Memorandum on Implementating
Sections 2 and 3 of the 14th Amendment to the Constitution
At the Federal Level

Revised Again December 28, 2024

To: Interested Parties

Re: How Congress can implement Sections 2 and 3 of the 14th Amendment

From: John M. Fitzgerald[1]

Date: December 28, 2024[2]

Executive Summary

Congress has the power to bar insurrectionists from office including the offices of the President and Vice President and from being seated in Congress and can do so, and more, immediately upon convening in Washington on January 3, 2025.

The Constitution speaks for itself. From its First Article which gives each House of Congress the sole power of determining who qualifies to serve in that House, to the 12th Amendment establishing the responsibility of Congress to certify the presidential election, the 14th Amendment clauses including Section 3 barring insurrectionists from holding office and more, the Constitution provides road maps.

The Constitution also speaks to the conscience of each citizen, each sworn official and each member of Congress. With regard to Section 3, the US Supreme Court in Trump v. Anderson refrained from clearing Donald Trump of the adjudications that he is an oath-breaking insurrectionist, and said that enforcement of Section 3 with regard to federal offices lies with Congress, not states, but did not restrict such enforcement to legislation.

Deschler's Precedents, a guide to the procedures of Congress, offers examples of successful petitions to Congress filed by citizens and addressed to the Clerk of the House requesting votes on the seating of Members not qualified to serve. Those can be the beginning of a successful process even in today's world of a closely divided Congress.

[1] Former Counsel to the House Subcommittee that closed loopholes in the Ethics in Government Act, former attorney with the Government Accountability Project, former Chair of the D.C. chapter of Common Cause, author of two amicus briefs cited by Maine Secretary of State Shenna Bellows in her decision to exclude Donald Trump from the 2024 primary ballot in Maine, among other positions and a Member of the D.C. and Supreme Court Bars.

[2] Over the past several months, versions of this memo have been sent by John Fitzgerald and like-minded citizens in NY, MD, MN, and CA, etc. to staff members of Members of Congress who have leadership or senior positions on Committees of jurisdiction over election law, government oversight and the judiciary, etc. We now follow our petition of December 26th sent via the U.S. Postal Service to the Clerk of the House and by email and USPS to the Secretary of the Senate and many other key Congressional offices.

The tools are there to be used. The time is now for Congress, and for all of us, to act.

Introduction

This is the latest in a series of memos sent in recent months that have reviewed the role that Congress and others can play during the critical period from the autumn of 2024 through mid-January 2025 in implementing Sections 2 and 3 of the 14th Amendment and in taking other steps to protect democracy as Congress manages the transition to the 119th Congress and the new Presidential term. This memo also notes complementary steps that can be taken by other bodies here and abroad to protect and enhance democratic governments and let them help each other overall.

Several sources have documented the role that several Republican Members of Congress and Mark Meadows Trump's chief of staff played in planning protests around the Capitol building on January 6th. Some have reported that their expressed intent was to pressure those involved in the election process to prevent Biden from taking office in different ways and some reported that Paul Gosar (R-AZ) promised them Trump would give them blanket pardons, which means they knew they were likely to be committing criminal offenses. Several House Democrats responded to such articles by calling for those Members who had helped coordinate the protests to expelled from Congress.[3] The Center for American Progress summarized this in a report and entitled " REPORT APR 20, 2023
Trump and His Allies Must Be Held Accountable for the January 6 Insurrection"[4]

> Many members of Congress were involved in the conspiracy and later thwarted the January 6th Committee's legitimate investigation, even defying lawful committee subpoenas. Multiple members of the House sought presidential pardons for their roles in Trump's sprawling scheme.[5]

As this memorandum points out, however, expulsion requires a vote of 2/3rds but **excluding a Member-elect from being seated as a Member or Senator due to his or her being disqualified on Constitutional grounds takes only a simple majority of those who are not so disqualified.**

Meanwhile, nothing should delay or inhibit the Secretaries of State and other election officials and courts from implementing the disqualification from office required by section 3 of the 14th amendment at the state and local levels with regard to state and local offices.

Similarly, law enforcement and national intelligence agencies can continue to share information with their counterparts in allied countries concerning efforts by foreign entities to

[3] Select Committee to Investigate the January 6th Attack on the U.S. Capitol, "Final Report," pp. 114–118, 121.
[4] https://www.americanprogress.org/article/trump-and-his-allies-must-be-held-accountable-for-the-january-6-insurrection/
[5] Select Committee to Investigate the January 6th Attack on the U.S. Capitol, "Final Report," pp. 114–118, 121.

interfere with or influence elections here and in other countries so that electors and Members-elect of Congress and their counterparts in other countries can be apprised of any new evidence of persons who have conspired and acted thereafter to interfere with the elections. In the U.S. that would enable electors, Congress and law enforcement agencies and their state counterparts to take the appropriate steps to exclude from office persons who have previously sworn an oath to uphold the Constitution who have later been found to have participated in or lent aid and comfort to the enemies of the Constitution including via an insurrection, bloody or not, which was an attempt to contravene the proper application of the Constitution. It would also enhance the prosecution or adjudication of those who violated the law in so doing in any jurisdiction.

Federal agencies, such as State, DOJ, USAID, the Election Assistance Commission, and Congress should enhance cooperation with our allies, such as the European Union, and the international justice system to cooperate in identifying and countering efforts by Nation-state actors and those they sponsor to interfere with our elections. Law enforcement entities such as Interpol (the multilateral law enforcement agency), the International Court of Justice and the International Criminal Court, the United Nations peacekeeping and other programs such as the UN Development and Environment Programs, and related non-state systems and experts can all help. Such well qualified offices can inform voters, electors and Congress of interference in elections that appears to be spread across the world and is often intended to weaken democratic institutions and governments.

Trade sanctions such as tariffs on essential imports and embargoes on other trade could be brought to bear to punish nation-states and companies that foster such election interference.

Section 3 of the 14th Amendment bars insurrectionists and those who have aided them from holding any state or Federal office. A draft bill to improve the enforcement of Section 3 is in appendix B to this memo but new legislation is not required for initial actions barring Donald Trump and potentially J.D. Vance from taking office as demonstrated below.

Section 2 directs that the Congressional delegations of states that abridge the right to vote of any portion of their voting age population "in any way" must be reduced in proportion to the part of their electorates whose rights to vote are so abridged or encumbered. A draft bill to improve the enforcement of Section 2 is in appendix C to this memo.

Given the continuing efforts apparently yielding results in nearly half the U.S. states to curtail access to the polls via legislation and litigation and given the Supreme Court's recent ruling implying that only Congress can implement Section 3 vis a vis Federal offices, this memo sets out effective ways to do that. Some would say that states have the power to instruct their electors more specifically but that opinion is only an opinion no matter how expert so far.

The steps outlined below rest principally on the power of Congress. They take into account the opinion of the Supreme Court in *Trump v. Anderson, et al*. of March 4, 2024. The window of opportunity for such action is narrow, however.

Reps. Raskin (MD-8th), Wasserman-Schulz (FL) and Swalwell (CA) were revising the bill introduced in 2022 to implement Section 3[6] beginning soon after the ruling of the Supreme Court in Anderson v. Trump. Shortly Rep. Raskin announced their intention to revise the 2022 bill, we shared earlier versions of this memo with then and a few other key Senators and Members of Congress with the hope that the majority and/or minority members of the Committees of jurisdiction, primarily the Senate Committees on the Judiciary and Rules and Administration, would hold introduce, hold hearings on, and if possible, report, such legislation to the full body in order to encourage states to restore full access for all to the ballot well before the general election of November 2024. Such action is still largely possible and has been urgently requested with regard to Section 2, by the United States Court of Appeals for the District of Columbia Circuit by way of the Concurring Opinion in its September 10th 2024 decision of in (No. 23-5140) in Citizens for Constitutional Integrity, appellant, v. Census Bureau, et al. Appellees.

We suggest that the next Congress start with its own seating and include Section 2 as well as Section 3 in its decisions on whether to seat Members-elect. This memorandum outlines a process for that and includes as attachments draft bills that could be introduced this year in order to begin the process of preparing the nation for implementing these elements of the Constitution.

Members-elect of both the Senate and the House who are potentially disqualified by Sections 2 or 3 can be initially barred from being seated by a challenge presented by the clerk to the presumed Speaker, Majority Leader or other presiding officer pending further review of their cases by Congress based on facts established in proceedings that have offered due process to parties on both sides of the issue as cited in the challenge or as reported by a Committee to whom the matter may be referred. Members of Congress who are not so challenged could be seated and proceed to adopt such rules and to enact such legislation as may be essential for the preservation of the peace and the rule of law.

That legislation should include a bill to further implement Section 3 including but not limited to an expanded version of the bill from 2022, H.R. 7906. In particular, a bill to allow citizens to sue in state or Federal court to bar from office insurrectionists and those who aided them can augment the power of Congress to exclude such Members-elect from Congress while also giving effect to the exceptions from the protections afforded Members by the "Speech and Debate Clause" of the Constitution. Those exceptions were carefully worded to prevent or punish just the kind of mischief we witnessed on January 6, 2021 and the aid given and promised before and afterward. We have included such a draft as Appendix B of this memo.

Congress also needs, among other things, to act in the first days of Congress to amend the Judiciary Act to expand the Federal judiciary from top to bottom to restore balance in the courts, to halt the current practice of filing complaints with national impact in the district court with only one judge who is a far right Republican, and to enact a readily enforceable strict code of ethics for the Supreme Court.

[6] H.R.7906 - To establish a civil action for disqualification under section 3 of the 14th Amendment to the Constitution, and for other purposes. 117th Congress (2021-2022)

This memo notes some of the other topics that should be addressed in those early days in January 2025 and has a draft bill to further enforce Section 2 and one for Section 3 in the appendix.

I -- Congress has the power to bar insurrectionists from being seated in its own Houses and should apply that power immediately upon coming to Washington in January 2025.

(a) Congress has the power to enforce Section 3 with regard to its own Members without enacting new legislation.

The power of determining who qualifies to serve in each House of Congress lies with each House, as specified by Article 1, Section 5, paragraph 1 of the Constitution. It states that each House shall determine who qualifies to serve in that House.[7] This and other parts of the Constitution, as well as related cases and precedents together provide, in our view, a path forward for Congress to enforce Sections 2 and 3 and to enact, early on, reforms that will last.

The determination to exclude Members-elect, Senators-elect, and probably Senators whose terms might otherwise carry over into the new Congress, can be made by the Congress with a simple majority of a quorum voting to exclude the person, as opposed to the Constitutionally required 2/3rds vote to expel a Member after a Member has been seated in Congress.

The controlling Supreme Court case on the power of a House of Congress to exclude a member-elect from that body is Powell v. McCormack, 395 U.S. 486 (1969). Its primary holding was that an individual who meets the constitutional requirements for being a member of the House of Representatives may not be denied a seat there upon being properly elected. Section 3 bars from any state or Federal office any person who has taken an oath to uphold the Constitution and then participated in an insurrection to block or subvert the implementation of the Constitution or given aid and comfort to the enemies of the Constitution. The present facts fit that holding as we seek to exclude Members-elect who are constitutionally disqualified by the terms of the 14th amendment.

(b) Congress can enforce Section 3 with regard to its own Members immediately upon coming to Washington in January 2025.

The 20th Amendment confirms that the new Congress convenes on the 3rd of January giving Congress several days in which to form itself and pass new legislation before the current Presidential term ends:

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[7] "Exclusions are not mentioned in the Constitution, so there is no two-thirds requirement, meaning that a Congressperson-elect can be excluded by a majority vote." -- *Kevin Wagner is a noted constitutional scholar and political science professor at Florida Atlantic University.* *https://www.palmbeachpost.com/story/opinion/columns/2023/01/05/the-civics-project-how-does-a-member-of-congress-get-removed/69779343007/*

Amendment XX Section 1.

> The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin. (Emphasis added.)

Deschler's Precedents (of Congressional procedure) explains how Members-elect may be excluded from the House:

> The House is constituted the sole judge of the qualifications and dis-qualifications of its Members.
>
> Alleged failure to meet qualifications is raised, usually by another Member-elect, before the House rises en masse to take the oath of office. If a challenge is made, the Speaker requests the challenged Member-elect to stand aside. The Member-elect whose qualifications are in doubt may then be authorized to take the oath of office pursuant to a resolution so providing, which resolution may either declare him entitled to the seat, or refer the question of his final right to committee. The House may also refuse to permit him to take the oath, and may refer the question of his qualifications and his right to take the oath to committee.
>
> The temporary deprivation to a state of its equal representation in Congress when a Member-elect is refused immediate or final right to a seat is a necessary consequence of Congress' exercise of its constitutional power to judge the qualifications, returns, and elections of its Members. Barry v ex rel. Cunningham, 279 U.S. 615 (1929). [8]

So, each House is not only empowered to make a final determination as to whether or not each prospective Member meets the basic qualifications or is disqualified but each House is also afforded plenty of time to do that, and to do more, by the 20th Amendment.

(c) Each House can use the recorded votes in both Houses on January 6, 2021 to prevent the electoral votes from Arizona and Pennsylvania from giving Biden enough to be sworn in, and thus to set the stage to either invoke the 12th amendment or to replace duly elected electors with false slates.

Recorded votes are indelible and undeniable evidence. As reported in The Washington Post the day after the storming of the Capitol, and as recorded in the official roll calls for those votes in the Congressional Record, Vol. 167, No. 4, 8 Senators and 139[9] House Members voted

[8] Deschler's includes footnotes including to pages from the 1933 Congressional Record. Not all are accessible on line but CRS could find them easily.

[9] With a few House Members changing their initial votes, e.g., at Pages H94 and H112, the tally may be 137 or so but the new Congress can certify which Members to exclude on this basis.

to prevent the counting of electoral votes certified as valid by the Governors of Arizona and Pennsylvania in order to prevent Joe Biden from having a majority of electoral votes and thus to win the Presidency. Their strategy seems to have been to trigger an investigation of sorts and to either have the House decide the election with one vote per delegation or to replace duly elected electors with false slates of electors who had pledged to vote for Trump in spite of their states having voted for Biden.[10] Any of those who seek seats in January 2025 should be excluded by a simple majority of the votes of the unchallenged Members seated before the Members-elect who are tainted by violating either section of the 14th Amendment.

Although it appears that the only recipients of electoral votes for President were Ms. Harris and Mr. Trump, as we await the counting of the electoral college votes, the transfer of power and the seating of the next Congress, we are reminded that the Constitution, Federal statutes and Congressional procedures and precedents guide and limit this process unless an insurrection or something else blocks their implementation.

One question that arises is who becomes President if neither Trump nor Harris has enough electoral votes to win and no third person has any so as to be included in the options available to the House, which decides. Those options are limited, in the context of the counting of electoral votes by the 12th amendment, to the three top recipients of electoral votes.

The electoral votes were cast on the Monday following the second Wednesday of December. Unless a person other than Harris received a valid electoral vote (one cast by an elector who is qualified and not disqualified) the House will have no choice but to choose Harris as the President under the 12th Amendment. It appears that no one else received any.

Notable Persons Who May Be Disqualified

Speaker Johnson (R-LA) is disqualified from being seated as a Member of Congress, being in the line of succession for President after the Vice President, or holding any public office, and his role in helping to lead the effort to block the counting of electoral votes from Arizona and Pennsylvania is among the first and perhaps strongest evidence of his disqualification under Section 3 of the 14th amendment. Members-elect of Congress who do not face such disqualification can vote to prevent him and others who have violated section 3 on the first day of the next Congress.

Rep. Johnson or anyone who cast the votes he cast or has otherwise lent aid and comfort to insurrectionists seeking to block a Constitutional process, especially on the record or as part of his or her official duties[11] or promised to do so, after taking an oath to uphold the Constitution, should also be considered disqualified to become President in the event of the death or incapacity of the President or Vice President, etc.

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[10] "How members of Congress voted on counting the electoral college vote", https://www.washingtonpost.com/graphics/2021/politics/congress-electoral-college-count-tracker/.

[11] J.D. Vance, for example, has sponsored and co-sponsored at least two bills in the U.S. Senate that together would end Department of Justice prosecutions of Trump and declare that Trump did not participate in an insurrection on January 6th, 2021.

In Anderson v. Trump, the Supreme Court blocked states such as Maine and Colorado from enforcing §3 vis a vis Federal elective offices including the President until Congress enacts legislation implementing it, or setting common standards for states to do so for Federal elective offices. The Secretaries of State of both states had held hearings on, and granted, bi-partisan petitions to bar Trump from their primary ballots. Those decisions had been confirmed by their state courts.

Congress may well enact such legislation, and Reps. Raskin, Swalwell and Wasserman-Schulz have noted they are revising their 2022 bill on Section 3, but each House of Congress retains its own power under Article 1, Section 5, paragraph 1, of the Constitution to be the sole judge of the constitutional qualifications of any person who seeks to be seated therein by a majority vote while a vote of 2/3rds is required to expel a Member or Senator who has already been seated.

Seating its own members is among the first business of each Congress. According to Deschler's Precedents and other official records kept by the Clerks of each House of Congress, petitions from citizens presenting well supported assertions that a member-elect is not qualified under the limited requirements of the Constitution to serve have been presented to the Clerk who has then presented them to the Speaker or Majority Leader for consideration by that House.

In regard to Rep. Johnson of Louisiana, and others who voted to omit the electoral votes of Arizona and Pennsylvania, the Congressional Record of January 6, 2021 is dispositive. On pages H77 and following is the record of the Republican attempt to not count the electors for Joe Biden from Arizona and from Pennsylvania.

The effort in the House to block the transfer of power to President-elect Joe Biden was led, among others, by now-Speaker of the House Johnson (R- Louisiana). This puts him on record as participating in the insurrection of that day or lending aid and comfort to it, as its goal was not to break windows or seek reforms, but was also his goal – the reelection of Donald Trump despite Trump not winning the electoral or popular vote. (See, page H83-4 in particular.)

The objective of blocking the count, and possibly having a kind of investigation of the election, seems to have been to invoke the 12th amendment. The 12th gives each state delegation in the House of Representatives one vote in choosing among the top three electoral vote recipients who should be President when none have over half of the electoral votes. By denying Biden a sufficient number to win the election outright they would have invoked the 12th amendment under which the majority of states' delegations would have probably chosen Trump. Raskin explained how the 12th works and Johnson countered by saying Congress decides if the electoral votes were correctly cast as directed by the legislature and not a court did in the Arizona case.

If those Senators not challenged were to vote to exclude the several Republican Senators who voted to block the counting of the electoral votes of Arizona and Pennsylvania those excluded would start with Ted Cruz and Josh Hawley, who signed the objections to those two states' electors, making the vote in order under the rules that applied then but several others joined them in those votes on January 6, 2021.

The other part of the process planned by the masterminds of the insurrection seems to have been to have the Congressional or other investigation of the Arizona and Pennsylvania elections that was called for by the Republican leaders of the debate on January 6, 2021 determine that Trump won those two states and to have another slate of pre-selected electors replace those chosen by the people in the November elections as certified by the Governors of each state.

Trump is now being prosecuted for his part in this process as have others already but the determinations of fact in the impeachment process have already laid a groundwork sufficient to exclude Johnson, Trump and others from office and no criminal conviction is necessary for that.

It is important to note that Section 3 does not require a finding of intent based on evidence that proves that beyond a reasonable doubt, unlike the crime of insurrection or any crime. It holds office holders to a higher standard. It demands that they control their actions and public statements so as to avoid aiding or lending comfort to an insurrection or participating in the planning of one or promising to pardon those who plan or participate in an effort to block the operation of the government as set out in the Constitution. They are not elected or appointed to plead ignorance. Therefore, the unfounded assertions made by those who offered the resolutions to reject the electors of Pennsylvania and Arizona on the grounds that they were not legally elected should not be sufficient to protect those 130 plus House Members or 8 Senators who voted to replace them from being barred from the new Congress.

Several more state Republican Parties had prepared alternative slates of Electors with the knowledge of some that these actions were not legal: To the extent that those involved had previously sworn an oath to support the Constitution, those persons are disqualified from holding public office or being seated in either House of Congress.[12]

Additional evidence can be based on other records and factual determinations made not only by the previous Congresses and the Department of Justice, and the Special Prosecutor, but also by the Governors, Secretaries of State, or Attorneys General or other officials who have made such determinations.[13]

(d) Citizen petitions can also initiate Congressional review of the qualifications of a member-elect:

Challenges to the qualifications of Members-elect have been brought to the Clerk of the House by citizens as well as by Members-elect so that they were among the first orders of

[12] Washington Post August 7, 2023, **'Fake' elector plot raised concerns over legal peril, indictment shows** A contingency plan, a crime or a 'donkey show'? Doubts across seven states and within the Trump campaign. https://apple.news/A6q5lyHCURAWAhXUpn9xgPg

[13] The Supreme Court's opinion in Trump v. Anderson of March 4, 2024 noted in footnote 3 on page 9, that the Governor of Georgia in 1868 had refused to commission John Christy, … because-- in the Governor's view—Section 3 made Christy ineligible to serve." Thereafter, "a committee of the House reviewed Christy's qualifications itself and recommended that he not be seated". "See 1 A. Hinds, Precedents of the House of Representatives §459 pp. 470-472 (1907).

business before the general swearing in of those Members-elect not so challenged. Majority or Minority Members of the current Committees of jurisdiction of each House can review and recommend any necessary changes in the procedures for this well in advance of the convening of Congress on January 3rd 2025.

Deschler's Precedents sets out a process citizens have used to prompt the exclusion of one or more members-elect by virtue of disqualification by petitioning Congress:

> § 9.2 A challenge to the qualifications of a Representative-elect may be instituted by the filing of a memorial or petition by a citizen.
>
> On Mar. 11, 1933,Speaker Henry T. Rainey, of Illinois, laid before the House a letter from the Clerk transmitting a memorial and accompanying letters challenging the citizenship qualifications of Henry Ellenbogen, Representative-elect from Pennsylvania.
>
> Mr. Ellenbogen did not take the oath until Jan. 3, 1934, and was not declared entitled to his seat until the adoption of a resolution to that effect on June 15, 1934.
>
> 14. 77 CONG. REC. 239, 73d Cong. 1st Sess.
>
> 15. 78 CONG. REC. 12193, 73d Cong. 2d Sess. See § 10.1, infra,

(e) Members of Congress can start now to outline the process by which Congress determines a Section 3 disqualification and votes to exclude from its ranks those who are disqualified.

Members of the current Congress can begin to establish criteria and procedures, with regard to the relevant questions of fact and law, including a review of the records and determinations of those Secretaries of State that have compiled records and findings and the records that Committees of Congress have compiled.

These should include the two predicates of Section 3 evident in the record of the events of January 6:

a) the existence of an insurrection against the operation of the Constitution, and
b) coordinated efforts to block the Constitutional transfer of power that were aided by others not directly within the insurrection.

Members-elect in the 119th Congress can then be prepared to address challenges to the seating of Members-elect using the combined records of qualified officials, such as Federal and state prosecutors, and previous Congressional committees[14] and determinations of the Committee and each House as to whether a Representative-elect or Senator-elect is disqualified under the 14th amendment's Section 3, before proceeding to any other business.

[14] Including but not limited to the 2022 Report of the January 6th Special Committee https://www.webharvest.gov/congress117th/20221231143403/january6report.house.gov/

II -- Beyond vetting its own Members, Congress has the power to prevent insurrectionists from holding Federal and state office, including the Presidency and the Vice-Presidency, and must prepare to do so through legislation and otherwise.

While the US Supreme Court in *Anderson v. Trump* ruled affirmatively and unanimously on the question before them - "Did the Colorado Supreme Court err in ordering President Trump excluded from the 2024 presidential primary ballot?", five of the Court's justices, including the deciding fifth who would normally have recused himself, reached beyond that question and opined that the authority to enforce Section 3 against federal office holders rests solely with Congress, and that in order to do so, Congress must enact legislation prescribing procedures for such enforcement. The Supreme Court also noted that "the Fourteenth Amendment grants new powers to Congress to enforce the provisions of the Amendment against states."[15] So, at this point Congress is well justified in so doing even if Congress agrees with the four Justices who wrote that the Court had addressed issues on which the case did not turn.

Congress now holds the power that the current Supreme Court majority of five, including one whose conflicts would normally require recusal, seems to believe are the only tools available to anyone to enforce Section 3 at the Federal level.

In addition to legislation, however, Congress may want to signal, well before the election of 2024, that the Constitution provides a number of steps that the Court did not address.

An article in the Hill on December 26 by two constitutional law scholars set out steps Congress should take to bar Trump from office:

Congress has the power to block Trump from taking office, but lawmakers must act now

By Evan A. Davis and David M. Schulte, opinion contributors - 12/26/24 08:00 AM EST

The Constitution provides that an oath-breaking insurrectionist is ineligible to be president. This is the plain wording of Section 3 of the 14th Amendment to the Constitution. "No person shall … hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath … to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

[15] Trump v. Anderson, pp. 7-8.

comfort to the enemies thereof." This disability can be removed by a two-thirds vote in each House.

Disqualification is based on insurrection against the Constitution and not the government. The evidence of Donald Trump's engaging in such insurrection is overwhelming. The matter has been decided in three separate forums, two of which were fully contested with the active participation of Trump's counsel.

The first fully contested proceeding was Trump's second impeachment trial. On Jan. 13, 2021, then-President Trump was impeached for "incitement of insurrection." At the trial in the Senate, seven Republicans joined all Democrats to provide a majority for conviction but failed to reach the two-thirds vote required for removal from office. Inciting insurrection encompasses "engaging in insurrection" against the Constitution "or giving aid and comfort to the enemies thereof," the grounds for disqualification specified in Section 3.

The second contested proceeding was the Colorado five-day judicial due process hearing where the court "found by clear and convincing evidence that President Trump engaged in insurrection as those terms are used in Section Three." The Colorado Supreme Court affirmed. On further appeal to the U.S. Supreme Court, the court held that states lack power to disqualify candidates for federal office and that federal legislation was required to enforce Section 3. The court did not address the finding that Trump had engaged in insurrection.

Finally, there is the bipartisan inquiry of the House Select Committee to Investigate the January 6th attack on the United States Capitol. More than half of the witnesses whose testimony was displayed at its nine public hearings were Republicans, including members of the Trump administration. The inescapable conclusion of this evidence is that Trump engaged in insurrection against the Constitution. In particular, Trump unlawfully demanded that his vice president, Mike Pence, throw out votes in the Electoral College for political opponent Joe Biden, a power he did not have. While the riot was in progress, Trump used Pence's rejection of his demand to further enflame the crowd and cause them to chant "Hang Mike Pence!"

Some will argue that the Supreme Court decision in the Colorado case, Trump v. Anderson, precludes Congress from rejecting electoral votes when they convene on Jan. 6, on the basis of 14thAmendment disqualification. This view lacks merit for three reasons.

First the majority's suggestion that there must be new implementing federal legislation passed pursuant to the enforcement power specified in the 14th Amendment is what lawyers call dicta. Dicta are the musings of an opinion that are not required to decide the case. The holding that Section 3 is not self-executing may be an alternate holding, but thoughts about the kind of implementing statute required are plain dicta. Dicta are not precedential. The four dissenters strenuously objected to this part of the opinion as overreach to decide a question not presented. This overreach is a power grab which Congress is not required to credit.

Second, counting the Electoral College votes is a matter uniquely assigned to Congress by the Constitution. Under well-settled law this fact deprives the Supreme Court of a voice in the matter, because the rejection of the vote on constitutionally specified grounds is a nonreviewable political question.

Third, specific legislation designed for this situation already exists. The Electoral Count Act was first enacted in 1887 and later amended and restated in 2022. That statute provides a detailed mechanism for resolving disputes as to the validity of Electoral College votes.

The act specifies two grounds for objection to an electoral vote: If the electors from a state were not lawfully certified or if the vote of one or more electors was not "regularly given." A vote for a candidate disqualified by the Constitution is plainly in accordance with the normal use of words "not regularly given." Disqualification for engaging in insurrection is no different from disqualification based on other constitutional requirements such as age, citizenship from birth and 14 years' residency in the United States.

To make an objection under the Count Act requires a petition signed by 20 percent of the members of each House. If the objection is sustained by majority vote in each house, the vote is not counted and the number of votes required to be elected is reduced by the number of disqualified votes. If all votes for Trump were not counted, Kamala Harris would be elected president.

The unlikelihood of congressional Republicans doing anything that might elect Harris as president is obvious. But Democrats need to take a stand against Electoral College votes for a person disqualified by the Constitution from holding office unless and until this disability is removed. No less is required by their oath to support and defend the Constitution.

Evan Davis was editor in chief of the Columbia Law Review and David Schulte was editor in chief of the Yale Law Journal. Both clerked for Justice Potter Stewart. Davis is a New York lawyer who served as president of the New York City Bar, and Schulte is a Chicago investment banker.

a) How We Count "Regularly Cast" Electors' votes is key now.

Consider the original function of the electors. The founding fathers intentionally left it to them to cast the votes that actually decide who becomes President rather than to provide for direct election of the President. A primary reason for that was to avoid a popular and ambitious person whom the statesmen of the day knew was dangerous from becoming President. A prime example is Aaron Burr who was relatively young when the Constitution was being written but

proved to be dangerous enough to keep from the oval office as he was tried but acquitted for his alleged attempt to lead states out of the union and into a new country that he would lead.[16]

So, one method of enforcing Section 3 is for electors to refuse to vote for a person who is patently disqualified by the insurrection clause of the 14th Amendment and who continues to suggest that he will take the office by means of a bloodbath if necessary. States that direct the vote of their electors, given the chance to reconsider, could amend those laws to allow electors to apply constitutional disqualifications.

There are several steps in the process of a Presidential election that have not yet come and gone. Congress addressed one in enacting the law as part of an appropriations bill in late 2022, that among other things, declared the counting of electoral votes by the Vice President to be ceremonial only. In its first days in 2025, as discussed below, the new Congress could follow that law as outlined by the article in the Hill of the 26th. Or if necessary, it could acknowledge that her constitutional duty supersedes any potentially conflicting statutory duty of the Vice President, or simply amend that law on the 3rd or 4th of January to direct the Vice President not to count electoral votes for a person who is constitutionally disqualified based on evidence obtained through an open process in which both sides enjoyed the opportunity to present and rebut evidence.

That is, since electors who are insurrectionists, or who lend aid and comfort to insurrectionists are also specifically disqualified by Section 3 and reduced by the trimming of delegations by Section 2, in the first days of Congress could by law instruct the Vice President not to count electoral votes cast by or for insurrectionists or those aiding an insurrection before or after the physical violence, for example, by promising pardons to those who conspire to obstruct the operations of the Federal Government as discussed above. The new law could also instruct the Vice President not to count the (perhaps one or two electors of each state), who are disqualified by Section 3 or by Section 2 of the 14th Amendment as it trims the delegations of states abridging the right to vote "in any way." The Presidential candidate with the highest total of valid electoral votes, that is, after removing those trimmed by the operation of the 14th Amendment would then become President on January 20th 2025.

We will now turn to other steps Congress can take to enforce the 14th Amendment.

b) Members of Congress can begin now in 2024 to prepare the legislation and other procedures that will be essential for enforcing Section 3 with regard to Federal officials, so that those procedures and legislation will be ready in the early days of January 2025 immediately after qualified Congressional members are seated.

[16] In 1804, Aaron Burr killed Alexander Hamilton in a duel, thus destroying his chances of a further political career in America. In 1807, Burr was tried for treason for the Burr conspiracy in which Burr was accused of trying to secede land from the United States. Burr then led a self-imposed exile abroad in Europe, eventually returning to America where he would die in 1834.

In January 2025, the new Congress, with only qualified Members seated, must be ready to enact, and President Biden (still in office until the inauguration) must be ready to sign, legislation prescribing the procedures for disqualification under Section 3.

This is unchartered territory that should be thought through carefully and planned and vetted with members of Congress before January 2025.

In light of Trump v. Anderson, and in light of the opportunity to add Justices early in 2025, as discussed below in part V beginning on page 15, one or more bills could address the issues addressed in H.R. 7906 of 2022, introduced by Rep. Wasserman-Schulz. The revised bill could include other elements that events unfolding since then require.

Issues that may call for revisions in H.R. 7906:

The d**efinition of insurrection** (as also discussed in (1) (c) of this memo with regard to Congress seating its own members) would include:

-not only the January 6, 2021 attack on the United States Capitol Buildings, but also
-any attempt to bypass the constitutional order of Presidential transition,
-any attempt to obstruct the counting of properly certified electoral votes of the several States for persons not disqualified on January 6, 2021, or at any other time,

The **definition of giving aid and comfort** to the enemies of the Constitution to include but not be limited to calls to violence, threats, promises to grant or seek pardons or other actions that supports or supported insurrection as defined in the legislation

The definition of individuals or persons encompassed in this legislation could include any individual, membership group, partnership, conspirators or coconspirators, or corporation having engaged in the actions described above.

The process by which entities other than Congress can determine the disqualification of candidates or electors before they are included on the ballot of a primary election or a general election (Congressional procedures can be determined not by legislation so much as by internal rules.)

Enforcement – Adding awards of attorneys' and expert witnesses' fees for substantially successful plaintiffs as is common in many environmental and other laws, such as the False Claims Act which awards treble damages to those who expose false claims filed for Federal compensation or billing which in this

Application to Members of the House and Senate – Those who voted to replace Biden electors with Trump electors voted in such a way as to fall within the exceptions listed in the speech and debate clause. That is, the terms, "Treason, Felony and Breach of the Peace", as they are the listed exceptions to the protections offered by the "speech and debate clause" (Article 1, Section 6, Clause 1) of the Constitution encompass and include those who supported, in voting to replace duly elected electors, or otherwise lent aid and comfort to the enemies of the Constitution whose goal for the January 6th insurrection, or any similar endeavor thereafter, was or may be to

prevent the peaceful transition of power to the next duly elected President of the United States. Therefore, Congress may by legislation create a cause of action to allow citizens to file complaints in state and Federal courts to enforce Section 3 against legislators who not only shared thoughts but took material steps to aid an insurrection, and to allow executive branch authorities to exercise their fact-finding and law enforcement authorities to use their powers in order to enforce Section 3 of the 14th Amendment with regard to such persons whose actions fall within the broad ambit of "Treason, Felony and Breach of the Peace" in specific regard to Section 3.

The primary author of this memorandum, John Fitzgerald, was a student of Prof. F. Reed Dickerson, who was the author of the Foundation Press law school casebook on Legislation used by most law schools in the United States. After moving to Washington, D.C., Fitzgerald drafted numerous bills and amendments as a legislative aide from 1979-1983. As Counsel to the Subcommittee on Human Resources of the Post Office and Civil Service Committee, from January 1983 to the fall of 1984, Fitzgerald drafted the bill that was enacted to strengthen the original Ethics in Government Act of 1976 and helped to direct the Subcommittee's investigation of the unauthorized (illegal) knowing receipt and use by the director and senior staff of the Reagan Campaign of 1980 of government information, including the President's personal briefing book, in an attempt to affect the Presidential and Vice Presidential debates and other aspects of the election of 1980. Unfortunately, that Committee had jurisdiction only over the Standards of Conduct and ethics laws affecting Federal employees. The Judiciary Committee had and still has jurisdiction over the ethics laws affecting Federal courts. From the fall of 1984 to the present Fitzgerald has worked for non-governmental organizations drafting Federal and state legislation and comments on proposed regulations and overseeing and assisting with litigation. He has drafted a revision of H.R. 7906 which is included as Appendix B to this memo. It is offered as a set of suggestions. It might not cover all of the issues noted above to the satisfaction of all concerned, but it is a starting point.

(c) Congress can enact procedures for barring disqualified state officials from taking office.

Congress can confirm its ability to address state offices as well. On Monday March 18th 2024 the Supreme Court rejected a petition from insurrectionist Couy Griffin to review his removal from the Otero County Board of Commissioners by order of the New Mexico courts enforcing the insurrection clause of Section 3. His removal was ordered a few months after Griffin was convicted in 2022 of misdemeanor offenses connected with his storming of the Capitol building on January 6th, 2021. The fact that states can use the 14th Amendment to bar or remove persons from state office does not negate or deny the ability of Congress to address state offices as well, given that Section 5 authorizes Congress to enact legislation further implementing the entire Amendment.[17]

With regard to Congressional delegations, Congress can be ready to apply Section 2 as well, in order to ensure full and fair representation as required by the Constitution.

[17] Politico, March18, 2024.

III -- Congress has the power to reduce Congressional delegations from states that abridge voting under Section 2 of the 14th Amendment without further legislation.

(a) Congress can implement Section 2 of the 14th Amendment fairly, aided by the Government Accountability Office, the Congressional Research Service, the Election Assistance Commission and the Census Bureau.

Section 2 requires the reduction of a delegation in proportion to the percentage of the population eligible to vote (in 1868, of males 21 and older) against whom any impediment to voting has been erected.[18] This would include impediments in fact - many of which have been documented by the Government Accountability Office[19], the Brennan Center for Justice at New York University Law School, Ballotpedia,[20] and other groups — and not just patently labeled or *de jure* impediments or those that discriminate against portions of the voting age population on their face. It should also include not just enacted or promulgated impediments but methods of denying access to qualified citizens that are applied systematically in such states, such as overly aggressive removal of persons for the voter registration rolls in such a way as to make it more difficult for them to vote or to cast absentee ballots or to cast ballots by mail, etc.

The Brennan Center for Justice at the New York University School of Law in 2023 posted a powerful conclusion after analyzing numerous recently enacted restrictive voting laws:

> Voters in 27 states[21] will face restrictions in the 2024 election that they've never experienced in a presidential election before (some of these laws were in effect in the

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[18] Section 2.
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. (These references have been amended to refer to persons 18 years of age or older.) (Emphasis added.)

[19] GAO has documented impediments imposed by photo-ID requirements and by lack of access for the 38 million voters with disabilities, e.g., Voters with Disabilities: State and Local Actions and Federal Resources to Address Accessibility of Early Voting -- **GAO-21-352**Published: Jun 21, 2021. Publicly Released: Jul 21, 2021.-- https://www.gao.gov/products/gao-21-352

[20] http://info.ballotpedia.org/dm?id=347B55E1DCDD367AACC89C5BD3C6E48C6E43630501AD63A4

[21] **footnote8_muscbuf**

2022 midterms). Also in 2024, 5 states[22] will have new election interference laws in place.[23]

Among the most restrictive, [is] an omnibus voting law in North Carolina[24] [that] shortens the period for returning mail ballots, eliminates ballot drop boxes, and makes it more likely that voters using same-day registration do not have their ballots counted.[25] This law has twice been challenged in court since it was enacted three months ago. Also of note is a Mississippi law[26] that makes it a crime for anyone but election officials, postal workers, family members, household members, and caregivers to help a voter return their mail ballot – a policy that can harm all voters but particularly those with disabilities or a limited ability to read or write. A federal judge blocked enforcement of this law as to voters with those conditions, but the state has appealed the decision. Depending on what happens on appeal, the law could be back in full effect by the 2024 elections.

Provisions of a Florida law that makes it more difficult for get-out-the-vote groups to register voters have been temporarily blocked by a federal court.[27] Two laws out of Idaho aimed at student voters are currently undergoing legal challenges.

(b) The Congress and the Courts Can Apply the "Statistical Prima Facie Case" Analysis Again

The 1970's Civil Rights tool of "statistical prima facie case" may have a valuable resurgence in enforcing Section 2. Developed and used by the Southern Poverty Law Center's Charles Abernathy in discrimination cases like the North Carolina prison *habeus corpus* cases and a number of school desegregation cases, the successes in establishing violations of the Civil Rights Act were, at the time, landmark.

The Civil Rights Division of the DOJ, or surrogates like SPLC or NAACP or AARP, can help build a record and gather evidence that demonstrates that the cases being brought by organized Republican bodies at the national or local level, or their surrogates have an explicit intent of disenfranchising identifiable "minority" groups. Rather than focusing on liberal vs conservative impacts and outcomes, the statistical evidence can be used to demonstrate that the effect of the GOP-inspired case in each venue shares a common impact , purpose and pattern of reducing ballot access to groups characterized as protected against invidious discrimination (e.g.,

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[22] **footnote9_789udgm** https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review#footnote9_789udgm

[23] https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review

[24] **footnote2_pg2ar6q** https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review#footnote2_pg2ar6q

[25] **footnote3_w2kqex0** https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review#footnote3_w2kqex0

[26] **footnote4_6xnxy6s** . https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review#footnote4_6xnxy6s

[27] **footnote5_2m0a78g** https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review#footnote5_2m0a78g

based on ethnicity, religion, income, age, gender or other identifiable discriminatory classification). Those are often referred to as "suspect classes" in such discrimination cases requiring the courts to review election laws and their application with "strict scrutiny" rather than presuming them to be the legitimate. These cases were won because the numbers don't lie.

The Committees of authorizing, appropriations or oversight jurisdiction or a special select Committee drawn from all three, comprised of Members who are not potentially disqualified by Sections 2 or 3 could review these suspect state laws and systemic practices that effectively abridge the right to vote by making it more difficult for any segment of the voting age population. They could hold hearings as well and then report their recommendations to the full House and Senate as to which Members, if any, should be denied seats based on Section 2, and which states should receive those seats in order to fulfill the statutory requirement of 435 Members representing the public in the House.[28]

To help in this analysis, the current chairpersons or ranking minority Members of the committees of jurisdiction can request and receive reports from the Congressional Research Service and the Government Accountability Office. These can be quick "letter reports" or longer reviews. Staff of the relevant Congressional committees of jurisdiction and the Congressional Research Service, the Government Accountability Office, and perhaps the Election Assistance Commission, could work with academic and other experts to assess the likely impact on different segments of the voting-eligible population of the restrictions enacted by the states. Such experts, in advance of 2025, and then a special or standing Committee could then recommend both a concomitant reduction in the delegations in Congress of each offending state and also the allocation of those seats to states that have fewer restrictions and that are next in line for another member of Congress according to the Census Bureau.[29]

Section 2 permits only a few restrictions and most states have enacted more over the years, but Congress could decide to enforce Section 2 only against those that have a decidedly

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[28] The U.S. Constitution in Article 1, Section 2, Clause 3 provides for proportional representation in the House of Representatives. The Reapportionment Act of 1929 required that the number of seats in the U.S. House of Representatives be kept at a constant 435, and a 1941 act made the reapportionment among the states by population automatic after every decennial census.[3] The **Apportionment Act of 1911** (Pub. L.Tooltip Public Law (United States) 62–5, 37 Stat. 13) was an apportionment bill passed by the United States Congress on August 8, 1911. The law initially set the number of members of the United States House of Representatives at 433, effective with the 63rd Congress on March 4, 1913.[1] It also included, in section 2, a provision to add an additional seat for each of the anticipated new states of Arizona and New Mexico (which happened in 1912), bringing the total number of seats to 435.[1] See also footnote 16 below. And throughout U.S. Code §2 Congress has set out requirements for elections and the allocation of seats in the House. See, https://en.wikipedia.org/wiki/Uniform_Congressional_District_Act

[29] States are allotted Members from among the 435 according to their populations as counted in the Census of each decade. So, the state that the next highest population in proportion to its allocation of seats would be next in line for the next additional seat in Congress. If a state were found to have abridged the right to vote of over half of its population, then it would lose a senate seat until the offending laws or practices were removed and another election held. There would not be any additional Senate seats awarded to the non-offending states. Non-government organizations or corporations also keep track of which states would be next in line to receive additional seats in the House but the states which had lost seats due to their abridging the right to vote would not receive more, rather those additional seats would go to the states not so abridging voting rights. For one analysis of states whose population trends put them in line to gain or lose seats in the House see, https://www.electiondataservices.com/wp-content/uploads/2023/12/NR_Appor23awTablesAndMaps-2023.pdf

discriminatory impact, for example, on racial, religious, economic, likely party affiliation, or those who are likely to live in the state for a limited period such as college students or members of the military, or measures burdening districts or towns where those voters live, rather than restrictions that impose a more uniform or justifiable inconvenience, such as having to register in advance to vote.

(c) As the 119th Congress convenes the clerk of each house can present to the presumed Speaker-elect, or any Member who is not facing a challenge to his or her seating can offer a motion to delay the seating of any Member-elect or Senator seeking to finish his or her term if such person faces potential disqualification under either Section 2 or 3. Once it has seated only Members not facing a motion to exclude based on disqualified under Section 3, Congress can be ready to reduce Congressional delegations from those states that have "abridged in any way" access to the vote, as required by Section 2.

The electors vote on November 17th 2024 but Congress counts those votes in a joint session on January 6, 2025.[30] Therefore, Congress can set aside the votes of electors that Section 2 would not allow states impeding access to the ballot to have. For most states, where the winner takes all of the electoral votes, Congress could consider allocating one more electoral vote to those whose population warrants the next seat out of the 435 making up Congress given that after the Census some states have more voting age population per District than other states. These calculations could be done in advance based on Census Bureau data.

Being prepared with well researched options, the qualified Members of Congress could then refuse to seat that proportion of the delegations or Members-elect from the 19 or so states that appear to have enacted impediments to voting with discriminatory effects until the Committees of authorizing jurisdiction have reviewed the evidence and reported their recommendations to the full bodies.[31] Those recommendations could address the immediate question of the seating of Members-elect from states with patently discriminatory election restrictions. (See Appendix for more on Section 2.)

Other recommendations could be in the form of legislation reported or rules recommended by the Committee to fulfill Section 5 of the 14th Amendment with regard not only to future Members-elect of Congress under Section 2 but also other aspects of the 14th Amendment vis a vis Federal and state offices.

For Section 2, a committee could undertake a parallel review of laws enacted in violation of Section 2 and report to the full body their recommendations as to:

[30] https://www.archives.gov/electoral-college/allocation

[31] In a case that was before the U.S. Circuit Court for the District of Columbia, when this memo was being drafted, *Citizens for Constitutional Integrity v. Census Bureau*, No. 21-3045, plaintiffs complained that several kinds of restrictions on voting violate Section 2 of the 14th amendment. Some of these restrictions are common and some are newer and/or have greater restrictive effects upon suspect classes or those likely to vote for a particular parties' candidates.

a) which members of which delegations should be excluded from Congress and
b) which electors should be trimmed from states violating section 2, and
c) which states should receive those seats for the appointment of at large members pending another Federal election cycle unencumbered by discriminatory voting laws.

That committee could also recommend procedures for reviewing the progress of affected states in restoring full access to the ballot.

IV -- Congress has the power under Section 5 to enforce Sections 2 and 3 by reallocating electors before the election, before their votes are cast or before the electors' votes for President are counted.

The 14th amendment addresses electors in at least two ways:

a) Section 3 bars insurrectionists or those aiding enemies of the Constitution who have broken their oath to uphold it from serving as electors,
b) Section 2 reduces the delegations in Congress of states abridging the right to vote of any segment of their voting age population in any way and that directly and proportionately reduces the electors from those states.

"On the first Tuesday after the second Wednesday in December, (December 17th, 2024) the electors meet in their respective States. The State legislature designates where in the State the meeting will take place, usually in the State capital. At this meeting, the electors cast their votes for President and Vice President."[32]

Therefore, Chairs and Ranking Members of Committees of jurisdiction and oversight should begin now, before the general election, to plan to implement both of these sections and inform states that they are preparing to do so in plenty of time for the states to correct any laws and practices that may abridge access to the ballot.

V -- Congress and President Biden can also enact legislation in early January 2025 beyond legislation enforcing Sections 2 and 3 of the 14th Amendment, given that additional changes in Federal law will also be necessary to preserve the changes Congress intended during judicial review and to otherwise protect the balance of power and the rule of law.

In addition to the legislation discussed at greater length above in this memo, the new Congress seated with qualified members can enact, and President Biden be ready to sign, legislation to:

[32] The National Archives -- https://www.archives.gov/electoral-college/roles#:~:text=Meeting%20of%20electors-,On%20the%20first%20Tuesday%20after%20the%20second%20Wednesday%20in%20December,for%20President%20and%20Vice%20President.

Impose ethics standards on the Supreme Court.

Add Justices and judges to the Federal Courts.

Remove the "Blue Slip" power of individual Senators to block confirmation votes on judges they dislike.

Remove anti-democratic "prudential" barriers to enforcement of the law, and otherwise empower affected citizens to enforce Federal law.

Protect elections and access to the polls (as in H.R.1 of 2019 and 2021 and the John Lewis Voting Rights Act).

In order to reduce frustration and alienation among citizens, Congress could approve modest increases in the staff of Congress and that of Federal agencies to improve communication with and assistance for persons who do not know how to communicate with or seek help from the legislative and executive branches of the Federal, State and local governments.

Congress could also enhance or devote existing Education Department funding for civics education for students to complete with their parents, for technical as well as liberal arts schools, and for inmates to complete prior to parole or release. The program could be named in honor of the late Justice Sandra Day O'Connor who was an advocate for civics education all her life.

VI -- To prevent election interference in November 2024 and avoid another, or a continuation of, insurrection against the Constitutional order, President Biden can use his existing powers to deploy safety measures well in advance of the elections.

The incitements to insurrection continue. Trump's statement in March 2024 at a rally in Dayton Ohio, that "If I don't get elected, it's going to be a bloodbath for the whole…that's going to be the least of it. It's going to be a bloodbath for the whole country" is warning enough.[33]

Given Donald Trump's threats and the behavior of some Governors and state officials such as the Governor of Texas in deploying their national guard units to oppose or hamper the implementation of Federal immigration policies, precautionary steps must be envisaged in order to hold a full, fair and safe election and avoid another insurrection.

Although this memo is primarily about using the powers of Congress in the first days of 2025, given President Biden's cautious approach to using his own executive powers, as contrasted with his very active cooperation with Congress in enacting legislation, Members of

[33] Huffington Post and MSNBC, Monday March 18, 2024

Congress could urge President Biden to exercise his authority under the Insurrection Act[34] to prepare and implement a plan to keep order beginning on the days when early voting is allowed in different states at least through the Presidential inauguration on January 20th 2025. Such a plan could call for President Biden and Governors to use their authorities to deploy an adequate number of not just national guard and civilian police but also members of the regular military, beginning with the Military Police who are trained for non-lethal police duty.

The time for action is now and citizens are ready to help:

With a plan for action in place well ahead of time, leading up to and through those "14 days" or so from the seating of the new Congress to the inauguration of the next presidential term, efforts to turn out the vote, fight disinformation, ensure fair and free elections and representation, and uphold the rule of law will be rewarded and better protected.

These steps take preparation. Citizens, through their petitions and advocacy groups like Free Speech for People, Committee for Responsibility and Ethics in Washington, and many others, are eager to help. We look to our Congress to do its part as well, and to your leadership in the present fight to preserve our democracy.

Appendices on the following pages:

[34] **Sec. 332. Use of militia and armed forces to enforce Federal authority**

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

Sec. 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it--

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Sec. 334. Proclamation to disperse

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time.

A) The 14th Amendment
B) A Revised Version of H.R. 7906, the 2022 Bill to Enhance Implementation of Section 3 of the 14th Amendment
C) A draft bill to enhance the implementation of Section 2 of the 14th Amendment
D) Further Information on the Potential Application of Section 2
E) Concurring Opinion of Circuit Judge Wilkins in Citizens for Constitutional Integrity v. Census Bureau, Imploring Congress to Apply Section 2 of the 14th Amendment.

(More)

Appendices

A) The 14th Amendment

B) A Revised Version of H.R. 7906, the 2022 Bill to Enhance Implementation of Section 3 of the 14th Amendment

C) A draft bill to enhance the implementation of Section 2 of the 14th Amendment

D) Further Information on the Potential Application of Section 2.

E) Concurring Opinion of Circuit Judge Wilkins in Citizens for Constitutional Integrity v. Census Bureau, Imploring Congress to Apply Section 2 of the 14th Amendment.

A) The 14th Amendment

AMENDMENT XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial

officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

B) A Revised Version of the 2022 Bill to Enhance the Implementation of Section 3 of the 14th Amendment for Consideration by Members of Congress

An updated and expanded version of H. R. 7906 of 2022
A bill enhancing the implementation of Section 3 of the 14th Amendment

The following draft is intended to be divided into three measures – the first to be a motion presented regarding the disqualification of persons seeking to serve in either House of Congress; the second being a bill to be referred to the Committees with jurisdiction over elections; and the third being a bill to create a process for enforcing Section 3 in the courts.

July 24, 2024

The following is a suggested revision of H.R. 7906 introduced in 2022. This revised version was written by John M. Fitzgerald, a Member of the District of Columbia and Supreme Court Bars and former Legislative Aide handling Judiciary and Election Legislation among others, and Counsel to the House Post Office and Civil Service Subcommittee on Human Resources. He helped the Subcommittee and Congress to strengthen the portion of the Ethics in Government Act that applied to civil servants.

To establish a civil action for disqualification under section 3 of the 14th Amendment to the Constitution, and for other purposes.
IN THE HOUSE OF REPRESENTATIVES
…
(To assist in the announced revisions of their bill of 2022 by Ms. WASSERMAN SCHULTZ (for herself and Mr. RASKIN) introduced the following bill; which was referred to the Committee on the Judiciary)

A BILL
For the 118TH CONGRESS 2D SESSION
To establish a civil action for disqualification under section 3 of the 14th Amendment to the Constitution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Purpose: The purpose of this Act is to provide further means for the enforcement of Section 3 of the 14th Amendment as provided in Section 5 of the 14th Amendment.

Findings: Through several investigations by its standing Committees and Special Committees Congress has found and reported facts and legal analysis constituting a sufficient factual and legal basis for barring from any Federal, state or local office or legislature any person who participated in calling for, planning, conducting, assisting, promising to pardon or otherwise gave aid and comfort to the insurrection of January 6th 2021 and its objectives the foremost of which were the halting, altering or impeding the counting of the votes of duly elected electors so as to ensure that Donald J. Trump would remain in the office of President. Congress now finds that these facts form a constitutional disqualification from serving in either House of Congress and that each House may and should bar such persons from being seated at the outset and that until by an affirmative vote such disqualification is specifically waived such disqualification shall be self-enforcing and shall be physically enforced by the Sergeant at Arms, the Capitol Police, and any forces that the President or Mayor of the District of Columbia may call upon for that purpose.

Congress also finds that with respect to official positions beyond Congress the President may and should make use of the records assembled by the Department of

Justice both before and after the date of this measure, and act to prevent persons so found to have participated in or aided that insurrection from holding local, state or Federal office. Congress may also enact legislation providing a right of action in Federal Courts to further implement Section 3 with regard to persons not addressed by the Department of Justice who have violated Section 3 or shall have violated it in the future.

Thus, the cause of action provided in this bill will allow citizens to sue in state or Federal court to bar from office insurrectionists and those who aided them in order to augment the power of Congress to exclude such Members-elect from Congress while also giving effect to the exceptions from the protections afforded Members by the "Speech and Debate Clause" of the Constitution. Those exceptions in the clause itself were carefully worded to prevent or punish just the kind of actions to undermine the Constitution that the nation witnessed on January 6, 2021 as well as the aid given and promised before and afterward. Therefore, Congress has found it necessary and advisable to provide in this legislation a tailored means of effectuating those exceptions.

As noted within the relevant section, the terms "insurrection" and "participant" as used in this Act fall within the ambit of the phrase of "except Treason, Felony and Breach of the Peace", as exceptions to the protections offered by the "speech and debate clause" (Article 1, Section 6, Clause 1) of the Constitution and encompass and include those who supported, in voting to replace duly elected electors, or otherwise lent aid and comfort to the enemies of the Constitution whose goal for the January 6th insurrection, or any similar endeavor thereafter, was to prevent the peaceful transition of power to the next duly elected President of the United States. Therefore, State and Federal Courts and Executive Branch authorities may exercise their fact-finding and law enforcement authorities in furtherance of this Act.

SECTION 1. CIVIL ACTIONS FOR DISQUALIFICATION UNDER SECTION 3 OF THE 14TH AMENDMENT.

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General is authorized and directed to—

(1) investigate and report to the Committees of jurisdiction conduct that would constitute cause for a disqualification pursuant to section 3 of the 14th Amendment; and

(2) bring an action in the United States district

court for the District of Columbia against any public official, or candidate or applicant for office, seeking declaratory and injunctive relief and for reasonable market rate attorneys' and expert witness' fees from the state and/or respondent(s) upon securing substantial relief, providing that a candidate, applicant, nominee or other person seeking a Federal, state or local office described in section 3 of the 14th Amendment is disqualified from holding office under section 3 of the 14th Amendment, and preventing that candidate's name from appearing on a ballot in an election for Federal or State office, preventing electors from voting for such a candidate, preventing any electoral votes cast for such a candidate from being counted and preventing any person from administering the oath of office to such a candidate or other person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) IN GENERAL.—A person may bring an action in the United States district court for the District of Columbia seeking the relief described in subsection (a)(2), including but not limited to reasonable market rate attorneys' and expert witness' fees from the state and/or respondent(s) upon securing substantial relief, against an individual described in paragraph (2) if the person is eligible to vote in an election, district, locality or state in which the candidate is seeking an office or appointment. All eligible voters in the affected state are hereby deemed to be harmed by the presence of such a person on the ballot or in office and thus deemed by Congress to have constitutional and prudential standing to sue.

(2) INDIVIDUAL DESCRIBED.—An individual described in this subsection is an individual who has:

a) engaged in insurrection or rebellion against the United States, or
b) has given aid or comfort to the enemies of the United States or the enemies of the proper implementation of the Constitution, including but not limited to:

i) planning, conducting, participating in, failing report to or make reasonable efforts to call-in proper authorities, police or other officers to halt such an insurrection,
ii) planning, applying, or voting to replace duly elected electors not disqualified by the 14th Amendment who are still capable of performing their duties with alternates,
iii) promising to seek or grant a pardon,

iv) conspiring to block or impede the proper conduct of an election, electoral vote, counting of such votes, assuming office, or
(v) violating any other law in the furtherance of such as conspiracy or insurrection.

(3) NOTICE TO GOVERNMENT.—In the case of an action brought under subsection (b), a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The Government shall decide initially whether to intervene and proceed with the action within 30 days after it receives both the complaint and the material evidence and information but may seek to intervene at any point thereafter.

(4) EXTENSION.—The Government may, for good cause shown, move the court for extensions of the time to review the complaint, material evidence and information but in no case shall such extension be so great as to make the action moot with regard to any step in the process of the election, seating, assuming office or appointment of affected officials or officers, including but not limited to the President and Vice President.

(5) DETERMINATION OF GOVERNMENT.—Before the expiration of the 30-day period or any ex- tensions obtained under paragraph (4), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or
(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action. Should the Government assume the lead in the litigation, the original complainant shall be entitled to such attorneys' and expert witness fees and costs as s/he shall have reasonably incurred.

(c) 3-JUDGE PANEL; APPEALS.—An action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the

hearing and determination thereof, and cause the case to be in every way expedited. Given that the operation of Section 3 will not result in any criminal or civil penalties, and that the purpose is to prevent those who have violated an oath of office from doing further harm to the public through any office, any exclusion based on a preponderance of the evidence in a proceeding allowing the office seeker to present and to challenge evidence shall stand and take effect unless a final judicial appeal overturns that ruling in such a manner and time as not to disrupt any election or necessary assumption of office by a person whose qualifications are not in dispute.

(d) STANDARD OF PROOF.—The court shall grant the relief described in subsection (a)(2) in an action under subsection (a) or (b) upon a showing, by a preponderance of the evidence, e.g., that the defendant should be disqualified from holding office pursuant to section 3 of the 14th Amendment.

(e) CHIEF STATE ELECTION OFFICIALS.—The court may require the joinder, and shall permit the intervention, of a chief State election official (as such term is defined in section 2) having an interest in the action under this section.

(f) RIGHTS OF THE GOVERNMENT.—

(1) SERVICE OF PROCESS.—If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(2) STAY OF DISCOVERY.—Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the

civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(g) INSURRECTION AGAINST THE UNITED STATES.—

For purposes of this section—

(1)(A) the January 6, 2021, attack on the United States Capitol Buildings constitutes an insurrection against the United States;

(B) the attempt to bypass constitutional order and obstruct the counting of certified electoral votes of the several States under section 15 of title 3, United States Code, on January 6, 2021, with intent to displace the lawfully elected President of the United States or thwart the will of the majority of electors, constitutes an insurrection against the United States; and

(C) any person who was a participant in an activity described in paragraph (h)(1) is deemed to have engaged in insurrection.

(D) The terms, "Treason, Felony and Breach of the Peace", as they are the listed exceptions to the protections offered by the "speech and debate clause" (Article 1, Section 6, Clause 1) of the Constitution encompass and include those who supported, in voting to replace duly elected electors, or otherwise lent aid and comfort to the enemies of the Constitution whose goal for the January 6th insurrection or any similar endeavor thereafter was to prevent the peaceful transition of power to the next duly elected President of the United States. Therefore, State and Federal Courts and Executive Branch authorities may exercise their fact finding and law enforcement authorities in furtherance of this Act.

(h) DEFINITIONS.—In this section:

(1) The term ''participant'' means, with respect to the activity described in subsection (g)(1), any person who—

(A) was physically present within the Capitol Buildings on January 6, 2021, without authorization, who knew or reasonably should have known that their actions would have the effect of disrupting Congressional

proceedings or intimidating Members of Congress, the Vice President, or Congressional personnel;

(B) gave direction, information, funding, or otherwise provided aid to facilitate access to the Capitol Buildings on January 6, 2021, and knew or should have known there was a reasonable likelihood that the person to whom such direction, information, funding, or other aid was provided, would enter the Capitol Buildings unlawfully for the purpose of disrupting Congressional proceedings or intimidating Members of Congress, the Vice President, or Congressional personnel, from executing of their duties;

(C) incited, or attempted to persuade, another to gain unauthorized access to the Capitol Buildings on January 6, 2021, and knew or should have known that the individual incited or persuaded would likely attempt to disrupt Congressional proceedings or intimidate Members of Congress, the Vice President, or Congressional personnel from executing their duties;

(D) had the duty or authority to halt the attack on January 6, 2021, but knowingly failed, refused, delayed, or obstructed others in doing so; or

(E) conspired or attempted to bypass the constitutional order and obstruct the counting of certified electoral votes of the several States under section 15 of title 3, United States Code, on January 6, 2021, or voted to replace duly elected electors with those who would vote for a candidate who did not win the votes of that state or district, with intent to displace the lawfully elected President of the United States or thwart the will of the majority of electors.

(F) The terms “insurrection” and “participant” as used in this Act fall within the ambit of the phrase of “except Treason, Felony and Breach of the Peace”, as exceptions to the protections offered by the “speech and debate clause” (Article 1, Section 6, Clause 1) of the Constitution and encompass and include those who supported, in voting to replace duly elected electors, or otherwise lent aid and comfort to the enemies of the Constitution whose goal for the January 6th insurrection, or any similar endeavor thereafter, was to prevent the peaceful transition of power to the next duly elected President of the United States. Therefore, State and Federal Courts and Executive Branch authorities may exercise their fact-finding and law enforcement authorities in furtherance of this Act.

(2) The term ‘‘candidate’’ means an individual who—

(A) uses general public political advertising

to publicize his or her intention to campaign for office;
(B) raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate;
(C) makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office;
(D) conducts activities in close proximity to the election or over a protracted period of time; or
(E) has taken action to qualify for the ballot under State law.

(3) The term ‘‘office, civil or military, under the United States’’ includes but is not limited to the Office of the President and Vice President.

(4) The term ‘‘officer of the United States’’ includes but is not limited to the President and Vice President.

(5) The term ‘‘Capitol Buildings’’ has the meaning given such term in section 5101 of title 40, United States Code.

SEC. 2. FEDERAL OFFENSE.

(a) In GENERAL.—Whoever, being a chief State election official, places on a ballot in an election for Federal or State office the name of an individual who has been found, pursuant to this Act, to be disqualified from holding public office under section 3 of the 14th Amendment, shall be fined under title 18, United States Code, or imprisoned not more than one year, or both. Whoever appoints to and assumes a state or local office, having been found to be disqualified under Section 3, pursuant to this Act or other another procedure established by state or Federal law that affords due process and requires a preponderance of the evidence and allows for judicial review, shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

(b) DEFINITION.—In this section, the term ‘‘chief State election official’’ means the individual designated by the State under section 10 of the National Voter Registration Act of 1993 (52 U.S.C. 20509) to be responsible for coordination of the State’s responsibilities under such Act.

SEC. 3. SEVERABILITY.

If any provision of this Act, or any application of such provision to any person or circumstance, is held to be un- constitutional, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected.

C) A draft bill to enhance the implementation of Section 2 of the 14th Amendment

DRAFT September 15, 2024

A draft bill to implement Section 2 of the 14th Amendment

Elements of the following draft bill could also be adopted as Rules of the House of Representatives

To establish a process for implementing section 2 of the 14th Amendment to the Constitution, and for other purposes.
IN THE HOUSE OF REPRESENTATIVES
…

A BILL
For the 118TH CONGRESS 2D SESSION
To establish a process for the reduction of delegations to Congress and for the reassignment of the affected seats under section 2 of the 14th Amendment to the Constitution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Findings: Congress has found and has taken official notice of the fact that at least twenty-seven states have enacted laws and others are facing judicially imposed restrictions on the right to vote that have the effect of abridging that right for certain segments of the population to a significantly greater extent than for others. The Second Section of the 14th amendment calls for and requires a concomitant and parallel reduction in the delegations and hence electors of those states that allow such restrictions to effect their elections.

Purpose: The purpose of this Act is to establish a process for the reduction of delegations and the consequent disqualification of Members-elect of Congress and for the reassignment of the affected seats under section 2 of the 14th Amendment as provided in Section 5 of the 14th Amendment, to provide notice thereof to the states and their citizens, and for other purposes as set forth herein.

SEC. 1. Procedures for Reducing and Increasing State Delegations Pursuant to Section 2 of the 14th Amendment. Nothing in this Act is intended to curtail the ability of each House of Congress to determine who is qualified or disqualified to be seated therein pursuant to Article 1, Section 5, paragraph one of the Constitution.

a) Any state that enacts a law, promulgates a regulation or implements a systematic practice that abridges in any way the right to vote, beyond the exceptions included in Section 2 of the 14th amendment, of any person of voting age who has been a resident of that state for 30 days or more other than the duty to register in an easily accessible manner, shall have its delegation in Congress reduced in proportion to the portion of its population whose right to vote is so abridged in accordance with the following procedures.

b) The House of Representatives (House) through the relevant Committee and with the assistance of the Comptroller General, the Secretary of Commerce and the Director of the Census Bureau, and such research arms as the House may choose, shall report to the public and to the relevant Secretaries of State or other election administrators, no later than 90 days before each Congressional election, a list of States that shall have their delegations to the House reduced and a list of States that shall gain one or more at large seats in the House based upon the criteria of subsection (1)(c) of this Act.

c) In its report under subsection (b), the House shall identify the seat(s) or Congressional district(s) of the senior Member of the party that gained an

advantage through the enactment or implementation of any abridgement as the seat(s) that shall be lost to that state and shall identify the state that shall be allocated each seat as an at-large seat based upon the growth of its population pending the next redistricting of that state. No state that shall have enacted or implemented any abridgement to voting shall be eligible to receive an at large seat under this section until it has removed such abridgements and notified the public and all registered voters directly of that correction at least 60 days before a Congressional election.

d) As it reconvenes for the next Congress, the House shall exclude any person who seeks to represent the excluded district unless the affected state has redistricted itself at least 60 days prior to the election so as to provide a legitimate, non-discriminatory allocation of its remaining seats across its population. Such exclusion shall take effect based on the report of the House under subsections (b) and (c) and shall not require a vote but if such vote be demanded on the basis of questions of proof or other question of fact or law, the Member-elect may be seated by a simple majority vote after the Committee of jurisdiction considers the question and reports its recommendation to the full House.

e) The Governor of each state awarded an additional seat shall appoint such Member at Large to serve until the next Congressional election or until that state shall have completed a special election for that purpose if its laws provide for such special elections.

f) The report issued in accordance with subsection (b) shall include the re-allocation of seats so as to fill the 435 seats in the House. The next Congress may review any reforms enacted and implemented after that report and determine which seats if any shall be restored to the previously offending states based on their timely corrections.

g) The Committee report shall also assess the costs and benefits of ways that the Federal Government can assist states and local jurisdictions in easing access to the ballot, including but not limited to, designating election day as a holiday or moving a current holiday, such as Presidents' Day, to coincide with election day, offering resources to assist in transportation, translation, and child or elder care on election day, and shall recommend appropriate actions at the state and Federal levels on those subjects.

h) Decisionmakers implementing Section 2 may rely upon the Civil Rights tool of a "statistical prima facie case" as it was used in discrimination cases such as the North Carolina prison *habeus corpus* cases and a number of school desegregation cases. The Attorney General shall direct the Civil Rights Division to build a record and gather evidence that may

demonstrate that the cases being brought by organized bodies affiliated with political parties or not, at the national or local level, or their surrogates, have an explicit intent of disenfranchising identifiable groups. Furthermore, the Attorney General is directed to assess the extent to which such litigation and legislation shares a common impact of reducing ballot access, and thus the right to vote, to groups characterized as protected against invidious discrimination (e.g., based on ethnicity, religion, income, age, gender or other identifiable discriminatory classification) and to present percentages of the voting age population whose rights have in any way been abridged. That evidence shall comprise a statistical prima facie case of a violation of Section 2 of the 14th Amendment.

i) The Election Assistance Commission is hereby directed to issue within 30 days of enactment guidance for states in preventing practices that in effect abridge the right to vote including but not limited to those listed in the definitions section (2) of this Act.

j) States will be considered to have abridged the franchise for section 2 enforcement purposes to the percentage of their voting age population whose access to the ballot is abridged by virtue of implementing the practices described in or pursuant to this Act. Pending the issuance of such guidance by the Election Assistance Commission, the House of Representatives' Committee on House Administration shall report to the House its recommendations on the exclusion of Members from such states pursuant to 2 U.S.C. §6 and Section 2 of the 14th amendment to the Constitution as affected by subsequent amendments.

SEC. 2. DEFINITIONS

As used in this Act, "abridged" includes, but is not limited to, to make more difficult the act of voting or the process of registering to vote or to increase the time and money needed to find, get to and from, and to cast a vote in an accessible and safe place or to assist others in so doing or in collecting and delivering ballots, including but not limited to:

(a) Removing from the rolls of registered voters anyone previously registered without his or her prior informed and written consent, unless the authority maintaining the voter registry is acting in reliance upon substantial evidence offered to and uncontested by such person or his or her next of kin that the same person they are removing from the rolls has registered to vote

in another jurisdiction, or is deceased -- or the removal is required by a Federally established and maintained National Voter Registry;

(b) Requiring more than twenty dollars or ninety minutes of time to register to vote including the cost in time and money of obtaining a birth certificate or other proof of citizenship, and the cost of filing an application with the state agency that processes the registration.

(c) Requiring more than twenty dollars of reasonably incurred expenses to vote by each of the legal methods allowed to registered voters -- such as vote-by-mail, mail ballot submission to a drop-box, or travel to reach the nearest in-person voting facility;

(d) Failing to ensure a safe and comfortable environment for voter registration and polling place volunteers to do their work;

(e) Failing to provide and publicize the location of registration and polling places or other voting options easily accessible to students, military personnel and others over the age of 18 who may be living in a jurisdiction on a non-permanent basis but not registered to vote elsewhere; or

(f) Failing to reimburse all reasonably incurred costs in excess of these limits or otherwise fail to follow guidance on these points that the Election Assistance Commission has been issued pursuant to Section 1 above.

SEC. 3. CIVIL ACTIONS FOR DISQUALIFICATION UNDER SECTION 2 OF THE 14TH AMENDMENT.

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General is authorized and directed to—
(1) investigate and report to the Committees of jurisdiction conduct that would constitute cause for a disqualification pursuant to section 2 of the 14th Amendment; and
(2) in the absence of a timely decision by either House of Congress not to seat a Member-elect thereof who should be barred by Section 2 of the 14rth Amendment or in order to prevent an electoral vote that should be barred by that section, bring an action in the appropriate United States district court against any Secretary of State or candidate for the House of Representatives or Senate or the position of elector, seeking declaratory and injunctive relief and for reasonable market rate attorneys' and expert witness' fees from the

state and/or respondent(s) upon securing substantial relief, providing that a candidate, applicant, nominee or other person seeking to act as an elector or be seated as a Member of Congress or Senator is disqualified from holding office under section 2 of the 14th Amendment, and preventing that candidate's name from appearing on a ballot in an election for the House of Representatives or Senate of the United States or preventing one or more electors from voting for a Presidential or Vice Presidential candidate, or preventing any electoral votes cast by such an elector from being counted and preventing any person from administering the oath of office to such a candidate or elector.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) IN GENERAL.—A person may bring an action in United States district court or the appropriate state court seeking the relief described in subsection (a)(2), including but not limited to reasonable market rate attorneys' and expert witness' fees from the state and/or respondent(s) upon securing substantial relief, against an individual described in paragraph (2) if the person is eligible to vote in an election, district, locality or state in which the candidate or would be elector is seeking an office or appointment or in a state that is likely to be assigned one or more additional seats in Congress with the disqualification of one or more Representatives or Senators from the offending state(s). All eligible voters in the affected state(s) are hereby deemed to be harmed by the presence of such a person on the ballot or in office and thus deemed by Congress to have constitutional and prudential standing to sue.

(2) Order of Disqualification.—The Members of Congress or Senators who are the most senior in the offending state's delegation representing the party that led the effort to abridge access to the ballot shall be disqualified in the order of their seniority with the most senior the first to be disqualified in light of the presumption that they have had the greatest potential influence upon the party that led the effort to abridge access to the ballot.

SEC. 4. SEVERABILITY.

If any provision of this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act and the application of this Act to any other person or circumstance shall not be affected.

Appendix D

D) Further Information on the Potential Application of Section 2

This appendix addresses several kinds of voting restrictions that are not allowed by Section 2 of the 14th Amendment and also appear to be intended to discriminate against certain segments of the voting population. It also explains the data that would allow Congress to fairly and efficiently re-allocate seats and consequently, electoral votes, of states violating Section 2.

The first section includes material from the Brennan Center at New York University Law School. It summarizes several laws that restrict voting access in several states.

This section also includes a summary of the Ballotpedia findings on state requirements for photo-I.D.s for voting and whether and how one can obtain a non-driver's license photo I.D. in that state.

The second section includes material taken from the complaint in the lawsuit filed by Citizens for Constitutional Integrity in the Federal District Court for the District of Columbia seeking to require the Census Bureau to calculate the effect of voting restrictions enacted by the states and the consequential reallocation of seats in the House of Representatives as directed by Section 2 of the 14th Amendment.

One practice, although required by Federal law, can be *implemented* in such a way as to remove more eligible voters than necessary from the rolls. That discriminates against persons who rent, rather than own, who live for a short period in one district, or have skipped voting in only one or two elections.

The National Voter Registration Act requires states to review their registration rolls periodically and remove those who no longer meet the requirements for voting, typically those who have moved out of the state, or who have died, or who have committed a felony. Whether this creates an unconstitutional impediment to voting under Section 2 depends on how fairly this process is administered. For example, affirmative proof of a voter moving out of state (often obtained by cooperation with other states' registrars) or having died, would simply be what is considered proper maintenance under current law but striking a voter from the rolls simply for not voting in the past election or two may discriminate unnecessarily against those who cannot leave work easily, or lack the mobility to vote easily.

The New York Times in early March 2024 published the results of an investigation into efforts coordinated by Trump supporters that are using software and disputed legal theories and succeeding in striking voters, including some who should not have been removed, from the rolls in several battleground states. [35]

More than 19 million voters were stricken from the rolls between 2020 and 2022, according to the Election Assistance Commission.[36]

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[35] https://www.nytimes.com/2024/03/03/us/politics/trump-voter-rolls.html

[36] https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf -- Exec. Summary iv.

In fact, as of October 2023 nine states had withdrawn from the Electronic Registration Information Center (ERIC), a non-partisan interstate cooperative body that was set up to help make these determinations. Such withdrawals raise the red flag of potential illegal intent according to some election law experts.[37]

Therefore, Congress could choose to focus on the more egregious impediments while leaving in place those with administrative justification and little discriminatory impact as Congress exercises its authority to enact legislation implementing the 14th Amendment in greater detail under Section 5 of that Amendment.

A body of voting experts should assist Congress in advance of and into 2025 in assessing the design and likely impact of those impediments. (See, https://www.brennancenter.org/our-work/research-reports/impacts-restrictive-voting-legislation-2020-election)

Brennan Center for Justice Summary of Recent Restrictive Voting Laws

As of early 2023 there had been several other requirements for voting enacted beyond those in several states including Arizona, Montana, Georgia, and Texas according to the Brennan Center. By the end of 2023 several more had been enacted and more such legislation was pending and likely to be enacted in time to limit access to the ballot in different ways in additional states:

> In 2023, we once again saw an unprecedented volume of state legislation changing the rules governing voting. There remains a stark divide: 14 states passed restrictive voting laws while others moved to implement changes to make voting more accessible. All told, states enacted more restrictive laws and more expansive laws in 2023 than in any year in the last decade except for 2021, which was itself an unprecedented year. Early indicators for 2024 suggest more of the same.
>
> Between January 1 and December 31, 2023, at least 14 states enacted 17 restrictive voting laws,**footnote1_p4928yi** all of which will be in effect for the 2024 general election.**footnote2_oliuchk** At least one of these laws made it harder to vote in several different ways.
>
> Voters in these states now face additional hurdles to reach the ballot box. Most of the restrictions limit mail voting, such as requiring additional information on a mail ballot application, shortening the window to request a mail ballot, or banning drop boxes.
>
> At least 6 states enacted 7 election interference laws,**footnote3_swyzpjn** with at least 6 laws in effect for the 2024 elections.**footnote4_a7ty6xa** Many create criminal penalties for election workers for minor mistakes such as not allowing a poll watcher to stand close enough to voters.

[37] https://www.npr.org/2023/10/20/1207142433/eric-investigation-follow-up-voter-data-election-integrity

Ballotpedia Findings on Photo-I.D. Requirements by State

> As of January 2024, 34 states required voters to present identification in order to vote at the polls on Election Day. Of these states, 23 required voters to present identification containing a photograph, and 11 accepted other forms of identification. The remaining 16 states did not require voters to present identification in order to vote at the polls on Election Day.
>
> Valid forms of identification differ by state. In certain states that require voters to provide identification, there may be exceptions that allow some voters to cast a ballot without providing an ID. To see more about these exceptions, see details by state below. Commonly accepted forms of ID include driver's licenses, state-issued identification cards, and military identification cards.[1][2]

Citizens' for Constitutional Integrity Complaint to Implement Section 2 Via the Reassignment of Seats in Congress.

The following excerpt from the "Citizens" complaint addresses primarily the effect of requiring a government-issued photo I.D. in order to vote but also describes a method of reassigning the seats in Congress from states violating Section 2 to states that do not violate it:

> 50. Voter denials and abridgments do not stop at registration. States abridge even registered voters' rights to vote. Some states do that by narrowing the list of documents by which voters can prove their identity. Some voter identification laws merely match a voter's signature with the signature on the voter's registration form. Others more simply require a voter to bring a utility bill or lease to the polls.
>
> Pl.'s Am. Compl.
> *Citizens for Constitutional Integrity v. Census Bureau*, No. 21-3045 18
>
> Case 1:21-cv-03045-CJN-JRW-FYP Document 20 Filed 03/21/22 Page 19 of 24
>
> Yet others allow a voter merely to sign a declaration. But some states have recently passed strict photo voter ID laws that prohibit voters from voting unless they bring with them to the polls, a particular photo ID. Those states list the particular photo ID documents that a voter can use. Some require very specific, unexpired photo IDs with current addresses.
>
> 51. Wisconsin may have the strictest photo voter ID law in the nation. It narrowed qualifying photo voter IDs so much that it disenfranchised "approximately 300,000 registered voters in Wisconsin, roughly 9% of all registered voters, [for lacking] a qualifying ID." *Frank v. Walker*, 17 F. Supp. 3d 837, 854 (E.D. Wis.), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014), *r'hrg en banc denied*, 773 F.3d 783, 785 (2014).

52. Citizens often do not possess the photo identification documents that states require. The Brennan Center for Justice at NYU Law School concluded that "[a]s many as 11 percent of United States citizens—more than 21 million individuals—do not have government-issued photo identification." Citizens Without Proof, Brennan Center for Justice, (Nov. 2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (cited approvingly by *Frank*, 773 F.3d at 785 (7th Cir. 2014) (Posner, J., dissenting from rehearing en banc)); *see also* Wendy R. Weiser, et al., *"Citizens Without Proof" Stands Strong*, Brennan Center for Justice (Sept. 8, 2011), https://www.brennancenter.org/our-work/research-reports/citizens-without-proof- stands-strong. Elderly, low-income, and minority citizens lack those IDs in even higher percentages. Citizens Without Proof 3. And even if citizens possess photo IDs, ten percent of those IDs reflect outdated addresses or legal names. *Id.*

53. Even registered voters do not own photo identification. The Government Accountability Office reviewed ten studies and estimated that only 84 to 95 percent of voters possess a driver's license or state identification. *Issues Related to State Voter Identification Laws* ii, No. GAO-14-634 (Sept. 2014 rev. Feb. 2015).

54. If Census had calculated Wisconsin's basis of representation under the Fourteenth Amendment's equation by subtracting 300,000 citizens who could not vote because of Wisconsin's photo voter ID law (without calculating denials from voter registration rates), the Fourteenth Amendment would have moved one seat from Wisconsin to New York.

55. Data Scientist Ayush Sharma completed the calculations that show precisely how these changes would move representative seats. Sharma Decl. ¶ 23, Ex. 9, Ex. 10.

56. These results also accord with the results from a separate election data analytics firm. Election Data Services, *Final Census Apportionment Counts Surprises Many Observers; Raising Questions of Why?*, Table #1 (Apr. 28, 2021), electiondataservices.com/wpcontent/uploads/2021/04/NR_Appor20wTablesMaps-20210428.pdf, Sharma Decl., Ex. 12. That firm concluded that, if Wisconsin had 188,088 fewer citizens, it would have lost a representative seat. This analytical shortcut calculation confirms that, because the 300,000 proven in district court exceeds 188,088, Wisconsin would lose a seat because of its photo voter ID law.

Because New York would have received the next representative (number 436), it would receive the one Wisconsin lost. *See id.* at Table #1, page 2. This data demonstrates that because Wisconsin disenfranchised so many of its citizens, it would likely lose one representative seat, and New York would gain one.

57. If Census had calculated bases for representation for all states using both (a) denials from voter registration rates and (b) Wisconsin's voter abridgments because of its photo voter ID law, the Fourteenth Amendment would have moved a seat from Wisconsin to Pennsylvania (in addition to the other moves for registration rates).

58. Data Scientist Ayush Sharma completed the calculations that show precisely how these changes would move representative seats. Sharma Decl. ¶ 26, Ex. 13, Ex. 14.

Appendix E) Concurring Opinion of Circuit Judge Wilkins in Citizens for Constitutional Integrity v. Census Bureau, Imploring Congress to Apply Section 2 of the 14th Amendment:

…

WILKINS, *Circuit Judge*, concurring: The Fourteenth Amendment was adopted in 1866 and ratified in 1868—over 150 years ago. CONG. GLOBE, 39th Cong., 1st Sess. 3149 (1866); *see also* Act of July 28, 1868, 15 Stat. 708–10 (1868) (ratifying the Fourteenth Amendment). Since then, while several other amendments to the Constitution have been robustly enforced, members of Congress and agency officials have undertaken shamefully few actions to implement the Amendment's Reduction Clause, and none have resulted in any meaningful, much less robust, enforcement of the penalty contemplated by that provision. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 107–24 (1961).

In this case, the Bureau argued that Citizens' claims are not redressable because the Bureau "neither [has] the authority nor the tools" to implement the Reduction Clause and because "it is far from clear that [the Secretary] would have authority to withdraw her [R]eport on the 2020 census at this point."

Appellee's Br. 20–21; *see* Oral Argument Tr. 21–22. At argument, the Bureau was asked how, under its theory, any plaintiff would have standing to enforce the Reduction Clause. *Id.* at 23–24. "I'm not sure," replied counsel for the Bureau, "[i]t's not clear because of the way that the [R]eduction [C]lause and the statutory scheme exist . . . there is no obvious . . . answer to that question." *Id.* at 23. When pressed further about which government actor is responsible for enforcing the Reduction Clause, if not the Bureau, the Bureau took no position, abdicating any responsibility for implementing the provision without some other congressional action. *Id.* at 26–28. The Bureau's response, put colloquially, was, "Not it."

This is an unacceptable position from an agency of the Executive Branch that is tasked with the responsibility, and empowered with the authority, to "take [c]are that the [l]aws be

faithfully executed." U.S. CONST. art. II, § 3. The Reduction Clause, which has been codified in statute since 1872, is just as important as any other constitutional provision, having been passed following intense deliberations about how to reunite a nation fractured by war and facing political differences that threatened to leave four million formerly enslaved Black Americans with "no political existence" while Southerners gained a profound increase in political power. W.E.B. DU BOIS, BLACK RECONSTRUCTION 290 (Free Press 1998) (1935); *see id.* at 295, 330. Equal treatment must be afforded not just to people but to the laws in place to protect their rights; it is high time, after 150 years, that the Reduction Clause receive the respect it deserves.

I.

Following the Civil War, the Joint Committee on Reconstruction (the "Committee") was tasked with "inquir[ing] into the condition of the [Confederate] States . . . and report[ing] whether they or any of them are entitled to be represented in either house of Congress." J. COMM. ON RECONSTRUCTION, 39TH CONG., 1ST SESS., REP. OF J. COMM. ON RECONSTRUCTION 1 (Comm. Print 1866). The Committee proposed the Fourteenth Amendment based on its findings. *Id.* at 15, 29. The originally stated purpose of the Amendment was to protect "the civil rights and privileges of all citizens in all parts of the republic" and to "place representation on an equitable basis[.]" *Id.* at 15. Adoption of the Reduction Clause specifically, however, was motivated by "[t]he Republicans who controlled the 39th Congress," who "were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken [the Republicans'] own political dominance." *Richardson v. Ramirez*, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting). The omission of any mention

of race or color in the final version of the Reduction Clause was occasioned by a fear that, by cabining it to race-based disenfranchisement, Congress would inadvertently "enable circumvention of the congressional purpose via imposition by the states of unpenalizable education or property qualifications." Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 112 (1960). In effect, however, they put "Southern States to a choice—enfranchise Negro voters or lose congressional representation." *Richardson*, 418 U.S. at 74 (Marshall, J., dissenting); *see* H.R.

REP. NO. 39-11, at 3 (1st Sess. 1866) (minority report explaining that "[t]he object of [the Fourteenth A]mendment is to establish universal and unqualified negro suffrage throughout the whole Union; and instead of boldly and openly meeting that issue, it attempts to deceive the people by inflicting a severe penalty upon the States that refuse unqualified suffrage to the colored race").

The government first sought to enforce the Reduction Clause through the 1870 Census. Senator James Harlan of Iowa proposed a resolution on December 19, 1868, directing the Senate Judiciary Committee to "prepare a bill for the apportionment of Representatives in compliance with" the Reduction Clause. Zuckerman, *supra*, at 107 (citing CONG. GLOBE, 40th Cong., 3d Sess. 158 (1868)). That resolution died on the vine when the short session of Congress that year terminated, but the House of Representatives took up the mantle soon after, appointing a Committee on the Ninth Census (the "Census Committee"), chaired by then-Representative Garfield of Ohio, to "ascertain the laws which restricted suffrage" and to "provide the census takers with this information to assist them in determining the number of adult male citizens whose right to vote was denied or abridged." *Id.*

at 108; *see* H.R. REP. NO. 41-3, at 52–53 (1870). The Census Committee concluded, in relevant part, that

> The [T]hirteenth and [F]ourteenth [A]mendments of the national Constitution have radically changed the basis of representation and provided for a redistribution of political power . . . . The census is our only constitutional means of determining the political or representative population. The [F]ourteenth [A]mendment has made that work a difficult one. At the time of its adoption it was generally understood that the exclusion applied only to colored people who should be denied the ballot by the laws of their State. But the language of the article excludes all who are denied the ballot on any and all grounds other than the two specified. This has made it necessary to ascertain what are in fact the grounds of such exclusion . . . .

H.R. REP. NO. 41-3, at 52. The Census Committee went on to identify "nine general classes" of state constitutional provisions and laws that impermissibly abridged or denied the voting franchise on account of: (1) race or color; (2) "residence

on lands of United States," "residence less than required time in United States," "residence in State less than required time," and "residence in county, city, town, district"; (3) lack of "property qualifications" or non-payment of taxes; (4) lack of "literary qualifications"; (5) character or behavior; (6) army or naval service; (7) "pauperism, idiocy, and insanity"; (8) "[r]equiring certain oaths as preliminary to voting"; and (9) other causes. *Id.* at 52–53; *see id.* 71–93. To capture a count of the population subject to such laws, the Census Committee recommended "add[ing] . . . a column for recording those who

are voters," and another for recording "Citizens of the United States, being twenty-one years of age, whose right to vote is denied or abridged on other grounds than rebellion or crime." *Id.* at 53.

At the outset, however, the Census Committee severely undermined its own proposal. After outlining its proposal for collecting population data on citizens whose right to vote had been denied or abridged, it asserted that, while this was "the best method that ha[d] been suggested," it might be "difficult to get true and accurate answers" to the relevant question because it would "allow the citizen to be a judge of the law as well as the fact." *Id.* The Commissioner of the Census, under direction of the Secretary of the Interior, nevertheless went ahead with changing the census schedule to incorporate the citizenship and suffrage questions. CONG. GLOBE, 42d Cong., 2d Sess. 79 (1872) ("[I]t was believed that . . . in order to carry out the requirements of the [F]ourteenth [A]mendment, the Department would not be clear if it neglected to make the attempt [to do so], it being the only executive organ through which, without such special provision, the information could be obtained . . . ."). To effectuate the collection of responses to these questions, the Secretary informed Assistant U.S. Marshals at the time, who were responsible for taking the census, that "[m]any persons never try to vote, and therefore do not know whether their right to vote is or is not abridged," but that the question was intended to capture "not only those whose votes have actually been challenged, and refused at the polls for some disability or want of qualification" but also "all who come within the scope of any State law denying or abridging suffrage to any class or individual on any other ground than participation in rebellion, or legal conviction of a crime." DEP'T OF INTERIOR, INSTRUCTIONS TO ASSISTANT MARSHALS (1870), https://usa.ipums.org/usa/voliii/inst1870.shtml [perma.cc/D49N-XUMS].

Despite these instructions, the positive response rate to the question on denial or abridgement was abysmally low. Reports of voter disenfranchisement at the time were common. *E.g.*, TESTIMONY TAKEN BY THE SUBCOMM. OF ELECTIONS IN LA., H.R. MISC. DOC. NO. 41-154, pt. 2, at 188 (2d Sess. 1869) ("It was remarked by [General A. L. Lee and Governor Warmoth] that the better course would be to advise the colored people not to vote [in the 1868 election]. This was done, and hence the small republican vote cast in [New Orleans] and in many of the parishes of the State."). Yet, the Census Bureau reported that only 185 out of 159,037 male citizens over 21 in Louisiana—and only 40,380 out of 8,314,805 nationwide—had their right to vote abridged or denied. CONG. GLOBE, 42d Cong., 2d Sess. 83 (1872). This outcome led the Secretary himself to "give but little credit to the returns made by assistant marshals in regard to the denial or abridgement of suffrage." CONG. GLOBE, 42 Cong., 2d Sess. 79. Members of the House of Representatives derided the results as "utterly inaccurate" and "not reliable" given that they reported so few disenfranchised voters. *Id*. The Superintendent of the Ninth Census further undermined the 1870 Census results by echoing the Census Committee's prior lack of confidence, reporting that "[t]he census is not the proper agency for . . . . questions of citizenship and of the denial of suffrage to rightful citizens" because they are "mixed questions of law and fact, which an assistant marshal is not competent to decide." FRANCIS A. WALKER, NINTH CENSUS – VOL. I, THE STATISTICS OF THE POPULATION OF THE UNITED STATES xxviii (1872). Incredibly, however, the Superintendent went on to deem "[t]he count . . . of the total number of male citizens above twenty-one in each State in the United States" to have been "carefully made," to be "as exact as most statistical results," and to have had "an important bearing upon political philosophy and political history in the United States." *Id.*

Based on these results, the representative population of the Southern states increased 13.92 percent. *Id.* at xiii. In the decade following, there were pervasive reports of voter disenfranchisement, but with the increase in political representation already in place, former slaveholding states received the same unwarranted political power the Reduction Clause was meant to prevent. *See* BENJAMIN GRIFFITH BRAWLEY, A SHORT HISTORY OF THE AMERICAN NEGRO 178 (Macmillan 1913) ("In the decade 1870-1880 intimidation; theft, suppression, or exchange of the ballot boxes; removal of the polls to unknown places; false certifications; and illegal arrests on the day before an election were the chief means used

by the South to make the Negro vote of little effect."); PROCEEDINGS OF THE NATIONAL CONFERENCE OF COLORED MEN OF THE UNITED STATES, HELD IN THE STATE CAPITOL AT NASHVILLE, TENNESSEE, 1879 32 (Darby 1879) (reporting Colonel Robert Harlan's statement that "[a]t present there seems to be no alternative [but to migrate to the North]. The reaction has robbed Southern Republicans, both white and colored, of their votes and of their voices, and this has thrown the nation into the hands of our opponents, who are determined to strip us of the last measure of protection.").

II.

To this day, the government has failed to enforce the Reduction Clause despite having codified it into law. *See* Act of Feb. 2, 1872, 17 Stat. 28–29 (1872) (codified at 2 U.S.C. § 6). While the Fifteenth Amendment invalidated *de jure* disenfranchisement based on race, states remained able through the Civil Rights Era to exercise *de facto* disenfranchisement and "eas[ily] . . . deny the franchise to persons on account of their race" through "poll tax[es], literacy test[s], and other similar qualifications imposed on the exercise of the franchise" without any proportionate reduction in their congressional

representation. Bonfield, *supra*, at 108–09. Indeed, "[B]lacks in the South," as well as other non-white groups, "were virtually disenfranchised from the end of the Reconstruction Period until 1965." U.S. COMM'N ON C.R., THE VOTING RIGHTS ACT SUMMARY AND TEXT 4 (1971). The Reduction Clause was essentially a dead letter, and it had no deterrent effect on these overt measures to disenfranchise Black citizens. This occurred notwithstanding the intermittent but courageous efforts of a small number of congresspeople to jumpstart the Executive Branch's failed enforcement of the Reduction Clause. In 1901, prior to the apportionment pursuant to the Twelfth Census, Representative Shattuc of Ohio introduced a resolution that would have directed the "Director of the Census" to furnish the House of Representatives with information regarding the denial or abridgement of suffrage on account of illiteracy, "pauperism," polygamy, "property qualifications, or for any other reason." Zuckerman, *supra*, at 117 (quoting 34 CONG. REC. 556 (1901)). That resolution died in committee. *Id.* at 118. In 1904, Senator Platt of New York introduced a bill to amend Congress's 1901 Apportionment Act to acknowledge that "the right . . . to vote at some . . . elections since [1901] . . . has in fact been denied or abridged for causes not permitted by the Constitution," and to reduce the representation of several Southern states.

Zuckerman, *supra*, at 119 (quoting S. 5747, 58th Cong. (3d Sess. 1904–1905)). That bill also died in committee. *Id.* In 1906, Representative Keifer of Ohio went further than anyone else had gone so far, introducing a bill to reduce the number of representatives of Southern states by 37—the number proportionate to the entire Black population in the South, which Keifer asserted was completely disenfranchised by "the use of fraudulent ballots, shotgun policies, dishonest registration policies, and intimidation at the polls." *Id.* at 120 (quoting 40 CONG. REC. 3885–86 (1905–1906)); *see id.* at 119–20.

Keifer's bill, similarly, died in committee. *Id.* at 120. Over fifty years later, in 1957, Senator McNamara of Michigan proposed an amendment to the bill that would ultimately become the Civil Rights Act of 1957, which detailed a plan for implementing the Reduction Clause through a joint committee that would have been responsible for identifying states that deny or abridge the right to suffrage and calculating the proportionate reduction in representation due to those states. *Id.* at 120–21. McNamara's proposal was rejected; he then reformulated the proposal into a standalone bill that—you guessed it—also died in committee. *Id.* at 121 (citing S. 2709, 85th Cong. (1st Sess. 1957)); 103 CONG. REC. 13703 (1957)).

Individuals have also sought to enforce the Reduction Clause's representation penalty through judicial action, albeit unsuccessfully. In *Saunders v. Wilkins*, Saunders, a prospective candidate for the House of Representatives in Virginia, sued the Secretary of the Commonwealth of Virginia over the latter's refusal to certify Saunders as a candidate despite his submission of a petition signed by 250 qualified voters. 152 F.2d 235, 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946). Saunders theorized that the Secretary's actions abridged the right "to vote for the choice of . . . Representatives in Congress" and that Congress's 1941 reapportionment, which did not reduce Virginia's representation proportionately, was invalid as a violation of the Reduction Clause. *Id.* at 236. The Fourth Circuit interpreted the "underlying purpose" of Saunders's Reduction Clause argument to be "abolition of the Virginia poll tax law," but then punted, finding that the question of whether the poll tax fell within the terms of the Reduction Clause was "a question political in its nature which must be determined by the legislative branch of the government and is not justiciable." *Id.* at 237. In another case, *Lampkin v. Connor*, this Court affirmed the dismissal of a complaint filed against the

Secretary of Commerce by voters seeking to enforce the Reduction Clause. 360 F.2d 505, 506 (D.C. Cir. 1966). Plaintiffs in that case fell into two categories—one group alleged potential vote dilution injury if the then-upcoming 1970 Census failed to implement the Reduction Clause and the other group alleged that they would be injured from the obstruction of their right to vote by state poll taxes and certain registration requirements.[1] *Id.* 506, 510. Our Court determined the first group's injury, alone, was too speculative to warrant adjudication and that adjudicating the claims of either group, in light of the Voting Rights Act of 1965 and the Twenty-Fourth Amendment to the Constitution banning poll taxes, would be "premature" unless "it c[ould] fairly be said that discrimination persists despite th[o]se new measures." *Id.* at 511. Nevertheless, this Court also made sure to say that, even though plaintiffs' timing might have rendered their complaint "unsuitable for judicial disposition at [the] time," it was also "premature to conclude that Section 2 of the Fourteenth Amendment does not mean what it appears to say." *Id.* at 512. Despite these enforcement efforts and ongoing evidence of voter disenfranchisement, neither the Bureau nor any other member of the Executive Branch appears to have meaningfully attempted to figure out how to implement this constitutional

[1] Notably, the *Lampkin* plaintiffs were represented by then-attorney William B. Bryant in their district court challenge, *Lampkin v. Connor*, 239 F. Supp. 757 (D.D.C. 1965), who, mere months after the case was decided, was appointed to serve as a judge on the U.S. District Court for the District of Columbia and later served as the first Black Chief Judge for that court. *William B. Bryant*, HIST. SOC'Y D.C. CIR., https://dcchs.org/judges/bryant-william/ [perma.cc/5ZSR-DZSD]; *William B. Bryant Annex History*, U.S. GEN. SERVS. ADMIN., https://www.gsa.gov/real-estate/gsa-properties/visiting-public-buildings/william-b-bryant-annex/whats-inside/history (Jan. 21, 2024) [perma.cc/836T-ASG8].

provision. It is as if the Reduction Clause were written in invisible, rather than indelible, ink. Its sister provisions in the Fourteenth Amendment are summarily lauded—failure to enforce them causes hand wringing and outcry—and yet the abandonment of the Reduction Clause has been met with a shrug.

III.

Part of the Bureau's defense that it does not have the authority to implement the Reduction Clause is that, by statute, the Secretary is not "directed" to "report population counts that are less than the 'total population.'" Appellee's Br. 11. To be sure, 13 U.S.C. § 141 provides that the Secretary

"shall . . . every 10 years . . . take a decennial census of population as of the first day of April of such year . . . in such form and content as [s]he may determine" and "report[]" the "tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States . . . within 9 months after the census date . . . to the President of the United States." The Report delivered to President Biden in 2020, however, betrays the Bureau's argument in that it specifically calculated the "number of apportioned representatives based on [the] 2020 Census" according to the method of equal proportions as provided for in 2 U.S.C. §§ 2a, 2b. A. 55 & n.2.

The Bureau cannot have it both ways. Contrary to the Bureau's representation at oral argument—that the Bureau only "count[s] the total number of people in the United States" and nothing else, Oral Argument Tr. 28—the Bureau demonstrates that it has the authority to provide the President with an apportionment count based on census data. It is thus the Bureau's responsibility to ensure that the apportionment

count it is providing accords with the Reduction Clause as well as the Clause's statutory codification at 2 U.S.C. § 6.

The Bureau made a slapdash, one-time attempt to effectuate the Reduction Clause in 1870, but that failed attempt cannot now justify the agency's ongoing failure to even try to ensure that states denying or abridging the right to vote are appropriately held to account. *See* Oral Argument Tr. 27. The census remains the most natural established way of ascertaining the data necessary to effectuate the Reduction Clause, as both the House and Senate recognized in the late 1860s. *See* Zuckerman, *supra*, 107–08. The Bureau has several tools at its disposal to identify ways to implement the provision; it can promulgate rules, engage in notice and comment, seek out implementation input from experts, or generate reports for submission to the President and Congress. I concede that implementing the Reduction Clause might be difficult, but that is no excuse for the Executive Branch to abdicate its responsibility to give effect to this important part of the Constitution. Many constitutional provisions are difficult to enforce, like the Second Amendment, the preservation of the right to trial by jury, and the guarantee of equal protection. But the government has a duty to enforce all of the Constitution, not just some of it, and it is time that the government stop treating the Reduction Clause as an afterthought. *Cf. Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) ("The difficulties of drafting and enforcing a decree are

no justification for us to refuse to perform the important function entrusted to us by the Constitution."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 691 (1977) ("[T]he prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights.").