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Congress of the United States
House of Representatives
Washington, DC 20515

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Dear Fellow Kentuckians:

Tonight, I offer this open letter to the people of the Sixth Congressional District explaining my decision to oppose objections to the counting of the votes of the Electoral College. This decision is compelled by my reading of the Constitution, and specifically the original meaning of the Twelfth Amendment, as implemented by the Electoral Count Act.

At the outset, let me emphasize that today's events at the U.S. Capitol were tragic, outrageous and devastating. They were wholly inconsistent with the fundamental values of our constitutional republic. The United States is an exceptional nation because we resolve our differences peacefully—through the ballot box, the courts and our democratic institutions—not through violence. What happened at the Capitol today is *not* who we are as a nation and should never happen again. I pray for peace and unity for our country and I am grateful for the brave men and women of the Capitol Hill Police, the Washington D.C. Police, and the National Guard who protected our Capitol building, the men and women who work there and peaceful protesters in harm's way.

Like many of you, I am deeply concerned about the abuses and irregularities that occurred in the 2020 elections which irrefutably have undermined Americans' confidence in the integrity of our democracy. While most of the national media and social media platforms ignored, censored or falsely reported no evidence of fraud or other irregularities, serious legal and constitutional questions have been raised about the manner in which elections were conducted in many states.

In fact, evidence in the form of affidavits, witness testimony in both judicial and legislative proceedings, video recordings of ballot tabulations, press reports and other documents all have been cited to support allegations of irregularities, violations of applicable election law or outright voter fraud. Allegations include manufactured or fake ballots, ballots cast in the name of dead, out-of-state or ineligible voters, ballots counted multiple times, ballots counted without applicable voter identification checks or signature matches, counting of "naked" ballots lacking required outer envelopes, ballots counted despite broken chain of custody issues, poll watchers

and observers being denied access or meaningful access as required by law, illegal ballot curing, and violations of state law mail-in and absentee ballot deadlines.

Most troubling to me from a legal standpoint was the manner in which some states, including Pennsylvania and Georgia, abruptly altered state mail-in ballot election rules through unilateral executive or judicial action without legislative authorization, even though Article II, Section 1, Clause 2 of the U.S. Constitution provides that each state shall appoint its electors "in such manner as the Legislature thereof may direct." Kentucky, as you may recall, also altered its absentee ballot rules as a result of the pandemic. But the Kentucky General Assembly specifically authorized such changes, overriding our Democrat Governor's veto and requiring him to agree on a plan with our Republican Secretary of State to expand early and absentee voting.

For Americans to have confidence in the legitimacy of our democracy, only legal votes should be counted, all illegal votes should be excluded from the count, and all counts should be lawfully verified. It is imperative, therefore, that state legislatures and Congress hold hearings to fully investigate what happened during the 2020 elections to address these legitimate concerns and, if necessary, hold accountable state officials and agencies for failing to faithfully implement or enforce applicable state and federal election laws. To that end, I strongly support an effort in Congress to establish a commission to investigate irregularities in the 2020 elections and make recommendations as to how states and the federal government can strengthen confidence in the integrity of our voting process going forward.

The immediate issue before Congress, however, is not whether there was voter fraud, violations of election laws or other irregularities in the 2020 elections. At issue before the joint session of Congress on every January 6th succeeding the meeting for the counting of electoral votes by the states is whether, and under what circumstances, Congress has the constitutional authority under our Electoral College system to take the extraordinary step of rejecting the votes from any state, possibly relegating to the House of Representatives the responsibility to choose by ballot the president.

Several of my conservative colleagues have opined that under Article II and the Twelfth Amendment of the Constitution, "only the states have authority to appoint electors in accordance with state law," that "Congress has only a narrow role in the presidential election process," and that "[i]ts job is to count the electors submitted by the states, not to determine which electors the states should have sent."

As you know, I swore an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same." In doing so, I am obligated, as I see it, to interpret the Constitution faithfully, as an originalist; that is, in accordance with the Constitution's text and original meaning, or in a way consistent with how it would have been understood or was intended to be understood at the time it was written. In my view, this interpretive philosophy, a philosophy espoused by the late Justice Antonin Scalia, is the proper one, whether judges are asked to apply the Constitution or whether, as in this case, Members of Congress are asked to apply it.

When it comes to the presidential selection process, both the text and original meaning of Article II, which creates the Electoral College system, and the Twelfth Amendment, which sets forth the final phase of the process by which electors' votes are counted, are clear: Congress has a very limited and defined role in certifying the Electoral College vote. Congress does not have the power to substitute its judgment for that of any state regarding its election laws or the manner in which it has implemented them. Congress cannot, on its own initiative, reject electoral votes based solely on its own findings of voter fraud, violations of election laws or other irregularities. Instead, Congress must count those electoral votes that have in fact been cast by those electors designated to do so under state law.

In fact, as a purely textual matter, the Twelfth Amendment appears to give Congress authority solely to open the certificates and count the votes. The text then provides that "[t]he person having the greatest number of votes for President *shall* be the President, if such number be a majority of the whole number of Electors appointed...." (Emphasis added.)

The framers of the Constitution understood how to give Congress plenary power to judge election returns. They explicitly did so in Article I, Section 5, Clause 1, providing that in congressional elections, "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members...." Not only did the framers decline to extend similar power to Congress in the presidential selection process, the framers of the Twelfth Amendment denied Congress the authority to substitute its judgment for the people and the states in this very discrete, carefully thought out and meticulously designed final phase of the process.

This is not to say Congress plays a purely mechanical role, merely carrying out the mundane task of performing arithmetic. Members of Congress, of course, do have authority under the law to raise objections and present evidence. But assuming Congress has some implicit authority to look beyond the certificates and votes submitted by the electors in the states, and on that basis actually reject those votes, it is important to examine the history of the Twelfth Amendment and how it would have been understood by those who passed and ratified it.

The Amendment was passed by Congress on December 9, 1803, and ratified June 15, 1804, in direct response to the controversial presidential election of 1800, in which weaknesses in the earlier electoral system were exposed and the House of Representatives was forced to sort out the election in a lame duck session in early 1801. Thirty-five ballots were cast over five days but neither candidate received a majority. Finally, on February 17, 1801, on the thirty-sixth ballot, the House elected Thomas Jefferson to be president.

The framers had not anticipated the difficulties Congress would have in resolving the election. The Twelfth Amendment was proposed, passed and ratified to correct these problems by providing for separate Electoral College votes for president and vice president.

I have concluded from this history of the 1800 election that the framers of the Twelfth Amendment clearly intended to *reduce* the role of Congress in the presidential selection process, not expand it. The Amendment, as originally understood by those who passed and ratified it, was designed to avoid this kind of chaos in the future. For the most part, it has served that purpose. Since the ratification of the Twelfth Amendment, substantial congressional

intervention in the presidential selection process has been required only twice, in 1824, when votes returned by electors did not produce a majority, and in 1876, when three states submitted competing slates of electors.[1]

As a result of the 1876 election, Congress passed a decade later the Electoral Count Act, which delegated to the states all front-end Electoral College issues, including the selection of electors and the methods used to commit them to pledged candidates. But once the process reached Congress, the law gave Members of Congress the power to object to a vote if one Representative and one Senator sign an objection together and allege the vote had not been "regularly given."

Importantly, however, the Act also creates a so-called "safe harbor" date, a deadline by which all election challenges such as recounts, audits and contests are supposed to be completed. For the 2020 election, the safe harbor date was December 8, 2020. As of that date, the vast majority of states, including contested states, had resolved all election challenges according to their legislative and judicial procedures and certified their results. Under the Act, election results certified on or before the safe harbor date are considered conclusive, and those states' Electoral College votes are deemed valid "in the counting of electoral votes as provided in the Constitution."

So under the Twelfth Amendment, as implemented by the Electoral Count Act, in order for Congress to intervene in the presidential selection process beyond merely counting the votes submitted by electors, the votes must not produce a majority, a state must submit competing slates of electors, or a state must fail to certify election results on or before the safe harbor date and communicate a problem such as an unauthorized faithless elector, an election never certified or a controversy with the selection of electors under the legal procedures of that state such as a disagreement between the legislature and the Governor as to certified results if such an agreement is required. Here, none of those facts are present.

As a result, I cannot in good conscience, consistent with the Constitution, the law and the facts, vote in favor of objections to the counting of electoral votes. To do so, in my opinion, would set a dangerous precedent to replace the Electoral College with a new system in which Congress selects the president, instead of the states and the people. This would *not* advance the interests of election integrity, but instead advance the interests of the extreme far left in this country, which has, for years, sought to undermine the Electoral College. I refuse to assist them in their misguided cause.

The Constitution created the Electoral College to ensure that our representative democracy accounts for all voices across America, not just those from the most populous states. A president elected by a simple majority, relying only on the national popular vote, would give undue power to more populous, left-leaning states, to dictate what is best for the rest of the country. The current system empowers rural, small and medium-sized states, like Kentucky, to have a voice in who leads the nation. The Electoral College is predicated on empowering each state to make a

[1] In 1969, two Members of Congress objected unsuccessfully to North Carolina's so-called "faithless elector," and in 2005, a small group of Democrats objected to the counting of Ohio's electoral votes, but that effort also earned little support.

decision for itself, based on the will of its citizens. We must preserve this system to ensure that states like California and New York do not have the final say on what is best for the citizens of Kentucky.

Some of my Republican colleagues contend that the Constitution, specifically Article II, Section 1, Clause 2, authorizes Congress to reject electoral votes submitted from states in which executive officials or the judiciary unilaterally changed election rules without the consent of the legislature in those states.

As indicated above, I share their concerns and agree that some of these unilateral decisions to abruptly alter state mail-in ballot election rules are legally suspect. But the aggrieved parties in those cases are the people and legislatures in those states and the Trump campaign who either failed to raise a timely formal objection to these state law changes or failed to successfully litigate the matter in court. Consistent with the principle of federalism, Congress is *not* the proper party to challenge the manner in which states appoint their electors. In fact, Article II, Section 1, Clause 2 specifically commits that decision to the states.

As my friend and colleague Senator Tom Cotton (R-AR), pointed out, the framers of the Constitution "entrusted the election of our president to the people, acting through the Electoral College—not Congress. And they entrusted the adjudication of election disputes to the courts—not Congress. Under the Constitution and federal law, Congress's power is limited to counting electoral votes submitted by the states."

I would simply add that the Constitution does not give Congress the authority to substitute its judgment for the courts for purposes of this very specific task of presidential selection. Our only task is to count electoral votes certified and submitted after all recounts and judicial challenges have been exhausted.

I respect those who may have a different opinion about the presidential selection process, including many of my constituents who have strenuously requested that I object to the counting of electoral votes. I share their frustration about the significant abuses and irregularities in the 2020 election.

But in the end, I am compelled to follow my conscience and the Constitution, which is clear: The people, through their states, select electors. Electors, in turn, select the president. A small group of politicians in Congress does not. We should be grateful for that. For this reason, I will vote against objections to the counting of the votes of the Electoral College.

Sincerely,

Andy Barr

Andy Barr
Member of Congress (KY-06)