MEMORANDUM IN SUPPORT OF NOT COUNTING VOTES OF ELECTORS IN VIOLATION OF LAW & THE U.S. CONSTITUTION

In support of denying votes for Electors selected in violation of Article II and the due process and equal protection clauses of the Fourteenth Amendment, this Memorandum sets forth those provisions of 3 U.S.C. §§ 2-5 and 15 that are inapplicable or unconstitutional, and the resulting Twelfth Amendment requirement that a vote be taken in the Congress with one vote by each state delegation as follows:

I. ELECTION PROCESS MANDATES UNDER THE U.S. CONSTITUTION

The Electors Clause requires that each State "shall appoint" its Presidential Electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 2 (emphasis added); *cf. id.* art. I, § 4 (similar for time, place, and manner of federal legislative elections). "[T]he state legislature's power to select the manner for appointing electors is *plenary*," *Bush II*, 531 U.S. at 104 (emphasis added), and sufficiently *federal* for this Court's review. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*"). This textual feature of our Constitution was adopted to ensure the integrity of the presidential selection process: "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." FEDERALIST NO. 68 (Alexander Hamilton). When a State conducts a popular election to appoint electors, the State must comply with all constitutional requirements. *Bush II*, 531 U.S. at 104. Those requirements include protection of all voters from a denial of due process and equal protection. Section 5 of the 14th Amendment grants to Congress the power to enforce its provisions and is broadly interpreted to authorize Congress to advance the protections of due process, equal protection, and the privileges and immunities of citizenship.

II. SLATES OF ELECTORS FOR VICE-PRESIDENT BIDEN FROM SIX STATES WERE SELECTED IN A PROCESS CONTRAVENING STATE ELECTION LAW AND ARTICLE II

Government officials in the Commonwealth of Pennsylvania and the states of Georgia, Michigan, Wisconsin, Arizona, and Nevada used the COVID-19 pandemic as a justification to usurp their legislatures' authority and unconstitutionally revise their state's election statutes in violation of Article II, Section 1, Clause 2, and the Fourteenth Amendment of the U.S. Constitution. These non-legislative officials illegally revised or disregarded election statutes designed to ensure ballot integrity – such as signature verification and witness requirements – through executive fiat or friendly lawsuits. These same government officials then flooded their states with millions of ballots to be sent through the mails, or placed in drop boxes, with little or no chain of custody. Mail-in ballots are "the largest source of potential voter fraud." Jimmy Carter-James Baker commission BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005). These officials' blatant violations of state election laws, while flooding their states with mail-in ballots, resulted in elections in their states that were unconstitutional on their face. These elections cannot be relied on to select the President and Vice President of the United States.

A. Pennsylvania

Pennsylvania has 20 electoral votes, with a statewide vote tally currently estimated at 3,363,951 for President Trump and 3,445,548 for former Vice President Biden, a margin of **81,597 votes**. Pennsylvania officials engaged in rampant violations of election law relating to mail-in ballots to steal the election in the Commonwealth for Mr. Biden. Approximately 70 percent of the requests for absentee ballots were from Democrats and 25 percent from Republicans. In 2020, Pennsylvania received more than 10 times the number of mail-in ballots compared to 2016, approximately 2.7 million versus just 266,208 in 2016. These officials' blatant violations of state election laws greatly inured to former Vice President Biden's benefit.

Specifically, Pennsylvania's Secretary of State, Kathy Boockvar, unilaterally abrogated signature verification requirements for absentee or mail-in ballots in violation of 25 PA. STAT. §§ 3146.2(d) & 3150.12(c) and 25 PA. STAT. 350(a.3)(1)-(2) and § 3146.8(g)(3)-(7). Secretary Boockvar also violated 25 PA. STAT. § 3146.8(a),(b), (g) for the opening, counting, and recording of absentee and mail-in ballots by urging local election officials to illegally open mail-in ballots *prior* to election day as set forth in those statutes to allow various persons—including political parties—to contact voters to "cure" defective mail-in ballots.

In addition, on September 17, 2020, a 4-3 majority of Pennsylvania's Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), extended that deadline to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely in violation of 25 PA. STAT. §§ 3146.6(c), 3150.16(c) and 2019 Pa. Legis. Serv. Act 2019-77, that set *inter alia* a deadline of 8:00 p.m. on election day for a county board of elections to receive mail-in ballots. When this decision was reviewed by the U.S. Supreme Court, Pennsylvania used guidance from its Secretary Boockvar to argue that the Court should not expedite review because the State would segregate potentially unlawful ballots. The Court then voted 4-4 not to review the Pennsylvania Supreme Court's decision. A court of law would reasonably rely on such a representation. Remarkably, before the ink was dry on the Court's 4-4 decision, Pennsylvania changed that guidance, and did not segregate the late arriving mail-in ballots, breaking the State's promise to this Court.[1]

On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon." Two issues identified in the Ryan Report are particularly striking. First, there is unexplained 400,000 ballot discrepancy between the number of mail-in ballots Pennsylvania sent out as reported on November 2, 2020 (2.7 million) versus the figure reported on November 4, 2020 (3.1

[1] *Compare Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 U.S. LEXIS 5188, at *5-6 (Oct. 28, 2020) ("we have been informed by the Pennsylvania Attorney General that the Secretary of the Commonwealth issued guidance today directing county boards of elections to segregate [late-arriving] ballots") (Alito, J., concurring) *with Republican Party v. Boockvar*, No. 20A84, 2020 U.S. LEXIS 5345, at *1 (Nov. 6, 2020) ("this Court was not informed that the guidance issued on October 28, which had an important bearing on the question whether to order special treatment of the ballots in question, had been modified") (Alito, J., Circuit Justice).

million). How were more than 400,00 more mail-in ballots magically injected into the Commonwealth as reported the day *after* the election? Second, 118,426 mail-in ballots that had no mail date, were nonsensically returned *before* the mailed date, or were improbably returned one day after the mail date. These illegal or questionable ballots far exceed Mr. Biden's margin of victory in Pennsylvania.

B. Georgia

Georgia has 16 electoral votes, with a statewide vote tally currently estimated at 2,458,121 for President Trump and 2,472,098 for former Vice President Biden, a margin of approximately 12,670 votes. Non-legislative officials in Georgia also gutted security measures designed to ensure the integrity of mail-in ballots. There were 1,305,659 absentee mail-in ballots submitted in Georgia in 2020 compared to just 213,033 in 2016. Former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). Mr, Biden greatly benefited from these illegal acts.

On March 6, 2020, Georgia's Secretary of State, Brad Raffensperger, entered a Compromise Settlement Agreement and Release with the Democratic Party of Georgia (the "Settlement") in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.). That Settlement materially changed the statutory requirements for reviewing signatures on absentee ballot envelopes to confirm the voter's identity by making it far more difficult to challenge defective signatures beyond the express mandatory procedures set forth at GA. CODE § 21-2-386(a)(1)(B). As a consequence, the rejection rate for defective ballots dropped from 6.42% in 2016 to just .37% in 2020—a *seventeen-fold* drop. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, President Trump would win by Georgia 12,917 votes.

Secretary Raffensperger, without legislative approval, also unilaterally abrogated Georgia's statute, O.C.G.A. § 21-2-386(a)(2), prohibiting the opening of mail-in absentee ballots prior to election day. In April 2020, the State Election Board, adopted Secretary of State Rule 183-1-14-0.9-.15, Processing Ballots Prior to Election Day authorizing county election officials to begin processing absentee ballots up to three weeks *before* Election Day. Outside parties were then given early and illegal access to purportedly defective ballots to "cure" them in violation of O.C.G.A. §§ 21-2-386(a)(1)(C), 21-2-419(c)(2).

On December 17, 2020, the Chairman of the Election Law Study Subcommittee of the Georgia Standing Senate Judiciary Committee issued a detailed report concluding:

> The Legislature should carefully consider its obligations under the U.S. Constitution. If a majority of the General Assembly concurs with the findings of this report, the certification of the Election should be rescinded and the General Assembly should act to determine the proper Electors to be certified to the Electoral College in the 2020 presidential race. Since time is of the essence, the Chairman and Senators who concur with this report recommend that the leadership of the General Assembly and the Governor immediately convene to allow further consideration by the entire General Assembly.

The illegal or questionable ballots far exceed Mr. Biden's margin of victory in Georgia.

C. Michigan

Michigan has 16 electoral votes, with a statewide vote tally currently estimated at 2,650,695 for President Trump and 2,796,702 for former Vice President Biden, a margin of 146,007 votes. In Wayne County, Mr. Biden's margin (322,925 votes) significantly exceeds his statewide lead. In 2016 only 587,618 Michigan voters requested absentee ballots. In stark contrast, in 2020, 3.2 million votes were cast by absentee ballot, about 57% of total votes cast – and more than *five times* the number of ballots *even requested* in 2016. Michigan's Secretary of State, Jocelyn Benson, unilaterally abrogated Michigan election statutes related to absentee ballot applications and signature verification. Democrats in Michigan voted by mail at a ratio of approximately two to one compared to Republican voters. *Millions* of absentee ballots were disseminated in violation of Michigan's statutory signature-verification requirements far exceeding the margin of votes dividing the candidates. Thus, former Vice President Biden materially benefited from these unconstitutional changes to Michigan's election law.

Specifically, on May 19, 2020, Secretary Benson announced that her office would send unsolicited absentee-voter ballot applications by mail to all 7.7 million registered Michigan voters prior to the primary and general elections. These actions violated M.C.L. § 168.759(3) which expressly limits the procedures for requesting an absentee ballot and does *not* include the Secretary as an authorized sender of absentee ballots. Secretary Benson also violated MCL §§ 168.759(4) and 168.761(2) when she launched a program in June 2020 allowing absentee ballots to be requested online, *without* signature verification as expressly required under Michigan law.

Former Vice President Biden received approximately 587,074, or 68%, of the votes cast in Wayne County compared to President Trump's receiving approximate 264,149, or 30.59%, of the total vote. The Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without being tied to a registered voter and exceeds Vice President Biden's margin of 146,007 votes by more than 28,377 votes. Indeed, the two Republican members of the Board *rescinded their votes* to certify the vote in Wayne County, and signed affidavits alleging they were bullied and misled into approving election results and do not believe the votes should be certified until these and other serious irregularities in Wayne County votes are resolved. These illegal or questionable ballots far exceed Mr. Biden's margin of victory in Michigan.

D. Wisconsin

Wisconsin has 10 electoral votes, with a statewide vote tally currently estimated at 1,610,151 for President Trump and 1,630,716 for former Vice President Biden, a margin of approximately 20,565 votes. Wisconsin statutes guard against fraud in absentee ballots: "[V]oting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse[.]" WISC. STAT. § 6.84(1). Non-legislative officials in Wisconsin gutted security measures designed to ensure the integrity of mail-in ballots. There were 1,275,019 mail-in ballots submitted in Wisconsin in 2020 compared to just 146,932 in

2016—a nearly 900 percent increase over 2016. Mr. Biden greatly benefited from these illegal acts.

The Wisconsin Legislature prohibits ballot drop box voting and instead requires that absentee ballots be delivered to an "office" that is "staffed." Wis. Stat. 6.855(3), Wis. Stat. 7.15(2m). Nevertheless, Wisconsin Elections Commission ("WEC") and other local officials unconstitutionally created hundreds of drop boxes to collect absentee ballots — including the use of unmanned drop boxes.[2] Indeed, the mayors of Wisconsin's five largest cities—Green Bay, Kenosha, Madison, Milwaukee, and Racine, which all have Democrat majorities—decided to collaborate in an effort to maximize voting from their cities; that plan included the use of purportedly "secure drop-boxes to facilitate return of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020). The fact that the WEC attempted to label ballot drop boxes "secure" does not make them secure or lawful according to the will of the Wisconsin Legislature, which requires ballots to be taken to a normal "office for absentee ballot purposes" (not a mere drop box) and with professional and "adequate staff" (not left unstaffed and unguarded).

In addition to the previous requirements that absentee ballots be collected in staffed offices, the state legislature further requires that ballots be "mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. Absentee ballots placed in a drop box are neither "mailed" nor "delivered in person to the municipal clerk," and by Legislative act "may not be counted." Wis. Stat. § 6.87(6). The ban on counting noncompliant absentee ballots is "mandatory" and emphasized further by the legislature when it again states: "Ballots cast in contravention of the procedures specified in those provisions *may not* be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election." Wis. Stat. § 6.84(2).

Lastly, the WEC and local election officials also took it upon themselves to encourage voters to unlawfully declare themselves "indefinitely confined" because of the COVID-19 pandemic —which under Wisconsin law allows the voter to avoid security measures like signature verification and photo ID requirements. WISC. STAT. § 6.86(2)(a),(b), (3)(a); *Id.* § 6.86(1)(ag)/(3)(a)(2). According to the WEC, nearly 216,000 voters said they were indefinitely confined in the 2020 election, nearly a fourfold increase from nearly 57,000 voters in 2016. In Dane and Milwaukee counties, more than 68,000 voters said they were indefinitely confined in 2020, a fourfold increase from the roughly 17,000 indefinitely confined voters in those counties in 2016.

On December 16, 2020, the Wisconsin Supreme Court rule that Wisconsin officials, including Gov. Evers, unlawfully told Wisconsin voters to declare themselves "indefinitely confined"—thereby avoiding signature and photo ID requirements. *See Jefferson v. Dane County*, 2020 Wisc. LEXIS 194 (Wis. Dec. 14, 2020) . The vast majority of these voters were from heavily democrat areas, thereby materially benefiting Mr. Biden.

[2] Wisconsin Elections Commission Memoranda, To: All Wisconsin Election Officials, Aug. 19, 2020, *available at*: https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/Drop%20Box%20Final.pdf. at p. 3 of 4. *See also* Wisconsin Safe Voting Plan 2020 Submitted to the Center for Tech & Civic Life, June 15, 2020, by the Mayors of Madison, Milwaukee, Racine, Kenosha and Green Bay *available at*: https://www.techandciviclife.org/wp-content/uploads/2020/07/Approved-Wisconsin-Safe-Voting-Plan-2020.pdf

In sum, the illegal or questionable ballots far exceed Mr. Biden's margin of victory in Wisconsin.

E. Arizona

Arizona has 11 electoral votes, with a state-wide vote tally currently estimated at 1,661,677 for President Trump and 1,672,054 for former Vice President Biden, a margin of 10,377 votes. In Arizona's most populous county, Maricopa County, Mr. Biden's margin (45,109 votes) significantly exceeds his statewide lead.

Since 1990, Arizona law has required that residents wishing to participate in an election submit their voter registration materials no later than 29 days prior to election day in order to vote in that election. Ariz. Rev. Stat. § 16-120(A). For 2020, that deadline was October 5. In *Mi Familia Vota v. Hobbs*, No. CV-20-01903-PHX-SPL, 2020 U.S. Dist. LEXIS 184397 (D. Ariz. Oct. 5, 2020), a federal district court violated the Constitution and enjoined that law, extending the registration deadline to October 23, 2020. The Ninth Circuit stayed that order on October 13, 2020 with a two-day grace period, *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 955 (9th Cir. 2020). The Ninth Circuit did not apply the stay retroactively because neither the Arizona Secretary of State nor the Arizona Attorney General requested retroactive relief. *Id.* at 954-55. As a net result, the deadline was unconstitutionally extended from the statutory deadline of October 5 to October 15, 2021, thereby allowing potentially thousands of illegal votes to be injected into the state.

Lastly, on December 15, 2020, due to a significant number of voting irregularities, the Arizona state Senate served two subpoenas on the Maricopa County Board of Supervisors (the "Maricopa Board") to audit scanned ballots, voting machines, and software. The Arizona Senate Judiciary Chairman stated in a public hearing earlier that day that "[t]here is evidence of tampering, there is evidence of fraud" with vote in Maricopa County. The Board then voted to refuse to comply with those subpoenas necessitating a lawsuit to enforce the subpoenas filed on December 21, 2020.

F. Nevada

Nevada has 6 electoral votes, with a statewide vote tally currently estimated at 669,890 for President Trump and 703,486 for former Vice President Biden, a margin of 33,596 votes. In Clark County, Mr. Biden's margin (90,922 votes) significantly exceeds his statewide lead.

In response to the COVID-19 pandemic, the Nevada Legislature enacted—and the Governor signed into law—Assembly Bill 4, 2020 Nev. Ch. 3, to address voting by mail and to require, for the first time in Nevada's history, the applicable county or city clerk to mail ballots to all registered voters in the state. Under Section 23 of Assembly Bill 4, the applicable city or county clerk's office is required to review the signature on ballots, without permitting a computer system to do so: "The *clerk or employee shall check* the signature used for the mail ballot against all signatures of the voter available in the records of the clerk." *Id.* § 23(1)(a) (codified at NEV. REV. STAT. § 293.8874(1)(a)) (emphasis add). Moreover, the system requires that two or more employees be included in any review of a questionable voter signature. *Id.* § 23(1)(b) (codified at NEV. REV. STAT. § 293.8874(1)(b)). A signature that differs from on-file signatures in multiple respects is inadequate: *Id.* § 23(2)(a) (codified at NEV. REV. STAT. § 293.8874(2)(a)). Finally,

under Nevada law, "each voter has the right … [t]o have a uniform, statewide standard for counting and recounting all votes accurately." NEV. REV. STAT. § 293.2546(10).

However, in clear violation of the statutory prohibition on using computer systems to check voter signatures, county election officials in Clark County ignored this requirement of Nevada law. Clark County, Nevada, processed all its mail-in ballots through a ballot sorting machine known as the Agilis Ballot Sorting System ("Agilis"). The Agilis system purported to match voters' ballot envelope signatures to exemplars maintained by the Clark County Registrar of Voters. Clark County was the only county in the State of Nevada to utilize the Agilis system during the 2020 election. Even after adjusting the Agilis system's tolerances outside the settings that the manufacturer recommends, the Agilis system nonetheless rejected approximately 70% of the approximately 453,248 mail-in ballots. Faced with a large amount of rejected ballots, Clark County violated Nevada election law and the U.S. Constitution.

These 453,248 mail-in ballots were then either processed under more lax signature verification criteria than the rest of Nevada, or were processed under criteria that Clark County consciously and expressly adopted in derogation of the statutory criteria for validating. Specifically, approximately 130,000 ballots did not have the signatures reviewed by two or more employees, as Nevada law requires. 323,000 ballots were counted by Clark County if a signature matched at least one letter between the ballot envelope signature and the maintained exemplar signature. These unconstitutional votes are outcome determinative and Congress should deny the entire 6 electoral votes from Nevada.

III. THE ELECTORAL COUNTING ACT OF 1877 DOES NOT CONTROL IN THE FACE OF THE CLEAR CONSTITUTIONAL VIOLATIONS AT ISSUE HERE

Marbury v. Madison confirms the Constitutional principle that a statute that violates the Constitution must be disregarded. 5 U.S. 137, 180 ("[t]hus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument."). *Marbury* confirms that legislators and judges alike must not follow such unconstitutional laws. 5 U. S. 179-80 ("the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature.") Legislators take an oath to follow the Constitution and, therefore, have a duty to disregard unconstitutional statutes irrespective of whether courts intervene – or fail to intervene.

The United States Congress will meet to count the Electoral College's votes on January 6, 2021. The United States Constitution governs that process. The Electoral Counting Act of 1877 ("ECA"), as codified at 3 U.S.C. §§ 2-5 and §15, purports to detail how Congress should count Electoral College votes. Congress may follow the ECA insofar as it does not conflict with the Constitution, but Congress is bound by oath to disregard any anti-Constitutional provisions of the ECA.

The ECA's meaning and scope has been challenged since its enactment. Commentators have criticized the ECA as "very confused, almost unintelligible."[3] One commentator noted the "astonishingly messy language"[4] of the ECA and observed that one of its most important sections is an "interpretive quagmire" that "amount[s] to a virtually impenetrable maze of 807 words."[5]

In addition to these concerns, as well as doubts about the ECA's constitutionality,[6] there is considerable historic debate as to whether the ECA should be considered a statute binding on Congress. Some commentators believe the ECA is merely a "joint rule" that can be altered by congressional action without a presidential signature or otherwise rescinded by unilateral action of one house.[7] Such doubts lend weight to the argument that the ECA cannot constitutionally bind a Senate and House that concur in refusing to count particular electoral votes. Many proponents of the ECA voted for it intending to give moral force to the ECA's approach to electoral vote counting, but it could be set aside when appropriate.[8] By contrast, Congressional authority under the Constitution is undisputed and clear.

A. The Historical Background of the ECA

The historic origins and legislative history of the ECA are found in the hotly contested presidential race of 1876 between Rutherford B. Hayes of Ohio and Sam Tilden of New York, wherein Tilden was short of victory by one electoral vote. Four southern states sent dueling slates of electors, so the Congress created an Electoral Commission with the *same powers as Congress* to settle the matter. The Commission was composed of five senators, five representatives and five justices of the Supreme Court.[9] The Chairman of that Commission was Justice Joseph Bradley.

Justice Bradley tailored the Commission's review to the circumstances of each state's electoral process. For example, the Republican electors from Florida, Louisiana, and South Carolina had their governors' certificates of election, which led to a presumption that these electors should have their ballots counted. However, because each governor's certification was ministerial in nature, Justice Bradley went behind the governor's certificate to determine whether the governor properly acted at the direction of the state returning board.[10] With regard to Florida, Louisiana, and South Carolina, each governor had done so.[11]

Aside from the governors' actions, the state returning boards of Florida and Louisiana were accused of fraudulently rejecting Democratic votes. Justice Bradley refused to go behind the actions of these returning boards because he determined that those boards exercised discretionary

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[3] John W. Burgess, *The Law of the Electoral Count*, 5 POL. SCI. Q. 633, 643 (1888). For Burgess's other criticisms, *see id.* at 637-39, 645-46, 648, 650-51.

[4] Edward B. Foley, *Preparing for A Disputed Presidential Election: An Exercise in Election Risk Assessment and Management*, 51 LOY. U. CHI. L.J. 309, 329 (2019). Judge Richard Posner also recently described the ECA as "maddeningly complex." RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 141 n.88 (2001); *see also* J. HAMPDEN DOUGHERTY, THE ELECTORAL COLLEGE SYSTEM OF THE UNITED STATES 214-49 (1906).

[5] *See* Foley, *supra* note __, at 329-30.

[6] *See, e.g.*, 18 CONG. REC. 828 (1887) (statement of Sen. Wilson); 17 *id.* at 1058-59 (1886) (statement of Sen. Wilson).

[7] *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541 (2004).

[8] *See id.* at 541.

[9] CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 xv-xvi (1988); PAUL HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 at 57-168 (1906).

[10] 5 CONG. REC. pt. 4, 263, 265, 266 (1877) (statement of Justice Bradley).

[11] *See* Siegel, *supra* at note __, at 575.

powers in determining whether to accept returns from county canvassing boards.[12] Given this discretion, the state boards' actions could not be challenged in the absence of "manifest fraud."[13] It should be noted, however, that Justice Bradley did not determine that fraud could never vitiate a returning board's discretionary decisions.[14]

Ultimately, Justice Bradley ruled that under Oregon law, the Oregon Governor acted outside his ministerial authority to disqualify one elector because he was a governmental employee ineligible to serve and appoint a Democratic elector in his place. Since all disputed electoral votes were awarded to Republican electors, Hayes won by one electoral vote.

B. Congress's Authority to Reject Fraudulent Returns

Given that Justice Bradley was, in effect, exercising the same authority as Congress, the historical record affirms Congress's inherent power under the Constitution to set aside returns for "manifest fraud." Manifest fraud must so notorious that it required no Congressional investigation and so extensive that it undermines the existence of "constitutional facts" underlying the jurisdiction and authority of the state entities relaying the state tribunals' assertion of jurisdiction.

Moreover, Congress clearly intended an implied exception to section 2 for fraud that rises to the level of constitutional infirmity.[15] In passing the ECA Congress retained its authority to scrutinize and reject electoral ballots cast corruptly involving bribery or in violation of the Constitutional principles underlying Article II.[16] That history is important as (1) precedent for future deliberations of Congress to review the legalities of any gubernatorial certificate and (2) the absence of any remedies for a failure of either houses to agree on any set of electors strongly suggests the implicit endorsement or respect for the 12th Amendment to the Constitution. That Amendment was in place when the ECA was passed and stipulates that a failure of any candidate to reach the required electoral threshold for election required submission to the House for one vote by each state delegation.

C. Bush v. Gore is Binding Judicial Precedent Rendering the Biden Electors' Selection Void

In *Bush v. Gore*, the order of the Supreme Court of the United States stopped the Florida counting of absentee ballots holding that the counting of those votes created disparate methods in Florida counties in violation of the equal protection guarantees of the 14th Amendment to the U.S. Constitution. Several justices opined that the counting methods were not authorized by Florida Legislature in violation of Article II, Section 1, Clause 2 of the U.S. Constitution (the "Electors Clause) requiring that the State Legislature is the "sole authority" for determining the process of selecting electors.

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[12] 5 CONG. REC., pt. 4, 261, 262-63 (1877).
[13] *Id.*
[14] *See* Siegel, *supra* at note __, at 576.
[15] In fact, when passing the ECA, Senator Bayard gave a specific example of evidence of fraud to create an exception to section 2 of the ECA, framing it as the absence of constitutional facts supporting the tribunal's judgment. See 8 CONG. REC. 158-59 (1878) (statement of Sen. Bayard).
[16] 8 CONG. REC. 163 (1878) (statement of Sen. Merrimon) (mentioning bribery, intimidation, and fraud); *id.* at 70; (statement of Sen. Morgan) (mentioning "corruption through bribery"). *See* U.S. CONST. art. II, § 1, cls. 3-5.

On a similar basis, on December 7, 2020—the day before all contests were required to be filed—the State of Texas filed a Motion and Complaint with SCOTUS supported by 18 other States. The suit claimed that other States' (Pennsylvania, Georgia, Michigan, and Wisconsin) administration of the 2020 election by taking or allowing non-legislative actions to change the election rules that would govern the appointment of presidential electors violated the Electors Clause of Article II, Section 1, Clause 2, and the Fourteenth Amendment of the U.S. Constitution.

While the Texas case was rejected by the Court on the basis that the state of Texas lacked standing, the fact remains that the defendant states plainly violated the Electors Clause in the U.S. Constitution.

D. Certification of the Biden Electors is Subject to Congressional Review

The opinion in *Bush v. Gore* stopped the vote counting in Florida the day before the statutory deadline to enable Florida to achieve protection under the "safe harbor" provisions of 3 U.S.C. §§ 2-5, purportedly making that certification "conclusive" in any subsequent review by the U.S. Congress. However, the "safe harbor" certification is still subject to later review. As noted by the dissent by Justices Bryer, Souter, and Ginsberg in that case:

> "The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its 'safe harbor.' **And even that determination is to be made, if made anywhere, in the Congress."**

Bush v. Gore, 531 U.S. 98, 130 (Souter, J. dissenting) (2000) (emphasis added).

E. Unconstitutional Process and Methods Void the Certifications of the Biden Electors

The identity of the Biden Electors was determined and allegedly certified under 3 U.S.C. § 2 when filed by December 8, which was 6 days prior to the December 14 election. But that section also states that the certification be made according to "laws enacted prior to" that day and "such determination made pursuant to such law so existing on said day." The *only* laws which could comply with this requirement are those enacted by the state legislatures, which has the sole Constitutional authority under Article II, Section 1, Clause 2 to make the law concerning the selection of those electors under Article II of the Constitution.[17] The multiple departures from the state election law in each of these states were also discriminatory in process and practice so that they are also violations of the due process and equal protections of all voting citizens under the 14th Amendment. Accordingly, the certification of these electors is false, and their selection

[17] *See* U.S. CONST. art. II, § 1, cls. 2-3 ("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 . . .").

cannot be considered "conclusive," nor can they "govern the counting of electoral votes as provided in the Constitution" as required by 3 U.S.C.§ 5.

F. Certifications by the Governors of the Biden Electors are Constitutionally False

Only after an appointment of the electors in "a final ascertainment under, and in pursuance of the laws of such state," is a duty is imposed upon the Governor pursuant to 3 U.S.C. § 5 to send a communication and certificate under state seal setting forth the names of the electors and "the canvass or other ascertainment under the laws of such state" to the Secretary of State of the United States and the Congress. Under the Constitutional requirements of Article II and the 14th Amendment, none of the canvasses selecting the Biden electors in these seven (7) states were conducted in complete compliance with the laws governing elections passed by the state legislatures. Those laws imposed various restrictions against counting votes of the deceased, those no longer resident in the state, illegal aliens, or absentee/mail-in ballots that were not verified by signature or other means. Consequently, the certifications are false in claiming ascertainment of electors in compliance with the law of the state, as well as false in their implicit affirmance of constitutionality in the absence of any inherent authority of the Governor to declare them to be so.

G. The Procedures in 3 U.S.C § 15 Permit Identification of Constitutional Infirmities in 3 U.S.C § 2

The current versions of the ECA in 3 U.S.C § 4 and § 5 are reflected in 3 U.S.C. § 15.[18] The sole purpose of 3 U.S.C § 2 was to describe how the identity of electors was to be determined and a "safe harbor" for that process. Section 4 reflected in 3 U.S.C. § 15 determines whether some defect bars counting the votes of the duly ascertained electors. That section inherently contradicts any conclusion about conclusiveness or finality under 3 U.S.C § 2 by allowing any such certification to be overruled by a concurrent vote of both Houses of Congress. Therefore, the text in 3 U.S.C. § 15 is an affirmation of the role and authority of Congress to provide a Constitutional review of otherwise "conclusive" certifications. This is consistent with the U.S. Supreme Court's assertion that Congress's constitutional power regarding elections is "judicial in character."[19]

H. The ECA Does Not Address Electoral Votes Based on Violations of the U.S. Constitution

What is not addressed by the ECA, however, is how Congress should address the counting of Electoral Votes that are based on the use of election procedures that manifestly violate the U.S. Constitution. ECA § 15 only goes so far as to allow both chambers of Congress to reject a state's electors if both chambers concurrently agree that either that the appointment of the electors was not "lawfully certified" by the governor (i.e., the state's certification process was not followed) or that the votes themselves were not "regularly given" by the electors (i.e., the elector voted based on a bribe or committed an otherwise corrupt act). Stated plainly, the circumstances created by the

[18] Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373, 373-74 (current version at 3 U.S.C.§ 15 (2000)).
[19] *See Buckley v. Valeo*, 424 U.S. 1, 134 (1976) ("The method by which Congress resolved the celebrated disputed Hayes-Tilden election of 1876 . . . supports the conclusion that Congress viewed [the Twelfth] Amendment as conferring upon its two Houses the same sort of power 'judicial in character,' as was conferred upon each House by Art. I, s. 5, with respect to elections of its own members." (citations omitted)).

actions of several swing states in the 2020 Presidential Election raises a constitutional question that cannot be remedied by looking to the provisions of the ECA.

It is therefore the responsibility of Vice President Pence, acting as President of the Senate, to set aside the Electoral Votes of states that permitted these electoral votes to be based on a faulty foundation of violations of the U.S. Constitution. Simply put, to count these contested Electoral Votes would disregard our Constitution and forever destroy its power to constrain. Similarly, it may be equally improper for the Vice President to count the alternate votes of Republican electors from the states at issue, as this would also undermine the authority of state legislatures to select a state's electors. To that end, the safest—and most constitutional—course of action would be to not count the contested votes of the swing states at issue.

If the result of this action is that neither candidate reaches the required threshold of 270 electoral votes, then the Twelfth Amendment provides a process by which both chambers may step into a well-paved constitutional path to select our President and Vice President.[20]

IV. CONCLUSION

It is undisputed that no less than six states openly failed to follow the Constitutional requirement in Article II, Sec. 1, Clause 2 that presidential electors must be appointed in a manner directed by each state "Legislature." As such these states cannot truthfully, lawfully and constitutionally "certify" Electors in favor of the former Vice-President Joe Biden. Absent these electoral votes, Biden does not have the required 270 voted and the Constitution then mandates that "the House of Representatives ***shall*** choose ***immediately***, by ballot, the President." Provisions in the ECA that attempt to usurp the Constitutional power of the House to choose the President must be treated as void by Senators.

[20] *See* U.S. CONST. amend. XII.