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One Hundred Seventeenth
Congress of the United States
House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION

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December 8, 2022

Dear Leader Schumer, Leader McConnell, Chair Klobuchar, Ranking Member Blunt, Senator Manchin, and Senator Collins:

As you know, Congress faces the urgent task of reforming the Electoral Count Act of 1887 (“ECA”) before the end of the year. The House has passed its version of ECA reform¹ and the Senate has reported its version from the Senate Rules Committee.² As we weigh the respective bills in pursuit of a final agreement, we would benefit from greater clarity regarding a few components of the Senate’s bill (referred to here as “ECRA”).

- 1) **ECRA retains the ECA’s objection grounds of “lawfully certified” and “regularly given” but does not define those terms.**
 - a. Do you believe that the Constitution permits Congress to reject a state’s electoral votes simply because Congress has a belief about election fraud in that state?
 - b. Do you believe that ECRA permits such an action?
 - c. Would your answer to either question change if a court has reached a final determination that there was no fraud in the state’s election?
 - d. Have you read Federalist No. 68, and if so, can you explain how ECRA has been informed by the Framers of the Constitution as outlined in that essay?

- 2) **ECRA does not create new federal subject matter jurisdiction in certificate-related litigation.³ As you may know, the Fifth Circuit, and by extension the Eleventh Circuit, has interpreted 28 U.S.C. § 1344 to deprive federal courts of subject matter jurisdiction over claims that implicate “a question of who won the most legal votes”⁴ in elections for the offices enumerated in that statute, which include presidential elector.⁵ Because ECRA does not repeal § 1344 or otherwise address this issue, it**

¹ H.R. 8873, The Presidential Election Reform Act (passed the House September 21, 2022).

² S. 4573, The Electoral Count Reform Act (reported out of Senate Rules Committee on October 18, 2022).

³ See ECRA at pages 7-8 (“This subsection shall be construed solely to establish venue and expedited procedures[.]”).

⁴ *Keyes v. Gunn*, 890 F.3d 232, 239 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 434 (2018). The Fifth Circuit’s case law on this issue predates the split between the Fifth and Eleventh Circuits, *see, e.g., Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948), and is thus binding in the Eleventh Circuit as well. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (accepting as binding all rulings of the former Fifth Circuit handed down before October 1, 1981, when the Eleventh Circuit became independent).

⁵ See 28 U.S.C. § 1344 (“The district courts shall have original jurisdiction of any civil action to recover possession of any office, **except that of elector of President or Vice President**, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.”) (emphasis added).

appears that the case law described here would remain in effect and that the provisions of ECRA regarding the timely transmission of lawful election certificates would risk being unenforceable in the American South.⁶

a. Do you agree or do you understand differently?

As Leader McConnell wisely said during the January 6th Joint Session of Congress, “The Constitution gives us here in Congress a limited role. We cannot simply declare ourselves a national board of elections on steroids. The voters, courts, and states have all spoken. They’ve all spoken. If we overrule them, it would damage our republic forever.”⁷ We could not agree more, yet we struggle to see how that peril will be avoided if Members are permitted to raise objections based on allegations of voter fraud and if failsafe judicial review mechanisms are inoperative in some parts of the country.

The Framers strove to avoid “cabal, intrigue, and corruption” in presidential elections.⁸ Your feedback regarding the above will help ensure that we meet that standard and further our great experiment in republican self-government.

Sincerely,



Zoe Lofgren
Chairperson



Liz Cheney
Vice Chair, Select Committee
to Investigate the January 6th
Attack on the United States
Capitol

⁶ The Fifth and Eleventh Circuits comprise Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

⁷ Barbara Sprunt, *McConnell Condemns Republican Objections to Electoral College Results*, NPR.org (Jan. 6, 2021), available at <https://www.npr.org/sections/congress-electoral-college-tally-live-updates/2021/01/06/954018944/mcconnell-condemns-republican-objections-to-electoral-college-results>.

⁸ See *The Federalist* No. 68, at 459 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).