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“The Electoral Count Act: The Need for Reform”

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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.<sup>1</sup> 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,

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<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup> 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 . . .”<sup>6</sup> 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.”<sup>7</sup>

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<sup>4</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>5</sup> U.S. CONST. art. II, § 1, cl. 4.

<sup>6</sup> U.S. CONST. amend. XII.

<sup>7</sup> 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.<sup>8</sup> In a 1792 law, Congress had instructed state executives to certify presidential election results and transmit certificates of election to electors<sup>9</sup> and set some rules for Congress to be in session for the counting of votes.<sup>10</sup> Upon ratification of the Twelfth Amendment, Congress enacted an updated statute in 1804.<sup>11</sup> 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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<sup>8</sup> 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").

<sup>9</sup> 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 . . .").

<sup>10</sup> *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.").

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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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<sup>12</sup> U.S. CONST. art. I, § 3, cl. 5.

<sup>13</sup> See *supra* note 8 and accompanying text.

<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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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<sup>15</sup> See, e.g., TADAHISA KURODA, THE ORIGINS OF THE TWELFTH AMENDMENT 80–82 (1994)

<sup>16</sup> 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.<sup>17</sup> 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.**

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<sup>17</sup> 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.<sup>18</sup> 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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<sup>18</sup> 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.<sup>19</sup> 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 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.

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<sup>19</sup> 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.<sup>20</sup> 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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<sup>20</sup> 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.<sup>21</sup> In either case, expedited review is appropriate to handle the narrow questions at hand.<sup>22</sup>

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.<sup>23</sup> But in such appeals, the Court “may dispose summarily of the appeal.”<sup>24</sup> 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.”<sup>25</sup> 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.<sup>26</sup>

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<sup>21</sup> 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>.

<sup>22</sup> 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.

<sup>23</sup> See, e.g., *McCutcheon v. Federal Election Comm’n*, 572 U.S. 185, 196 (2014).

<sup>24</sup> Sup. Ct. R. 18.12.

<sup>25</sup> *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, J., concurring).

<sup>26</sup> 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;<sup>27</sup> the Court refused to hear an election case where it had “original, exclusive” jurisdiction in 2020.<sup>28</sup> 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).<sup>29</sup> 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)).

<sup>27</sup> 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 . . .”).

<sup>28</sup> 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.”).

<sup>29</sup> 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.<sup>30</sup>

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.”<sup>31</sup> The Rules of the Senate routinely require actions taken upon a percentage of the votes of the Members “duly chosen and sworn.”<sup>32</sup> 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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<sup>30</sup> 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.

<sup>31</sup> U.S. CONST., art. I, § 5, cl. 3.

<sup>32</sup> *See, e.g.*, Rules of the Senate XXVIII(6)(b).

raised around the 2020 election.<sup>33</sup> 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.<sup>34</sup> 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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<sup>33</sup> 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 . . . .”).

<sup>34</sup> 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.”<sup>35</sup> 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.<sup>36</sup> Additionally, the 9/11 Commission Report recognized that improving presidential transitions was crucial to improve national security.<sup>37</sup> It acknowledged that disputed presidential elections can delay transitions at a significant cost to, among other

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<sup>35</sup> U.S. CONST. amend. XII.

<sup>36</sup> Letter of Emily W. Murphy, Administrator, U.S. General Services Administration, November 23, 2020.

<sup>37</sup> THE 9/11 COMMISSION REPORT 422 (2004).

things, national security.<sup>38</sup> 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.<sup>39</sup>

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

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<sup>38</sup> *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.”).

<sup>39</sup> 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 3a~~1~~ ~~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.

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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.