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How to Pick a President

A Guide to Electoral Count Act Reform

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EXECUTIVE SUMMARY

The peaceful transfer of power, regular elections, and limited terms of office are among our most precious legacies of the American Revolution. These bedrock constitutional principles are indispensable both to "insure domestic Tranquility" and to "secure the Blessings of Liberty to ourselves and our Posterity."

But as we saw in the 2020 election, operating under an antiquated rule book can pose serious risks. The Electoral Count Act of 1887 (ECA), with minor amendments since, is the statutory codification of important details left unaddressed by the Constitution's sparse provisions for electing a president. It is in dire need of reform.

America should not have to confront a potential constitutional crisis every four years. We should have confidence that the rule of law will prevail in determining the occupant of our highest office. The ECA as it stands is woefully inadequate to provide that assurance.

There is broad agreement on the need for ECA reform. Proposals range from a broad, expansive bill that could be criticized as overly complicated and assuming a role for Congress beyond the Constitution's limits, to a narrow, minimalist bill that could leave important problems unresolved by only making minor cosmetic changes.

There is a better middle course, built on a thorough consideration of the constitutional principles at stake. The ECA as it exists now is too flawed to save. Even if no substantive changes were to be made, a thorough rewrite is necessary to clarify the muddled and confusing language that Congress adopted in 1887. At the same time, ECA reform should respect the limits of Congress's role, in line with the principle that the ECA is simply codifying and clarifying constitutionally mandated processes. To that end, this analysis provides a top-to-bottom how-to guide for an ECA reform that is both constitutionally and practically sound.

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INTRODUCTION

The attempt to overturn the 2020 presidential election took advantage of long-neglected ambiguities in the process of translating votes cast at the polls into the declaration of a formal winner. It was a stress test of our electoral architecture: the patchwork of historical practices, informal norms, and ambiguous laws that govern how the United States chooses its chief executive every four years. While the election result was ultimately confirmed despite the defeated incumbent's efforts, the crisis revealed severe flaws that can no longer be safely ignored. Understandably, there has been growing bipartisan support in Congress for shoring up presidential election procedures.[1]

At the heart of the matter is the Electoral Count Act (ECA).[2] Passed in 1887, the Electoral Count Act was Congress's response to our closest call with a disputed presidential election, the notorious Hayes-Tilden dispute of 1876 and the renewed civil war it very nearly sparked. As Congress correctly recognized in 1887, the ad hoc Electoral Commission that was created to resolve the 1876 election was a deeply problematic precedent that should not be repeated.[3] This well-intentioned but poorly drafted statute governs how electoral votes are cast, certified, sent to Congress, and counted, and how any objections to the results are handled.

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The ECA is, simply put, a mess. It is a tangle of woefully unclear drafting, apparent contradictions, and constitutional infirmities, leaving too much room for partisan actors to undo the choice of the American people. The stakes are too high for us to rely on the current ECA for future elections. Congress must go back to the drawing board and get it right this time.

In doing so, Congress should recognize the limited purpose of the ECA. For the most part, the rules of the electoral count are not discretionary policy decisions, because the valid options are already sharply circumscribed by the Constitution. The purpose of the ECA is merely to fill in the gaps, to specify the necessary details for avoiding ambiguities. A careful reading of the Constitution's text and appreciation of its structural implications can provide us with both a better process and one less prone to potential subversion.

This analysis will explain in detail how to properly reform the Electoral Count Act, along with a model template for statutory text. The first section covers the general principles that should guide ECA reform, while the second examines in detail, section by section, each of the necessary provisions of a model draft statute. Two appendices follow: Appendix A contains, for reference, the relevant provisions of the Constitution, and Appendix B contains the model statutory language.

GENERAL PRINCIPLES

Constitutional Compliance

The purpose of the Electoral Count Act is to fill in the details of the presidential election process required by the Constitution.[4] The relevant constitutional provisions are in most respects sparse, but they lay out some important guidelines. Scrupulous compliance with these provisions is necessary not only for fidelity to the Constitution but also because a constitutionally defective ECA invites challenges and uncertainty, defeating the purpose of providing clarity and predictability.

In broad strokes, the Constitution's process is as follows: states select electors in a manner of their choosing at a time set by Congress. The electors meet and vote on the appointed day, which is also specified by Congress. Congress then meets in a joint session and counts the electoral votes to formally determine the winner.[5]

In effect, what we call a presidential election really consists of two distinct elections.[6] In November, the states hold their popular elections to choose electors from among slates of candidates nominated by each party. In December, the chosen electors meet in their respective states and cast their votes for president and vice president. It is only with regard to this second election that Congress plays a limited role in counting the electoral votes—a task that necessarily entails determining whether a purported electoral vote has, in fact, been validly cast under the terms of the Constitution.

Thus, the states canvass their voters to pick the Electoral College, and then Congress canvasses the Electoral College to find out who has been elected president and vice president. A constitutionally sound ECA must respect this bifurcation, limiting both the states and Congress to their prescribed functions. If we were designing a system from scratch, we might choose a different allocation of powers and roles, but that is not the Constitution's current design. Absent a constitutional amendment, the prescribed process must be followed above all other concerns.

Clarity and Simplicity

There are important constitutional defects in the existing ECA, but its main problem is its baffling lack of clarity. It contains convoluted run-on sentences, conflicting provisions, confusing ambiguities, and needless complexity.

At the heart of the matter is how little guidance is offered for the proper role of Congress, which has led to dangerous assertions that Congress has essentially unlimited power to throw out electoral votes for any reason it chooses.

The ECA, in the law's most notoriously unclear section, which governs the joint session of Congress (3 U.S.C. § 15), says only that objections can be raised on the basis that an electoral vote was not "regularly given" or that the electors' appointment was not "lawfully certified," and both terms are left undefined. That language was intended to invoke terms of art referring to possible flaws in how the electors voted or how their appointments were certified.[7] It was not intended to enable Congress to sit in judgment of the underlying popular election in each state. Unfortunately, that limitation has been repeatedly ignored, with objections in recent years attempting to relitigate the popular election results in a manner inconsistent with Congress's actual constitutional role. These objections, including in the elections of 2004 and 2020 that triggered congressional debates and votes, should not have been considered at all.[8] But because the Electoral Count Act does not clearly define the limits of proper objections, spurious objections for purposes of political grandstanding have repeatedly reached the floor without being ruled out of order.

A reformed Electoral Count Act should spell out explicitly an exhaustive list of grounds for objections, excluding all others as improper, and unambiguously specify the proper procedures Congress is to follow.

State Autonomy

The Constitution leaves it up to the states to decide how to select their members of the Electoral College and then administer the process chosen. Congress has no power over it other than setting the time at which states are supposed to conduct their chosen method of selection and the day on which the electors are to meet and vote. The Electoral Count Act must not overstep this boundary.

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The Framers of the Constitution certainly knew how to grant Congress a wider and more general power, because they did grant exactly that with regards to congressional elections, for which Congress may prescribe the place and manner as well as the time. Primary responsibility for deciding the rules of congressional elections remains with the states, but Congress is given a broad power to "at any time by Law make or alter such Regulations."[9] The Constitution further provides that "each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[10] It grants neither Congress nor the incumbent presidential administration any such powers over presidential elections.

Congress's sharply limited power over states' conduct of presidential elections does not extend to prescribing what methods a state uses to choose electors. For example, while 48 states use the winner-take-all method of choosing electors, two (Nebraska and Maine) pick one elector each to reflect the winner of each congressional district, with two more chosen by statewide vote. But Congress could not mandate either method. Note the contrast with Congress's far broader power to prescribe rules for House elections, where it can and has mandated election by single-member districts, even though single-member districts are not specifically required by the Constitution.

There is a risk of Congress taking an overly expansive view of its power over when presidential elections are conducted to

impose unconstitutional requirements on how states conduct their elections. It is a proper use of Congress's time-setting power for it to spell out circumstances under which late selection of electors is authorized, such as in the event of extreme natural disasters. But this must not become a backdoor to get around its inability to impose manner requirements. Deciding on a method of late selection is a policy decision that still belongs to the states, so long as they abide with the time limits set by Congress.

In short, a reformed Electoral Count Act should respect state autonomy to the greatest degree possible, in line with the Constitution's tightly constrained grants of congressional power over presidential elections. How electors are chosen is a state law process, to reach its culmination in the same way as any other state law process: administration of the law by state executive officials followed by resolution by courts of any litigation that may arise.

Judicial Deference

The general principle of state autonomy is not without limits. States are still subject to federal constitutional requirements, such as the Fourteenth and Fifteenth Amendments, and Congress's power to enforce these restrictions through statutes such as the Voting Rights Act.

Like other claims that state governments have violated applicable federal law or the Constitution, claims that a state's popular election for presidential electors has somehow violated a federal obligation are properly brought before the federal courts. A litigant with standing (easily satisfied by a candidate challenging their apparent defeat) can, under current law, already take their case to federal court for a binding decision on their federal claims.

In practice, sweeping constitutional provisions such as the Equal Protection Clause provide very broad, though not boundless, grounds for federal court jurisdiction over claims of serious election misconduct. Federal courts already have this broad jurisdiction and for the most part have done a good job exercising it, deciding election challenges quickly and with solid legal grounding. Courts are also much better suited than legislative bodies for parsing the complicated facts and nuanced legal questions that can arise in something with as many moving parts as an election with millions of voters.

Once a final determination has been made through the administrative-judicial process of state executives conducting the elections, appeals through the state courts, and possible federal appeals as to federal claims, Congress should respect this outcome as decisive in determining who the state has appointed as its members of the Electoral College. This is how the ultimate outcome of every other state-law issue is decided. In this respect, disputes over elections for electors are no different from disputed elections for governor, mayor, or other such state and local offices.

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Even though federal courts have performed admirably, there is room for improvement on the tightly constrained timeline between Election Day in early November and Inauguration Day on January 20. By moving the date on which the Electoral College meets and votes later in the calendar, a few extra weeks can be provided to avoid the perception of a rushed, insufficiently considered decision. An expedited appeals process can also be provided, following a model set by the Bipartisan Campaign Reform Act that has already been successfully used.[11] This procedure involves a three-judge panel composed of a mix of district court and circuit judges. Its decisions can be appealed directly to the Supreme Court. The three-judge panel model provides for quick decisions in time-sensitive cases, sidestepping the usual need for an intermediate appeal from the district court to the circuit court.

Limited Congressional and Vice-Presidential Role

The Framers considered and deliberately rejected letting Congress select the president.[12] The most serious flaw in the existing Electoral Count Act is that it has been interpreted by some as implying that Congress has carte blanche to throw out electoral votes for any reason and, in effect, determine the winner of the election.

In fact, Congress does not get to decide under what set of conditions an electoral vote can be invalidated. The Constitution does that, with a specific set of rules that spell out who can be an elector and under which narrow conditions their votes are void. Congress has a role in applying these rules, and for that purpose can codify them to enhance procedural clarity. But the substance of these rules is not Congress's to determine. In spelling out what constitutes a validly cast electoral vote, Congress is not properly engaged in a policy judgment about what those rules should be, but is instead simply articulating what's already in the constitutional text.

It was this confusion, more than any other, that made the Capitol a target on January 6, 2021. Fueled by baseless claims of fraud, a mob targeted Congress, demanding that it do something Congress has no constitutional power to do: invalidate electoral votes on the basis of how the underlying popular election was conducted in each state.

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The constitutionally permissible reasons for valid objections, each grounded in a specific provision of the Constitution, can and should be enumerated by Congress. Any other objections should be out of order and not permitted, because such objections cannot be acted on without violating the Constitution. It is improper for Congress to even consider an objection if a constitutionally valid reason for the objection has not been alleged.

Even more narrowly constrained is the role of the vice president, who is constitutionally directed (as the president of the Senate) to simply open the envelopes containing the votes during the joint session of Congress. In practice, Congress has also interpreted this as designating the vice president as the presiding officer for the proceedings. But as Vice President Pence correctly determined, in spite of demands to the contrary, that job is not intended to have any substantive power to change the results.[13] Vice presidents—including Pence in 2021, Al Gore in 2001, and Richard Nixon in 1961—have dutifully presided over the count and affirmed their own defeat for either president or vice president. ECA reform should firmly and unequivocally rebut the theories advanced by President Trump and his allies that an incumbent vice president can, in effect, decide who won the election.

A reformed Electoral Count Act should confine Congress to enforcing a few specific constitutional mandates about who can be an elector and how the electors must meet and cast their votes. How each state conducted its popular election, including how its outcome was ultimately adjudicated through the courts if it were disputed, is constitutionally none of Congress's business. The vice president, as the ceremonial presiding officer, should be granted no authority to do anything more than read the script: in effect, announcing the results of the decisions made by the states, the Electoral College, and Congress.

Avoid Bottlenecks

Electing a president requires an intricate set of steps involving, in turn, state legislators, voters, state executive officials, courts, the vice president, and Congress. Each one must act lawfully and within the bounds of the Constitution so that the process can continue to the next step.

There is always a risk of bad-faith lawless actors, particularly when the number of people involved (even excluding the millions of voters) runs well into the thousands. In some cases, the limitations on what these public officials should do can be logically derived from the Constitution, but they are not explicitly and clearly stated. Nor does the Constitution specifically explain what enforcement mechanisms are available. Codifying, with actionable clarity, both these limits and what to do if they are violated properly falls to Congress.

One of the riskiest bottlenecks is the certification of electors by the state government, a task that currently falls to the governor (although the ECA's text refers to only "the executive" of the state, which could cause its own problematic disputes between conflicting state executive officers).[14] This certification is a ministerial duty: simply issuing the proper paperwork in confirmation of a decision that has already been made by other actors. It is also a federal constitutional duty: "each State *shall* appoint electors" in the manner chosen (emphasis added).[15] Federal courts should

therefore be empowered to compel the proper certification if it has been denied because of partisan malfeasance on the part of state officials.

If the relevant state officer refuses to issue the needed certification in disregard of a court order, the court should be able to identify and compel an alternative state officer to issue the certification, such as a secretary of state. Congress should be committed to accepting this outcome. It is a matter solely between the states and the courts. Congress has some inherent power to provide for the process in its capacity as organizer of the federal courts, but it has no power to intervene in specific cases.

Better Timeline

Currently, there is a tight window between Election Day in early November and when the electors must meet and vote in mid-December.[16] But the time between that date and when Congress meets in early January serves no specific purpose. The date of the Electoral College meeting should be moved back, closer to the congressional joint session, to provide the greatest possible amount of time for the courts to resolve contests.

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A reasonable scheduling option would be for the electors to meet on January 2, with Congress then meeting on January 6 as it does currently. This would allow courts most of November and all of December to consider challenges, which would help not only on practical grounds but also in avoiding the appearance that a decision was unduly rushed or that the courts did not have sufficient time to consider evidence and arguments.

The "safe harbor" provision in 3 U.S.C. § 5 is intended to provide some guarantee of deference to the state's determinations and to encourage timely certification. It provides that if a state certifies its electors at least six days prior to Electoral College meeting day, that certification "shall be conclusive" during the joint session of Congress.

But the safe harbor rule is unclear on what, if any, types of congressional objections it precludes. It does not recognize the distinction between an objection to the validity of a state's *appointment* of electors (for timeliness or other possible reasons) as opposed to possible ways in which validly appointed electors can then cast invalid *votes*. The latter possibility falls to Congress to enforce and has nothing to do with the timeliness and finality of who the state has appointed as its electors. In effect, the safe harbor rule has not limited objections at all, and Congress has disregarded it when considering objections to states that have met the deadline.

The safe harbor rule also inserts another six-day gap in the calendar prior to the Electoral College meeting day, which played an outsized role in the disputed 2000 election and the Supreme Court's ruling in *Bush v. Gore*. It can be made unnecessary by spelling out elsewhere what sorts of congressional objections are permitted. In a well-designed Electoral Count Act, the safe harbor mechanism should be eliminated altogether. It is a failed idea whose purposes can be better achieved in other ways.

MODEL TEMPLATE: THE ELECTORAL COUNT ACT OF 2022

The following analysis walks through, section by section, what a reformed Electoral Count Act should look like, replacing most of the existing U.S.C. Title 3, chapter 1. Besides the explanations here, the model legislation language in Appendix B reflects these conclusions. The section numberings refer to those in the draft template, which largely follow the same order but may not necessarily align with the current section numberings in 3 U.S.C.

In this case, the statutory language—and specifically the clarity of that language—in large part *is* the policy substance. The best way to explain the policy recommendations is by reference to the proposed text. There are a number of ways the same substantive provisions could be drafted. But in general, Congress should not be reluctant to repeal and replace all of the existing sections, ensuring that there is a coherent whole and that all of the parts interact with each other as intended. Patchwork fixes would be insufficient and risk overlooking important flaws in current law. They could even run the risk of introducing new conflicts between different sections.

A minimalist, least-changes fix to the ECA might seem to be a narrow and conservative solution, but it has the potential to unsettle things even more and to leave important problems unsolved. By the standards of federal legislation, a comprehensive rewrite and recodification of the ECA would be relatively simple and short. This model proposal would repeal and replace in full 3 U.S.C. §§ 1–18, with some aspects of the 1887 ECA retained but rewritten for clarity.

Section 1: Selection of Electors

The first order of business and the predicate for much of what follows is for Congress to exercise its time-setting power over the selection of electors. The current provision simply defines the date commonly known as Election Day, the first Tuesday after the first Monday in November. But this fails to clearly articulate some details and interpretations that have developed in practice.

States have long permitted early voting even though it is not clearly authorized. Currently, every state allows at least some early voting by some voters. In elections soon after the ratification of the Constitution, before the election period was narrowed down to a single day, Congress instead defined a longer window with the understanding that all relevant voting had to occur within those dates. States were left free within that window to specify their own times for when voters could go to the polls.

When Congress instead narrowed its time-setting authorization to a single Election Day in 1845, early and absentee voting were not yet practiced. Absentee voting was first developed for soldier voters during the Civil War. Other federal statutory provisions do now refer to and in some cases regulate, early and absentee voting, but the time-setting provision itself was never clearly amended to authorize it. This oversight should be corrected before it becomes a potential argument raised in the context of an election dispute.

A provision authorizing early voting up to 60 days prior to Election Day would cover all existing state laws as well as military and overseas voters under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). However, the extent of early voting is currently a partisan issue, with Democrats supportive of more extensive early voting and Republicans tending to favor a narrower window closer to Election Day. A reformed Section 1 could sidestep that dispute by simply saying that early voting is permitted without setting a particular limit on how early is allowed. The hypothetical possibility that a state could try to adopt extremely early voting, such as many months or even years in advance, is highly unlikely. If such a situation arises, Congress would have plenty of time to address it.

With regards to post–Election Day counting and certification, a reformed time-setting provision should articulate the distinction that is already implicitly drawn in current practice. No state actually completes the tabulation of its results on Election Day, which would be a logistical impossibility. The distinction implicitly made in current law, and which should be made explicit, is between voting or any other discretionary act of choosing, which cannot occur later than Election Day, as opposed to simply counting and certifying the results of choices made on or before Election Day. There should be no confusion that the time period for valid voting ends on Election Day. Everything that follows is just determining what choice has already been made.

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The model draft in Appendix B would retain the existing definition of Election Day; explicitly authorize early voting; explicitly authorize post–Election Day vote counting; authorize a deadline extension under Section 2's failed election provision; and state the general principle that states must in all cases set their manner of choosing electors by law no later than Election Day.

Section 2: Conditions Authorizing Later Elector Selection

The current provision in 3 U.S.C. § 2 covers so-called failed elections, stating in full 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."

What does it mean for a state's election to have failed to make a choice? Who gets to decide that an election has failed? Can the state legislature invoke this provision at will? Is it up to the governor or other state executive agencies? Does the manner the legislature may direct for this scenario have to be adopted prior to Election Day? The current statute is unhelpfully silent. In particular, this has led to incorrect claims that state legislatures retain some power to overturn or alter the results after Election Day.

The failed elections provision has had two predominant understandings during its history. It predates the Electoral Count Act of 1887 and was inserted when Congress narrowed the "time of chusing electors" to a single day. At the time, some states required an absolute majority of the vote for their popular election to be conclusive. In cases where the 50 percent threshold wasn't reached, some states opted to have the legislature decide or to hold a runoff election. Vermont still uses the former system for its gubernatorial elections, with a contingent election in the legislature if no candidate gets a majority of the popular vote (in practice and by well-established convention, the legislature always selects the plurality winner even when that candidate is from the opposite party). Two states, Georgia and Louisiana, use runoffs for their congressional elections. However, no state has had such a runoff or contingent election system for president since Georgia abolished its presidential runoffs in the 1960s.[17]

It would be a policy judgment, validly exercised under the time-setting power, if Congress wants to explicitly allow runoff elections for president. If that is the intention, it should be spelled out clearly, including a deadline for when the runoff must be completed.

On the one hand, permitting runoff elections would respect state autonomy to make their own judgment on the merits including, for example, a desire to avoid spoilers. There is nothing inherently unfair or unjust about a two-round runoff system. American politics is not totally unfamiliar with the possibility that a runoff election could affect a national outcome, as we saw when Georgia's runoff elections for both of its Senate seats in 2020 determined which party would hold the Senate majority.

On the other hand, it might be undesirable to have a presidential election come down to a runoff in a determinative state held weeks later, impinging on what is already a tight timeline and causing substantial political turmoil. If a state holds a runoff that would not affect the national outcome, then it would be a wasteful and undoubtedly low-turnout affair. In addition, the spread of ranked choice voting allows states to conduct so-called instant runoffs if they prefer to avoid "spoiler" candidates that can affect the outcome under a traditional plurality election.

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Given those downsides and the fact that no state has chosen or is likely to choose to have presidential runoffs, it would be reasonable for Congress to omit a provision authorizing them. In that case, the general time-setting provision should be phrased to clearly exclude the possibility by making it unambiguous that all voting for the purpose of choosing electors must be completed no later than Election Day. If Congress instead chooses to permit runoff elections by allowing a deadline extension for that purpose, then the provision should clearly and narrowly define what is being authorized, including that such runoffs should be conducted no later than the end of November.

The other practical function of the failed elections provision and the main understanding of it in the modern era has been to cover natural disasters and other large-scale catastrophes interrupting an election: hurricanes, terrorist attacks, and the like. The statute should clearly define these circumstances under a force majeure provision and explain how the states must prepare and what they can do in such a scenario. Most critically, this should require that the state's laws on the topic must be established before Election Day. The ECA should also specify how long this deadline extension would last and when the state's backup process must be completed. Again, November 30 would be a suitable option that avoids impinging too much on the timeline for post-election litigation, the meeting and voting of the Electoral College, and the presidential transition.

Beyond that, Congress should defer to the same sort of state law process that governs the regular selection of

electors. Federal power over the states in this area is fundamentally limited to time-setting. Congress can create an extension to the time permitted for specific exigent circumstances, but it should not stretch that power to interfere with states' authority over the manner of choosing electors.

In the case of a failed election, there are reasonable arguments about holding an extended popular election, versus legislative selection, versus some other possibility. It might partly depend on the facts on the ground regarding the scale of the catastrophe. States should be left free to make their own decision about what to do in these sorts of scenarios, including who is authorized to initiate the process and under what circumstances specific options are to be used. As always, these state laws must still comply with all generally applicable constitutional restraints, such as the Equal Protection Clause.

The model draft provision in Appendix B does not authorize runoff elections but does authorize later elector selection in the event of an election impaired by force majeure, which the provision also defines, and sets a deadline to complete the backup process by November 30.

Section 3: Certification of Electors

In order to cast electoral votes, a state must first certify who it has chosen as its electors, informing Congress of whose votes are to be counted. Without this crucial step, there would be no formal basis for Congress to distinguish between real votes cast by the proper electors and fake votes submitted by imposters. It is also necessary that Congress know the identity of the electors in order to enforce the constitutional eligibility requirement that forbids electors who are members of Congress or holders of other federal office.

Certification of the electors is a ministerial function of the state's executive, the culmination of the state law process for choosing electors, including, when applicable, any litigation over the outcome of that process. This executive function is obligatory and nondiscretionary, and it reflects a federal constitutional obligation under the Electors Clause. This constitutional obligation provides the necessary hook for federal judicial action in the event that a state's executive refuses to provide the proper certification.

While Congress is codifying this cause of action, it can also provide for an expedited review process of a three-judge panel with direct appeal to the Supreme Court. This judicial mechanism would not preclude other, earlier litigation over various federal claims, such as under the Equal Protection Clause. Instead, it would only serve as a fail-safe in the event that other administrative and judicial remedies have failed to secure issuance of the proper certification.

In the event that the certifying state official refuses to comply with a court order, plaintiffs should be permitted to request an alternative remedy by designating another appropriate state officer. This would give the court the ability to order this alternative officer to issue the certification. It is important to note that the certification must ultimately come from the state in some form. Congress should not simply accept a certification issued directly and only by a federal court, which is not a state and has no power to appoint electors. But the federal judiciary is well within its proper role to compel a state to abide by its constitutional obligations, including by going around a recalcitrant state officer to find a suitable alternative who is able and willing to comply.

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It is important to narrowly define standing for this cause of action in order to comply with Article III's jurisdictional requirements. State laws sometimes extend the right to request recounts or dispute results to any candidate who was on the ballot (see, for example, Green Party candidate Jill Stein's successful request for a recount in Wisconsin in 2016 under that state's since-changed laws). But a distant third- or fourth-place candidate who is making no claim that they actually won does not have the required injury in fact. Nor should standing be extended to individual voters, who have other appropriate remedies for any claims they may have. If a state and the defeated candidate are not in dispute over the result, some other litigant should not be able to force a contest over it.

This section should also clearly authorize filling vacancies among the electors and specify that an amended

certification in such cases is proper and will be accepted. How to fill vacancies is a decision that should be left to the states. This could include the election of alternates at the same time as the electors, allowing the nominating party or some state executive officer to fill the vacancies, or allowing the remaining electors to select somebody to fill the vacancy. These are all valid options, and the only restriction should be that a state must specify how it will fill its vacancies prior to Election Day.

It is also under the vacancy-filling provision that states can enforce their laws against faithless electors. These state laws provide that, if an elector attempts to cast a vote other than for the candidate they are pledged to vote for, this is interpreted as disqualifying the elector, which creates a vacancy to be filled on the spot.

In 2016, amid a coordinated nationwide effort to persuade electors to cast faithless votes, multiple states enforced these laws for the first time. This led to the Supreme Court upholding elector-binding laws in the twin cases of *Chiafalo v. Washington* and *Baca v. Colorado*. Those decisions confirmed Congress's historical practice, which has been to count faithless votes that have been duly submitted and certified by the states. Adopting laws against faithless electors or leaving electors free to vote as they choose is a policy decision for the states; it does not implicate Congress's power to count the votes and thus does not need to be explicitly addressed by the ECA.

Section 4: Meeting and Voting of Electors

The Constitution requires that the members of the Electoral College must meet in their respective states to cast their votes on a day set by Congress, and that this day must be the same throughout the United States.[18] Currently, Electoral College day is set in mid-December, on the first Monday after the second Wednesday of the month.

The gap between when the electors meet and when Congress meets serves no purpose and can be shortened substantially. All litigation and administrative disputes over who has been validly appointed should be resolved by the day the electors meet, because that is the inherent constitutional deadline after which there is no function for the electors to perform. There is no further adjudication to take place between when the electors cast their votes and when Congress meets to count the votes. Any irregularities that arise at the Electoral College meetings themselves, such as a certified elector being replaced with an alternative who has not been duly chosen, fall under Congress's purview to address. The only thing that needs to happen during this gap is the physical transportation of the vote certificates from the state capitals to Washington, DC.

An understandable practical concern is to avoid a meeting that conflicts with the holidays. In line with that, and the desire to maximize the time for the courts to resolve disputes, a date of January 2 would be reasonable, four days prior to when Congress meets on January 6. This will ensure adequate time to transmit the votes "to the Seat of Government of the United States, directed to the President of the Senate" as required by the Constitution. The law should also not require any particular method of transmitting the certificates, such as permitting the use of a courier if needed rather than requiring delivery through the U.S. Postal Service.

"There is no further adjudication to take place between when the electors cast their votes and when Congress meets to count the votes."

The model draft in Appendix B would set the date for the electors to meet and vote as January 2. It further incorporates the language of the Twelfth Amendment regarding how they are to vote, certify their votes, and transmit the votes. It provides that all certificates are to be produced in triplicate, with the two additional copies sent to the speaker of the House and the archivist of the United States.

Section 5: Joint Session of Congress

The constitutionally mandated joint session of Congress is currently fixed on January 6. This date strikes a good balance, ensuring that even in the most protracted scenario, Congress is able to complete the certification of a president-elect prior to Inauguration Day on January 20.

In line with existing practice and the desire to avoid discretionary functions for the vice president, each house

should appoint tellers to do the actual counting and reporting of the vote totals. This includes verification that the votes are certified by the same electors who have been previously certified by the states.

If there is no majority for either president or vice president, then the contingent election process is triggered, whereby the House votes by states to choose the president and the Senate elects the vice president.[19] Additional clarification about how to calculate the needed majority and how to conduct contingent elections is provided later, in Section 8 of this proposal.

The model draft in Appendix B maintains the current date of January 6 for the joint session; contains a slightly simplified and clarified version of the current rules regarding the tellers appointed by each house; incorporates the Constitution's language for when a conclusive majority has been reached; and contains a precise script for the form of the announcement by the vice president that a candidate has been elected.

The form of this announcement is improved from the current practice, which merely announces the vote totals and leaves it to implication that the candidate with a majority of the votes has been elected. The vice president should conclusively name the persons who have been elected. This is a cosmetic change, but one worth undertaking to affirm the ceremonial importance of the announcement, especially when it serves as the incumbent party's acknowledgement of a defeat.

Section 6: Challenges

The most important and substantive aspect of Electoral Count Act reform is limiting objections, in line with Congress's limited constitutional role in counting the votes.

One of the most obvious flaws with the existing ECA is the low threshold for triggering the objection process, which requires the two houses to retire to their respective chambers to debate and vote on the question. Currently, this procedure can be invoked any time one member from each house signs an objection—that is, at least one representative together with at least one senator. There is widespread consensus that this hurdle is much too low. Instead, consideration of an objection should require support from a substantial fraction of the members of Congress, such as one-third of both houses.

The list of valid grounds for objections is the centerpiece of ECA reform. This list can and should be distilled from the applicable constitutional rules, including some that seem rather obvious and unlikely to be violated, but that should be included for the purpose of ensuring the exhaustiveness of the list. The list of permitted objections should be contained in a single section for simplicity and to avoid possible conflicts between separate categories enumerated in separate sections.

The exhaustive nature of the list is a crucial part of its function. Otherwise, the law will be susceptible to constitutional objections on the grounds that it is invalid (and thus can be disregarded altogether) because it does not allow Congress to handle theoretically possible invalid votes.

As improbable as it might seem today, an example of such a dispute occurred in the 1820 election when Congress could not decide if Missouri had become a state in time because of ambiguous wording in Missouri's statehood act. The House and Senate both launched into a heated debate over the dispute, eventually producing two conflicting vote totals. In the end, it was agreed to simply announce and record both results, one with Missouri included and one with Missouri omitted. This constitutionally dubious compromise was only possible because it made no difference to the outcome: President James Monroe had been reelected near unanimously and effectively unopposed.[20] To be constitutionally exhaustive, the list of permitted objections must include such scenarios even if they are extremely unlikely in the modern era.

"The list of valid grounds for objections is the centerpiece of ECA reform. This list can and should be distilled from the applicable constitutional rules."

The constitutional requirements for valid electoral votes include that only states, and not other entities (such as territories), may cast votes; that states may only cast the number of votes to which they are entitled; that the electors may not hold a prohibited federal office; that the selection and meeting of the electors must comply with the applicable time requirements; that the certificate of electors and the certificate of the votes must not be fraudulent in the narrow sense of literal

forgery; that the certificates must comply with the constitutionally required forms; that the electors and their votes may not be accepted in defiance of an applicable judicial ruling that Congress should defer to; that an elector may not cast votes for both offices (president and vice president) for candidates who are both residents of the same state as the electors; and that the candidates must be constitutionally eligible.

This is the total, exhaustive list of constitutionally valid reasons for objections, each grounded in a specific constitutional requirement for who the electors can be and how they may vote. Anything else should be deemed out of order and not considered.

Special care must be taken as to the last type of objection: that votes have been cast for a constitutionally ineligible candidate for president or vice president. In all other scenarios, the proper outcome of a sustained objection is to not count the votes on the grounds that they are not valid votes at all. However, the Twentieth Amendment requires a different procedure in the case of votes cast for ineligible candidates.

> "When it comes to sustaining objections, a simple majority in both chambers should prevail. Creating a supermajority requirement (such as two-thirds) on a statutory basis invites a possible 'nuclear option' fight."

Because the Twentieth Amendment speaks to the possibility that an ineligible presidential candidate has been elected ("if the President elect shall have failed to qualify"), this requires counting such votes even if Congress determines that the candidate is ineligible to take office.[21] This is an important distinction because the amendment specifies that in such a scenario, the vice president-elect should become president, rather than triggering a contingent House election. In practice, this means the difference between an ineligible candidate's *running mate* taking office and an ineligible candidate's *defeated opponent* taking office. In the case of vice president, an ineligible candidate being elected should be interpreted to create a vacancy that can then be filled under the Twenty-fifth Amendment after Inauguration Day, rather than a contingent Senate election whose only option would be the losing party's candidate.[22]

While the outcome of an eligibility objection must be different, it is practically desirable to handle such objections at the same time and through the same process as other objections, during the roll call announcement of each state's votes. This avoids requiring a new opportunity for objections at the end of the count, when the process would otherwise be concluded. This can be accomplished by simply specifying the difference in outcome for candidate eligibility objections, thus keeping the process streamlined. The procedure can also provide that, once votes from one state have been found to have been cast for an ineligible candidate, the same finding automatically carries over to all other votes cast by other states for the same person.

When it comes to sustaining objections, a simple majority in both chambers should prevail. Creating a supermajority requirement (such as two-thirds) on a statutory basis invites a possible "nuclear option" fight whereby simple majorities can invoke the Rules of Proceedings Clause to lower the threshold down to simple majorities by a joint resolution. Ultimately, simple majorities in Congress will have their way. If that already high hurdle has been reached, it is desirable that it be done cleanly and without inviting disputes over the power of simple majorities to make or amend congressional rules. It is also practically doubtful that Congress can be compelled to do business with a president that majorities of both houses have declared to be ineligible or otherwise not legitimately elected.

The model draft in Appendix B would raise the threshold for making objections to one-third of both houses; require that all objections be for a reason contained in the exhaustive list of constitutionally valid grounds; specify the process for debate and votes on objections; and provide for the distinct handling of candidate eligibility objections in compliance with the Twentieth Amendment.

Section 7: Multiple Certificates

After the experience of the 1876 election, the drafters of the Electoral Count Act of 1887 were primarily concerned with the possibility that multiple conflicting certificates would be received by Congress, each certified by different

officers or purported officers of the state government. This possibility still needs to be accounted for, but it is today mostly obsolete. In the Reconstruction period, when such issues could only be resolved by more cumbersome procedures such as the writ of quo warranto, disputes over the rightful state leadership could last much longer.[23]

The courts are in a better position, and can be better empowered, to decide these disputes in advance of the joint session of Congress. It is also much less likely that a state could have multiple competing claimant governors, as happened during Reconstruction, without a rapid and conclusive judicial determination by the state courts.

Rather than opening the door for Congress to make a discretionary decision, the handling of multiple purported certificates should be decided by an automated, mechanistic procedure administered by the archivist. In the first instance, this should be by reference to how the courts have ruled, as provided in Section 3 above. This would cover all realistic scenarios, since it is difficult to conceive of a scenario in which such a dispute has not been litigated. And it would be preferable to the current ECA's "governor tiebreaker" system, in which a governor's certification is decisive if the House and Senate cannot agree, even if this outcome is in spite of a judicial decision.

In the unlikely event that the courts have not provided a definitive ruling, the archivist should default to accepting the electors and votes certified by the governor of the state. And as a further backup option, if no gubernatorial certification has been provided, then the acceptance should default to the certification made by the officer generally responsible for keeping and affixing the seal of the state (in most states, this is an official duty of the secretary of state).

The model draft in Appendix B would instruct the archivist to, in the event of multiple conflicting submissions, accept the certificates in compliance with applicable court rulings. If there is no court ruling, acceptance would default to the certifications provided by the governor, or else by a secretary of state or the equivalent.

Section 8: Contingent Elections

The Constitution requires an absolute majority of the Electoral College to produce a winner for both president and vice president. In the event that no such majority exists (which has not happened since 1824 for president and 1836 for vice president), then a contingent election is to be held immediately. In the case of contingent elections for president, the House chooses from among the top three vote getters in the Electoral College. In the case of a contingent election for vice president, the Senate chooses from among the top two vote getters in the Electoral College.[24]

The procedure for contingent elections is contained in the Constitution and the statute's rules should simply incorporate the constitutional provisions. That includes how the House, in choosing a president, is to follow a unique procedure where the votes are cast by state delegations, with each state having one vote and a majority of the states (i.e., 26 votes) necessary to determine the winner.

> "One ambiguity that should be clarified is how to calculate the needed majority of the Electoral College when some votes have been thrown out on sustained objections."

One ambiguity that should be clarified is how to calculate the needed majority of the Electoral College when some votes have been thrown out on sustained objections. The Constitution specifies that the number is "a majority of the whole number of Electors appointed."[25] This use of the word "appointed" provides a distinction that should be carefully observed: if Congress finds that *an elector* is ineligible, then no such elector has been validly appointed and the number required for a majority is reduced accordingly. If Congress finds that *a vote* by a validly appointed elector is invalid (such as for an impermissible combination of same-state candidates), then the elector still counts for determining a majority even though they did not cast a valid vote.

The model draft in Appendix B restates the constitutional procedures for contingent elections and contains an explicit clarification of how to calculate a majority of the electoral votes. It also provides for how the results of a contingent election are to be formally announced by means of informing the other house, in lieu of the usual announcement by the vice president at the end of the joint session.

Section 9: Parliamentary Authority

The creation of binding rules of procedure, such as the limits on valid grounds for objections, requires some authority for making these determinations. In usual parliamentary procedure, these determinations would fall to the presiding officer acting on advice of a parliamentarian. However, one of the important goals here is to avoid putting discretionary power into the hands of the vice president.

A suitable alternative and trusted neutral authority would be to use the official parliamentarians for the House and Senate, in the same way the parliamentarians make rulings during the normal course of business in each body. Because of the need to avoid a deadlock between the two parliamentarians, they should select ahead of time a third parliamentarian, with rulings requiring the concurrence of any two of the three.

> "One of the important goals here is to avoid putting discretionary power into the hands of the vice president."

Ultimate authority for interpreting and applying the rules of procedure still rests with the elected members of Congress, who can always overrule the parliamentarians. In normal business within a single house, this would require an appeal of the chair's ruling to the full body. Matters are complicated by the mechanics of a bicameral joint session, and also by the need to avoid a backdoor loophole through which invalid objections could be debated under the guise of appealing the ruling. The latter would render moot the ECA's limitations on valid grounds for objections.

To handle procedural appeals without excessive delay, the right to make an appeal should be limited to the presiding officers and party leaders in both chambers: the speaker of the House, the president pro tempore of the Senate, and the majority and minority leaders in both houses. This would ensure that appeals are made only with substantial support but also that they can be made expeditiously in the moment, without requiring the gathering of a large number of cosigners.

To decide an appealed parliamentary ruling expeditiously, the joint session should not divide back into the House and Senate for debate and separate votes, as in the case of objections. Instead, the matter should be immediately put to a vote in the joint session, with all senators and representatives voting by electronic device in the House chamber (the usual manner in which the House conducts votes). To overturn the ruling, a majority of both the House and the Senate would have to vote in favor of the appeal.

To ensure the compliance of the vice president with any parliamentary rulings, noncompliance should trigger the ability to remove the vice president from the role of presiding officer, to be replaced with the president pro tempore of the Senate. This power would likewise be vested solely in leadership, exercised by the joint concurrence of the speaker and the president pro tempore.

The model draft in Appendix B would lay out the process of empowering the House and Senate parliamentarians, together with a third parliamentarian jointly selected in advance; provide an expedited procedure for deciding appeals of parliamentary rulings; provide for the absence or noncompliance of the vice president by transferring the gavel to the president pro tempore of the Senate; and generally limit the exercise of these functions to the constitutional officers and party leaders from each house.

CONCLUSION

The proposals outlined in this analysis are by no means the only possible outcomes Congress could reach in reforming the Electoral Count Act. A wealth of scholarship and analyses, some of which have reached differing conclusions on some of the details, are thoughtful and are worthy of consideration. All of them provide guidance for ECA reform that would be a substantial improvement over the status quo. Of particular note are the report prepared by the House Committee on House Administration at the direction of Chair Zoe Lofgren (D-CA);[26] the report of the cross-ideological expert commission cochaired by Bob Bauer and Jack Goldsmith for the American Law Institute;[27] Richard L. Hasen's forthcoming *Harvard Law Review* article, "Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States";[28] Matthew Seligman's "Disputed Presidential Elections and the Collapse of Constitutional Norms";[29] Edward Foley's "Preparing for

a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management";[30] Cass Sunstein's Harvard Public Law Working Paper "Post-Election Chaos: A Primer";[31] and Stephen A. Siegel's "The Conscientious Congressman's Guide to the Electoral Count Act of 1887."[32]

> "The peaceful transfer of power, fixed terms of office, and free and fair elections are innovations at the heart of America's constitutional traditions."

The task before Congress in reforming the ECA is urgent and should be taken up now, before the next presidential election campaign begins. The moment for reform is ripe when neither party can know which might benefit, enabling the establishment of neutral principles without partisan advantage. At present, it is unknown which party will control the House and Senate and which party will be the apparent presidential winner after the 2024 elections.

The peaceful transfer of power, fixed terms of office, and free and fair elections are innovations at the heart of America's constitutional traditions, indispensable aspects of how we define a legitimate government with the consent of the governed. Safeguarding these aspects of the rule of law is a crucial responsibility to ensure that we pass on to generations to come the domestic tranquility and blessings of liberty secured by the Constitution.

The Electoral Count Act is a ticking time bomb, and we had a close brush with disaster at the last election. The misguided and confused readings of the law led directly to the attack on Congress last year and the efforts to overturn the results of the election. Fixing the ECA should be Congress's highest priority in crafting a legislative response to that tragedy and the broader constitutional crisis. Nobody should be under the illusion that there is any legal path to overturning the constitutional results of a free and fair election for our country's highest office.

APPENDIX A: CONSTITUTIONAL PROVISIONS

Article II

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. . . .

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.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

Twelfth Amendment

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—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 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; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for

as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.—] The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Twentieth Amendment, Section 3

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

APPENDIX B: MODEL DRAFT STATUTE

Electoral Count Act of 2022

The following statutory language would repeal and replace in full 3 U.S.C. §§ 1–18, with further sections renumbered accordingly.

1. Selection of Electors

In each State, the electors shall be chosen pursuant to the manner directed by the legislature thereof on Election Day, the first Tuesday after the first Monday in November in calendar years evenly divisible by four. In such cases where the legislature has directed popular election of electors, early voting may be permitted as the State may provide by law. In no case shall any vote or other action to effect the selection of electors be made after Election Day, except as to tabulate and determine the result of choices made on or before Election Day, or in the case of filling a vacancy among the electors, or in the case of an impaired election under Section 2.

2. Conditions Authorizing Later Elector Selection

a. Whenever any State has provided for an election for the purpose of choosing electors, and the ability to conduct the election has been impaired by force majeure, the electors may be appointed on a subsequent day in a manner which the State has provided by law enacted prior to Election Day. The selection of electors in such cases shall be completed no later than the thirtieth day of November.

b. An election impaired by force majeure shall only be an election in which, due to natural disaster, war, civil disorder, terrorist attack, or other similar emergency substantially disrupting administration of the election, either a substantial portion of the eligible voters in the State have been made unable to vote on Election Day or the counting of a substantial portion of the votes has been made impossible.

3. Certification of Electors

a. As soon as the final determination of the selection of electors is made under the laws of the State, including

administrative or judicial determination of any contest concerning the selection, the executive authority of the State shall certify under the seal of the State the list of electors chosen and transmit the certificate in triplicate to the Archivist of the United States. The Archivist shall retain one certificate in the Archives of the United States and provide one certificate each to the Speaker of the House and the President pro tempore of the Senate.

b. The certificate of electors, including any amended certificates in the case of filling vacancies among the electors, shall be made and transmitted no later than the second day of January, or else the State shall be considered for all purposes thereafter to have failed to appoint electors. Two additional original copies of the certificate of electors shall be provided by the executive authority of the State to each of the electors.

c. Each State may, by laws enacted prior to Election Day, provide for the manner of filling vacancies among the electors.

d. In the case of filling vacancies among the electors, amended certificates of the list of electors shall be made and transmitted in the same manner as provided in subsection (a).

e. In the event that the executive authority of the State fails to certify the State's duly chosen electors, then any duly chosen elector refused such certificate, or any candidate for president or vice president to whom such an elector is pledged, may bring an action against the relevant officer or officers of the State in the federal district court for the district containing the capital of the State. In such cases, a three-judge court as provided in subsection (f) shall be impaneled. The three-judge court may provide declaratory or injunctive relief as it deems necessary to compel the proper certificate. If necessary, at the request of the plaintiff the court may provide alternative relief by ordering that the certificate be provided by an appropriate alternative officer of the State. In such cases, the certification of electors made and transmitted in compliance with the court's order shall exclusively govern in all proceedings thereafter, and any purported certification which is not in compliance with the court's determination shall be null and void for all purposes.

f. The three-judge court under this section shall be convened by the district judge who has received a complaint under subsection (e). The panel shall consist of the district judge together with two circuit judges randomly selected from the circuit containing the district.

g. Decisions of the three-judge court under this section may be appealed directly to the Supreme Court by petition for a writ of certiorari. Nothing in this section shall be construed to preclude other actions brought under other federal causes of action, which shall be handled in the usual manner.

4. Meeting and Voting of Electors

a. The electors shall meet in their respective States on the second day of January. The electors shall vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.

b. The certified lists of the votes cast shall be produced and transmitted in triplicate and, upon their receipt, one shall be provided by the President of the Senate to each of the Archivist and the Speaker of the House. The certificate kept by the President of the Senate shall be the certificate used during the counting of the electoral votes, but one of the other two may be used if it becomes necessary.

5. Joint Session of Congress

a. On the sixth day of January, the House and Senate shall meet in joint session in the chamber of the House of Representatives, or otherwise at such location and later time as may be jointly designated by the Speaker of the House and the Senate Majority Leader due to exigent circumstances, but in no event later than the ninth day of January.

b. Prior to the joint session, the House and Senate shall each appoint two tellers.

c. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates of votes cast, proceeding in alphabetical order through each State, and the votes shall be counted by the appointed tellers, including verification by the tellers that the names of the electors comport with the certified list of electors provided by the State to the Archivist. The tellers shall inform

the President of the Senate of the results from each State, and the President of the Senate shall immediately announce the same. Upon the opening and counting of the certificates from all States, the tellers shall inform the President of the Senate of the total number of votes received by each candidate for President and Vice President, and the President of the Senate shall immediately announce the same.

d. The eligible person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed. The eligible person having the greatest number of votes for Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed. In either such case, the President of the Senate shall announce from the chair the following: "Pursuant to the laws and Constitution of the United States, (name) has received (number) votes for (President or Vice President), such number being a majority of the whole number of electors appointed. (Name) is therefore elected as (President or Vice President) of the United States for the term beginning at noon on January 20, (year), and this announcement shall be entered in the journals of the House and Senate and constitute due notice and affirmation of the person elected."

6. Challenges

a. During the joint session, after the announcement of the results for a given State, objections for a valid reason may be made to the President of the Senate in writing, stating the reason for the objection and the factual basis thereof, by no fewer than one-third of the whole number of Representatives together with no fewer than one-third of the whole number of Senators, and specifying which votes or electors from the State are the subject of the objection.

b. Valid reasons for objections shall consist of one or more of the following and no other reasons. Any objection which does not state one or more of the following reasons shall not be in order:

(i) that the entity which has purported to certify electors is not a State or was not a State on Election Day.

(ii) that the list of electors reflects a number of electors, or the certificate of votes reflects a number of votes for either President or Vice President, in excess of the state's number of apportioned Representatives and Senators.

(iii) that the list of electors includes one or more electors who is a Senator or Representative or holds an office of trust or profit under the United States.

(iv) that the electors were not chosen within the time prescribed for choosing electors.

(v) that the electors did not meet and give their votes on the day prescribed and which is the same throughout the United States.

(vi) that the list of electors is fraudulent in that it was not actually signed and certified by the purported officer of the State.

(vii) that the certificate of votes is fraudulent in that it was not actually signed and certified by the electors named in the list of electors, including as amended in the case of filling vacancies among the electors.

(viii) that the certificate of votes does not facially conform to the requirements of the twelfth article of amendment to the Constitution.

(ix) that one or more electors have cast their votes for President and Vice President for persons who are both inhabitants of the same State as the elector or electors casting such votes.

(x) that either the list of electors or the certificate of votes was given in violation of a State or federal judicial determination in force at the time the list or certificate was issued, and such judicial determination has not since been withdrawn or overruled.

(xi) that votes have been cast for President for a person who is constitutionally ineligible, in which case if the objection is sustained, the votes from that State and from any other States which have been cast for the ineligible candidate shall still be counted, and if the ineligible candidate has been elected, then the Vice President elect shall become President pursuant to the twentieth article of amendment to the Constitution.

(xii) that votes have been cast for Vice President for a person who is constitutionally ineligible, in which case if the objection is sustained, the votes from that State and from any other States which have been cast for the ineligible candidate shall still be counted, and if the ineligible candidate has been

elected, then the office of Vice President shall become vacant, and the vacancy may be filled pursuant to the twenty-fifth article of amendment to the Constitution.

c. Upon an objection for a valid reason having been made by the requisite number of Representatives and Senators, the House and Senate shall separate to their respective chambers to consider the objection. Debate shall be limited in both the House and Senate to two hours, with no more than five minutes per member. After the conclusion of debate, the House and Senate shall each vote on whether to sustain the objection. After both the House and Senate have voted on whether to sustain the objection, they shall reconvene in the joint session.

d. Objections shall not be sustained unless the House and Senate both concur in sustaining the objection by majorities of all members present and voting. Sustained objections shall result in the votes objected to not being counted, except in cases of candidate eligibility challenges as provided in 6(b)(xi) and 6(b)(xii) of this chapter. A sustained objection shall not result in other purported votes being counted in place of the rejected votes.

7. Multiple Certifications

a. In the event that the Archivist receives conflicting claimed certificates of electors from the same State, each certified by a different officer of the State, then the Archivist shall accept only the certificate issued in compliance with an applicable judicial determination, if such determination has been made.

b. If no such judicial determination has been made, the Archivist shall accept only the certificate issued by the governor of the State or the State's equivalent highest executive officer.

c. If no judicial determination has been made and no claimed certificate is certified by the governor or equivalent, then the Archivist shall accept only the certificate issued by the officer generally responsible under the laws of the State for keeping and affixing the seal of the State.

d. If none of the claimed certificates are valid under any of the preceding criteria, none of them shall be accepted by the Archivist and the State shall have failed to appoint electors.

8. Contingent Elections

a. If no eligible person has received a number of votes for President constituting a majority of the whole number of electors appointed, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before noon on January 20, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.

b. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed. If no person has a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President. A quorum for this purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

c. In the case of a contingent election for President under this section, the result shall be announced by the Speaker of the House and notice shall be sent to the President of the Senate, who shall announce the same to the Senate. In the case of a contingent election for Vice President under this section, the result shall be announced by the President of the Senate and notice shall be sent to the Speaker of the House, who shall announce the same to the House.

d. For determining the whole number of electors appointed, electors determined to be ineligible or otherwise not duly appointed by a sustained objection shall not be counted as electors appointed, but electors whose appointment was valid but who were determined to have cast invalid votes shall still be counted as electors appointed.

e. The House may adopt any further rules of proceedings for a contingent election for President, and the Senate may adopt any further rules of proceedings for a contingent election for Vice President, consistent with the Constitution and this act.

9. Parliamentarians and Presiding Officer

a. Prior to the joint session for counting electoral votes, the House Parliamentarian and the Senate Parliamentarian shall by mutual agreement select a third Congressional Parliamentarian, and the three together shall be the Joint Session Parliamentarians.

b. In all questions arising as to the interpretation and application of the rules of proceedings under this act, the President of the Senate shall immediately refer the matter to the Joint Session Parliamentarians, who shall be present in the chamber and provide a ruling with the concurrence of at least two of them.

c. If the President of the Senate acts in any manner inconsistent with the rules of proceedings and fails to refer the matter to the Joint Session Parliamentarians, then any one of the Speaker of the House, the President pro tempore of the Senate, the Senate Majority Leader, the Senate Minority Leader, or the House Minority Leader may object and refer the matter to the Joint Parliamentarians Committee for their ruling as in subsection (b).

d. Any ruling of the parliamentarians may be appealed by any one of the Speaker of the House, the President pro tempore of the Senate, the Senate Majority Leader, the Senate Minority Leader, the House Majority Leader, or the House Minority Leader. Appealed rulings shall immediately be submitted to the joint session, without division into the House and Senate and without debate. All members of both houses shall simultaneously vote by electronic device and the concurrence of both a majority of the Representatives voting and a majority of the Senators voting shall be necessary to overturn the ruling.

e. If, for any reason, the President of the Senate is absent from the joint session, the President pro tempore of the Senate shall preside.

f. If the President of the Senate refuses to comply with a ruling of the Parliamentarians, the Speaker of the House and the Senate Majority Leader may by their mutual concurrence remove the President of the Senate from presiding over the joint session and the President pro tempore shall instead preside. In such a case, the President of the Senate shall remain in the chamber solely to open the envelopes directed to the President of the Senate under the twelfth article of amendment to the Constitution. If the President of the Senate is thereafter absent or refuses to open the envelopes, they shall instead be opened by the President pro tempore.

g. If, when called upon to act as presiding officer for the joint session, there is a vacancy or absence of the president pro tempore of the Senate, then the Senate Majority Leader shall designate another Senator to preside.

NOTES

1. Andy Craig, "Bipartisan Momentum Builds for Fixing the Electoral Count Act," *Cato at Liberty* (blog), January 5, 2022.

2. A note on terminology: the 1887 Act is usually referred to as "the" Electoral Count Act, but some provisions were adopted prior to 1887 or have been introduced in minor amendments since. In line with common usage, this analysis uses "Electoral Count Act" to refer to all election-related provisions in 3 U.S.C., which are found in §§ 1–18 and the definitions provision in § 21. This does not include 3 U.S.C. §§ 19–20, which govern vacancy, resignation, and succession under the Presidential Succession Act and are not considered to be part of the Electoral Count Act.

3. Thomas A. Berry, "GOP Senators' Electoral College Stunt Is a Dead End," *National Review Online*, January 5, 2021.

4. For a more detailed defense of the constitutionality and necessity of having an Electoral Count Act, see Thomas A. Berry, "The Legitimate Role of Congress in the Electoral Count," Cato Briefing Paper no. 135, February 22, 2022.

5. U.S. Const. art. II, § 1; U.S. Const. amend. XII.

6. For a more detailed explanation of this bifurcated structure of presidential elections, see Andy Craig, "What Changes Should Be Made to the Electoral Count Act?," *Cato at Liberty* (blog), January 12, 2022.

7. Derek T. Muller, "Electoral Votes Regularly Given," *Georgia Law Review* 55 (June 28, 2021): 1529, University of Iowa Legal Studies Research Paper no. 2021-30.

8. Under the current ECA, objections must be made by at least

one member of each house in order to proceed to debate and votes in each chamber (3 U.S.C. § 15). This requirement was met for objections regarding the elections of 1968, 2004, and 2020. Objections made by one or more House members but that failed to be cosponsored by a senator were also made in 2000 and 2016.

9. U.S. Const. art. I, § 4.

10. U.S. Const. art. I, § 5.

11. *McConnell v. FEC*, 540 U.S. 93 (2003).

12. James Madison, "Madison Notes, July 19," Yale Law School Lillian Goldman Law Library, original notes on debates at the Federal Constitutional Convention for July 19, 1787.

13. Walter Olson, "In Final Weeks, Trump White House Searched for Excuses to Overturn Election Results," *Cato at Liberty* (blog), December 13, 2021.

14. Electoral Count Act, 3 U.S.C. § 6 (1887).

15. U.S. Const. art. II, § 1.

16. Electoral Count Act, 3 U.S.C. § 1; and Electoral Count Act, 3 U.S.C. § 7.

17. Thomas A. Berry, "A Presidential-Election Runoff Would Be Legal for States to Adopt," *National Review Online*, April 14, 2016.

18. U.S. Const. art. II, § 1.

19. U.S. Const. amend. XII.

20. *The Debates and Proceedings in the Congress of the United States, Sixteenth Congress, Second Session* (February 14, 1821) (Washington: Gales and Seaton, 1856), pp. 1147–65.

21. U.S. Const. amend. XX.

22. Thomas A. Berry, "The Electoral Count Act and Presidential Ineligibility," *Cato at Liberty* (blog), February 3, 2022.

23. Stephen A. Siegel, "The Conscientious Congressman's Guide to the Electoral Count Act of 1887," *Florida Law Review* 56, no. 3 (July 2004): 541.

24. U.S. Const. amend. XII.

25. U.S. Const. amend. XII.

26. Thomas A. Berry and Andy Craig, "House Committee Issues Report on Electoral Count Act Reform," *Cato at Liberty* (blog), January 21, 2022; and Committee on House Administration, "The Electoral Count Act of 1887: Proposals for Reform," January 2022.

27. Bob Bauer, et al., "Principles for ECA Reform," April 4, 2022.

28. Richard L. Hasen, "Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States," *Harvard Law Review*, forthcoming 2022.

29. Matthew Seligman, "Disputed Presidential Elections and the Collapse of Constitutional Norms," November 12, 2018.

30. Edward B. Foley, "Preparing for a Disputed Presidential Election: An Exercise in Election Risk Assessment and Management," *Loyola University Chicago Law Journal* 51 (August 31, 2019): 309.

31. Cass R. Sunstein, "Post-Election Chaos: A Primer," Harvard Public Law Working Paper no. 20-25, September 2, 2020.

32. Stephen A. Siegel, "The Conscientious Congressman's Guide to the Electoral Count Act of 1887," *Florida Law Review* 56, no. 3 (July 2004): 541.

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