

Senate State, Veterans, & Military Affairs

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HB25-1315 Vacancies in the General Assembly

Typed Text of Testimony Submitted

Name, Position, Representing	Typed Text of Testimony
Mark Bohnhorst Amend themselves	<p>Thank you for the opportunity to submit this testimony, which recommends an amendment to HB 1315.</p> <p>I am a retired Minnesota public sector attorney. Since 2021, I have been researching and publishing about presidential election history and law, including about Section 2 of the Fourteenth Amendment. Denver Law Review will be publishing my fifth such article this summer.</p> <p>I want to make five points about HB 1315.</p> <p>ONE: Risk of Violation: There is a Genuine Risk that HB 1315 Violates Section 2 of the Fourteenth Amendment.</p> <p>Section 2 enshrines the principle of universal (then male) suffrage in the United States Constitution and creates a penalty for any violation of that principle in the nation's most important elections. As applicable to HB 1315, the words are quite clear; Section 2 applies to:</p> <p>"any election for the choice of. . .the members of the Legislature [of a state]."</p> <p>The word "any" means "any." A vacancy election under HB 1315, like all special elections, is "for the choice of" a member of the legislature. In contrast, a primary election is "for the choice of a candidate," not "for the choice of a member."</p> <p>HB 1315, by excluding 30 to 40% of the electorate from a vacancy election, seems to be a straightforward violation of federal law. I understand the proponents have cited no other state that has such a law. (Puerto Rico is not a state, and Section 2 does not apply to Puerto Rico.)</p> <p>TWO: The Severity of the Risk is Substantial.</p> <p>The consequence of violating Section 2 can be severe. The whole point of Section 2 was to give the South a stark choice: either enfranchise all Black (men)(and all other men), or suffer a penalty that can amount to a crippling loss of political power. In the</p>

most extreme case, if a state legislature usurps the right of all the people to elect presidential electors, the state could be reduced to one member of the House and three electoral college votes.

THREE: The Timing of the Penalty has Changed.

Under Section 2 as ratified in 1868, the political penalty is assessed every 10 years, as part of the census/apportionment process. Each penalty would then last for ten years, until the next census. Following an unsuccessful attempt to implement Section 2 in 1870, implementing legislation from 1872 modified the timing. Under 2 U.S.C. Sec. 6, a proportionate reduction in membership in the House shall be assessed following each election that violates Section 2. In practice, Section 6 has never been enforced; but its mandatory terms are part of U.S. law. Under those terms, HB 1315 could cost Colorado 30 to 40% of its representation in the House in 2026 and an equal reduction in its electoral college vote in 2028.

FOUR: A Simple Solution to Eliminate the Risk.

The risk can be eliminated by pre-election judicial review. A cause of action exists: 42 U.S.C Sec. 1983. Section 2 has never been implemented; so no one can say authoritatively what the law means. A judicial determination of the scope and application of Section 2 should actually be welcomed--for Section 2 is a potentially valuable tool for vindicating the rights of "we the people" in a number of settings. The danger is that a court might invalidate HB 1315 as a whole.

FIVE: Recommendation: Amend HB 1315 to Avoid that Danger.

I suggest amending HB 1315 to specify that the requirement of a vacancy election is severable from the restriction on who can vote in the election and that the requirement of an election shall survive. One way or the other, "we the people" will elect their representatives.

Respectfully submitted,

Mark Bohnhorst

Retired publish sector attorney, independent research author

Minneapolis

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April 26, 2025

To: Colorado Senate State, Veterans, & Military Affairs Committee
From: Mark A. Bohnhorst, Attorney (retired), Independent Researcher/Author
Re: HB25-1315 Vacancies in the General Assembly

Dear Chair Weissman and Committee Members:

Thank you for this opportunity to provide written testimony concerning HB 1315. Empowering the voters to choose who will represent them for the second year of a vacancy in a legislator's term of office is an important pro-democracy reform, which in principle I strongly support. I offer two points that I hope will be of use to the Committee.

First, the Committee should be aware that there is a genuine possibility that the bill as passed by the Colorado House violates the principle of universal suffrage that is embodied in Section 2 of the Fourteenth Amendment. This principle is effectuated through implementing legislation (2 U.S.C. Sec. 6) and is judicially enforceable (42 U.S.C. Sec. 1983).

Second, in light of the possibility that the bill may not be consistent with federal law, the Committee may wish to consider revising HB 1315 to specify that the core reform—that representation for the second year shall be determined by the voters—is severable from the specification that voters from one of the major political parties are barred from participating in the election. This would assure the core reform of a special election will be implemented, whatever the outcome of any judicial review.

By way of background, I am a retired public sector attorney,¹ and I am testifying solely as an individual. In retirement I have researched, advocated for and published about presidential election reform and (in recent years) about Section 2 of the Fourteenth Amendment as well.²

¹ Law Clerk, United States District Court (1 yr.); Attorney/Litigation Director, Southern Minnesota Regional Legal Services (16 yrs.); Senior Associate General Counsel (hp., Director of Transactional Law), University of Minnesota Office of the General Counsel (24 yrs.).

² Recent publications include: (i) Michael W. Fitzgerald and Mark Bohnhorst, *Reconstruction, Racial Terror, and the Electoral College*, 14 JOURNAL OF THE CIVIL WAR ERA 31 (2024); (ii) Mark Bohnhorst, Michael W. Fitzgerald and Aviam Soifer, *Gaping Gaps in the History of the Independent State Legislature Doctrine: McPherson v. Blacker, Usurpation, and the Right of the People to Elect the President*, 49 MITCHELL HAMLINE L. REV. 257 (2023); and (iii) Mark Bohnhorst, Reed Hundt, Kate E. Morrow and Aviam Soifer, *Presidential Election Reform: A Current National Imperative*, 46 LEWIS & CLARK L. REV. 437 (2022). Current work is supported by the University of Minnesota, Office of the Provost, Professional Development Grant for Retirees, administered by the University of Minnesota Retirees Association.

Section 2 of the Fourteenth Amendment has never been enforced, and it had long been almost completely overlooked. Yet, at the very beginning of the voting rights revolution of the 1960s, there was recognition that Section 2 could be quite powerful, and Martin Luther King’s marches on the 1960 national political conventions included a demand that Section 2 be enforced.³ With the Supreme Court’s transformation of voting rights law under Section 1 of the Fourteenth Amendment in the 1960s, and with the enactment of the Voting Rights Act of 1965, the potential power of Section 2 became irrelevant, and for several decades Section 2 lay dormant.

Today, commentators are looking at Section 2 afresh—particularly as a way to foreclose state legislatures from intervening to prevent or overturn a popular election of presidential electors.⁴ In the forthcoming article in the *Denver Law Review* cited in footnote 3, I survey the recent literature and report on my own research.

Most recently, on April 4 I spoke on a panel on “The Law of Democracy” at the *Denver Law Review*’s April 4 symposium, “The Fourteenth Amendment: Modern Interpretations and Implications.” During the panel, in response to a question about prohibiting some voters from participating in a legislative election based on political party affiliation, I gave a “first impression” answer—which was that Section 2 enshrines the principle of universal suffrage in all elections for choice of state legislators, and the bill appears to violate the Fourteenth Amendment.

On second thought, I continue to think that HB 1315 violates the universal suffrage principle. Of course, since Section 2 and 2 U.S.C. Sec. 6 have never been enforced, whether there is a constitutional or statutory violation is an open question—any commentator is talking on a blank slate.

Further, 2 U.S.C. Sec. 6 was enacted in 1872 in midst of a wave of appalling racial political violence, which prompted the creation of the Department of Justice and the dispatch of the Seventh Cavalry to South Carolina. The legislative history indicates

³ Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section 2*, 46 CORNELL L.Q. 108, 112-113 (1960)(Section 2, though never enforced, potentially one of the most powerful sections of the Fourteenth Amendment; a “guarantee by indirection” of universal suffrage); Mark Bohnhorst, *Revisiting Section 2 and the Electors Clause: On the Right of the People to Choose Presidential Electors*, 102 DENVER L.REV., No. 4, forthcoming August 2025, available at SSRN, no. 5180256, at 3 (marches on the national conventions).

⁴ The current litigation over the Supreme Court election in North Carolina may raise another important Section 2 issue—in that case involving state courts and unconstitutional relief, rather than state legislatures and direct usurpation of the rights of the voters. To explain: a court-ordered post-election change in the rules that voters reasonably relied upon in casting votes—resulting in court-ordered throwing out of votes and a change in the result of the election—at least arguably “abridges” the rights of the majority of the voters who were entitled to elect on the basis of the rules as they were understood and enforced on election day. Applying 2 U.S.C. Sec. 6, North Carolina’s representation in the House of Representatives could be reduced to 7 in 2026 and its electoral college votes reduced to 9 in 2028.

the framers intended to prevent any “hocus pocus” denial or abridgement of the right to vote in any election specified in Section 2. The term “any” is comprehensive. An argument that an “election” that chooses a state legislator for one year is not an “election” under the constitution and statute might be considered a hocus pocus effort to avoid federal law.

Obviously, HB 1315 is not an attempt to overthrow popular elections or to throw out ballots in order to reverse the results of an election.⁵

A common feature of all these cases, however, is that what may appear to be a Draconian and overreaching political penalty can lead, instead, to a straightforward judicial enforcement of federal law. The Draconian penalty comes under Section 2. Literally, the penalty would be assessed every 10 years, as part of the census and reapportionment; and literally, once assessed, the penalty would last for a decade. Thus, a state whose legislature abridged or denied its citizens the right to vote in a legislative election could see its political power in Congress and the electoral college reduced to that of Wyoming, for a decade, but not right away, as of the next census.

This is overly harsh and not timely. Fortunately, 2 U.S.C. Sec. 6 modifies the system so that it applies to each election. In turn, most modern commentators conclude that federal courts can adjudicate the issues. Thus, a declaratory judgment or injunction can vindicate the principle of universal suffrage in real time and avoid the imposition of any penalty.

With this perspective in mind, I respectfully suggest the Committee consider revising HB 1315 in a manner that separates the requirement for an election from the specification that only some voters are allowed to vote in the election, and that the Committee propose an amendment to specify that the two provisions are severable. With this change, what I believe is the main reform—popular election of representatives and senators—will survive, whatever the law may be under Section 2.

Of course, the change that would clearly comply with Section 2, and avoid any litigation, is for all voters to be allowed to vote in the election.

Respectfully submitted,
Mark Bohnhorst

⁵ The Section 2 issue was not raised in state court in the pending North Carolina litigation over the election of a supreme court justice, *Griffin v. North Carolina State Board of Elections*. Due to abstention and reservation of federal issues for federal court, the state case was limited to issues of state law. As of this writing, it is not known whether the Section 2 issue will be raised in federal court.

HB25-1315 LWVCO Written Testimony

4/29/25, Senate State, Veterans, & Military Affairs Committee

Proposed LWVCO Amendments:

The League of Women Voters of Colorado (LWVCO) is pleased that the HB25-1315 sponsors want to hold a November odd-year election rather than allow a vacancy committee appointment to serve more than one year. However, LWVCO is asking for 3 amendments to the bill:

- 1) Allow every elector in the legislative district to vote in the November odd-year special vacancy election,
- 2) Allow any elector, regardless of party, to run in the November odd-year special vacancy election as long as they meet the qualifications to serve in the legislative office, and
- 3) Use a better voting method to reduce vote-splitting when there are more than 2 candidates running in the November odd-year special vacancy election.

Election Administrators Already Conduct Special Vacancy Elections Open to All Voters and Candidates

Opening up the vacancy election to all candidates and all voters, regardless of party, is the way all special elections currently operate.

- An example of an off-cycle special election was the special election in June last year to fill the vacancy when US House Representative Ken Buck resigned.
- Examples of past on-cycle special elections to fill vacancies include US Senator Michael Bennet, JD20 District Attorney Michael Dougherty, and CU Regent Ken Montero.
- Examples of upcoming on-cycle special elections to fill vacancies include State Senate Districts 17, 29, and 31.

The point is, Colorado has been running special vacancy elections open to all candidates and all voters. To restrict the proposed odd-year November vacancy elections to only one party is unnecessary and increases costs for election administrators.

Only Partisan Primary Elections Limit Participation Based on Political Affiliation

The word “democracy” indicates participation by the entire population. In practice, we have some limitations based on citizenship, age and so forth. A partisan primary election to choose a political party’s nominee may restrict who can cast a ballot based on party. It’s also important to note that a primary election does not fill a seat; rather it winnows down the candidate pool and advances the primary-election winners to the general election.

The vacancy election in HB1315 is not a primary election. And because it’s not a primary election and it is a government-run election, the vacancy election should be open to every elector, regardless of party. When some voters are denied the right to vote, it’s voter disenfranchisement.

No States Hold Government-Run Vacancy Elections that Limit Participation Based on Party Affiliation

The League of Women Voters doesn’t know of any states that disenfranchise certain voters and certain candidates, based on party, in any elections conducted by county clerks – except for partisan primary elections, which are the first election in a 2-election process.

The LWV does not want Colorado be the only state that disenfranchises voters based on party affiliation in a government-run election to actually fill a seat. We are also concerned that denying some electors the right to vote for their state rep or state senator **might be a violation of Section 2 of the 14th Amendment of the US Constitution.**

According to the *Colorado Sun*, this bill was modeled after the Tennessee Constitution, Article II, Section 15, which states, “When twelve months or more remain prior to the next general election for legislators, a successor shall be elected by the qualified voters of the district represented ...” and “Only a qualified voter of the district represented shall be eligible to succeed to the vacant seat.” As you can see, Tennessee does not restrict candidates nor the voters by party affiliation.

LWV Serves the People

The League of Women Voters, LWV, is a nonpartisan group that works to empower voters and defend democracy. We work for the people, not a political party.

Adopting the LWVCO Amendments Can Save ~90% of the Fiscal Note

Our election system is set up to allow every voter to vote in every November election. Because that’s the way our system works, if this bill were amended to allow all candidates and voters to participate in the November odd-year special vacancy election, the fiscal note could be reduced by about \$300,000 dollars – 90% of the fiscal note. Given our very tight budget this year, now is not the time to increase election costs, particularly if the costs will disenfranchise some voters.

Outreach to Bill Sponsors

We have reached out to the bill sponsors with our amendments and our comments on the fiscal note savings, and we’d like to thank Sen. Mike Weissman for his response. He was the only bill sponsor to respond to us. We think the constitutional question deserves a robust discussion, which hasn’t happened. We don’t believe that any of us testifying on this bill or voting on the committee want Colorado to be in violation of the U.S. Constitution.

Sadly, LWV was told by one influential supporter of this bill, “Sue us.” Our preference is to work through the legislative process to get LWV’s proposed amendments. If the current, possibly unconstitutional, bill is passed and the governor signs it, Colorado will be unique in disenfranchising voters based on voter registration. That would be a terrible precedent!

Reducing Vote-Splitting in a Vacancy Election

For our final point, after amending this bill to create a special vacancy election open to participation by all, the question of what voting method to use arises. In our current system, primary elections serve to winnow the candidate field and ensure that candidates represent different parties – but, with no primary election, all the candidates would run against each other.

For a Republican-dominant district, we might have 3 Republicans and 1 Democrat compete for the seat. If the election uses choose-one plurality voting, the three Republicans could split 60% of the vote and enable the Democrat to win with 40% of the vote.

The solution is to use a better, more expressive voting method, such as Approval Voting, which could be implemented immediately, is simple to audit, does not increase election administration costs, results in fewer ballot errors and is very transparent in terms of tabulation. The Instant-Runoff Voting form of Ranked Choice Voting is another option for odd-year November elections but would increase costs and labor. (SB24-210 – also sponsored by Rep. Sirota – forbid the use of Instant-Runoff Voting in primary and general elections, but Instant-Runoff Voting is still allowed in coordinated odd-year November elections.)

Conclusion

To be clear, LWV wants vacancy elections in November of odd-numbered years, but we want to honor the 14th Amendment and hold elections open to all voters and all candidates. The 14th Amendment was ratified after the Civil War – our nation’s deadliest war to date – to give all (male) citizens the right to cast a meaningful vote.

In conclusion, we strongly urge this committee to adopt the 3 amendments that the League of Women Voters has proposed.