



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

Memo In Support of Assembly Bill A3289 and Senate Bill S888, Restrict Insurrectionists from Office Taking (RIOT) Act

Citizens for Responsibility and Ethics in Washington (CREW) is a nonpartisan nonprofit committed to government ethics, transparency, and accountability. We are submitting this memorandum of support for Assembly Bill A3289 and Senate Bill S888, the Restrict Insurrectionists from Office Taking (RIOT) Act, which would bar individuals convicted of insurrection or rebellion from holding civil office in New York State.¹

On January 6, 2021, a violent mob, egged on by then-President Trump, stormed the United States Capitol, seeking to overturn the lawful results of the 2020 presidential election. The mob's violent efforts disrupted and delayed the peaceful transfer of power for the first time in American history.

The framers of the post-Civil War Amendments to the U.S. Constitution understood the fundamental truth that those who seek to overthrow the government should not be entrusted to hold positions of power within that government. That is why they adopted Section 3 of the Fourteenth Amendment, which provides that no individual who engages in insurrection or rebellion against the Constitution—after having previously taken an oath to support it—shall hold any federal or state office (unless Congress, by a vote of two-thirds in each house, removes such disability).² In the immediate aftermath of the Civil War, it was used to bar former Confederates from office including North Carolina secessionist Governor and Confederate officer Zebulon Vance who was denied a seat in the U.S. Senate for violating Section 3 of the Fourteenth Amendment.³

Although Section 3 of the Fourteenth Amendment was written to address the challenges of the post-Civil War era, its words are applicable today as well. This past September, a state district court judge in New Mexico removed then-County Commissioner Couy Griffin from office for engaging in insurrection in violation of Section 3 of the Fourteenth Amendment, in a case CREW brought on behalf of three New Mexicans.⁴ In that ruling - the first judicial decision in over 150 years removing someone from office under the Fourteenth Amendment - the court explained that the events on and before January 6 were

¹ *Restrict Insurrectionists from Office Taking (RIOT) Act*, S.B. S888 crossfiled as A.B. A3289, 2023-2024 Sess. (N.Y. 2023), <https://www.nysenate.gov/legislation/bills/2023/s888>; <https://www.nysenate.gov/legislation/bills/2023/A3289> [hereinafter RIOT Act].

² U.S. Const. amend. XIV, § 3.

³ In 1870 the North Carolina legislature elected Vance to an open U.S. Senate seat but Congress refused to seat Vance under Section 3 of the Fourteenth Amendment. In 1878 Vance was able to reclaim that Senate seat after President Grant signed the Amnesty Act of 1872 which stated that all political disabilities imposed by the Fourteenth Amendment "are hereby removed". See Anne M. Butler and Wendy Wolff, *United States Senate Election, Expulsion, and Censure Cases, 1793-1990*, S. Doc. 103-33. Washington, GPO (1995), https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/059Abbott_Vance_Ransom.htm.

⁴ See, e.g., *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Sep. 06, 2022).

an “insurrection’ against the Constitution of the United States.”⁵ The New Mexico Supreme Court recently dismissed Mr. Griffin’s appeal on procedural grounds, leaving the district court’s decision in place.⁶

Section 3 of the Fourteenth Amendment is a crucial tool for securing our democracy, but it is not without its limitations. Section 3 only applies to individuals who previously swore an oath to the Constitution and then engaged in insurrection. It has no application to individuals who engaged in prohibited conduct but did not previously swear an oath. For instance, at the end of January four members of the right-wing militia group the Oath Keepers were found guilty of seditious conspiracy and other charges related to the January 6, 2021 attack on the U.S. Capitol.⁷ Although seditious conspiracy under 18 U.S.C. § 2384 closely tracks the criminal elements in the crime of insurrection under 18 U.S.C. § 2383, most of these individuals are not barred from holding office by Section 3 of the Fourteenth Amendment because they did not previously swear an oath to the Constitution.⁸ Constitutionally speaking, they are free to seek office and run the government that they violently tried to overthrow.

Assembly Bill A3289 and Senate Bill S888, the Restrict Insurrectionists from Office Taking (RIOT) Act, fills this gap in our legal framework. By its very terms, it bars from office in New York State anyone convicted of rebellion or insurrection, regardless of whether they previously swore an oath to the Constitution.⁹

While we endorse this legislation and think it represents an important step forward in closing a loophole in our legal framework, we recommend amending it to encapsulate a larger subset of criminal conduct. To that end, we think individuals who are convicted or plead guilty to seditious conspiracy (18 U.S.C. § 2384) should also be prohibited from holding office. Seditious conspiracy is very similar to criminal insurrection, containing many of the same legal elements, conviction of which makes them “incapable of holding any office under the United States.”¹⁰ Moreover, we also recommend that the legislation be amended to apply to a felony in relation to insurrection, rebellion, or sedition. Taking these suggestions together, we recommend that the language be amended to read as follows: “No person shall be capable of holding a civil office who pleads guilty or stands convicted of a felony defined in 18 U.S.C. § 2383 or 18 U.S.C. § 2384, or a felony in relation to such act.”

This proposed amendment, which is similar to language that the Connecticut Assembly is considering in a similar bill, would more completely capture the individuals who attacked the U.S. Capitol and prohibit them from trying to run the government that they attempted to overthrow without inadvertently sweeping in protected First Amendment

⁵ *Id.* at *16.

⁶ *Griffin v. State*, No. S-1-SC-39571 (N.M. Sup. Ct. Feb. 16, 2023), <https://www.citizensforethics.org/wp-content/uploads/2023/03/2023.02.16-order-denying-motion-for-reconsideration.pdf>.

⁷ *Four Oathkeepers Found Guilty of Seditious Conspiracy Related to U.S. Capitol Breach*, Dept. of Just. (Jan. 23, 2023), <https://www.justice.gov/opa/pr/four-oath-keepers-found-guilty-seditious-conspiracy-related-us-capitol-breach#:~:text=Today's%20verdict%20follows%20the%20Nov.charges%20in%20that%20first%20trial>.

⁸ 18 U.S.C. § 2383; 18 U.S.C. § 2384.

⁹ *Id.* RIOT Act, *supra* note 1.

¹⁰ 18 U.S.C. § 2383.

conduct.¹¹ This is because the prohibition would still be tied to the existence of an insurrection, rebellion, or sedition and therefore could not be weaponized against legitimate protest activity. The need to protect legitimate First Amendment activity was a cornerstone of CREW's litigation in New Mexico and remains a cornerstone of our advocacy work. As part of that case, the NAACP submitted an amicus curiae brief explaining the difference between an insurrectionist and a protestor and why courts have been correct in uniformly rejecting comparisons between January 6th insurrectionists and Black Lives Matter protestors.¹² Another amicus brief was submitted by some of the country's leading First Amendment scholars who explained that the "First Amendment does not protect speech that—like any speech that could trigger constitutional disqualification—is integral to inciting imminent lawless action or making 'true threats.'" Their legal reasoning is applicable to this legislation as well since it would be narrowly tailored to only apply to individuals who are convicted of insurrection, rebellion, seditious conspiracy, or a felony related to one of those acts.

Protecting our democracy from those who wish to overthrow it is not a theoretical concern. To date, the Department of Justice has brought criminal charges against over 900 individuals who participated in the January 6th attack on the U.S. Capitol. Amongst those are over 50 people from the state of New York who have been charged in relation to their conduct on January 6th and over 30 who have so far pled guilty or been convicted of crimes related to the insurrection; many others are awaiting trial.

The January 6 insurrection was a shameful day for our nation. The fact that individuals who participated in that attack continue to serve in government throughout the country represents an acute threat to the future vitality of our democracy. We are heartened to see that the New York legislature is considering passing this important democracy preservative legislation. We strongly urge you to consider and pass Assembly Bill A3289 and Senate Bill S888 during this legislative session.

¹¹*An Act Concerning Eligibility to Hold Public Office Or Be Employed by the State or Any Municipality*, S.B. 244, 2023 Sess. (C.T. 2023), https://cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=SB-244.

¹² Brief for NAACP N.M. and NAACP Otero Cty. as Amici Curiae Supporting Plaintiffs, *State v. Griffin*, No. D-101-CV-2022-00473, 2022 WL 4295619 (N.M. Dist. Sep. 06, 2022), <https://www.citizensforethics.org/wp-content/uploads/2022/08/Brief-of-Amicus-Curiae-NAACP-NM-State-Conference-and-Exhibits-8-23-22.pdf>.