

CLC URGES IMMEDIATE PASSAGE OF REFORMS TO THE ELECTORAL COUNT ACT

On July 20, 2022, Senators Susan Collins (R-ME), Joe Manchin (D-WV), and 14 bipartisan cosponsors introduced the [Electoral Count Reform and Presidential Transition Improvement Act of 2022 \(ECRA\)](#) (S. 4573). This vital legislation would update the [Electoral Count Act of 1887 \(ECA\)](#) and help prevent attempts to sabotage the results of presidential elections. Campaign Legal Center (CLC) urges Congress to modernize the ECA without further delay.

America's ability to elect a president fairly and peacefully every four years is a hallmark of our democracy. For more than a century, the ECA has provided the primary framework governing how presidential votes are cast and counted, including establishing procedures for how Congress counts each state's electoral votes. But recent events demonstrate the pressing need to update this archaic law to combat the ongoing threat of election sabotage.

The ECA has not been updated since it was first enacted more than 130 years ago, and it is rife with imprecise language, and ambiguities that partisan actors tried to [exploit](#) as part of an organized [attempt](#) to overturn the 2020 election. Although these efforts failed, the obscure language of the ECA unfortunately remains ripe for manipulation. As a result, interest in clarifying the ECA's language has grown, and members of Congress from both sides of the aisle are working together to protect the will of the people.

CLC believes, at a minimum, four essential changes must be [made](#) to update the ECA:

- 1) Prohibit state legislatures from overruling their own voters.
- 2) Resolve disputes about electors and electoral votes before they reach Congress.
- 3) Strictly limit opportunities for members of Congress to second-guess electors and electoral votes.
- 4) Clarify the vice president's ministerial role in the counting of electoral votes.

The ECRA would significantly improve the ECA to reduce opportunities for election sabotage in all four of these key areas. CLC commends the strong bipartisan effort to draft this legislation and encourages additional bipartisan consideration of technical amendments to further clarify its provisions.

The following summary outlines how the ECRA will specifically update the ECA:

Key Reform #1: Prohibit state legislatures from overruling their own voters.

Section 102 of the ECRA would update Section 1 of the ECA (3 U.S.C. § 1) to provide that each state's electors shall be appointed on election day, in accordance with the laws of that state enacted prior to election day. This section eliminates archaic language in the existing ECA that some have claimed could allow states to change their rules after election day. The ECRA makes clear that the only permissible modification would be for a state, as "necessitated by extraordinary and catastrophic events," to extend voting beyond election day as provided for under pre-existing state law.

This update to the ECA would bar a state legislature from changing the law after election day to overrule the results of the state's popular election.

Key Reform #2: Resolve disputes about electors and electoral votes before they reach Congress.

Section 104 of the ECRA would update Section 5 of the ECA (3 U.S.C. § 5) to establish a timeline under which each state shall issue a "certificate of ascertainment of appointment of electors" that designates and certifies the electors (and thereby the election results) from that state. This section also establishes a process for streamlined judicial review of legitimate lawsuits brought by a candidate to challenge the legality of a state's certification of (or failure to certify) its election. In addition, this section establishes that Congress shall treat any electors certified through this process--including any judicial review--as conclusive when Congress counts electoral votes.

This update to the ECA would provide a timeline and a mechanism to resolve disputes about electors and election certifications in the courts before those disputes reach Congress.

Key Reform #3: Strictly limit opportunities for members of Congress to second-guess electors and electoral votes.

Section 109 of the ECRA would update Section 15 of the ECA (3 U.S.C. § 15) to raise the numerical threshold for members of Congress to object to a state's appointment of electors or to electoral votes. Current law provides that an objection is recognized if it is signed by only one member from each chamber of Congress. This reform would raise that threshold for recognition to one-fifth of the Senate and one-fifth of the House. The ECRA also clarifies how to determine whether a candidate has achieved a majority of electoral votes (and thereby

been elected president), specifically by providing that electoral votes rejected by both chambers of Congress are not included in either the numerator or the denominator of the majority determination.

By requiring significantly larger thresholds for objections, this update to the ECA would help ensure that Congress accepts a state's certified election results in all but the most extraordinary circumstances. Addressing the denominator question also reduces the incentives for gamesmanship in objecting to electoral votes.

Key Reform #4: Clarify the vice president's ministerial role in the counting of electoral votes

Section 109 of the ECRA would update Section 15 of the ECA (3 U.S.C. § 15) to explicitly provide that the role of the vice president, serving as the President of the Senate, is "limited to performing solely ministerial duties" while Congress counts the electoral votes. This section also emphasizes the ministerial nature of the vice president's duties by noting that the vice president "shall have no power to solely determine, accept, reject, or otherwise adjudicate or resolve disputes over the proper list of electors, the validity of electors, or the votes of electors."

This update to the ECA would reinforce that the vice president does not decide election results.

The Electoral Count Reform and Presidential Transition Improvement Act addresses each of the ECA's major vulnerabilities. CLC supports these changes, which would provide significant protections to ensure that elections are decided by voters. CLC urges Congress to perfect and advance the ECRA as soon as possible.

If you have any questions, please contact Jo Deutsch (jdeutsch@campaignlegalcenter.org) and Eric Kashdan (ekashdan@campaignlegalcenter.org) on our legislative strategy team.