasing recalcitrance and hostility of election officials who were instituting discriminatory voting changes with impunity. She noted that between 2000 and 2010, the DOJ had received between 4500 and 5500 preclearance submissions each year, and concluded that the preclearance process had a deterrent effect which had now been lost.[115]

The Judiciary Committee Report explained that without the preclearance remedy, states would continue to enact discriminatory, although facially neutral, voting laws and succeed in disenfranchising African-American citizens even while VRA Section 2 lawsuits against them were pending. Upon losing the court battle, these states would "simply switch to some other method of voter suppression," continuing the exclusion, such that minority voters would be continuously shut out of voting, even upon winning every single Section 2 suit they brought[116]—precisely the "whack-a-mole" strategy described by Justice Kagan in *Brnovich*.

The Judiciary Committee concluded that the testimony before the subcommittees showed continuing discrimination which was "highly concentrated" in jurisdictions which had previously been subject to preclearance review and which in some cases revealed intentional discrimination of a type which had previously been blocked by the Section 5 process.[117] It recommended passage of H.R. 4, with a new coverage formulation enabling a resumption of the preclearance remedy, as a result.

B. Restoring Preclearance in "Covered Jurisdictions"[118]

Recalling that it had held a dozen hearings, heard from 39 witnesses and gathered more than 12,000 pages of testimony and documentary evidence from attorneys, election officials, the

[113] 2019 House Judiciary Comm. Report at 12, citing Hearings Before the Subcomm. on Elections of the H. Comm. on House Admin. 116th Cong. (2019).

[114] 2019 House Judiciary Comm. Report at 30.

[115] 2019 House Judiciary Comm. Report at 30.

[116] 2019 House Judiciary Comm. Report at 14.

[117] 2019 House Judiciary Comm. Report at 52.

[118] 2019 House Judiciary Comm. Report at 10.

DOJ and various NGOs, the Committee explained that the provisions of H.R. 4 would build upon that record and restore the enforcement mechanisms of Sections 4(b) and 5 of the VRA.[119]

After the passage of H.R. 4 in the House, the bill was introduced in the Senate as S. 4263 and entitled the John Lewis Voting Rights Advancement Act ("JLVRA") [120] after the civil rights leader and congressional representative's death in July 2020. Its key provisions, as of June 2021, are as follows:

First, the JLVRA would create a new coverage formula under section 4(b) of the VRA to determine which states and localities have a recent historic pattern of discrimination based upon current evidence of voting discrimination, as required by *Shelby County.*[121] This practice-based preclearance requirement would apply to any jurisdiction meeting any of the following criteria:

a) any state having had 15 or more voting rights violations within the previous 25 years;

b) any state which has had 10 or more voting rights violations, at least one of which was committed by the state itself, as opposed to a political subdivision of the state, within the preceding 25 years; or

c) any subdivision of a state which has had three or more voting rights violations within the last 25 years.[122]

In general, the coverage formula would subject a jurisdiction having repeated violations to preclearance procedures for a period of ten years.[123] The 25-year period would continue to roll forward, ensuring that the covered jurisdiction designation keeps pace with current conditions. The bill also establishes a "bail-out" procedure enabling a covered jurisdiction to demonstrate that preclearance is no longer necessary, either by obtaining a declaratory judgment in the United States District Court for the District of Columbia establishing that the covered practice would not have the purpose or effect of denying or abridging the right to vote on account of race, color or minority language group membership; or by submitting the practice to the Attorney General and receiving either an affirmation that no objection will be made to the practice or a failure to respond after 60 days.[124]

[119] 2019 House Judiciary Comm. Report at 10.

[120] *See* https://www.congress.gov/bill/116th-congress/senate-bill/4263, introduced by Senator Patrick Leahy. All 46 Democrats in the Senate signed on as co-sponsors, as did Senator Lisa Murkowski. The House renamed their bill the John R. Lewis Voting Rights Act of 2020 shortly after Representative Lewis' death. *See* https://www.congress.gov/bill/116th-congress/house-concurrent-resolution/107. It will here be referenced as the JLVRA.

[121] References will be made to the sections of the VRA as amended by H.R. 4/S. 4263, as sections of the JLVRA. JLVRA §4(b); 2019 House Judiciary Comm. Report at 11.

[122] JLVRA §4(b)(1)(A),(B).

[123] JLVRA §4(b)(2)(A).

[124] JLVRA §4(b)(2)(B).

We believe these amended Section 4(b) procedures should satisfy the requirements of *Shelby County*, as they tie the preclearance requirement to the recent, extensively documented incidence of discrimination in objective terms, and also expire after ten years. States and subdivisions can bail out of them if they are not warranted. Nor does there appear to be any basis to object to them on the ground of the equal state sovereignty doctrine, even as set forth by the majority in *Shelby County.*[125]The covered jurisdictions would be included based on their recent conduct, not conduct from the distant past or the views of an allegedly biased federal decision maker.

Second, the bill adds a new Section 4A which would expand the types of covered practices/election law changes requiring federal preclearance under Section 5, pertaining to *all* jurisdictions adopting any such laws, in some instances depending upon the percentage of the population in the jurisdiction considered a racial minority. These new covered election practices would include the following second and third generation discriminatory policies:

1) changes in the manner of election of seats, to add seats elected at large, or to convert seats elected from a single member district to one or more at-large seats or seats from a multi-member district (in diverse districts as defined by the statute);[126]

2) changes to jurisdiction boundaries, which within a year reduces by 3% or more the proportion of voting age population which is from a particular racial or language minority group (in diverse districts as defined by the statute);[127]

3) changes to boundaries of election districts through redistricting (in diverse districts as defined by the statute);[128]

4) changes in documentation or qualifications to vote which are more stringent than existing federal or state law;[129]

5) changes to multilingual voting materials which are not similarly made in English materials;[130]

6) changes which reduce or relocate polling locations (in diverse districts as defined by the statute).[131]

[125] Whether the doctrine has future viability remains an open question. Justice Kagan, dissenting in *Brnovich*, noted that the doctrine had previously been rejected and has not been cited by the Court since *Shelby County. Brnovich,* dissenting op., at 8-9, citing *Shelby County* (Ginsburg, J., dissenting), 570 US at 587-88.

[126] JLVRA §4A(b)(1).

[127] JLVRA §4A(b)(2).

[128] JLVRA §4A(b)(3).4A

[129] JLVRA §4A(b)(4).

[130] JLVRA §4A(b)(5).

[131] JLVRA §4A(b)(6).

Addressing criticism from the Supreme Court, the bill includes in the new Section 4A a specific definition of "denying or abridging the right to vote" for preclearance and bail-out purposes as meaning "[a]ny covered practice described in subsection (b) which will have the effect of diminishing the ability of any citizens to vote, on account of race, color or membership in a language minority group . . . ."[132] Further, as to the covered practices in Section 4A, the bill provides for enforcement by the Attorney General or any aggrieved citizen to secure compliance with its terms before a three-judge federal court in the District of Columbia, and for the possibility of securing immediate injunctive relief against such violations.[133]

As the preclearance procedures of Section 4A would apply to all states equally, the equal sovereignty doctrine relied upon by the *Shelby County* majority would not apply to them. Further, the 2019 House Judiciary Committee Report and the Fudge Report document numerous instances of such second and third generation enactments and their discriminatory effect.

Other protections provided by the JLVRA include a broadening of the scope of review and retention of jurisdiction by federal courts and the DOJ to include violations of the statute and other federal voting rights laws, in addition to violations of the Fourteenth and Fifteenth Amendments.[134] Another is an expansion of the situations in which the DOJ may send federal observers to jurisdictions where necessary in the discretion of the Attorney General to prevent a substantial risk of discrimination at the polls in order to protect voters' rights under the Fourteenth or Fifteenth Amendments, the JLVRA or any other provision of federal law.[135] A further notable change expands transparency by the addition of a public notice requirement of any voting law changes not in effect 180 days prior to the next federal election.[136]

On August 6, 2021, on the 56th anniversary of the VRA being signed into law, the Subcommittee on Elections released its report of the contemporaneous evidence it had gathered during its five investigatory hearings held during the 117th Congress probing instances of voter suppression and election administration practices resulting in a discriminatory impact on minority voters' access to the ballot. In its report, Chair G.K. Butterfield and the Subcommittee identified six types of voting and election administration practices which demonstrated evidence of discriminatory impact: 1) voter list maintenance and discriminatory voter purges; 2) voter identification and documentary proof of citizenship requirements; 3) lack of access to multilingual voting materials and language assistance; 4) polling place closures, consolidations, reductions and long wait times; 5) restrictions on additional opportunities to vote; and 6) changes to methods of election, jurisdictional boundaries and redistricting practices.[137] In discussing each of these areas,

[132] JLVRA §4A(c).

[133] JLVRA §4A(d).

[134] JLVRA §3(a,c).

[135] JLVRA §8(a)(2)(B).

[136] JLVRA §6.

[137] Comm. on House Administration, Subcomm. on Elections, *Report on Voting in America: Ensuring Free and Fair Access to the Ballot* (July 2021) (Butterfield Report) *available at:* https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf.

the Butterfield Report detailed how the specific practices identified currently impose a disproportionate and discriminatory impact on minority voters, providing the evidentiary basis required by *Shelby County* for a revised Section 4(b) preclearance formula in the JLVRA, now entitled the John R. Lewis Voting Rights Advancement Act.[138] Commenting on the flood of election laws enacted since *Shelby County* restricting voting opportunities on the ground of election integrity, the Butterfield Report observed:

> The increase in voter turnout in both the 2018 and 2020 elections has not been met with celebrations in statehouses across the country, but has been met with backlash and false claims of fraud—claims that are being used to justify voter suppression and the passage of laws that will disenfranchise minority voters. Investigations have repeatedly found no evidence of widespread fraud in American elections. Fraud in American elections is vanishingly rare.[139]

The Subcommittee reviewed numerous state election law changes since *Shelby County* and concluded that the barriers faced by minority voters and identified in the Fudge Report did not subside after the 2020 elections, and in some instances were actually exacerbated.[140] Indeed, the Subcommittee found evidence of discriminatory purpose as well as effect in many of the new laws, and noted that many election law changes after *Shelby County* occurred in states which had previously been designated covered jurisdictions due to their long history of racial discrimination in voting, and involved measures which had earlier been rejected through the VRA Section 5 preclearance process.[141] The Butterfield Report concluded that congressional action to restore preclearance was imperative.[142]

Protection from racially discriminatory voting laws requires, in our judgment, reinstatement of a preclearance mechanism at least as effective as Sections 4(b) and 5 of the VRA prior to the *Shelby County* decision. The record amassed by the House Judiciary Committee and by the House Committee on Administration Subcommittee on Elections in both 2021 and 2019 make clear that the numerous second and third generation restrictive voting laws being adopted in many jurisdictions, including in a significant number of states previously designated as covered jurisdictions subject to preclearance procedures, will diminish the franchise for many minority voters.[143] Only by restoring preclearance through an updated Section 4(b), and extending practice-based preclearance as to the new covered practices in all jurisdictions, will Congress be effective in addressing the continuing barriers it has documented since the *Shelby County* decision.

[138] Butterfield Report, *passim*.

[139] Butterfield Report, at 8-9.

[140] Butterfield Report, at 23.

[141] Butterfield Report, at 24.

[142] Butterfield Report, at 124.

[143] *See* note 8, *supra*; *see* 2019 House Judiciary Comm. Report, *passim*, and Fudge Report, *passim*; *see also* Section I of this report, *supra*.

Importantly, the JLVRA takes up the Supreme Court's invitation to create a contemporary coverage formula for preclearance which satisfies the requirements set in *Shelby County*. Using that roadmap, the JLVRA targets contemporaneous discrimination by states having poor records over the preceding 25 years, and does so on a rolling basis, so that the 25-year period continues to move forward with time. Where a formerly errant state improves its record, it can be relieved (bailed out) of the burden of being included among the Section 4(b) covered jurisdictions. To the extent the equal state sovereignty doctrine retains viability after *Shelby County*, we conclude the JLVRA satisfies its requirements.

C. Equal Openness After *Brnovich*

If Section 2 is to retain any vitality after the Supreme Court's ruling in *Brnovich*, Congress must amend that section of the statute as well to clarify the meaning of "equal openness" and "less opportunity to participate" in the electoral process. The majority's conclusion was that the disparate impact of the Arizona policies in question was too "small" to warrant invalidating laws which admittedly discriminated. The dissent urged that *any* impact which discriminated against a minority group's ability to have equal access to any of the voting methods provided was a disparate impact and fatal to the provision's survival under the statute and the Court's precedential jurisprudence.

One approach to addressing the equal openness/less opportunity issue is the Inclusive Elections Act, introduced by representatives Mondaire Jones of New York and Ruben Gallego of Arizona. That bill would restore the protections of VRA Section 2 by requiring that in making the determination of whether members of a protected minority have less opportunity to participate in the political process, a reviewing court must consider whether "the challenged standard, practice or procedure imposes a disparate burden" on members of a protected class, and whether "the disparate burden is in part caused by or related to social and historical conditions that produce or produced discrimination against members of the protected class."[144] This bill would mark a return to the standards of the Court's prior totality of the circumstances jurisprudence (*Gingles, Regester* and *DeGandy*) and prevent adoption of the *Brnovich* rationale of a too "modest" disparate impact being non-actionable under the JLVRA. Crucially, it would render the five "guideposts" announced in Brnovich for evaluating the impact of challenged laws obsolete.

Additionally, Congress may also wish to consider that the *Brnovich* majority's elevation of the rights of the state to regulate its own election over the rights of its citizens to vote is contrary to existing Supreme Court jurisprudence under the *Anderson-Burdick* doctrine.[145] In the context of First and Fourteenth Amendment challenges to abridgement of voting rights, that doctrine

[144] Inclusive Elections Act of 2021, H.R. 4298, introduced July 1, 2021.

[145] *Anderson v Celebrezze*, 460 US 780 (1983); *Burdick v Takushi*, 504 US 428 (1992). *Anderson* involved a challenge by former Congressmember John Anderson to get listed on the presidential ballot in Ohio, where state law required candidates to file in March for the November election. The Supreme Court found the state law unduly burdensome. *Burdick* presented the validity of Hawaii's preclusion of write-in votes. The Court sustained the law, due to candidates' ability to compete in Hawaii's open primary process. *See* Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and how to Treat and Cure Them*, ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY, Vol. 19, No. 3 (Sept. 17, 2020), *available at:* https://www.liebertpub.com/doi/10.1089/elj.2020.0646.

weighs the burdens imposed on voters' rights against the asserted state interests, imposing higher levels of judicial scrutiny and requiring a greater showing by the state to justify its voting procedures as the burden on voting rights becomes more severe. The Supreme Court has never offered any clear approach to the application of this standard, however.[146] Congress should address the judicial review standard under the forthcoming JLVRA, taking lessons from the *Anderson-Burdick* jurisprudence, and ensuring that plaintiffs do not bear greater burdens of proof than does the state in Section 2 cases.[147] Certainly, the 2021 version of the JLVRA should require that in order to meet its burden under any version of a balancing test, given the primacy of the right to vote (and most certainly, under the compelling state interest test purportedly applied in *Brnovich*), a state must proffer *actual* evidence—not just surmise or prediction—demonstrating that the challenged provision is narrowly tailored to address an existing, factually-based concern, and is likely to do so effectively. The opening for Justice Alito's observation that even if a cognizable disparate impact had been shown by the plaintiffs, their challenge to the ballot collection measure would nonetheless have failed due to the unsupported claim of potential harm to the integrity of Arizona's election process must be unambiguously rejected by Congress in the new law.

D. Post-Election Override Laws

Among the most insidious of the raft of voting suppressive laws which have been enacted since November 2020 are those which permit state legislatures to override the handling of election results by the public officials designated in their state to do so, seemingly on a totally partisan basis.[148] As President Biden has explained, who gets to count the votes is as important as who gets to vote:

> This is election subversion. It's the most dangerous threat to voting and the integrity of free and fair elections in our history. Never before have [polarized state legislatures and partisan actors] decided who gets to count–count–what votes count.[149]

[146] *See Crawford v Marion County Election Board*, 553 US 181 (2008) (resulting in a 3-3-3 split). Indeed, the Supreme Court's reliance on the doctrine is itself a departure from its reliance on strict scrutiny in evaluating voting rights cases in the 1960's, requiring the government to justify its position without according it any deference. *See, e.g., Reynolds v Sims*, 377 US at 562.

[147] Although the *Anderson-Burdick* test has thus far only been applied to constitutional claims, there is no reason it could not be adapted for use in evaluating statutory voting rights claims under the JLVRA. *See* "The Anderson-Burdick Doctrine Balancing the Benefits and Burdens of Voting Restrictions," SCOTUSBLOG, available at: https://www.scotusblog.com/election-law-explainers/the-anderson-burdick-doctrine-balancing-the benefits-and-burdens-of-voting-restrictions/.

[148] Carrie Levine, "Why there's even more pressure now on Congress to pass a voting rights bill," Center for Public Integrity (July 9, 2021), *available at:* https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/why-theres-even-more-pressure-now-on-congress-to-pass-a-voting-rights-bill/; *see also* section I of this report, *supra*.

[149] Joseph R. Biden, Jr., "President Joe Biden's Speech on Voting Rights," July 13, 2021, *available at:* https://abcnews.go.com/Politics/president-joe-bidens-speech-voting-rights-transcript/story?id=78827023; *see also* Michael Waldman, "Death By a Thousand Cuts," BRENNAN CENTER FOR JUSTICE (July 20, 2021), *available at:* https://brennancenter.org/our-work/analysis-opinion/votings-death-thousand-cuts.

At this writing, there is no indication that Congress is working to address these post-election administrative provisions in the JLVRA. However, with the congressional select committee's investigation of the attempted insurrection of January 6, 2021 just beginning, and President Biden's warning about our democracy ringing in our ears, these election subversion provisions should also be the focus of congressional reform this term.

This is not a matter that can be left for a future Congress to address. The ongoing efforts by some state legislatures to overturn the 2020 presidential election and the fear that state legislatures are already attempting to influence the outcome of the 2024 election by enacting voter suppressive state laws[150] make it important to consider promptly what action Congress could take to prohibit state legislatures from overriding the popular vote for electoral slates in their respective states, either through superseding vote counts or simply by legislative action to disregard a popular vote in selecting presidential electors. As discussed below, the feasibility of addressing this abuse through Congressional legislation is not clear, though one approach to this threat may withstand Constitutional scrutiny.

Under the Constitution, each state has the authority to appoint its presidential electors "in such Manner as the Legislature thereof may direct."[151] It is well settled that the federal Constitution "'convey[s to state legislatures] the broadest power of determination' over who becomes an elector."[152] Thus, broad curtailment of this power in order to avert its exercise beyond the bounds of "tracking [a] State's popular vote"[153] could require a constitutional amendment or, at least, further Supreme Court guidance. However, federal law already provides a role for Congress – counting the electoral votes it receives from each of the states and certifying the winner of the majority of those votes as President[154] – in accordance with procedures set forth in the Electoral Count Act of 1887.[155]

The 1887 Act provides that state legislatures may name a slate of presidential electors after a popular vote has occurred in a "failed" election. Congress could amend the 1887 Act to define the term "failed election" or simply to clarify that a state legislature's broad powers do *not* include appointing a slate of electors after the legislature has authorized a popular vote (or when a state's constitution requires such a vote) and that popular vote has been taken unless the federal courts determine that, for reasons unrelated to actions by the legislature or executive of the state, the

[150] *See* Charlie Sykes, "The Steal Next Time," *available at:* https://morningshots.thebulwark.com/p/the-steal-next-time, quoting David Atkins, "What Happens When Republicans Simply Refuse to Certify Democratic Wins?", May 8, 2021, *available at:* https://washingtonmonthly.com/2021/05/08/what-happens-when-republicans-simply-refuse-to-certify-democratic-wins/ ("So what happens in 2024 . . . when state legislatures who have seized control of certification refuse to certify their state tallies").

[151] US Const., Art. II, sec. 1; Amend. XIII.

[152] *Chiafalo v Washington*, __ US ___, 140 S.Ct. 2316, 2324 (2020), quoting *McPherson v. Blacker*, 146 US 1, 27 (1892).

[153] *Chiafalo*, 140 S.Ct. at 2324, *citing Ray v Blair*, 343 U.S. 214, 227 (1952).

[154] US Const., Art. II, sec. 1.

[155] 3 U.S.C. sec. 15; *see* Richard L. Hasan, "We Can't Let Our Elections Be this Vulnerable Again," THE ATLANTIC, Jan. 3, 2021, *available at:* https://www.theatlantic.com/ideas/archive/2021/01/we-cant-let-our-elections-be-vulnerable-again/617542/.

election failed to provide a meaningful opportunity for the state's citizens to cast their ballots and that it is not possible to repeat the popular vote in order to cure that failure.[156]

Any such Congressional amendment of the 1887 Act could, if upheld by the Supreme Court, reduce the likelihood of abuse of state legislative power in this area.[157] The rationale for such an approach is simply that, once a state decides to select its electors through a popular vote, it may not ignore the results of that vote unless the federal courts determine that the entire electoral process was a "failed" exercise that deprived voters of a fair opportunity to register their choices and that no feasible remedy exists for that failure through a new election.

E. The So-Called "Independent Legislature" Theory

In furtherance of the efforts to overturn the results of the 2020 election, the Supreme Court was repeatedly urged to rely upon a theory articulated in Chief Justice Rehnquist's concurrence in *Bush v Gore*.[158] The proponents of this theory maintain that the federal Constitution not only confers upon state legislatures the broad power to regulate presidential elections, as discussed above, but that this power is not subject to any restrictions imposed by state constitutions as interpreted by state courts. According to proponents, this unfettered authority includes the power to select the slate of presidential electors without state constitutional restriction. While this view has been reflected in the opinions of a few of the Supreme Court Justices,[159] it has never been adopted by a majority of the Court. There are a number of reasons why it should not be.

First, although Article II, section 1 of the U.S. Constitution grants broad authority to state legislatures to choose their state's method of appointment of electors, their powers are not entirely unconstrained. Since the enactment of the Electoral Count Act in 1887, state legislatures have been prevented from seeking to change the method of choosing the electors after the election has

[156] Several commentators and organizations have called for reform of the 1887 Act. *See, e.g.*, "How Are Electoral College Votes Counted, and Why Must This Process Be Updated?", Campaign Legal Center, July 9, 2021, *available at:* https://campaignlegal.org/update/how-are-electoral-college-votes-counted-and-why-must-process-be-updated; Matt Ford, "The Obscure Law That Enabled Trump's Subversion of the Electoral College," The New Republic, June 25, 2021, *available at* https://newrepublic.com/article/162853/electoral-college-law-reform-election-integrity; Ed Kilgore, "It's Time to Fix the 1887 Law That Led to the Capitol Riot," New York Magazine, Apr. 7, 2021, *available at* https://nymag.com/intelligencer/amp/article/fix-1887-election-law-capitol-riot.html.

[157] Such an amendment would not eliminate the possibility of misuse of congressional authority during the counting process. The Act provides that Congress may reject electoral votes presented to it for counting when such votes "have not been so regularly given." (3 U.S.C. sec. 15) As occurred after the 2020 election, the objection of one Senator and one House member is sufficient to open the floor for debate on whether to reject a state's slate of electors. *Id.* Attempts by several House members to challenge the results of the 2016 election failed because no Senator could be persuaded to lodge an objection. *See* Kyle Cheney, "House Democrats Fail to Muster Support to Challenge Trump's Electoral College Win," Politico, Jan. 6, 2017, *available at* https://www.politico.com/story/2017/01/no-trump-electoral-college-chsallenge-233294.

[158] *See Bush v. Gore,* 531 US 98, 120 (2000) (Rehnquist, C.J., concurring).

[159] Four of the current Justices have indicated their support for this view. *See Republican Party of Pennsylvania v Degraffenreid*, 592 US ___, 141 SCt 732 (Feb. 22, 2021)(Thomas, J, dissenting); *Republican Party of Pennsyvania v Boockvar,* 592 US ___, 141 SCt 1 (Oct. 28, 2020)(statement of Alito, J., joined by Thomas and Gorsuch, JJ.); *Democratic National Committee v Wisconsin State Legislature,* 592 US ___, 141 SCt 28 (Oct. 28, 2020) (Gorsuch, J., concurring, joined by Kavanaugh, J.).

occurred.[160] Additionally, for the past 150 years, state legislatures have chosen electors who, either because of an implied or direct pledge, would vote for the candidate who had won the state's popular election.[161]

In his concurrence in *Bush v Gore*, the Chief Justice quoted dicta in *McPherson v Blacker*[162] to characterize the state legislative power as both broad and exclusive.[163] McPherson, however, involved the question of whether the state of Michigan could authorize the selection of its electors by district instead of on an at-large basis, and concluded that "[t]hey may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the state at large, or in districts. . . ."[164] The case said nothing precluding state judicial review of the actions of state legislatures in regulating elections, for example, to ensure consistency with the provisions of their state constitutions. As explained by the McPherson Court, "The legislative power is the supreme authority except as limited by the constitution of the state . . . ."[165]

Indeed, in no case prior to *Bush v Gore* did the Supreme Court ever try to overturn a state's high court decision interpreting state election law.[166] Generally, state constitutions are interpreted by state courts to determine the legitimacy of the actions of state legislatures in regulating elections. In fact, as recently as 2015 the Supreme Court clarified that nothing in the Elections Clause of Article I, section 4 of the Constitution "instructs, nor has this court ever held, that a State legislature . . . [may regulate] federal elections in defiance of the provisions of the state's constitution," presumably as interpreted by the state's highest court.[167] It has been reasonably argued that the same approach should follow with respect to the direction of Article II, section 1, clause 2 as to the power of state legislatures to regulate the manner of selecting presidential electors.[168] Were that not the case, divergent rules could be in force for federal and state elections

[160] Electoral Count Act, 3 USC § 5 (state's selection of electors is conclusive, provided that the electors are chosen under laws enacted prior to election day).

[161] See *Chiafalo v Washington*, 591 US , 140 SCt 2316, 2324, 2325 (2020). Since the 1860's, all but two states have chosen electors based upon the statewide results of the popular election. In those two states, Maine and Nebraska, two electors are awarded to the winner of the statewide popular vote and one elector is awarded to the winner of each congressional district in the state.

[162] 146 US 1, 27 (1892).

[163] 531 US at 534. *See also Chiafalo v Washington*, 591 US , 140 SCt 2316, 2324 (2020), where Justice Kagan, writing for the majority in upholding Washington state's penalty for faithless electors, similarly relied on *McPherson* to acknowledge that the state legislature had the "broadest power of determination" of the state's electors and the conditions attached to their service.

[164] *McPherson v Blacker*, 146 US at 34.

[165] *McPherson v Blacker*, 146 US at 25; *see* Jack M. Balkin, "Essay: *Bush v Gore* and the Boundary Between Law and Politics," 110 Yale L.J. 101, 108-09 & nn. 28, 29 (May 2, 2001) ("nothing in *McPherson* prevents ordinary interpretation of statutes, including harmonizing them with constitutional values, like equality or procedural fairness").

[166] Amar, Amar and Katyal, "The Supreme Court Should Not Muck Around In State Election Laws," THE NEW YORK TIMES, (Oct. 28, 2020), *available at:* https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections-state-law.html; *see Bush v Gore*, 531 US at 141 (Ginsburg, J., dissenting).

[167] *Arizona Legislature v. Arizona Independent Redistricting Commission*, 576 US 787, 818 (2015).

[168] Amar, Amar and Katyal, "The Supreme Court Should Not Muck Around In State Election Laws," THE NEW YORK TIMES, (Oct. 28, 2020), *available at*: https://www.nytimes.com/2020/10/28/opinion/supreme-court-elections-

in the same state, even when they are held simultaneously, engendering confusion and possible resulting disenfranchisement.

We also note that Article IV, section 4 of the Constitution places an affirmative obligation on the federal government to guarantee to every state a "Republican Form of Government."[169] This guaranty presupposes that each state's government will be determined by its people, under their own state constitutions. If judicial review of state election rules were to be eliminated, "elections" could proceed on an undemocratic basis, vitiating the federal constitutional promise of a republican form of government. State court judicial review of state legislation, including its election laws, is an integral part of the actions of a state government. Any attempt to divorce such function from the action of the state legislature in enacting the laws upends the state's scheme for its own governance. As explained by Justice Ginsburg in her dissent in *Bush v. Gore*:

> The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U.S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U.S. Const., Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit.[170]

For all of these reasons, we believe that the theory derived from Chief Justice Rehnquist's concurrence purporting to give state legislatures plenary, unchecked power over electoral selection—notwithstanding other federal constitutional provisions or the constitutional and legal provisions of the legislatures' own states—misinterprets precedent and endangers our republican form of democracy. It should have no place in our federal election jurisprudence.[171] Thus, as

state-law.html.

[169] "The United States shall guarantee to every State in this Union a Republican form of Government ..." US Const. Art. IV, §4.

[170] *Bush v Gore*, 531 US at 141 (Ginsburg, J., dissenting).

[171] As Jack Balkin has explained, "[t]he problem with Chief Justice Rehnquist's interpretation of Article II is that it assumes that one can divorce the Florida legislature from every other element of the Florida lawmaking process, including the Florida courts and the Florida Constitution":

> This is a difficult claim to sustain. The legislature only is the legislature because the Florida Constitution creates it as such. All legislative power in Florida is subject to judicial review under the Florida Constitution and statutes are subject to ordinary judicial interpretation as well as to judicial review under the requirements of the Florida Constitution. To argue otherwise would mean that in picking electors some handful of the Florida legislators could assemble as a rump session and do almost anything they wanted, because under Article II they could not be bound by what the Florida courts or the Florida Constitution said.

Congress revises both the For the People Act and the 2021 JLVRA, it should also consider clarifying the rules implementing Article II, section I in the Electoral Count Act to ensure that this theory will never be used in future elections to defeat the will of the people.

F. Constitutional Amendment Guaranteeing the Right to Vote

Another possible approach to protecting voting rights has been proposed by Professor Richard Hasen, who advocates passage of a constitutional amendment guaranteeing the right to vote.[172] Although existing constitutional amendments prohibit abridgment of the right to vote on account of race, color, sex, and age, these protections do not enshrine voting as an affirmative constitutional right which is guaranteed to every American citizen.[173] Hasen's proposed 28th Amendment to the Constitution would "guarantee all adult citizens the right to vote in federal elections, establish a nonpartisan administrative body to run federal elections that would automatically register all eligible voters to vote, and impose basic standards of voting access and competency for state and local elections."[174]

Voting rights protection in our country, Hasen argues, has not developed as quickly or efficiently as needed. Although the 15th Amendment was enacted more than 150 years ago, it took a century before the VRA halted the Jim Crow era denial of African Americans' voting rights, and even now, national elections have continued to generate litigation over citizens' rights to vote.[175] Hasen notes the impermanence of statutory rights in a system where protection of the vote relies upon commencement of expensive and time-consuming state-by-state litigation, the outcome of which is uncertain, not necessarily uniform, and subject to shifts depending upon the current politically polarized environment.[176] Certainly, *Shelby County* and *Brnovich* support his hypothesis and have exacerbated the situation. A constitutional right to vote, on the other hand, could result in the overruling of cases like *Rucho v. Common Cause*,[177] which determined that partisan gerrymandering was non-justiciable and did not violate the U.S. Constitution, effectively greenlighting voter discrimination on the basis of political party affiliation. Hasen recognizes that passage of a constitutional amendment is likely a generational undertaking; but he observes that the effect of the status quo on voter rights, especially in communities of color and among other historically disenfranchised groups, is no longer tenable if our democracy is to be maintained.[178]

Balkin, *supra* note 165, at 1414.

[172] Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and how to Treat and Cure Them*, (publication forthcoming)(Hasen, *Three Pathologies*); Richard L. Hasen, "Bring on the 28th Amendment," N.Y. TIMES (June 29, 2020) (Hasen, *Times* op. ed.) *available at:* https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html.

[173] U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXVI.

[174] Hasen, *Times* op. ed.; Hasen, *Three Pathologies*. Hasen notes that while awaiting support for a constitutional right-to-vote amendment, Congress using its enforcement powers under the Elections Clause and under the voting amendments could enact many of the required protections statutorily.

[175] Hasen, Times op. ed.; Hasen, *Three Pathologies*.

[176] Hasen, Times op. ed.; Hasen, *Three Pathologies*.

[177] 139 S.Ct. 2484 (2019).

[178] Hasen, *Three Pathologies,*

G. August 2021 Developments

On August 17, 2021, Representative Terri Sewell, the principal author of the 2019 JLVRA, introduced the John R. Lewis Voting Rights Advancement Act of 2021 (2021 JLVRA) and was joined by 190 original co-sponsors in the House.[179] On August 24, 2021, the House passed the 2021 JLVRA and sent it to the Senate for its consideration.

The 2021 JLVRA is designed to restore key protections of the VRA which were gutted by *Shelby County* and *Brnovich*, and is based upon the findings of the Butterfield Report as to its hearings held between April and July 2021. In sum, the revised bill would prohibit states and localities with a recent history of voter discrimination from restricting voting rights by adding an updated formula for determining which ones are subject to federal oversight via preclearance, and would amend Section 2 to overrule the higher standard created by *Brnovich* for plaintiffs who are challenging voter discrimination.[180] The new bill retains many parts of the JLVRA passed by the House in 2019,[181] includes several of the remedies we have advocated in this report, and introduces some new provisions designed to address the rash of third-generation state voter suppressive and subversive laws which have emerged since the 2020 elections, particularly via significant amendments to VRA Section 2. Through the 2021 JLVRA, the sponsors seek to restore the full protections originally afforded by the VRA,[182] legislatively overruling the Supreme Court's restrictions on the statute in *Shelby County* and *Brnovich*, and clarifying previously ambiguous aspects of the law.[183]

i. *2021 JLVRA Section 5: Enhancements to Preclearance Process*

Within the expansion of practice-based preclearance found in the 2021 JLVRA's new Section 4A, applicable to any jurisdiction engaged in such practices (in some instances, limited by demographic characteristics), the 2021 JLVRA makes two significant changes. First, it revises the provision on "Changes in Documentation or Qualifications to Vote" to make clear that all changes in voter identification laws which are more stringent than previous state requirements will have to

[179] The current version of the House bill is available at: https://www.congress.gov/bill/117th-congress/house-bill/4?q=%7B%22search%22%3A%5B%22Vote%22%5D%7D&s=4&r=4 (the John R. Lewis Voting Rights Advancement Act of 2021). As of August 23, 2021, more than 200 members had signed on as co-sponsors of the bill in the House.

[180] *See* press release, Rep. Terri Sewell (Aug. 17, 2021), *available at:* https://sewell.house.gov/media-center/press-releases (Sewell press release); Nicholas Fandos, "House Democrats Introduce a Bill to Beef Up the Voting Rights Act," THE NEW YORK TIMES (Aug. 17, 2021), *available at:* https://www.nytimes.com/2021/08/17/us/politics/house-democrats-voting-rights-john-lewis.html.

[181] Provisions retained in significant form from the earlier bill will not be discussed in this section.

[182] *See* Sewell press release.

[183] For a concise discussion of all of the most significant aspects of the 2021 JLVRA, including those retained from the JLVRA as passed in H.R. 4 in 2019, *see* Rick Hasen, *Election Law Blog*, "Travis Crum: 'Revising Sections 2 and 5 in the John Lewis Voting Rights Advancement Act of 2021,'" (Aug. 17, 2021) (Crum analysis), *available at:* https://electionlawblog.org/?p=124147.

go through preclearance.[184] The new bill also provides that any preexisting voter identification law will be subject to what is effectively retroactive preclearance unless it permits the voter to establish identity by means of a sworn written statement, signed by the voter under penalty of perjury, attesting to identity and eligibility to vote in the election.[185]

The second change in the 2021 bill is that it adds a seventh covered practice which will be universally applicable to any jurisdiction employing it. Specifically, it adds a section entitled "New List Maintenance Process," which addresses the problem raised in the Butterfield Report of purging of voter lists in minority districts:

> Any change to the maintenance of voter registration lists that adds a new basis for removal from the list of active registered voters or that incorporates new sources of information in determining a voter's eligibility to vote, wherein such a change would have a statistically significant disparate impact on the removal from voter rolls of members of racial groups or language minority groups that constitute greater than 5 percent of the voting-age population…. [under defined circumstances].[186]

Both of these enhancements would do much to guarantee voter access, and we endorse them.

ii. *2021 JLVRA Section 2 Amendments*

1. Brnovich Standard Overruled

To counter the Supreme Court's refusal, in the *Brnovich* time, place and manner context, to apply the Senate factors employed by the Court to evaluate the vote dilution claim in *Gingles,* the 2021 JLVRA establishes separate standards in Section 2 for evaluation of vote-denial and vote-dilution claims. For vote denial claims (as in *Brnovich*), the bill overrules the five-factor "guidelines" test Justice Alito announced there and instead adopts the two-part test urged by the dissent, namely that plaintiffs must show first, that a disparate impact resulted, and second, that it was attributable to past discrimination against their minority group.[187] The new provision requires consideration of the totality of the circumstances,[188] as urged by the dissenters in *Brnovich*, and specifically includes among the non-exclusive[189] list of those circumstances, whether the state employs voter identification requirements beyond those required by federal law.[190] The bill further

[184] 2021 JLVRA sec. 4A(b)(4) (citations are to the proposed amended VRA section).

[185] 2021 JLVRA sec. 4A(b)(4)(A), (B). *See* Derek Muller, *Election Law Blog*, "Nationwide Preclearance of Existing Voter Identification Laws in the John L. [sic] Lewis Voting Rights Advancement Act," (Aug. 20, 2021), *available at:* https://electionlawblog.org/?p=124198.

[186] 2021 JLVRA sec. 4A(b)(7).

[187] 2021 JLVRA sec. 2(c).

[188] 2021 JLVRA sec. 2(c)(3)(A).

[189] 2021 JLVRA sec. 2(c(3)(A)(ix).

[190] 2021 JLVRA sec. 2(c)(3)(A)(iii).

implicitly rebukes the *Brnovich* majority by expressly rejecting as a factor the "mere invocation" of "voter fraud" to justify such voting laws, apparently requiring instead actual, fact-based evidence of fraud as a justification for a restrictive law.[191]

In addition, the 2021 JLVRA expressly precludes states from seeking to justify their restrictive voting laws on grounds of partisanship.[192] The rationale for this provision is found in the Supreme Court's determination in *Rucho v. Common Cause*[193] that the question of the legitimacy of partisan gerrymandering is non-justiciable, making a Congressional remedy appropriate for such abuses, which have long-plagued our nation's electoral practices.

As to vote dilution claims, the 2021 JLVRA adopts the Senate Factors from *Gingles* and makes them part of the statutory text.[194] As with the vote-denial provisions, the totality of the circumstances test and its list of factors endorsed by the 1982 VRA legislative history (but not then incorporated into the statutory text) is now included in the bill[195] and characterized as non-exclusive.[196]

2. Other Section 2 Relief

Another new provision in the 2021 JLVRA, entitled "Relief From Violation of Voting Rights Laws," would require appellate courts reviewing claims for equitable relief under the statute to offer reasoned explanations for their decisions on applications for stays and vacaturs, curtailing the growing practice of "shadow dockets" by courts that decline to provide reasoned bases for decisions. Equitable relief could only be granted if the reviewing court made specific findings that the public interest, including in expanding access to the ballot, would be harmed or that compliance with the equitable relief would impose serious burdens on the party seeking the stay or vacatur which would outweigh the benefits to the public interest.[197] The new section further provides that the findings of fact made by the reviewing court in issuing the order under review could not be set aside unless they meet the heightened "clearly erroneous" standard.[198]

[191] 2021 JLVRA sec. 2c)(4)(F).

[192] 2021 JLVRA sec. 2((d)(3).

[193] 139 S.Ct. 2484 (2019).

[194] 2021 JLVRA sec. 2(b)(2)(A)-(G).

[195] 2021 JLVRA sec. 2(b)(2). In general, these factors include the state or political subdivision's history of official voting discrimination, racially polarized voting, use of voting practices or procedures to enhance opportunities for voting discrimination, use of a candidate slating process that denies access to members of a protected class, the continuing effects of discrimination in education, health care and employment which hinder the ability of members of a protected class to participate in the political process, political campaigns characterized by overt or subtle racial appeals, the extent to which members of a protected class have been elected to public office and other related factors that the court considers relevant.

[196] 2021 JLVRA sec. 2(b)(3).

[197] 2021 JLVRA sec. 11.

[198] 2021 JLVRA sec. 11.

Finally, for all Section 2 claims, the 2021 JLVRA has included protections against retrogression of minority voting strength.[199] Taking lessons from the pre-*Shelby County* experience under the VRA Section 5 preclearance process, the new bill would use Section 2 to outlaw laws which roll back provisions which had made it easier to vote, *e.g.,* during the COVID-19 pandemic.[200]

We believe the 2021 JLVRA does much to protect and enhance the right to vote for all Americans and to preserve our republican form of democracy. We urge Congress to pass it speedily.

H. H.R.1 / S.1: The For the People Act

Independently of JLVRA, Congress is also considering a broad remedial statute entitled "The For the People Act," with a House component known as H.R.1 and a Senate component known as S.1. The For the People Act aims, among other things, to expand Americans' access to the ballot box and provide election security in federal elections.[201] H.R.1 passed the House for the second time in 2021; S.1 is pending in the Senate but is not currently up for a vote prior to the early fall. Unlike the JLVRA, the For the People Act is concerned primarily with protecting the rights of eligible voters in federal, not state, elections, though it is likely that many of its provisions, if enacted, would become templates for state elections because of the practical difficulty of managing two differing sets of eligibility rules and voting procedures. As of July 31, 2021, The For the People Act seeks to address voting rights in federal elections in the following ways (as noted above, a narrower version of the proposed Act, known as the "Freedom to Vote Act," was introduced in the Senate on September 14, 2021):

i. *Voting Rights*

The Voting Rights provision of H.R.1 calls for several changes in favor of citizens' voting rights in federal elections. For example, the bill calls for automatic voter registration for every eligible citizen who interacts with designated government agencies.[202] H.R. 1 requires the chief election official in every state to create an automatic voter-registration system that gathers individuals' information from government databases and registers them unless the individual actively declines registration.[203] According to the bill, it is the government's responsibility to retrieve voter information from agencies such as state motor vehicle administrations, agencies that receive money from Social Security or the Affordable Care Act, the justice system and federal

[199] Crum analysis, *supra* note 183.

[200] Crum analysis, *supra* note 183; 2021 JLVRA sec.2(e).

[201] *See* https://www.congress.gov/bill/117th-congress/house-bill/1/; https://www.congress.gov/bill/117th-congress/senate-bill/1. H.R.1 also includes provisions relating to a proposed ethics code for Supreme Court Justices and ethics in government generally. We do not address those provisions in this report.

[202] H.R. 1, Title I, Subtitle A, Part 2.

[203] *Id.*

agencies, including the Department of Veterans Affairs, the Defense Department, the Social Security Administration and others and also to keep that information up to date.[204]

Currently, 19 states and the District of Columbia allow for automatic voter registration.[205] An increase of nationwide participation would add more than 50 million new eligible voters to future elections.[206]

The bill further advocates for vote by mail, creating a baseline standard for access to mail voting in federal elections.[207] H.R. 1 would allow eligible voters to request a mail ballot via various methods including in person, online, by phone, or by mail.[208] Currently, certain states require that a voter requesting a mail ballot provide a valid reason.[209] The Bill would eliminate this requirement.[210] Additionally, the Bill permits states to allow the option that one request for a mail-in ballot stand as that particular voter's default choice for future elections.[211]

In an effort to achieve nationwide early voting, the bill would extend early voting to every state and establish implementation standards for federal elections.[212] Each state would be required to provide two weeks of early voting at minimum, with each day lasting for a period of at least ten hours. The states would also be required to include early day and evening hours.[213] The bill would also require states to ensure, as much as possible, that early voting locations be walkable from public transportation, accessible to rural voters, and exist on college campuses.[214]

Lastly, H.R. 1 prevents wait times at the polls by requiring states to evenly distribute voting systems, poll workers, and other election resources to ensure fair waiting times no longer than thirty minutes.[215] While we recognize that this 30-minute requirement may not always be feasible, the principle that voters in all jurisdictions should have reasonable, and reasonably equal, waiting times when voting is one that we endorse.

[204] *Id.*

[205] Sixteen states and Washington, DC, enacted AVR legislatively or via ballot initiative; two states (Colorado and Georgia) adopted it administratively; and one state (Connecticut) adopted it as an agreement between the state secretary of state and state DMV officials. *See* "Automatic Voter Registration," NCSL, Feb. 8, 2021, *available at:* https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx.

[206] "The Case for Automatic Voter Registration," THE BRENNAN CENTER FOR JUSTICE, July 21, 2016, *available at:* https://www.brennancenter.org/our-work/research-reports/case-automatic-voter-registration.

[207] H.R. 1, Title I, Subtitle I.

[208] *Id.*

[209] "Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options," NCSL (Sept. 24, 2020), *available at:* https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[210] *Id.*

[211] H.R. 1, Title I, Subtitle I.

[212] H.R. 1, Title I, Subtitle H.

[213] *Id.*

[214] *Id.*

[215] H.R. 1, Title I, Subtitle N, Part 1.

ii. *Campaign Finance*

The H.R.1 bill as currently proposed also aims to reform campaign finance policies via small donor matching.[216] In order for a candidate to opt into the donor matching system, he/she must first gather small donations.[217] Under the bill, small donor contributions will be matched.[218] The funds for matching are derived entirely from money paid to the government by corporations and individual taxpayers found to have failed to pay their required taxes. There are limits on the total amount of matching funds a presidential, Senate or House candidate can receive for an election.[219]

Under the bill, candidates running in the primary and general election and opting to participate in the system will receive a 6-to-1 match on contributions of up to $200 per donor.[220] This system will allow candidates that do not accept donations from large donors to run a competitive campaign, especially considering trends to collect small online contributions.[221]

The Bill also aims to amend certain existing federal campaign disclosure rules by strengthening federal disclosure law to expose candidates accepting dark money and continuing transparency requirements to political ads on the internet.[222]

iii. *Election Security*

In an effort to improve voter security, the bill mandates replacing simple electronic voting machines with those requiring a paper ballot of each individual vote.[223] Paper ballots are essential to voter protection, as they safeguard against hackers and foreign governments attempting to interfere with U.S. elections.[224]

Additionally, the bill would require that states maintain paper ballots in the event of hand recounts or audits.[225] During the last election, approximately 16 million citizens voted with paperless ballots,[226] making verification of vote totals more difficult. The vast majority of voters

[216] H.R. 1, Title V, Subtitle B.

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] Title I, Subtitle F.

[224] Rick Pearson, "State Officials Say Russian Hackers Stole 76k Illinois Voters' Info in 2016, not 500K," THE CHICAGO TRIBUNE (Aug. 8, 2018), *available at:* https://www.chicagotribune.com/politics/ct-met-illinois-elections-board-russia-2016-election-hacking-20180808-story.html.

[225] Title III, Subtitle A, Part 2.

[226] Patrick H. O'Neill, "16 Million Americans will Vote on Hackable Paperless Machines," *MIT Technology*

(90%) support conducting election audits to ensure voting machines worked properly and votes were counted accurately.[227] Currently, eight states use paperless voting machines exclusively.[228] The Bill would require states to use paper ballots allowing for recounts and manual audits—ensuring a trustworthy election process.[229]

The bill addresses the audit process for election results. H.R.1 requires robust "risk-limiting audits," where statistical models are utilized to confirm that a sufficient amount of ballots have been checked to corroborate vote tallies.[230] Risk-limiting audits provide a high probability of accuracy because they require that election officials manually recount an adequate number of paper ballots.[231] The Bill also calls for the Election Assistance Commission to provide grants to officials conducting risk-limiting audits.[232] Election security is paramount to protecting our democracy.

H.R. 1 has been subject to a number of inaccurate criticisms that exaggerate or misrepresent aspects of the Bill and that deserve brief response. Senator Ted Cruz, for example, has been quoted as claiming:

> Under this bill, there's automatic registration of anybody - if you get a driver's license, if you get a welfare payment, if you get an unemployment payment, if you attend a public university. Now everyone knows there are millions of illegal aliens who have driver's licenses, who are getting welfare benefits, who attend public universities.[233]

Senator Cruz's suggestion that the bill will result in large numbers of non-citizens being registered to vote is not accurate. Federal law banning non-Americans from registering to vote remains intact[234] and would be unaffected by the Bill.[235] While H.R. 1 requires every state to

Review, Aug. 13 2019, *available at:* https://www.technologyreview.com/2019/08/13/238715/16-million-americans-will-vote-on-hackable-paperless-voting-machines/.

[227] "The For the People Act," VOTING RIGHTS LAB (Mar 1, 2021), *available at:* https://votingrightslab.org/the-for-the-people-act/.

[228] The states that exclusively use paperless voting machines are: Texas, Tennessee, Louisiana, Mississippi, Indiana, Kansas, Kentucky, and New Jersey.

[229] H.R. 1, Title I, Subtitle F.

[230] Mark Lindeman and Philip B. Stark, "A Gentle Introduction to Risk-Limiting Audits," *IEEE Security and Privacy, Special Issue on Electronic Voting* (2012): 1, *available at:* https://www.stat.berkeley.edu/~stark/Preprints/gentle12.pdf.

[231] "Post-Election Audits," *National Conference of State Legislatures* (Oct. 25, 2019), *available at:* https://www.ncsl.org/research/elections-and-campaigns/post-election-audits635926066.aspx.

[232] H.R. 1, Title III, Subtitle A, Part 1.

[233] Daniel Dale, Holmes Lybrand, and Tara Subramaniam, "Fact Check: Breaking down 10 claims about the Democrats' elections bill," CNN (Mar. 25, 2021), *available at:* https://www.cnn.com/2021/03/25/politics/fact-check-hr1-s1-for-the-people-hearing-voting-elections/index.html.

[234] 18 U.S.C. § 611.

[235] H.R.1 Title I, Subtitle A, Part 2.

implement an automatic voter registration system, it continually makes clear that only citizens are eligible to be registered.[236] Section 1013 of the bill states that each contributing agency that (in the normal course of its operations) requests individuals to affirm United States citizenship (either directly or as part of the overall application for service or assistance) shall inform such individual of the "substantive qualifications" required to vote, and that they will be registered to vote unless they decline to register or are found ineligible.[237]

While there have occasionally been errors under state automatic voter registration systems that led to noncitizens being registered to vote,[238] there have also been errors in states that have not implemented automatic voter registration.[239] Any errors resulting in noncitizens being registered to vote should not be used as evidence that automatic voter registration will result in increased noncitizen voting.

Another criticism of automatic voter registration has been expressed by West Virginia Secretary of State Mac Warner, who[240] claimed that the bill "overrules checks and balances in our election security. It mandates [automatic voter registration], including 16-year-olds."[241] However, while the *bill would require states to allow individuals as young as 16 to register to vote, 14 states and D.C.* already allow this practice.[242] Section 1094 of the Bill explicitly states that such early pre-registration has no effect on state voting age requirements. The Bill states: "Nothing in paragraph (1) may be construed to require a State to permit an individual who is under 18 years of age at the time of an election for Federal office to vote in the election," the bill reads.[243]

The bill also aims to improve the process of maintaining rolls. In the past, election officials have removed ineligible voters from roles in conjunction with resources provided by a national consortium.[244] The consortium shares data on who had moved, passed away, or registered multiple

[236] H.R.1 Title I, Subtitle A, Part 2. Sec. 1012(c): [One-time Registration of Voters Based on Existing Contributing Agency Records] State officials are required to provide applicants with the following: "the substantive qualifications of an elector in the State… " as well as "the consequences of false registration, and a statement that the individual should decline to register if the individual does not meet all those qualifications."

[237] H.R.1 Title I, Subtitle A, Part 2. Sec. 1013.

[238] John Myers, "Layered on top of previous mistakes, California's DMV finds an additional 1,500 people wrongly registered to vote under new system," Los Angeles Times (Oct. 8, 2018), *available at:* https://www.latimes.com/politics/la-pol-ca-dmv-more-voter-registration-errors-20181008-story.html.

[239] "Some Noncitizens Do Wind Up Registered To Vote, But Usually Not on Purpose," NPR (Feb. 26, 2019), *available at:* https://www.npr.org/2019/02/26/697848417/some-noncitizens-do-wind-up-registered-to-vote-but-usually-not-on-purpose.

[240] Daniel Dale, Holmes Lybrand, and Tara Subramaniam, "Fact Check: Breaking down 10 claims about the Democrats' elections bill," CNN (Mar. 25, 2021), *available at:* https://www.cnn.com/2021/03/25/politics/fact-check-hr1-s1-for-the-people-hearing-voting-elections/index.html.

[241] *Id.*

[242] "Preregistration for Young Voters," NCSL (June 28, 2021), *available at:* https://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx.

[243] H.R.1 Title I, Subtitle A, Part 10. Sec. 1094.

[244] *Id.*

times.[245] Still, some persons who are ineligible to vote have not been removed from the rolls and voters who are eligible to vote have been mistakenly removed.[246] H.R. 1 calls for "standards governing the comparison of data for voter registration list maintenance purposes" and that standards must be public and applied in a uniform and nondiscriminatory manner.[247] The passing of the bill will allow for more accurate voter rolls and greater public confidence in that accuracy in all jurisdictions.

As noted above, a narrower version of H.R. 1 was introduced in the Senate on September 14, 2021. We have not yet been able to review this revised version, which omits a number of the provisions of H.R. 1 discussed above but does seek to improve access to the ballot through automatic voter registration, facilitating mail-in voting, making election day a federal holiday, restoring voting rights to former prisoners, and protecting the voting rights of people with disabilities and Native Americans. The new bill also would require paper ballots to be used as part of electronic voting, and seek to limit partisan gerrymandering and facilitate judicial review of such actions.[248] While it does not have the same broad reach as H.R.1, the new bill represents a significant effort to prevent many of the most serious voting abuses addressed in the prior proposal and for that reason deserves similar support.

V. MANAGING THE FILIBUSTER

To have any realistic prospect of enacting the JLVRA, the For the People Act or any of the other legislative proposals discussed above, some reform of the current Senate "filibuster" rules is necessary. Since 1975, 60 votes in the Senate have been required to end a filibuster. And the historical requirement of a "talking filibuster" (requiring Senators to be present in person) is no longer required—making 60 votes a de facto requirement for most major legislation. We believe this is wrong in principle and contrary to the expectation, reflected in the Constitution and public perception, that the Senate, which is already structured to protect minority views, would normally act by majority vote. It is also wrong in practice because it effectively paralyzes half of the Legislative Branch of our federal government and, by so doing, leads inevitably to greater reliance on the Executive Branch (that is, the President and Presidential appointees) to establish policies and programs that are often properly within the purview of Congress.[249]

[245] *Id.*

[246] *Id.*

[247] H.R.1 Title I, Subtitle A, Part 2. Sec. 1015.

[248] *See* Trish Turner and Briana Stewart, "Senate Democrats introduce new voting rights bill," ABC News (Sept. 14, 2021), *available at:* https://abcnews.go.com/Politics/senate-democrats-introduce-freedom-vote-act/story?id=80009296; *see also* Michael Waldman, "Pass the Freedom to Vote Act," Brennan Center for Justice (Sept. 14, 2021), *available at:* https://www.brennancenter.org/our-work/analysis-opinion/pass-freedom-vote-act. The text of the bill is available at: https://www.klobuchar.senate.gov/public/_cache/files/e/4/e448657f-914b-43a3-9153-05cabfb31c76/68440D88BF5EF1F90133FCB5AD2865D9.freedom-to-vote-act-text.pdf.

[249] *See The Senate Filibuster - Abolish, Restrict or Live With?*, NEW YORK CITY BAR ASSOCIATION, (Jun. 8, 2021), *available at*: https://www.youtube.com/watch?v=mM3TwZZCZiY (discussion of reform proposals begins at 47:33). Some of the proposed filibuster reforms proposed below were debated during a recent panel discussion sponsored by the New York City Bar Association's Rule of Law Task Force and included former U.S. Senator Russell D. Feingold, Brookings Institution Senior Fellow Sarah A. Binder, and Norman J. Ornstein, Emeritus Scholar at the American Enterprise Institute), and much of the information included in this section is based on that discussion.

To understand how the contemporary filibuster came to be, two points of historical context are useful. First, the filibuster does not have its origins in the text or understanding of the Constitution. Nor was the filibuster part of the Framers' original plan to foster extended deliberation in the Senate. The filibuster emerged largely by happenstance as a result of an early nineteenth-century change to Senate rules and evolved as a tactic to stall proposed legislation after the Civil War.[250] The modern rule of "cloture" (requiring the vote of a two-thirds majority of the Senate) was formulated in 1917 as a compromise between opposing factions to break a filibuster of a proposal to arm merchant ships in the midst of World War I.[251]

Second, commentators have noted the extensive historical use of the filibuster to block civil rights legislation. As far back as 1891, Southern Democrats used the filibuster to block a voting rights bill.[252] In the 1920s, members of the Senate filibustered an anti-lynching bill.[253] And in 1964, opponents of the Civil Rights Act famously used the filibuster to prolong debate for two months before 67 votes were mustered to move to a vote.[254] Similar tactics were employed in an attempt to block the Voting Rights Act of 1965, and again in 1982 to block revisions aimed at strengthening the Voting Rights Act.[255] As Professor Sarah Binder explained during the New York City Bar Association panel discussion, battles over civil rights historically have been so intertwined with the filibuster that "battles over reforming the cloture rule" were effectively "proxy wars over civil rights." However, as former Senator Feingold pointed out during the same panel discussion, the filibuster has also been used as a negotiating technique by Senators from Northern states to protect their constituents' interests when that was the most effective tool available to them.

Given the current 50-50 split in the Senate, much attention has focused on what kinds of filibuster reforms are appropriate and feasible. We list below several options that we believe may satisfy those criteria, not only for voting rights but more generally.

[250] *Id.*

[251] *Id. See also* Sarah A. Binder, *The History of the Filibuster*, BROOKINGS (Apr. 12, 2010), *available at:* https://www.brookings.edu/testimonies/the-history-of-the-filibuster/; Caroline Fredrickson, *The Case Against the Filibuster,* BRENNAN CENTER FOR JUSTICE (Oct. 30, 2020), *available at:* https://www.brennancenter.org/our-work/research-reports/case-against-filibuster.

[252] Magdalene Zier & John Fabian Witt, *For 100 years, the filibuster has been used to deny Black rights*, THE WASHINGTON POST (Mar. 18, 2021), *available at:* https://www.washingtonpost.com/outlook/2021/03/18/100-years-filibuster-has-been-used-deny-black-rights/.

[253] *Id.*

[254] Craig Becker, *The Filibuster Threatens Both Civil Rights and Workers' Rights*, ACS Expert Forum (Apr. 5, 2021), *available at:* https://www.acslaw.org/expertforum/the-filibuster-threatens-both-civil-rights-and-workers-rights/.

[255] *See* Steven V. Roberts, *Filibuster Ends on Voting Rights; Senate Rejects Weakening Clauses*, N.Y. TIMES (June 18, 1982), *available at:* https://www.nytimes.com/1982/06/18/us/filibuster-ends-on-voting-rights-senate-rejects-weakening-clauses.html.

A. "Talking" Filibuster

This reform, proposed in 2013 by Senators Tom Udall, Jeff Merkley, and Tom Harkin, would require Senators filibustering legislation to be physically present to speak on the floor of the Senate. Returning to prior practice, this measure is designed to make it more difficult to mount a successful filibuster that blocks a vote on legislation. Proponents of this approach argue that, by requiring a greater expenditure of time and energy by the minority, it will encourage more sparing use of the filibuster.[256] However, this proposal would not prevent the ability of a determined minority to hold up legislation for extended, though not indefinite, periods of time.

B. "Sliding Scale" Filibuster

This reform, first proposed several decades ago by former Senator Tom Harkin, would gradually require fewer votes for cloture (i.e., ending a filibuster) over the course of a debate. Initially, there would be a 60-vote threshold to invoke cloture; after a week of debate, the threshold would change to 57 votes; after two weeks, 54 votes; and after three weeks, cloture would require only a simple majority. This would give the minority time to make its case and extract compromises, but without putting legislation with majority support on hold indefinitely.[257]

C. Shifting the Burden for Cloture

This reform, proposed by former Senator Al Franken, would shift the burden for a cloture vote (i.e., ending a filibuster) from requiring 60 votes for cloture, to requiring 41 votes to block cloture.[258] This would shift the burden to the minority to be physically present to block cloture. The status quo only requires one or two members of the minority to be present to object and places the onus on the majority to make a quorum and collect 60 votes to end debate.[259] Like the "talking" filibuster proposal, however, burden-shifting would not eliminate the ability of a determined minority to hold up popular legislation for an extended period.

D. Cloture Change for Voting Rights

This reform would move the threshold for cloture to a simple majority vote, but only for voting rights bills. The Constitution delegates to Congress the authority to "at any time by Law

[256] *See* Press Release, Senator Jeff Merkley, Senators Introduce Rules Resolution to Restore Senate Debate and Accountability (Jan. 4, 2013), *available at:* https://www.merkley.senate.gov/news/press-releases/senators-introduce-rules-resolution-to-restore-senate-debate-and-accountability.

[257] *See* Tom Harkin, *Fixing the filibuster (Sen. Tom Harkin)*, THE HILL (Feb. 12, 2010), https://thehill.com/blogs/congress-blog/politics/80903-fixing-the-filibuster-sen-tom-harkin.

[258] *See* Al Franken & Norman Ornstein, *Al Franken, Norman Ornstein: Make the filibuster great again*, STARTRIBUNE (Feb. 7, 2021), *available at:* https://www.startribune.com/make-the-filibuster-great-again/600020321/. Cloture is defined as "[[a] procedure used in the Senate to place a time limit on consideration of a bill or other matter. Used to overcome a filibuster." Under the cloture rule (Rule XXII), the Senate may limit consideration of a pending matter to 30 additional hours, but only by vote of three-fifths of the full Senate, normally 60 votes. *See* United States Senate, *Glossary Term: Cloture*, https://www.senate.gov/about/glossary.htm#C.

[259] A similar proposed reform would require only the support of three-fifths of those Senators *present* for cloture, rather than three-fifths of the entire Senate.

make or alter [state] Regulations" as to "The Times, Places and Manner of holding Elections for Senators and Representatives."[260] Proponents of this approach note that it would allow Congress to address the issue of voting rights without a more expansive rule change.[261] Critics have variously argued either (i) that it does not go far enough to restrain what they see as abusive use of the filibuster to thwart a wide range of legislative efforts or, conversely, (ii) that this reform would be a "slippery slope" that leads to the piecemeal abolition of the filibuster for all or most legislation over time.

E. "Majority Representation" Cloture

This reform would allow cloture to be invoked by a majority of Senators representing a majority of the United States population as of the most recent Congressional reapportionment. This proposal is intended to implement (according to its proponents) a "popular-majoritarian cloture rule"—rather than the current rule whereby a filibuster can be, and often is, successfully mounted by a group of Senators who collectively represent only a minority of the U.S. population.[262] Critics have argued that this proposal would be unconstitutional, including running afoul of the Seventeenth Amendment's requirement that "each Senator shall have one vote." Proponents respond that while this objection presents a "significant challenge," the Constitution expressly provides that each chamber of Congress has the power to alter its own rules.[263]

F. Abolish the Filibuster

Finally, some members of the Senate (and many others) have advocated doing away with the filibuster entirely.[264] Given the stated opposition of many Senators to this far-reaching reform,[265] it does not appear to be practically feasible at this time. Critics argue that this reform would weaken incentives to compromise in order to enact legislation on a bipartisan basis, while proponents counter that the filibuster does not actually promote bipartisanship and it is more often abused for partisan and obstructionist reasons.

[260] U.S. Const., art. I, § 4, cl. 1. Congress may not, however, alter the *place* of voting for Senators. *Id.*

[261] Recently, House Majority Whip Jim Clyburn (D-SC) expressed his support for carving out an exception to the legislative filibuster for legislation that applies to the Constitution, which would effectively clear the way for voting rights legislation to pass by a simple majority vote. *See* Laura Barrón-López, "Top Biden ally pleads with him to scrap filibuster for election reform," POLITICO (Jul. 10, 2021), *available at:* https://www.politico.com/news/2021/07/10/clyburn-biden-filibuster-election-reform-499051.

[262] *See* Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Filibuster*, AMERICAN CONSTITUTION SOCIETY (May 2021), *available at:* https://www.acslaw.org/wp-content/uploads/2021/05/Democratizing-the-Filibuster.pdf.

[263] *Id.* at 6 (citing U.S. Const., art. I, sec. 5, cl. 2 ("Each House may determine the Rules of its Proceedings")).

[264] *See, e.g.,* Glenn Thrush, *More Democrats join the effort to kill the filibuster as a way of saving Biden's agenda*, THE NEW YORK TIMES (March 5, 2021), *available at:* https://www.nytimes.com/2021/03/05/us/filibuster-senate-democrats.html.

[265] *See supra* at note 264; *see also* Sen. Kyrsten Sinema, *We have more to lose than gain by ending the filibuster*, WASHINGTON POST (Jan. 21, 2021), *available at:* https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act/.

We take no position at this time which of these possible reforms is preferred, though we do note that some would (or could) apply broadly to a range of fundamental rights that Congress is currently failing to address. What we do urge, however, is that the Senate act promptly on at least *one* of these (or comparable) reforms in order to permit that chamber to carry out its Constitutional duties and play the cooperative legislative role that our democratic system contemplates and that our nation's needs require.

VI. THE ROLE OF THE BAR

If action by Congress is necessary to counter the current wave of voter suppression actions by state legislatures, lawyers also have important, even indispensable, roles in defending this most basic right of citizens in a democracy. The roles that lawyers play in making democracy work – or not – are varied and include (a) their role in litigation, whether as judges or as counsel for parties in cases involving claims of either voter fraud or voter suppression; (b) their participation in state and local bar associations; (c) their service as law school professors and deans, where they teach and model the role of lawyers in building and sustaining a just society; and (d) their actions as individual citizens in their own communities, where many lawyers occupy elected or appointed positions of trust and authority. Unfortunately, as discussed below, the defense of democracy has too often been left to the courts and a relatively small number of lawyers and bar associations who have spoken forcefully about the importance of voting rights to democracy and the rule of law. We believe it is now time for our profession as a whole to speak and to act to protect these values.

A. Courts

We applaud the increasing willingness of courts to criticize, and where appropriate, to sanction lawyers who engaged in repeated efforts to undermine the results of the 2020 Presidential election through frivolous litigation and public statements that went far beyond the limits of accepted professional conduct. The decision of the Appellate Division (First Dept.) of the New York State Supreme Court to suspend Rudolph Giuliani from the practice of law during the pendency of two ethics complaints submitted by non-partisan groups of lawyers makes clear that lawyers who consciously mislead the court and the public in order to undermine the results of previously-adjudicated elections face not only sanctions related to an individual case but the potential loss of their law license.[266] In reaching its decision, the Appellate Division stated:

> [T]here is uncontroverted evidence that respondent communicated demonstrably false and misleading statements to courts, lawmakers and the public at large in his capacity as lawyer for former President Donald J. Trump and the Trump campaign in connection with Trump's failed effort at reelection in 2020. These false statements were made to improperly bolster respondent's narrative that due to widespread voter fraud, victory in the 2020 United States presidential election was stolen from his client. We conclude that respondent's conduct immediately threatens the

[266] *Attorney Grievance Committee for the First Judicial Department v. Rudolph W. Giuliani*, No. 2021-00506 (App. Div. 1st Dep't 2021).

> public interest and warrants interim suspension from the practice of law, pending further proceedings before the Attorney Grievance Committee..."[267]

Similarly, in the more familiar context of sanctions imposed for frivolous or bad faith litigation, Magistrate Judge N. Reid Neureiter imposed sanctions, in an amount still to be determined, against plaintiffs' counsel in *O'Rourke v. Dominion Voting Systems Inc.et al*,[268] a Colorado federal district court case in which those counsel sought to invalidate the 2020 presidential election results in Colorado, Georgia, Michigan, Pennsylvania and Wisconsin based on wholly unsubstantiated claims of a "rigged" or stolen election. Like the Appellate Division decision in *Giuliani*, Judge Neureiter emphasized the dangers to the public and the rule of law from irresponsible and unethical actions by lawyers who fabricate facts and consciously seek to mislead the courts and the public in order to undermine the democratic process.

In the most recent decision to address such attorney misconduct challenging the 2020 presidential election results, U.S. District Judge Linda Parker of the Eastern District of Michigan imposed attorney-fee sanctions *and* referred the plaintiffs' Michigan and out of state attorneys to their respective disciplinary bodies because of their "profound abuse of the judicial process" in *King et al. v. Whitmer, et al.*[269] "It is one thing," Judge Parker wrote, "to take on the charge of vindicating rights associated with an allegedly fraudulent election. It is another to take on the charge of deceiving a federal court and the American people into believing that rights were infringed, without regard to whether any laws or rights were in fact violated. This is what happened here."[270]

B. Law Firms

We also commend those law firms who, frequently on a pro bono basis, have volunteered to assist in challenges to voter suppression measures in their home states. We also note the continued efforts of groups such as Lawyers Defending American Democracy (LDAD) to participate directly, whether as complainants or *amicus curiae*, through proceedings seeking to hold lawyers to account for maintaining frivolous "election fraud" claims. A broad coalition of the nation's leading law firms and corporate legal departments has publicly condemned state voter suppression legislation and pledged to fight those efforts where they are enacted.[271]

C. Bar Associations

Beyond these efforts, however, it is the role of the organized Bar through its local, state and national bar associations that can play the most useful role in addressing the threat of voter suppression in states across our nation. Unfortunately, publicly stated concern for voting rights,

[267] *Id.* slip op. at 2.

[268] *O'Rourke v. Dominion Voting Sys.*, 2021 U.S. Dist. LEXIS 145644 (D. Colo., Aug. 3, 2021).

[269] *King et al. v. Whitmer, et al.*, Civil Case No. 20-13134 (E.D. Mich. Aug. 25, 2021).

[270] *Id.*

[271] *We Stand for Democracy*, N.Y. TIMES, p.A15 (Apr. 14, 2021).

and the current legislative efforts to limit citizens' exercise of those rights, has been limited at bar associations across the country. Most bar associations focus on a similar range of services for lawyers: opportunities for networking, developments in the law and Continuing Legal Education (CLE) requirements. Some bar associations do publish reports dealing with areas of interest to their members and some also provide testimony to federal, state, and local governments on current legal issues. However, very few bar associations appear to be addressing threats to voting rights either generally or to specific portions of the electorate.

The reasons for this reluctance by the organized bar to speak out in defense of voting rights are varied, but the most important is surely the desire to avoid taking a "political" stand on issues that are controversial within an association's membership. This reluctance finds additional support in the 1990 Supreme Court decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990), which held that an integrated (i.e., mandatory) state bar association could not use its members' dues for political or ideological positions not germane to the association's purpose of regulating the legal profession and improving the quality of legal services. Although *Keller* is an important reminder of the limits on integrated bar association activities, we believe that defending the right to vote, and thus the legitimacy of democratically-elected governments, can properly be viewed as part of most bar associations' central commitment to the rule of law. We hope that more of our colleagues in such associations will concur that, when our nation's democracy and the rule of law are threatened, it is proper for their associations to speak and act on behalf of our shared professional commitment to a lawful and Constitutional democracy.

Some bar associations already view voting rights as squarely within their ambit. Chief among these is the American Bar Association, which has long sponsored its Rule of Law Initiative (ABA ROLI), which has worked for more than 25 years with lawyers, law schools and judges from dozens of other countries to help preserve the rule of law, including democratic elections, around the world. Domestically, the ABA has been a consistent advocate for voting rights as part of the rule of law through its Standing Committee on Election Law, which has, among other things, advocated for publicly available centralized lists of registered voters for states and a wider variety of identification measures for voters to use.

In addition to the ABA, there are at least three state and three local bar associations that have attempted to address voter suppression within the past several years. The New Jersey Bar Association, for example, has an Election Law Committee, which is active on election law and voting rights advocacy and education. Among their responsibilities, the New Jersey Bar Association states that they monitor "funding for the Election Law Enforcement Commission; [] campaign disclosure laws regarding various entities and persons[; and] make[] comments and/or recommendations when appropriate."[272] This committee is notable among other state bar association committees because it was one of the very few which stated that their members advise on election law when appropriate.

Our colleagues at the New York State Bar Association recently launched a Task Force to Protect Voting Rights and Democratic Institutions, indicating that its members "will tap into their

[272] *Election Law Special Committee*, N.J. BAR ASS'N, https://community.njsba.com/electionlawspecialcommittee/home?ssopc=1.

collective expertise to analyze the issues before [them] and help policymakers, the legal profession, and the public combat the restrictive laws that are being adopted or are under consideration in many states."[273] Prior to this Task Force, NYSBA had a 2020 Task Force on the Presidential Election,[274] another rarity among state bar associations.

The Texas Bar Association was also extremely clear in encouraging voter turnout during the 2020 elections. Specifically, the Texas Young Lawyers Association spearheaded an impressive campaign with educational materials and voting tools and was one of the few bar associations that sought to register voters by creating public outlines on canvassing and organizing volunteers to register eligible voters on the ground.[275] The Texas Bar Association Annual Meeting, like several other bar associations last year, included an event focused on voting rights: "A History of Voter Suppression."[276]

At the city level, the Austin Bar Association, the Boston Bar Association, and the Philadelphia Bar Association have sponsored several CLE programs and events to educate attorneys on the current voting rights climate. A number of other local bar associations hosted similar events, but these three associations promoted voter protection in particularly innovative ways.

The Austin Bar Association hosted a CLE entitled "Election Protection Issues" on April 23, 2021 featuring the Texas Legal Rights Project.[277] This program explicitly described the voter suppression tactics witnessed by the Texas Legal Rights Project during the last presidential election—an effective public educational tool. Also, their Civil Rights and Immigration Section hosted a CLE entitled "Defending Voting Rights in Texas" on November 26, 2018 featuring Nina Perales from The Mexican American Legal Defense Fund.[278]

The Boston Bar Association hosted webinars entitled: "Election Protection 2020 Training - Protect the Right to Vote and Learn About Election Law," through their Joan B. DiCola Fund, featuring Sophia Hall from Lawyers for Civil Rights, and Pamela Wilmot, Common Cause

[273] Susan DeSantis, New York State Bar Association Launches Task Force To Protect Voting Rights and Democratic Institutions, N.Y. STATE BAR ASS'N (July 22, 2021), *available at:* https://nysba.org/new-york-state-bar-association-launches-task-force-to-protect-voting-rights-and-democratic-institutions/.

[274] *Id.*

[275] TEX. YOUNG LAW.S ASS'N, *Vote America! Roll Out Guide*, TEX. BAR ASS'N, https://26i1x33zddmb2ub5ei1n3bec-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/Vote-America-Roll-Out-Guide-7-2018.pdf.

[276] DIVERSITY F., Event, *Annual Meeting On Demand 2020*, TEX. BAR ASS'N (June 25, 2020), https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=51175.

[277] *Election Protection Issues*, AUSTIN BAR ASS'N (Apr. 23, 2021), https://www.austinbar.org/for-attorneys/online-cles/election-protection-issues/ (last visited Aug. 2, 2021) (sharing the voter suppression tactics which occurred in the last election cycle including not being given a mail-in-ballot or that they was no confirmation of receipt; not offering curbside voting or lack of signage for curbside voting; voter intimidation (e.g., bringing tanks to the poll place parking lot, brandishing of guns in line, stalking people of color, etc.); and ballot races).

[278] CIV. RTS. & IMMIGR. SECTION, *Defending the Right to Vote in Texas*, AUSTIN BAR ASS'N (Nov. 26, 2018), https://www.austinbar.org/event/civil-rights-immigration-section-cle-12/.

(Massachusetts);[279] and "Can Our Election Be Hacked? Election Cybersecurity and Covid-19 Impact" sponsored by the Privacy, Cyber Security, & Digital Law Section, featuring Michelle K. Tassinari, Director and Legal Counsel, Elections Division of the Office of the Massachusetts Secretary of State and Keryn Cadogan, Chief Information Officer of the Office of the Massachusetts Secretary of the Commonwealth.[280]

The Philadelphia Bar Association had a compelling event through its Chancellor's Forum entitled "When the Rule of Law Fails: Lessons From the Holocaust"[281] as well as a CLE hosted by their Civil Rights Committee entitled "Voting Rights: Where We Came From & Where We Are Going,"[282] and a subsequent CLE program entitled "Seeking Justice for All" to discuss election litigation.[283]

A number of affinity bar associations have also been strong advocates against voter suppression. For example, The Coalition of Bar Associations of Color (which is comprised of the Hispanic National Bar Association, the National Bar Association,[284] the National Asian Pacific American Bar Association, and the National Native American Bar Association[285]) has adopted a strong resolution on restoring the Voting Rights Act.[286]

[279] Sophia Hall and Pamela Wilmot, *Election Protection 2020 Training - Protect the Right to Vote and Learn About Election Law*, (Oct. 2018).

[280] Michelle K. Tassinari, and Keryn Cadogan, *Can Our Election Be Hacked? Election Cybersecurity and Covid-19 Impact*, (Oct. 2020).

[281] *See When the Rule of Law Fails – Lessons of the Holocaust*, PHILADELPHIA BAR ASS'N (June 18, 2020), https://mailchi.mp/philabar/chancellors-forum-when-the-rule-of-law-fails-lessons-of-the-holocaust-zpvx5cgd83.

[282] *See Voting Rights: Where We Came From & Where We Are Going*, PHILADELPHIA BAR ASS'N (Apr. 22, 2020), https://www.philadelphiabar.org/page/YLDEZine032216?appNum=5#story7.

[283] *See* BD. GOVERNORS, Minutes, *Board of Governors Meeting*, PHILADELPHIA BAR ASS'N (Oct. 1, 2020), 3, *available at:* https://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/BOGOct2020Minutes.pdf.

[284] The National Bar Association (NBA) also has an Election Protection Task Force working on voter and election protection initiatives. See https://www.nationalbar.org/NBAR/content/election_protection.Along with the Transformative Justice Coalition, the NBA also created a paid fellowship to help support voting rights and election protection. The Election Protection Fellow's mandate is to "work[] with NBA local affiliates to insure the maximum pro bono participation of African American lawyers in the national Election Protection Coalition Program which is facilitated by the Lawyers' Committee for Civil Rights and features over 100 partner organizations. The mission of the Election Protection Coalition is to advance the right of every eligible citizen of the US to exercise the franchise without obstruction due to voter suppression, onerous and restrictive laws, maladministration, disinformation, deceptive practices, intimidation, racial, gender, and age discrimination, discrimination against one's national origin and language or disability status, or other obstacles." TJC and NBA Election Protection Fellow job posting (on file at the New York City Bar Association).

[285] *See 2020-2021 Annual Report*, NAT'L NATIVE AMER. BAR ASS'N (Apr. 7, 2021), 118, *available at:* https://www.nativeamericanbar.org/wp-content/uploads/2021/04/2020-2021-Annual-Report-1.pdf.

[286] *Id.* at 119.

D. Law Schools

To the best of our knowledge, no law school dean has yet spoken out about the current threat posed by voter suppression measures in any state. We are hopeful that this too will change as the threat to democracy and the rule of law becomes evident and the leaders of our preeminent law schools reconsider their own reluctance to speak out in defense of the principles they attempt to instill in their students and for which their institutions stand.

VII. CONCLUSION

The threats to our nation's democratic institutions by the legislative actions described above are serious and should not be disregarded or treated as conventional political combat. While our nation's courts have dealt fairly, quickly and decisively with the numerous frivolous challenges to the results of the 2020 Presidential election, the current wave of state legislation aimed at suppressing the voting rights of citizens disfavored by legislative leaders demands prompt and effective Congressional action and a broader response from the legal profession as a whole.

We urge Congress to promptly exercise its authority under the Constitution to enact both the 2021 John Lewis Voting Rights Advancement Act and The For the People Act (or its successor, the Freedom to Vote Act), either in their currently proposed forms or in substantially similar forms that encourage and protect the broadest exercise by American citizens of their right to vote in both state and federal elections. We recognize that, at least under present circumstances, passage of this legislation will require some amendment of the Senate's current "filibuster" rule and have suggested above a range of reforms to that rule that we believe are appropriate both for the current – and urgent – voting rights legislation and more broadly for the Senate to perform its Constitutional duties in a timely manner.

We also urge our colleagues in the legal profession to speak and act with the urgency that the current threats require, whether through their firms and corporate law departments or through their state and local bar associations, to make clear to the public that voting rights are not "political" issues but the bedrock foundation of our democracy and need to be respected regardless of party preferences or allegiance. We call too on the leaders of our preeminent law schools to raise their voices publicly in support of the rule of law and the need for all elected officials to work to strengthen and broaden, rather than dilute, democratic participation in our nation's electoral process. Our nation's elected officials, our courts and the American public deserve no less from our profession.

September 2021

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We would like to thank Megan Wheeler, a law student intern from Indiana University Maurer School of Law, for her assistance in the preparation of this report.

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Testimony of

Fred Wertheimer
President, Democracy 21

On Reforming the Electoral Count Act

Submitted to

Senate Rules Committee Hearing On
"The Electoral Count Act: The Need For Reform"

August 3, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Senate Rules Committee, Democracy 21 appreciates the opportunity to submit testimony to the Committee on the essential need to reform two antiquated 19th-century laws that govern the presidential election process.

These laws are the Presidential Election Day Act of 1845 (1845 Act) and the Electoral Count Act of 1887 (ECA), into which the 1845 Act was incorporated.

The Electoral Count Reform Act of 2022 (ECRA), introduced by Senators Susan Collins (R-ME) and Joe Manchin (D-WV) – and representing the work of a bipartisan group of Senators – is important and necessary reform legislation.

But there are also important changes that must be made in the ECRA to ensure the reform legislation effectively accomplishes its goals in preventing future efforts to steal the presidency.

The flaws in the 1845 Act and the ECA were brought into sharp focus by former President Donald Trump's attempted coup to overturn the presidential election in 2020, which Joe Biden had clearly won.

At stake in this reform effort is preserving the foundational concept that has governed our nation since George Washington decided not to run for a third term as President: the peaceful transfer of power.

For more than 200 years, the peaceful transfer of power has been the unwritten rule of our constitutional system of representative democracy. When Richard Nixon in 1960 and Al Gore in 2000 each lost an extremely close election, they honored this defining principle of our democracy.

But, 233 years after the birth of our nation, former President Trump shattered the rule that has served our nation for centuries and has been admired in democracies around the world.

After decisively losing the election, Trump pursued every avenue he and his collaborators could think up to try to overturn the election result. In the process, Trump built a cult following of people who accepted his blatant lie that the election had been stolen from him, despite there being zero evidence for his false claim.

Trump's effort to steal the presidency teaches a vital lesson for the country about what could happen in future presidential elections if the 1845 Act and the ECA are not effectively repaired.

With his attempted coup and his Orwellian campaign about the election being stolen, Trump cracked open the door for another autocratic, losing candidate in the future to attempt to steal the presidency.

That stark reality makes it essential that the ECRA is enacted free of loopholes that could be exploited in another attempt to steal the presidency. Given how close former President Trump came to overturning the 2020 election, there is no room for error in the reform legislation.

Importantly, the ECRA does effectively solve the major problem with the 1845 Act – the potential for a rogue state legislature to override the choice of the voters on Election Day, an effort that Trump and his collaborators aggressively pursued.

The 1845 Act provides that state legislators can themselves name the presidential electors if they determine that the voters in their state have "failed to make a choice" on Election Day. This undefined language could allow a state legislature to declare – for whatever reason it chooses, including a spurious claim of widespread fraud – that the voters have "failed to make a choice" and then appoint its own presidential electors.

Trump and his hand-picked minion at the Justice Department, Jeffrey Clark, tried to use the Department to set the stage for precisely such an effort, but they were blocked by top DOJ officials who refused to go along with the scheme.

The ECRA solves this dangerous problem by eliminating the "failed choice" option for state legislatures, thereby removing the ability of rogue state legislatures to override the choice of voters in their states and name their own presidential electors.

The ECRA contains other important reforms such as the codification of the long-held understanding that under the Constitution and the ECA, the Vice President has only a ministerial role in presiding over the congressional process of counting the electoral votes.

The ECRA, however, fails to effectively solve other key problems in the 19th-century laws and that failure could allow rogue state officials and rogue Members of Congress to reject the choice of the voters in a presidential election.

If these serious problems are not addressed and solved in the ECRA, Members of Congress must recognize that some future, rogue presidential candidate could use any such available loopholes to seek to overturn the loss of a presidential election. This could happen as early as the 2024 election.

The problems in the ECRA that must be addressed include the following:

- The judicial review process in the bill to check a governor's improper certification of electors is unworkable;
- The standard for extending Election Day in "extraordinary and catastropic" circumstances is too broad and gives states too much unchecked discretion; and
- The bill needs clearly enumerated standards that limit the ability of Congress to override a "conclusive" certification of presidential electors by a governor or a court.

The Judicial Review Process

The ECRA empowers a governor or other designated state official, after Election Day, to make a "conclusive" certification of electors, subject to judicial review. It is essential for that judicial review process to be able to deal effectively with a rogue governor's improper certification of presidential electors or failure to certify any electors at all.

The judicial review process in the ECRA, however, is unworkable.

The ECRA allows a governor to certify the electors as late as six days before the Electoral College meets in mid-December to determine the winner of the election. It also provides for an aggrieved presidential candidate to bring a federal court challenge to a governor's certification (or failure to certify) in an expedited process before a special three-judge district court with a direct appeal to the Supreme Court.

If a rogue governor formally certifies the wrong electors but delays the certification until the deadline just six days before the Electoral College meets (or refuses to certify any electors), the judicial review process in the ECRA will not work.

The process simply does not provide enough time for a legal challenge to the governor's certification to be filed, briefed, argued, and decided by the three-judge court and then appealed, briefed, argued, and decided by the Supreme Court.

All of that cannot realistically happen in six days and thus the appeals process cannot serve its necessary purpose.

A governor's refusal to certify the winning electors in a state is not a fanciful proposition. For example, Kari Lake, currently the leading Republican gubernatorial candidate in Arizona, has said that if she had been governor in 2020 she would not have complied with the legal responsibility to certify Joe Biden as the winner of the 2020 presidential election in Arizona.

Under the ECRA as presently written, a presidential candidate cannot seek judicial review for a governor's failure to certify until six days before the Electoral College meets.

If Lake had been governor in 2020 and had refused to certify the Biden electors, as she says she would have done, it would have been extremely difficult, if not impossible, for the courts to act on her failure to certify in the six-day period for judicial review provided in the ECRA. This could have resulted in no Arizona electors voting in the Electoral College.

The time frame for judicial review must be expanded.

One way of accomplishing this would be to move back the date of the Electoral College meeting until later in December, leaving more time for judicial challenges between a deadline date for certification by the governor and the date of the meeting of the Electoral College when the electors vote for President.

There is no magic to the current date set by the ECA for the Electoral College to meet in mid-December. The date can be changed by Congress and moved closer to the end of December.

More time must be provided for a realistic judicial review process to be able to take place.

Related to the certification and judicial review process, the ECRA also should require that a governor certify the presidential electors chosen by the voters – an obvious but important legal requirement that is currently lacking and that can also serve as a standard for the courts to use in reviewing a challenge to a certification (or failure to certify) made by the governor.

Extending Election Day

In the course of solving the "failed to make a choice" problem in the 1845 Act, the ECRA created a new problem by providing that a state can extend Election Day if "necessitated by extraordinary and catastrophic events." But, crucially, it leaves entirely to the states to define what constitutes an "extraordinary and catastrophic" event and provides no date certain by which the extended election must be held.

The standard in the ECRA is clearly intended to include events such as a terrorist attack or a weather-related or other natural disaster on, or near, Election Day.

But it is phrased so broadly and gives states so much unchecked discretion that it also leaves room for the state legislature to pass legislation before an election that would empower a rogue governor or rogue state legislature after an election to declare that claims of supposedly widespread voter fraud on or before Election Day constitutes an "extraordinary" event. This would open the door for manipulating for partisan purposes when and where the extended election would be held.

This problem can be addressed by providing a better-tailored definition of the "extraordinary and catastrophic" circumstances the provision is properly meant to cover, such as by using the term "force majeure," a suggestion also made by Andy Craig of the Cato Institute who notes that the term has a well-developed legal definition.

The provision should also explicitly prevent "voter fraud" from being considered an "extraordinary and catastrophic" event. And, the provision should set a date certain by which any extended election must be concluded.

While it might seem farfetched to imagine a governor or state legislature claiming that "voter fraud" is an "extraordinary and catastrophic" event, the 2020 election and its aftermath showed the nation that there is no scheme too farfetched for a Trump or Trump-like nominee to undertake in attempting to steal a presidential election.

Standards For Congress To Apply

The ECRA provides that the certification of presidential electors by a governor or other designated state official shall be "conclusive." It also provides an exception to this finality: if a reviewing court finds that the governor's certification was in error, the court has the authority to require a revised certification to be issued and that certification is then "conclusive."

But the ECRA also allows Congress, when counting the electoral votes, to reject a "conclusive" certification by a governor or a court and instead find that the electors from a state were not "lawfully certified" or that their votes were not "regularly given," two terms in the current ECA that the proposed legislation does not change or define.

These various provisions of the ECRA are contradictory, as also pointed out by Andy Craig of the Cato Institute. In other words, the ECRA appears to say that the certification given by a governor or by a court is "conclusive" unless and until Congress finds it is not. The broad and ill-

defined standards to allow Congress to override a "conclusive" certification by a governor or a court – not "lawfully certified" or "regularly given" – are easily subject to abuse.

In order to prevent rogue Members of Congress from overriding a "conclusive" state certification of electors, we share the view expressed by Craig of the Cato Institute that the ECRA "should clearly enumerate the constitutionally valid reasons Congress might reject a vote," and that these standards should be the only basis for Congress to override a "conclusive" state certification.

There are other technical changes that should also be considered as the Senate proceeds with its review of the ECRA.

For instance, the three-judge court statute, 28 U.S.C. § 2284(b)(2), has a five-day notice requirement that should be waived (or shortened) for purposes of the judicial review provisions in the ECRA which, even if the time period for judicial review in the bill is expanded, as is necessary, may not be adequate to accommodate a five-day notice requirement.

Also, an existing jurisdictional statute relating to federal elections, 28 U.S.C. § 1344, should be repealed. That statute provides that federal courts may not hear cases "to recover possession of any office." But it has been construed in certain Circuits to displace general grants of federal jurisdiction in election cases, thus depriving federal courts in those Circuits of all jurisdiction to hear federal election-related cases. This could be interpreted, for example, to include federal court review of a state governor's certification of presidential electors. Repealing Section 1344 would clarify federal court jurisdiction for election matters and bring uniformity on this question to all Circuits.

Finally, it is unfortunate that that none of the essential provisions in the Freedom to Vote: John R. Lewis Act have been enacted or included in proposed legislation for consideration by the Senate. These provisions would have overridden the unprecedented state voter suppression and election sabotage laws enacted since 2020 and thereby would have protected the right of every eligible citizen to vote and have their vote properly counted. That vitally important Act was killed by a Senate filibuster in January.

The ECRA is necessary legislation to address the serious problems in two antiquated 19th-century laws, including the dangerous "failed election" provision in the 1845 Act.

It is not enough, however, to eliminate the ability of rogue state legislatures to override the will of the voters expressed on Election Day, but then leave room for rogue governors or rogue Members of Congress to accomplish that same result.

The ECRA must be revised in order that the final reform legislation passed by Congress ensures that all of the existing problems in the 19th-century laws are effectively resolved, but in a way that does not create new ones.

Congress must act now to ensure a Trump-like effort to steal a presidential election cannot be successful in the future.

Senate Committee on Rules and Administration
The Electoral Count Act: The Need for Reform
August 3, 2022
Questions for the Record
Mr. Bob Bauer

Chairwoman Klobuchar

At the hearing you testified about the importance of making sure there are clear rules for the joint session of Congress.

- Do you agree that once Congress has acted on an objection to a state's electoral votes, there should be no further opportunities to challenge those electoral votes?

  Yes, I agree. The reformed statute should bring clarity and finality to the process and protect against circumvention of the defined and limited role Congress would have in reviewing the electoral vote count.

- Some experts have suggested that the changes in the bipartisan bill to Section 15(e) of the *Electoral Count Act* could be interpreted to instruct tellers to reject certain electoral votes even if Congress has not sustained such an objection. Would you support clarifying that an objection is the last chance to challenge a state's electoral votes?

  Only Congress can resolve an objection within the class of objections allowable, on the grounds permitted and in the order required, under the proposed reform. Should there be a perceived need for clarification, I would support it, but also not see the basis for this particular interpretation the tellers' authority.

Senate Committee on Rules and Administration
The Electoral Count Act: The Need for Reform
August 3, 2022
Ambassador Norman L. Eisen (ret.)

Chairwoman Klobuchar

At Wednesday's hearing we discussed your suggestion to improve the bipartisan bill by putting limits on states' ability to extend Election Day during an "extraordinary and catastrophic" emergency to guard against the potential for abuse by partisan actors.

- Can you elaborate on your ideas on this point?

RESPONSE: If the last two years since the 2020 presidential election have taught us anything, it is that bad actors will exploit any latent ambiguity or loophole in the laws governing our elections to further their anti-democratic agenda. While the language of "extraordinary and catastrophic" certainly represents an improvement from the Electoral Count Act's (ECA) dangerously ambiguous "failed election" provision, there is still room for manipulation. Congress must establish more robust guardrails surrounding election day extensions in the case of extenuating circumstances—circumstances which should clearly and exclusively be defined as "force majeure" events. Indeed, current state laws dealing with declarations of emergencies by a governor, court, or legislature suggest that the term "extraordinary and catastrophic" is more capacious than it appears at first glance.[1] Moreover, there is no reason for Congress not to provide guardrails for this term. Not only is doing so well within Congress's legislative powers, but also there already exist clear definitions for the term. Two sources of federal authority, the first preferred and the second an alternate, provide us with these definitions. First, we can look to the King-Klobuchar-Durbin reform proposal for what is, in my view, the most thorough definition of "extraordinary and catastrophic." Their proposal provides that "'catastrophic event' means a major disaster, act of terrorism, act of war, insurrection, power outage, arson or malicious destruction of property, or cyber attack," and supplements this list with precise definitions for "major disaster" and "act of terrorism." Second, we can also turn to 6 U.S.C. 311(3), the definition section of the federal law authorizing the Federal Emergency Management Agency (FEMA), which provides that the term "catastrophic incident," a slight deviation of "extraordinary and catastrophic event," "means any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area." While the King-Klobuchar-Durbin proposal provides in my view the strongest definition for the term "extraordinary and catastrophic," as I have just laid out there is no shortage of workable definitions that could be incorporated to improve the proposed bill. Extending a presidential election day is, to put it bluntly, a big deal. As such, it is imperative that we not leave any ambiguous terms in the proposed provision in place—especially when we already have the tools to define them.

[1] I submit this response in my personal capacity only, and not on behalf of any of the entities with which I am associated. The views herein are my own only.
[2] *See* Legislative Oversight of Emergency Executive Powers, National Conference of State Legislatures (June 14, 2022), https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx.
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