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**Guide to Counting
Electoral College Votes
and**

**The January 6, 2021
Meeting of Congress**

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INTRODUCTION

A Joint Session of Congress will commence on January 6, 2021 in the chamber of the House of Representatives to count electoral votes received from the states. This Joint Session occurs pursuant to the Twelfth Amendment of the Constitution, which describes the fundamental procedures for electing the President and Vice President. But the Twelfth Amendment is silent on many key points—a fact that was cast into stark relief following the disastrous election of 1876. In response, Congress enacted the Electoral Count Act of 1887 (“ECA”), which now comprises most of Title 3 of the U.S. Code. By its plain terms, the ECA governs the proceedings of the Joint Session. In addition, the House and Senate historically have exercised their power under the Rules of Proceedings Clause of the Constitution to adopt a concurrent resolution specifying the application of the ECA’s procedures to the Joint Session.

In Part I, this guide surveys the rules set forth in Title 3 and how those rules apply to the Joint Session. It also addresses how the Joint Session will likely unfold in light of objections that may be lodged against certain slates that were certified by state executives and upheld by the courts. Part II steps back to explain a foundation of this process: state executive certification of electors. Part III contrasts valid slates of Biden-Harris electors (ascertained and certified by state executives) with the sham Trump-Pence presidential electors who claim to have voted in defiance of state law and popular will. Part IV describes two historical examples of objections at the Joint Session: namely, North Carolina in 1969 and Ohio in 2005. Finally, Part V unpacks and specifies the ministerial role that the Vice President properly plays at the Joint Session.

Our bottom line is simple: The voters have chosen Joe Biden and Kamala Harris as the next President and Vice President. The Biden-Harris electors have been properly certified under applicable state and federal law, and those certificates have repeatedly been upheld by the courts. Under the rules set forth in the ECA, it is inconceivable that the Joint Session will reach any result other than a recognition of the election of Biden and Harris. There is no legitimate basis for objections, and if they are made they will represent an insult to the voters and to our democracy. There may be sound and fury on January 6, but it will not change the outcome. As the law requires, Congress will accept the properly certified slates of Biden-Harris electors from all contested states.

I. CONGRESSIONAL COUNTING PROCEDURES (3 U.S.C. § 15)

Title 3, Section 15 of the U.S. Code establishes a procedure in Congress for the counting of electoral votes. Unfortunately, it does so with language that laypeople and lawyers alike can find challenging to untangle. We summarize how ballots are counted and what happens if there is a dispute. We then describe how those rules will be operationalized on January 6, 2021.

To start, both houses of Congress convene at 1 p.m. on January 6 in the House of Representatives with the Vice President (in his or her official capacity as the President of the Senate) serving as the presiding officer of the Joint Session.¹ The Vice President proceeds alphabetically through the states, opening “all the certificates and papers purporting to be certificates of the electoral votes” and handing them to “tellers” separately appointed by the House and Senate, who read them aloud to the legislators.² Once the votes are counted, the result is delivered to the Vice President, who announces the state of the vote, which is later entered into the Journals of the Houses of Congress.³

As each certificate purporting to constitute electoral votes is read aloud, the Vice President should call for objections, if any; regardless of whether the Vice President does so, legislators may make objections at this point.⁴ Any objection must be made in writing and signed by both a member of the House and a member of the Senate.⁵ If an objection arises, the Senate immediately withdraws to its chamber, and each house of Congress must separately reach its own decision as to the objection.⁶ Once the houses have

¹ “Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o’clock in the afternoon on that day, and the President of the Senate shall be their presiding officer.” 3 U.S.C. § 15.

² “Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A.” *Id.*

³ “And said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses.” *Id.*

⁴ “Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any.” *Id.*

⁵ “Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received.” *Id.*

⁶ “When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of

footnote continues

both voted, they “immediately again meet” and the Vice President announces the result. It is likely that no votes or papers from any other state may be acted upon by the Vice President or the Joint Session until an objection is resolved.⁷

Title 3 provides rules to address what happens when a procedurally proper objection is lodged. These rules contemplate two basic scenarios: the submission of a single certificate of electoral votes from a given state, and the submission of multiple certificates of electoral votes from a given state. With respect to both scenarios, “[a]t almost every turn, the ECA seeks to limit congressional discretion and to confine the role of the Senate and the House.”⁸

The January 6, 2021 Joint Session will face a single certificate scenario. As we explain below in Part II, each state has transmitted to Congress a single certificate of electoral votes bearing a certification by the state executive under 3 U.S.C. § 6. And as we demonstrate below in Part III, the papers submitted by sham Trump-Pence electors are so facially defective that they must be disregarded. Thus, the only slates of electoral votes properly before Congress from the relevant states are those recording Biden-Harris votes.

The ECA is clear on what happens in this circumstance. When Congress is presented with only a single certificate from a state, and that certificate has been lawfully certified by the state executive under 3 U.S.C. § 6, it must be counted unless *both* the House and the Senate each separately vote to reject it.⁹ In other words, if there is an objection and either the House or the Senate votes to accept the single certificate, it must be counted.¹⁰

Representatives shall, in like manner, submit such objections to the House of Representatives for its decision.” *Id.*

⁷ “When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.” *Id.*

⁸ Cass Sunstein, *Post-Election Chaos: A Primer*, 1, 5 (SSRN October 23, 2020).

⁹ “[N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.” 3 U.S.C. § 15.

¹⁰ The ECA does not address a scenario in which there is a single certificate that is not certified by the executive of the state pursuant to 3 U.S.C. § 6. But this scenario is not applicable in 2020, since all state executives submitted certificates of ascertainment.

Because it is inconceivable that the House will vote to reject certified Biden-Harris slates, there can be no doubt that the votes cast by Biden-Harris slates will be counted. Ultimately, that will prove to be the end of the story.

Of course, the Senate is almost equally unlikely to reject any Biden-Harris slate. Only a handful of Republican defectors would deprive the GOP of the majority needed for a futile vote to reject a certified slate of Biden-Harris electors—and Republican Senators including Romney, Murkowski, Toomey, Collins, Cassidy, and Sasse have already publicly stated their opposition to calls to reject certified slates of electors.¹¹ They will likely have company in that position: The Majority Leader of the Senate has already made his inclinations known, and his caucus tends to follow where he leads.¹²

Senators Cruz, Johnson, Lankford, Daines, Kennedy, Blackburn, and Braun—joined by Senators-Elect Lummis, Marshall, Hagerty, and Tuberville—have declared that they will “vote on January 6 to reject the electors from disputed states as not ‘regularly given’ and ‘lawfully certified’ (the statutory requisite), unless and until [an] emergency 10-day audit is completed.”¹³ The language of this statement is revealing. By admitting that “regularly given” and “lawfully certified” are “the statutory requisite,” this group quoted language from the section of the ECA that applies solely to a single-certificate scenario: the phrase “lawfully certified” appears only once in 3 U.S.C. § 15 and refers to the criteria for “a State . . . from which but one return has been received.”¹⁴

While 3 U.S.C. § 15 allows objections to a single certified slate if its votes were not “regularly given” or “lawfully certified,” there is no legitimate basis

¹¹ See Joint Statement from Senators Manchin, Collins, Warner, Cassidy, Shaheen, Murkowski, King, Romney, Hassan, and Durbin (Jan. 3, 2021) ([link](#)); Romney Statement On Certification of Presidential Election Results (Jan. 3, 2021) ([link](#)); Toomey Statement Regarding the Certification of the Presidential Election Results (Jan. 2, 2021) ([link](#)); Murkowski: I will vote to affirm the 2020 election (Jan. 2, 2021) ([link](#)); What Happens on January 6th (Ben Sasse, Dec. 30, 2020) ([link](#)).

¹² See Alex Isenstadt, *Hawley faces heat from Senate Republicans over Electoral College plans*, POLITICO (Dec. 31, 2020).

¹³ See Joint Statement from Senators Cruz, Johnson, Lankford, Daines, Kennedy, Blackburn, Braun, Senators-Elect Lummis, Marshall, Hagerty, Tuberville (January 2, 2021) ([link](#)).

¹⁴ “[N]o electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified.” 3 U.S.C. § 15.

for any such objection here. As scholars have explained, a vote is not “regularly given” when there are clear grounds for objecting to the electors’ conduct in office: for instance, if they voted on the wrong day; voted for someone who is constitutionally barred from serving as president; or accepted a bribe in exchange for their vote.¹⁵ None of the Biden-Harris electors have misused their office that way. Turning to the “lawfully certified” prong of the ECA, this is triggered only in extremely irregular cases: for example, when an elector is constitutionally ineligible to hold the office of elector; if the elector has purported to vote on behalf of a jurisdiction that is not eligible to participate in the Electoral College; or if the elector was not actually entitled to executive certification under state law.¹⁶ Yet all Biden-Harris electors are eligible to hold that position, hail from jurisdictions entitled to vote in the Electoral College, and possess executive certifications that are valid under state law and have been upheld by every state and federal court to consider that question.¹⁷

With respect to the vague, ever-shifting, never-evidenced allegations of fraud advanced by President Trump and his allies, dozens of courts have considered these and related claims and every single one has found them to lack merit. As Judge Stephanos Bibas of the U.S. Court of Appeals for the Third Circuit pointedly remarked: “[F]air elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”¹⁸ Indeed, former Attorney General William Barr (like many others) has unequivocally affirmed that there was no “fraud on a scale that could have effected a different outcome in the election.”¹⁹ And history makes clear that unsubstantiated allegations of fraud “may not afford a pretext for usurpation by Congress of the very power which the [ECA] intends to repudiate; that is, the power to reopen all aspects of the elector’s election.”²⁰ Accordingly, the Biden-Harris slates will unquestionably be counted, and Joe Biden and Kamala Harris will be declared the winners of the election.

¹⁵ See, e.g., Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 619 & n.474 (2004).

¹⁶ See *id.* at 619-621.

¹⁷ *Id.* at 622; see also *id.* at 619-621.

¹⁸ *Donald J. Trump for President v. Boockvar*, No. 20-3371 (3d Cir. Nov. 27, 2020).

¹⁹ See Matt Zapotesky et al., *Barr says he hasn't seen fraud that could affect the election outcome*, WASHINGTON POST (December 1, 2020).

²⁰ See *id.* at 624; see also *id.* at 622-624; Sunstein, *Post-Election Chaos*, at 12 (surveying historical sources and concluding that “to disallow votes, the fraud must be shown to be very clear”).

That would remain true even if multiple documents purporting to be certificates of electoral votes were put before Congress. In addressing what happens in multiple-certificate scenarios, 3 U.S.C. § 15 relies in substantial part on the “safe harbor” provision of 3 U.S.C. § 5. Simply put, if a state has defined rules before Election Day to resolve any contests or controversies, and the application of those rules after Election Day successfully results in a “final determination” of such disputes by six days before the Electoral College meets, then the electors thereby certified are “conclusive.”²¹ This year, the Electoral College met on December 14, so the safe harbor deadline was December 8.

Where multiple certificates of electoral votes are put before Congress, the ECA offers the following basic framework:

- Where Congress has received multiple certificates and one enjoys safe harbor status, the safe harbor certificate is counted (and the others are not) so long as the votes on that certificate were “regularly given.”²²
- Where Congress has received multiple certificates and none enjoys safe harbor status, then the statute provides two basic rules. First, if both the House and the Senate agree on which certificate to accept, that

²¹ “If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.” 3 U.S.C. § 15.

²² “If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State.” *Id.*

As explained above, only in exceptional cases would votes not be “regularly given”—for example, if they were cast on the wrong day, were cast for someone who is constitutionally barred from serving as president; or were induced through corruption or the acceptance of a bribe.

certificated is counted.²³ And second, if the House and Senate disagree on which certificate to accept, then whichever certificate was certified by the executive of the state is counted.²⁴ This latter rule is often described as the “gubernatorial tiebreaker” provision of the ECA.²⁵

Although we believe that Congress must and will proceed under the single-slate scenario on January 6, a multiple-slate procedure would not change the outcome. More than enough electors to guarantee the selection of Biden and Harris were certified before the safe harbor deadline of December 8.²⁶ And because every Biden-Harris slate was certified by its state executive, the gubernatorial tiebreaker provision ensures they will be counted so long as a single chamber votes to do so—a foregone conclusion.

II. ROLE OF THE STATE EXECUTIVE IN CERTIFYING ELECTORS

As we have noted, it matters under the ECA which slate of electors bears a certification from the state’s executive. That is because 3 U.S.C. § 6 assigns the “executive of each State” the responsibility for certifying electors—and 3 U.S.C. § 15 incorporates that understanding into its rules for counting votes. To further unpack Section 6, it vests three duties in state executives:

- *First*, “as soon as practicable” after “the final ascertainment” of electors—“under and in pursuance of the laws of such State providing for such ascertainment”—the executive must send a certificate of ascertainment to the U.S. Archivist setting forth the names of the

²³ “In such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State.” *Id.*

²⁴ “But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.” *Id.*

²⁵ Section 15 anticipates a third scenario not remotely here at issue: “But in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law.”

²⁶ See National Archives, “2020 Electoral College Results” ([link](#)).

electors and “the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person.”

- *Second*, the executive must “deliver to the electors . . . on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State.”
- *Finally*, if there “shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment” of electors, the executive shall “as soon as practicable after such determination” send “a certificate of such determination.”

Notably, while federal law establishes these rules, it is state law that defines who “the executive” is in any given state; that person is most often the governor or secretary of state. State law also defines the procedures—including a popular vote—that control the executive’s authority to identify which electors should be certified. Thus, whether an executive certification has been properly given for purposes of 3 U.S.C. § 6 is fundamentally a state law matter—one that the Joint Session has historically respected.

Consistent with the ECA and each state’s laws, the National Archivist recognizes the appropriate state executives and posts their ascertainments on its website. As explained above in the discussion of congressional counting rules, certification by “the executive” under 3 U.S.C. § 6 is critical. As such, the power to certify under Section 6 is taken very seriously. In this election, all state executives have long since performed their official certification duties—including, of course, the executives who certified 306 Biden-Harris electors. And every one of these certifications has (if disputed) been upheld by the courts. Thus, the electors reflecting the popular vote in each state have met and voted in the manner required by state law, and these slates of electors have been duly certified by the relevant state executive under rules codified in state law. Those are the only legitimate electors that should be considered by the Joint Session and, under the ECA, they are the electors whose votes will stand.

III. SHAM “ALTERNATIVE” SLATES OF ELECTORS

It has been reported that supporters of President Trump have gathered in various locations around the country and declared themselves to be electoral slates.²⁷ There is no legal basis for such self-selection: the votes of the electors who won the popular vote in a state, and whose victory was certified

²⁷ Nick Corasaniti & Jim Rutenberg, *No, there aren’t ‘alternate electors’ who can vote for President Trump*, N.Y. TIMES (December 15, 2020).

by that state's executive pursuant to state law procedures, are the only ones that count. In every state where Joe Biden won the popular vote, the sole legal slate of electors is his slate. Anyone purporting to meet and cast an Electoral College vote for Trump in a state he lost is a sham. To the extent such sham electors have transmitted documents to the Joint Session, it would be proper for Vice President Pence to disregard them outright: they cannot "purport" to constitute electoral votes under the ECA because of clear facial deficiencies. Vice President Pence might also seek unanimous consent to disregard these sham votes. Of course, if he does open and read such documents, Members of the House and Senate should be prepared to submit objections.

Here, we will identify three considerations bearing on the assessment of any papers submitted by sham Trump-Pence electors.

First, for the electors of a candidate who lost the popular vote of a state to meet and send a certificate to Congress—and to do so contrary to state law procedure—is anti-democratic and offensive. Nearly 160 million Americans have voted. Many of them did so under truly extraordinary circumstances—sometimes risking their health to cast a ballot. Any claim that the candidate who lost the popular vote can try again later in Congress in hopes of overturning the will of the majority is anti-democratic. No group of failed candidates, merely by calling themselves "electors," can undo an election.

Second, state laws create clear rules and procedures for identifying and certifying presidential electors. By virtue of those rules, the sham electors have no authority to speak for any state. Indeed, in every state, the slate of electors for each party was chosen well in advance of Election Day. *See, e.g.*, Ariz. Rev. Stat. § 16-344; Ga. Code § 21-2-172; 25 Pa. St. § 2878; Wis. Stat. § 8.18; Mich. Comp. Laws §§ 168.42. Every state further provides that the only lawful presidential electors are those who won the popular vote. *See, e.g.*, Ga. Code § 21-2-499 ("The Governor shall enumerate and ascertain the number of votes for each person so voted and shall certify the slates of presidential electors receiving the highest number of votes."); *accord* Ariz. Rev. Stat. §§ 16-645, 16-647 (requiring a certificate of election for candidates, including presidential electors, "receiving the highest number of votes cast"); Mich. Comp. Laws §§ 168.46; Wis. Stat. §§ 7.60(4)-(5); 25 Pa. St. § 3166. As the United States Supreme Court recently explained: "Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom *each State appoints based on the popular returns*. Those few 'electors' then choose the President." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319 (2020) (emphasis added).

Thus, in each state where Joe Biden won the popular vote, his slate of presidential electors—and *only* his slate of electors—has the legal authority to meet and send a certificate to Congress. Accordingly, only his electors have

the formal certificates of ascertainment from state executives required to comply with federal law when they vote. *See* 3 U.S.C. § 6 (requiring that the state executive furnish certificates of ascertainment to electors who have been appointed “under and in pursuance of the laws of such State”); *see also* 3 U.S.C. § 9 (requiring that the electors “shall annex to [their votes] one of the lists of electors which shall have been furnished to them by direction of the executive of the State”). Moreover, faithless elector laws in at least some states would affirmatively preclude even a validly selected elector from supporting anyone other than the candidate who won the popular vote. *See Chiafalo*, 140 S. Ct. at 2322 n.2 (identifying fifteen states, including Arizona, Michigan, and Nevada, with faithless elector provisions). State law affords no ambiguity. The proper slate of electors is the one that received the most votes, and any other slate has no authority to either meet or send a “certificate” of votes to Congress.²⁸

Finally, it is clear that Congress has received 306 lawful and properly certified electoral votes for Joe Biden. Never in the history of our nation has Congress rejected a slate of electors for the candidate who won the popular vote in a state. Nothing in law or logic would suggest it should start now, relying on a series of unsubstantiated and outlandish claims that have been rejected by every single state and federal court to consider them. For that reason, among many others, the Joint Session should ignore the procedurally and legally deficient sham slates and proceed to confirm the election results.

Historical precedent supports the conclusion that sham slates must be discarded. For example, in 1873, the presiding officer did not present a set of returns from Arkansas because they “did not in any respect comply with the requirements of the law on the subject,” including that they were only “signed by three out of the six electors, and they stated that they could not obtain the certificate of the governor.”²⁹ On that basis, the presiding officer noted that “the Chair opened them on the distinct understanding that they were informal, because they were directed to him as any other letter might be.”³⁰ Similarly, just a few years later in 1877, the presiding officer declined to present a second packet of returns from Vermont on the stated ground that they were received

²⁸ Indeed, the reported slates of sham Trump-Pence electors may each suffer from one or more procedural deficiencies, including: (1) the electors are not the same ones previously selected pursuant to state law, *see* 3 U.S.C. §6; (2) the electors did not meet in the place required by state law, *see id.* at § 7; (3) the electors did not cast votes on the certificates provided by the state executive, *see id.* at §9; or (4) the “certificates” were not disposed of in the manner required by law, *see id.* at §11.

²⁹ *See* H.R. MISC. DOC. NO. 44-13, at 309-91 (quoted in Siegel, *supra*, at 637).

³⁰ *Id.*

after the date specified by law for all packets to be received.³¹ In 1889, a second set of certificates presented by Oregon was quickly dismissed on unanimous consent, and the same occurred in 1961 when there were two additional certificates submitted from Hawaii. Notably, in that case, Hawaii submitted multiple returns certified by different governors—Acting Governor James K. Kealoha and Governor William F. Quinn—who were each the legitimate governor at the time they certified the results (this occurred because of an unresolved dispute over the election outcome).³² In contrast, the “certificates” submitted by purported Trump electors in states where they lost the popular vote were never certified by *any* executive in those states. They are bogus.

IV. PRIOR OBJECTIONS: TWO EXAMPLES

Since the ECA was enacted, there have been only two circumstances in which an objection required the House and Senate to withdraw for debate—one in 1969 and the other in 2005. We will describe those cases here as a point of reference for the procedures that Congress has historically adopted.

In 1969, when an objection was raised concerning a faithless elector from North Carolina, the houses withdrew to their chambers and debated the question. The Joint Session then reconvened and the presiding officer announced the results as follows: “The two Houses retired to consider separately and decide upon the vote of the State of North Carolina, to which objection has been filed.”³³ The teller then announced the results of the votes in the House and the Senate—both of which rejected the objection to the electoral votes cast in North Carolina—and then the presiding officer noted: “Under the statute in this case made and provided, the two Houses having rejected the objection that was duly filed, the original certificate submitted by the State of North Carolina will be counted as provided therein.”³⁴

In 2005, there was an objection to the votes from Ohio on the ground that “they were not, under all of the known circumstances, regularly given.”³⁵ As with the objection in 1969, the objection to the electoral votes was rejected resoundingly in both the House (by a vote of 267 at 31) and the Senate (by a vote of 74 to 1). After the Secretary of the Senate and the Clerk of the House reported the results of the vote in their respective houses, the presiding officer said: “Pursuant to the law, chapter 1 of title 3, United States Code, because the

³¹ See Siegel, *supra*, at 637.

³² 107 Cong. Rec. 289-90 (1961). See also Siegel, *supra*, at 631 n.542.

³³ 115 Cong. Rec. 171 (1969).

³⁴ *Id.*

³⁵ 151 Cong. Rec. H2, 85-86. (2006).

two Houses have not sustained the objection, the original certificate submitted by the State of Ohio will be counted as provided therein.”³⁶

These historical examples, and two others, are discussed in detail in the Appendix. They shed light on the congressional procedures that apply under the ECA when an objection is properly submitted to the Vice President.

V. THE PRESIDING OFFICER’S ROLE IS MINISTERIAL

We will conclude by briefly addressing the role that the Vice President plays at the Joint Session, where he serves as presiding officer by virtue of his role as President of the Senate.³⁷ (If the Vice President is unable or unwilling to preside, the president pro tempore of the Senate presides instead, as occurred in 1965 and then again in 1969, among other occasions.³⁸)

The presiding officer’s role, as defined by the Twelfth Amendment and the ECA, is ministerial. The Twelfth Amendment states that “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.” U.S. CONST. amend. XII. Under the plain meaning of that text, as confirmed by longstanding historical practice, it is the Vice President who “open[s] all the certificates” and it is Congress that counts them. The ECA provides more detail and lays out four main functions of the presiding officer: (1) preserving order and decorum;³⁹ (2) opening and handing electoral vote certificates to the tellers;⁴⁰ (3) calling

³⁶ *Id.* at H84.

³⁷ *See* 3 U.S.C. § 15 (“The Senate and House of Representatives shall meet in the Hall of the House of Representatives . . . and the President of the Senate shall be their presiding officer.”).

³⁸ *See* Deschler’s Precedents of the United States House of Representatives, Chapter 10, §2.5 (hereinafter, “Deschler’s Precedents”). Based on our historical research, the president pro tempore has also presided on several other occasions, including in 1949, 1925, 1913, 1905, and 1901.

³⁹ *See* 3 U.S.C. § 18 (“While the two Houses shall be in meeting as provided in this chapter, the President of the Senate shall have power to preserve order; and no debate shall be allowed, and no question shall be put by the presiding officer except to either House on a motion to withdraw.”).

⁴⁰ *See* 3 U.S.C. § 15 (“Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetic order of the States ”).

for objections;⁴¹ and (4) announcing the results of the tally and of votes on objections.⁴² If an objection is raised and the houses of Congress withdraw to discuss it, the presiding officer of each house calls a vote on objections after all debate.⁴³

Underlying all these roles is a basic understanding that the procedural provisions of the ECA are intended to “drain away as much power as possible from the Senate President.”⁴⁴ For example, before the ECA was passed, the House removed language that allowed the presiding officer to announce “the names of the person, if any elected.”⁴⁵ As the Conference Report noted: “[T]he effect of [the amendment] is to prevent the President of the Senate from doing more than announcing the state of the vote as ascertained and delivered to him by the tellers; and such announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President.”⁴⁶ The legislative history confirms that “one goal of the ECA was to ‘settle’ that ‘the power to count the vote’ is held by Congress, organized as two separate houses, and ‘is not in the President of the Senate.’”⁴⁷ That said, we now turn to some of the Vice President’s specific—and limited—duties:

1. Preserve Order

The presiding officer “shall have power to preserve order” during the Joint Session. This power is not substantive and is the standard obligation of a presiding officer in a chamber of Congress. *See* Rules of the House of

⁴¹ *See id.* (“Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any.”).

⁴² *See id.* (“[T]he results of the [list of votes] shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote.”); *id.* (“When the two Houses have voted [on any objections], they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted.”).

⁴³ *See* 3 U.S.C. § 17 (“[B]ut after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.”).

⁴⁴ *See* Siegel, *supra*, at 634-35 (2004).

⁴⁵ *See id.* at 641-42 (quoting 18 Cong. Rec. 77 (1886) (statement of Rep. Oates)).

⁴⁶ *See* 18 Cong. Rec. 668 (1886). For a more detailed account, *see* Siegel, *supra*, at 641-42.

⁴⁷ Siegel, *supra*, at 636 (quoting 18 CONG. REC. 30-31 (1886) (statement of Rep. Caldwell)); *see also* 17 CONG. REC. 865 (1886) (noting that the Senate President presides “only by reason of some rule or agreement between the two Houses. The Constitution is silent upon that point. The Constitution speaks of no officer who is to preside over the joint meeting.”) (statement of Sen. Morgan).

Representatives I.2, 116 Cong. (“The Speaker shall preserve order and decorum and, in case of disturbance or disorderly conduct in the gallery or in the lobby, may cause the same to be cleared.”); *see* Standing Rules of the Senate XIX.4, XIX.6, S. Doc. 113-18 (Jan. 24, 2013) (same). Accordingly, this authority is best understood as allowing the presiding officer to maintain order and decorum in the Joint Session and remove any disturbances or disruptions. For example, then-Vice President Biden used this authority to remove protesters from the gallery during the 2017 Joint Session.⁴⁸ Presiding officers have also used this authority to restrict “applause or manifestation of approval or disapproval during any stage” of the Joint Session.⁴⁹

2. Floor Debates

The ECA prohibits debate as well as the offering and consideration of almost all questions except a motion to withdraw to consider objections.⁵⁰ This is affirmed by historical practice, as presiding officers have repeatedly shut down debate masquerading as an objection. At the 2017 Joint Session, the presiding officer (then-Vice President Biden) rejected attempts from members of the House to debate or discuss electoral votes, noting that “debate is not in order” and that “there is no debate. Section 15 and 17 of title 3 of the United States Code requires that any objection be presented in writing, signed by both a Member of the House of Representatives and a Senator.”⁵¹ Similarly, at the 2001 Joint Session, the presiding officer, then-Vice President Gore, rejected attempts for a debate, noting that “the Chair is advised by the Parliamentarian that, under section 18 of title 3, United States Code, no debate is allowed in the joint session. If the gentleman has a point of order, please present the point of order.”⁵² The prohibition on debate is also recognized in the *House Practice Guide*: “No debate is allowed in the joint session.”⁵³

3. Points of Order and Procedural Motions

As for procedural motions and points of order, “it is not entirely clear that the ECA’s framers intended to allow procedural motions, including

⁴⁸163 *Cong. Rec.* H 185-8 (2017).

⁴⁹49 *Cong. Rec.* 3042 (1913).

⁵⁰*See* 3 U.S.C. § 18 (“[N]o debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.”).

⁵¹163 *Cong. Rec.* H186 (2017).

⁵²147 *Cong. Rec.* H32 (2001).

⁵³House Practice Guide: A Guide to the Rules, Precedents and Procedures of the House (115th Congress) (Mar. 31, 2017) (hereinafter, “House Practice Guide”) (citing 3 USC § 18; Manual § 220).

appeals from the Senate President’s ruling.”⁵⁴ There is some textual support for procedural motions in a provision of the ECA stating that “when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, *or other question arising in the matter*, each Senator and Representative may speak to such objection *or question* five minutes, and not more than once ” 3 U.S.C. § 17 (emphasis added). To the extent procedural motions and points of order are permitted, it is likely they must proceed through the same process as substantive objections under the ECA (i.e., they must be in writing and signed by a member of the House and Senate).

There is little historical precedent on the issue. In 2001, then-Vice President Gore ruled that, though procedural motions were permitted, they must be submitted through the same process as substantive objections. “Reading sections 15 through 18 of title 3, United States Code, as a coherent whole, the Chair holds that no procedural question is to be recognized by the presiding officer in the joint session unless presented in writing and signed by both a Representative and a Senator.”⁵⁵ He held the same as to a point of order, noting that “the Chair is advised by the Parliamentarian that section 17 of title 3, United States Code, prescribes a single procedure for resolution of either an objection to a certificate or other questions arising in the matter. That includes a point of order that a quorum is not present.”⁵⁶

Though procedural motions and points of order are standard parts of parliamentary procedure, the ECA was enacted with the backdrop of the 1876 Joint Session, where it was readily apparent that there were not sufficient rules providing for how the two houses of Congress could act when they met for a Joint Session.⁵⁷ Accordingly, the ECA provided a mechanism, and indeed the only mechanism, for the House and Senate to act jointly to resolve all of the

⁵⁴ Siegel, *supra*, at 647.

⁵⁵ 147 *Cong. Rec.* H35 (2001) (statement of the Vice President).

⁵⁶ *Id.*

⁵⁷ See Deschler’s Precedents, Chapter 10 §2.6 (“Where the two Houses meet to count the electoral vote, a joint session is convened pursuant to a concurrent resolution of the two Houses which incorporates by reference the applicable provisions of the United States Code; and the procedures set forth in those provisions are in effect constituted as a joint rule of the two Houses for the occasion and govern the procedures in the joint session ”).

substantive and procedural disputes.⁵⁸ The *House Practice Guide* also recognizes that the Joint Session divides to consider procedural motions.⁵⁹

4. Unanimous Consent

The presiding officer has some added authority if the Joint Session provides unanimous consent. For example, the presiding officer can, and has in almost every instance since the passing of the ECA, dispensed with the reading of the formal portions of the certificates with unanimous consent.⁶⁰

Unanimous consent can also be used to select a particular slate of electors if there are two or more conflicting electoral certificates from a state. *See* Deschler's Precedents Chapter 10, § 3 ("The two Houses, meeting in joint session to count the electoral votes, may by unanimous consent decide which of two conflicting electoral certificates from a state is valid; and the tellers are then directed to count the electoral votes in the certificate deemed valid."). This was the case in 1889, when the presiding officer was presented with a

⁵⁸ *See* Siegel, *supra*, at 649 ("To require the Senate President to allow procedural motions and appeals to his rulings when they are (1) timely, (2) meet the ECA's formal requirements, and (3) not dilatory, helps to effectuate the ECA's basic tenet that Congress, not the Senate President, counts the state's electoral votes."). Comparing the ECA to the 22d Joint Rule, which governed the procedure for the House and Senate before the ECA, further supports the conclusion that procedural motions and points of order should be considered through the same procedure provided for substantive objections. The 22d Joint Rule provided as much: "And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner." S.J. Res. 22, 38th Cong. (1865). And in 1865, pursuant to this rule, the President of the Senate indicated that he would receive procedural motions "if the houses are willing to 'separate in order to pass upon the question.'" Siegel, *supra*, at 648 n.657 (quoting SUBCOMM. ON COMPILATION OF PRECEDENTS, COUNTING ELECTORAL VOTES, H.R. MISC. DOC. No. 44-13, at 226 (1877)).

⁵⁹ "In addition to the joint session dividing to consider an objection to the counting of any electoral vote, the joint session divides to consider an 'other question arising in the matter.' 3 USC §§ 15-18; *Manual* § 220. Such a question also must be in writing and signed by both a Member and a Senator. *Manual* § 220; 107-1, Jan. 6, 2001, p 104. Examples of an 'other question arising in the matter' include: (1) an objection for lack of a quorum; (2) a motion that either House withdraw from the joint session; and (3) an appeal from a ruling by the presiding officer. *Manual* § 220. Such questions are not debatable in the joint session. 3 USC § 18." House Practice Guide §3.

⁶⁰ *See, e.g.*, 103 *Cong. Rec.* 312 (1993). ("Under well-established precedents, unless a motion shall be made in any case, the reading of the formal portions of the certificates will be dispensed with."); *id* ("If there is no objection, the Chair will omit in the further procedure the formal statement just made, and we will open the certificates in alphabetical order "). *See also* Siegel, *supra*, at 649 n.664 (noting that unanimous consent was also used in 1913 to correct a clerical error).

second set of returns from Oregon that had been sent as a practical joke by someone claiming to be Oregon's "Governor de jure."⁶¹ The presiding officer noted: "The President of the Senate has received two certificates and two other papers purporting to be certificates from the State of Oregon. He is required by law to deliver them all, and delivers them to the tellers, who will, if there is no objection, read those certificates which are authenticated by the signatures of the electors certified by the governor of Oregon to have been duly [sic] appointed in that State."⁶² There was no objection, and the votes were counted.

Similarly, in 1961, the presiding officer was presented with three returns from the State of Hawaii and accepted only one based on unanimous consent of the Joint Session.⁶³ After the presiding officer handed the three returns to the tellers, he said: "The Chair has knowledge, and is convinced that he is supported by the facts, that the certificate from the Honorable William F. Quinn, Governor of the State of Hawaii . . . properly and legally portrays the facts with respect to the electors chosen by the people of Hawaii at the election for President and Vice President held on November 8, 1960."⁶⁴ He went on to note that "in order not to delay the further count of the elector vote here, the Chair, without the intent of establishing a precedent, suggests that the electors named in the certificate of the Governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii."⁶⁵ There being no objection from the Joint Session, the tellers accordingly counted the electors in the certificate named by the presiding officer.

⁶¹ Siegel, *supra*, at 638.

⁶² 51 *Cong. Rec.* 1860 (1889).

⁶³ On November 16, 1960, Hawaii's lieutenant governor certified the results for Richard Nixon. The same day, Democratic officials announced a recount petition, which Republican Party officials and the lieutenant governor agreed not to contest. On December 13, 1960, the state court ordered a recount. On December 19, the appointed balloting day for the meeting of the electors, the recount was ongoing. Nonetheless, two sets of electors met and cast their ballots. The governor presented the Nixon electors with documents certifying that Nixon won Hawaii and that they were legally elected the state's electors. When the Nixon electors finished, the Kennedy electors—lacking any credentials showing John F. Kennedy had won the state—cast their votes and signed their certificates. On December 30, the state court found that the Kennedy electors prevailed by 115 votes. On January 4, the governor sent the Administrator of General Services a copy of the court decree and revised certificate, certifying the Kennedy electors as Hawaii's legal electors. On January 6, when Congress met, the certificate of the Nixon electors, the certificate of Kennedy electors, the governor of Hawaii's revised certificate, and the court's judgment were presented. *See* 107 *Cong. Rec.* 290 (1961). There were thus three total certificates.

⁶⁴ 87 *Cong. Rec.* 290 (1961).

⁶⁵ *Id.*

5. Unauthorized Conduct

The presiding officer has no authority to withhold a validly cast slate of electoral votes. The ECA expressly removes discretion from the presiding officer, who must open and present “all the certificates *and papers purporting to be certificates* of electoral votes.” 3 U.S.C. § 15 (emphasis added).⁶⁶ Each certificate sent by the electors in support of Biden from states where he won the popular vote was sent pursuant to the ECA, and the presiding officer has no discretion whether to present these certificates. He must do so.

Conversely, the presiding officer has no legal authority to present papers from electors who lost a state’s popular vote. As noted above, these slates of electors are impermissible because they do not follow any of the requirements of the ECA and thus cannot even “purport[]” to be “certificates of electoral votes.” If the presiding officer presents an illegitimate certificate from electors who lost the popular vote, the Joint Session can reject the slate, as occurred in 1889 and 1961.⁶⁷

VI. CONCLUSION

The Twelfth Amendment and the ECA illuminate what lies ahead at the Joint Session on January 6, 2021. There will likely be an objection, or even multiple ones, to specific slates. Passionate rhetoric may be heard, and dramatic gestures made. Congress’ and the nation’s time—so valuable in the face of a pandemic and an economic crisis—may be wasted. Proceedings may drag on into the night (or end early, the objectors’ point having been made). But the outcome is foreordained. Congress will reflect the will of the voters and the choice of the Electoral College and confirm Joe Biden and Kamala Harris as the next President and Vice President of the United States.

⁶⁶ See also House Practice § 3 (“Where more than one set of certificates have been received from a state, and each set purports to be the duly appointed electors from the state, the Vice President presents the certificates, with all the attached papers, in the order in which they have been received.”).

⁶⁷ See Deschler’s Precedents Chapter 10, § 3.

APPENDIX: HISTORICAL EXAMPLES OF OBJECTIONS UNDER THE ECA

The list of modern applications of the Electoral Count Act (ECA) in which the presidential election did not proceed as expected is short. Hawaii's disputed result in the 1960 election provides the most robust example, and the ECA's safe-harbor deadline famously played a role in bringing Florida's recount to a close in 2000. The other historical moments from which one might glean some insight into the meaning of the ECA draw from unsuccessful objections to electoral votes in Congress in the 1968 and 2004 elections.

We note, however, that in counting the votes in the 1960 election, no members of Congress objected to then-Vice President Richard M. Nixon's acceptance of the votes of Democratic electors from Hawaii, even though the Republican electors had initially been certified as the state's electors. It is doubtful that all in Congress would abide the 1960 precedent today. Past examples were also not outcome determinative of the election, with less on the line for all actors involved. Nevertheless, these examples provide possible operations of the ECA in the electoral process.

I. HAWAII, 1960

Going into the presidential election between John F. Kennedy and Nixon in 1960, Hawaii was widely perceived to be a solid state for Nixon.⁶⁸ But late polls suggested the race was a toss-up, and early returns showed Kennedy the winner by 92 votes.⁶⁹ After the November 8 election, the official tabulation sheets were audited, and reporting errors led to a Nixon lead of 141 votes of approximately 184,000 cast.⁷⁰ On November 16, 1960, Hawaii's lieutenant governor certified the results for Nixon.⁷¹

The same day, Democratic officials planned a recount petition, which Republican Party officials and the lieutenant governor agreed not to contest.⁷² The petition—filed against the Republican electors, the alternate Republican electors, and the lieutenant governor—was filed on November 22 and alleged

⁶⁸ Daniel W. Tuttle, Jr., *The 1960 Election in Hawaii*, 14 *The Western Political Quarterly* 331, 332–33 (1961).

⁶⁹ *Id.* at 333, 337.

⁷⁰ *Id.* at 337.

⁷¹ *Id.* at 337; Nixon Wins Isles; Recount Move Set, *Honolulu Advertiser*, Nov. 17, 1960, at 21.

⁷² Nixon Wins Isles, *supra* note 71.

tallying errors, counting of invalidated votes, and a charge that 235 more votes were counted than were actually cast.⁷³

On December 13, 1960, a state court ordered a recount, despite the state Attorney General's argument that federal law required a decision six days prior to the meeting of the electors.⁷⁴ On December 19, the appointed day for the meeting of the electors, the recount was ongoing.⁷⁵ Two sets of electors met and cast their ballots. Hawaii's governor presented the Republican electors with documents certifying that Nixon won Hawaii and that they were legally elected the state's electors.⁷⁶ The electors voted and signed six certificates, which were placed in envelopes to transmit as required by law.⁷⁷ When the Republican electors finished, the Democratic electors—lacking any credentials showing Kennedy had won the state—cast their votes and signed their certificates.⁷⁸

At the time the Democratic electors voted, the state-wide recount was one-third complete and had put Kennedy ahead by 83 votes.⁷⁹ The attorney representing the Democratic electors in the state court case was described as saying the Democratic electors were voting for Kennedy as a legal safeguard in case Kennedy should emerge the victor.⁸⁰

On December 30, the state court found that Kennedy had prevailed in the election by 115 votes.⁸¹ On January 4, the governor sent the Administrator of the General Services Administration a copy of the court decree and a revised certificate, certifying the Democratic electors as Hawaii's legal electors.⁸² The governor noted that the time to appeal the court's ruling would not expire until January 9 and that the state's Attorney General would not appeal and had

⁷³ Democrats File Recount Suit; Cite Irregularities, Honolulu Advertiser, Nov. 23, 1960, at 1.

⁷⁴ L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 Dick. L. Rev. 321, 341 (1961).

⁷⁵ *Id.*

⁷⁶ Elder Statesmen Cast Two Sets of Elector Votes for Isles; Honolulu Star-Bulletin, Dec. 20, 1960, at 1.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Wroth, *supra* note 58, at 341.

⁸² *Id.*

advised the governor “that the possibility of an appeal in this case by any defendant not represented by him is remote.”⁸³

On January 6, when Congress met, the certificate of the Republican electors, the certificate of Democratic electors, the governor’s revised certificate, and the court’s judgment were presented.⁸⁴ Then-Vice President Nixon, presiding as President of the Senate, announced, “In order not to delay the further count of the electoral vote here, the Chair, without the intent of establishing a precedent, suggests that the electors named in the certificate of the governor of Hawaii dated January 4, 1961, be considered as the lawful electors from the State of Hawaii.”⁸⁵ No objections to counting the votes of the Democratic electors were made, and the tellers therefore proceeded to count Hawaii’s votes for Kennedy.⁸⁶

In the 1960 election, Hawaii’s electoral votes did not decide the election: including Hawaii’s three votes, Kennedy received 303 electoral votes to Nixon’s 219.⁸⁷ Professor L. Kinvin Wroth later offered the opinion that “it is plain that there was no obligation under the Act to accept the state recount.”⁸⁸

II. FLORIDA, 2000

On November 8, 2000, the day after the presidential election, the first complete returns in Florida showed George W. Bush winning the state by margin of 1,784 votes, which gave Bush 271 electoral votes and the presidency.⁸⁹ State law provided for an automatic statewide machine recount because the margin was one-half of one percent or less, and that recount, completed in all but one county on November 10, shrank Bush’s lead.⁹⁰ Then-Vice President Al Gore sought hand recounts in four counties, and Florida officials indicated they would certify statewide results on November 14, the day provided for by state law, even though hand recounts would not be complete. On November 21, the Florida Supreme Court ordered the counties

⁸³ 107 Cong. Rec. 290 (1961).

⁸⁴ *Id.* at 289–90.

⁸⁵ *Id.* at 290.

⁸⁶ *Id.*

⁸⁷ *Id.* at 291.

⁸⁸ *The Electoral College and Direct Election of the President and Vice President: Hearings Before the S. Committee on the Judiciary*, 95th Cong. 130 (1977) (statement of Professor L. Kinvin Wroth).

⁸⁹ *Bush v. Gore*, 531 U.S. 98, 100–01 (2000).

⁹⁰ *Id.* at 101.

to complete the hand recounts by November 26 and ordered that vote tallies submitted prior to the deadline be included in the state's official total.⁹¹

On November 26, 2000, the Florida secretary of state and the state's elections canvassing commission certified the official returns, declaring Bush the winner, even though not all counties had completed and submitted their hand recounts.⁹² Governor Jeb Bush then signed and forwarded his Certificate of Ascertainment that same night declaring his brother the winner. Gore contested the certification in state court under Florida's election laws, and the state circuit court ultimately denied relief.⁹³ The same day, the United States Supreme Court vacated and remanded the Florida Supreme Court's ruling extending the hand recount deadlines.⁹⁴ Gore appealed the circuit court's decision, and, on December 8, the Florida Supreme Court concluded that under state law, Gore was entitled to a hand recount of 9,000 votes in Miami-Dade County and that vote totals submitted after the November 26 deadline should be included in the state's certified results.⁹⁵ The next day, the U.S. Supreme Court stayed the recounts and granted certiorari.⁹⁶ And finally, on December 12, 2000, the Supreme Court declined to invalidate the previously certified results and brought the recounts to an end.⁹⁷ And on December 19, 2000, Bush garnered 271 votes when electors met and cast their ballots in the states.⁹⁸

The ECA—specifically the “safe harbor” provision of 3 U.S.C. § 5—played a role in bringing about an end to Florida's recounts. In the U.S. Supreme Court's December 4 ruling vacating the extension of the hand recount deadlines, the Court noted that the Florida Supreme Court had cited 3 U.S.C. §§ 1–10 but had not specifically addressed § 5.⁹⁹ The Court suggested that “a legislative wish to take advantage of the ‘safe harbor’ would counsel against

⁹¹ *Id.*; *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 75–76 (2000).

⁹² *Bush v. Gore*, 531 U.S. at 101; Count the Vote: the Overview; Bush is Declared Winner in Florida, but Gore Vows to Contest Results, N.Y. Times, Nov. 27, 2000, at A1.

⁹³ *Bush v. Gore*, 531 U.S. at 101.

⁹⁴ *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000).

⁹⁵ *Bush v. Gore*, 531 U.S. at 101; see also *Gore v. Harris*, 772 So. 2d 1243, 1260–62 (Fla.), *rev'd sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

⁹⁶ *Bush v. Gore*, 531 U.S. at 100.

⁹⁷ *Id.* at 110–11.

⁹⁸ The 43rd President: The Electoral College; The Electors Vote, and the Surprises are Few, N.Y. Times, Dec. 19, 2000, at A31.

⁹⁹ *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 78 (2000).

any construction of the Election Code that Congress might deem to be a change in the law.”¹⁰⁰

On remand, among other issues, the Florida Supreme Court concluded that Florida statutes gave the Florida Department of State discretion to reject amended returns if a “failure to ignore the amended returns” would “result in Florida voters not participating fully in the federal electoral process, as provided in 3 U.S.C. § 5.”¹⁰¹ When the case returned to the U.S. Supreme Court, the Court declared that “[t]he Supreme Court of Florida has said that the legislature intended the State’s electors to ‘participat[e] fully in the federal electoral process,’ as provided in 3 U.S.C. § 5.”¹⁰² And because the safe harbor deadline had arrived, in the Court’s view, there was no way to respect that legislative intent to have contests and controversies resolved by the deadline except by ending the recount. The Court appeared to rely chiefly on the Florida Supreme Court’s statement, rather than any direct legislative statement that the state prioritized meeting the safe harbor deadline above all else.¹⁰³

When Congress met to count the votes, Representative Alcee Hastings, a Florida Democrat, objected to Florida’s twenty-five electoral votes, seeking to offer a formal challenge to their validity based on the “overwhelming evidence of official misconduct, deliberate fraud, and an attempt to suppress voter turnout.”¹⁰⁴ House members offered seventeen other objections and points of order, challenging the presence of a quorum, moving to withdraw the House of Representatives to hold a formal debate on the objections, and even attempting to appeal the parliamentary rulings of then-Vice President Gore on the previous motions.¹⁰⁵

Then-Vice President Gore, presiding as President of the Senate, concluded the objections could not be received: “Reading sections 15 through 18 of title 3, United States Code, as a coherent whole, the Chair holds that no procedural question is to be recognized by the presiding officer in the Joint Session unless presented in writing and signed by both a Representative and

¹⁰⁰ *Id.*

¹⁰¹ *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2000).

¹⁰² *Bush v. Gore*, 531 U.S. 98, 110 (2000).

¹⁰³ *See, e.g., Gore v. Harris*, 772 So. 2d 1243, 1268 n.30 (Fla. 2000) (Wells, C.J., dissenting) (“There is no legislative suggestion that the Florida Legislature did not want to take advantage of this safe harbor provision.”), *rev’d sub nom. Bush v. Gore*, 531 U.S. 98, (2000)

¹⁰⁴ 147 Cong. Rec. 104 (2001).

¹⁰⁵ *Id.* at 104–06; *see also* Chris Land & David Schultz, *On the Unenforceability of the Electoral Count Act*, 13 Rutgers J.L. & Pub. Pol’y 340, 361–63 (2016).

a Senator.”¹⁰⁶ Because no senator had signed any objections, Florida’s votes were accepted, and the count continued.¹⁰⁷

Hawaii in 1960 and Florida in 2000 are the chief examples of the operation of the ECA when a state’s election results were in doubt. Both examples come with explicit limitations on the value of their present-day application. In accepting the votes of Hawaii’s Democratic electors, Nixon went out of his way to express that he accepted the votes without “intent of establishing a precedent.”¹⁰⁸ And the U.S. Supreme Court, in halting Florida’s recount in 2000, clarified that its “consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”¹⁰⁹

The following two examples involve objections to electoral votes in Congress. Both objections were ultimately rejected, but these examples nonetheless illustrate the types of arguments that members of Congress have made that votes have not “been regularly given by electors whose appointment has been lawfully certified.”¹¹⁰ Much like the examples from Hawaii and Florida, these examples have limited precedential value, as the objections were rejected.

III. NORTH CAROLINA, 1968

In the 1968 election between Nixon and Hubert Humphrey, Nixon carried the state of North Carolina. But one of North Carolina’s thirteen Republican electors, Lloyd Bailey, publicly expressed his intent to vote for George Wallace, rather than Nixon.¹¹¹ North Carolina had no requirements that electors vote for the ticket that carried the state in the general election.¹¹² And North Carolina’s governor certified the thirteen Republican electors, including Bailey.¹¹³

¹⁰⁶ 147 Cong. Rec. 105 (2001).

¹⁰⁷ *Id.* at 106.

¹⁰⁸ *Id.* at 290.

¹⁰⁹ *Bush v. Gore*, 531 U.S. 98, 109 (2000).

¹¹⁰ 3 U.S.C. § 15.

¹¹¹ 115 *Cong. Rec.* 10 (1969).

¹¹² *Id.*

¹¹³ *Id.* at 207.

Representative James O’Hara of Michigan and Senator Edmund S. Muskie of Maine announced their plan to object to the faithless vote in advance of Congress’s count.¹¹⁴ Because of the ECA’s time limits on debates over objections, the Senate discussed the expected objection prior to the joint meeting with the House.¹¹⁵ Senator Muskie argued that the voters of North Carolina anticipated that if Nixon carried the state, all thirteen votes would go to Nixon and that the voters’ expectations should be honored.¹¹⁶ Senator Sam Ervin of North Carolina argued against invalidating the vote, chiefly on the basis that there was no constitutional argument supporting denying North Carolina one of its thirteen electoral votes.¹¹⁷ But Senator Ervin also argued that where 3 U.S.C. § 15 speaks of “votes being regularly given by an elector,” it “means simply that that vote must be given or cast in the manner prescribed by the Constitution.”¹¹⁸

When the House and Senate met jointly, Representative O’Hara presented the objection, which 37 other members of the House and seven members of the Senate, including Senator Muskie, joined.¹¹⁹ The objection read:

We object to the votes from the State of North Carolina for George C. Wallace for President and for Curtis E. LeMay for Vice President on the ground that they were not regularly given in that the plurality of votes of the people of North Carolina were cast for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and the State thereby appointed thirteen electors to vote for Richard M. Nixon for President and for Spiro T. Agnew for Vice President and appointed no electors to vote for any other persons. Therefore, no electoral vote of North Carolina. should be counted for George C. Wallace for President or for Curtis E. LeMay for Vice President.¹²⁰

Both chambers separately met and ultimately voted to reject the objection. The Senate voted 58 to 33 to reject the objection, and the House

¹¹⁴ *Id.* at 206.

¹¹⁵ *Id.* at 199–200.

¹¹⁶ *Id.* at 197–209.

¹¹⁷ *Id.* at 204–05.

¹¹⁸ *Id.* at 207.

¹¹⁹ *Id.* at 146.

¹²⁰ *Id.*

voted 226 to 170 to reject the objection, with over thirty members not voting.¹²¹

IV. OHIO, 2004

In the 2004 election between Bush and John F. Kerry, voters in Ohio faced long lines at the polls, malfunctioning voter machines, poorly trained poll workers who directed voters to the wrong polling places, and inconsistent policies about provisional ballots.¹²² Early vote totals showed Bush with a 136,000 vote lead over Kerry, and Kerry conceded the election.¹²³ The final vote count showed a margin of 118,775 votes, and the Ohio secretary of state certified the results on December 6, the day before the December 7 safe-harbor deadline, despite demands for a recount.¹²⁴

After the certification, Representative John Conyers and other members of the House wrote to Ohio's governor and the leaders of the state legislature requesting a delay of the meeting of Ohio's electors.¹²⁵ The letter alleged that by waiting to declare the results, Ohio's secretary of state had "engineered a conflict with state recount laws" because the state law deadlines relating to recounts—which required the secretary of state to certify results in the first instance before a recount—would extend the recount past the December 13 appointed day for the meeting of electors.¹²⁶ The letter urged Ohio's leaders to treat the scheduled December 13 meeting of the electors and submission of certificates of ascertainment as provisional and hold a conclusive meeting of electors and ascertainment after the recount.¹²⁷ Nonetheless, Republican electors voted on December 13, and the meeting was not treated as provisional.

¹²¹ *Id.* at 170–71.

¹²² *Ohio Recount Gives a Smaller Margin to Bush*, N.Y. Times, Dec. 29, 2004, at A14.

¹²³ *As Questions Keep Coming, Ohio Certifies Its Vote Count*, N.Y. Times, Dec. 7, 2004, at A18.

¹²⁴ *Id.*

¹²⁵ 151 *Cong. Rec.* 202 (2005).

¹²⁶ Letter to Bob Taft, Governor of Ohio, Larry Householder, Speaker of the Ohio House, and Doug White, President of the Ohio Senate - Urges Provisional Treatment of Ohio Electors Pending Results of Recount and Challenges (Dec. 10, 2004), *available at* <https://votesmart.org/public-statement/87685/letter-to-bob-taft-Governor-of-ohio-larry-householder-speaker-of-the-ohio-house-and-doug-white-president-of-the-ohio-senate-urges-provisional-treatment-of-ohio-electors-pending-results-of-recount-and-challenges#.X3CPnGhKg2x>

¹²⁷ *Id.*

When Congress convened to count the votes, Representative Stephanie Tubbs Jones of Ohio and a Senator Barbara Boxer of California objected in writing to the Ohio electoral votes.¹²⁸ The chambers withdrew from the Joint Session to consider the objection.

In the House, Representative Tubbs Jones objected to the counting of any of Ohio’s electoral votes, noting two pending lawsuits challenging the denial of provisional ballots to voters along with the state’s other election administration issues—long lines, polling places without working machines, and voter roll purges.¹²⁹ The Democratic staff of the House Judiciary Committee had prepared a report on Ohio’s election, which was entered into the record.¹³⁰ The report noted misallocation of election machines, improper purging and registration errors, voter intimidation, and other irregularities. In preparing the report, members of the Judiciary Committee sent questions to Ohio’s secretary of state, who—although he indicated he would reply—never answered the questions.¹³¹ The report also summarized Ohio election law provisions relevant to the dispute.

The report also discussed 3 U.S.C. et seq, particularly § 5: “Congress has specified that all controversies regarding the appointment of electors should be resolved six days prior to the meeting of elections (on December 7, 2004 for purposes of this year’s presidential election) in order for a state’s electors to be binding on Congress when Congress meets on January 6, 2005, to declare the results of the 2004 election.”¹³² It noted:

Historically, there appears to be three general grounds for objecting to the counting of electoral votes. The law suggests that an objection may be made on the grounds that (1) a vote was not “regularly given” by the challenged elector(s); (2) the elector(s) was not “lawfully certified” under state law; or (3) two slates of electors have been presented to Congress from the same State. . . . Since the Electoral Count Act of 1887, no objection meeting the requirements of the Act has been made against an entire slate of state electors.¹³³

¹²⁸ 151 *Cong. Rec.* 198 (2005).

¹²⁹ *Id.* at 199.

¹³⁰ *Id.* at 200–18.

¹³¹ *Id.* at 201.

¹³² *Id.* at 204.

¹³³ *Id.* at 204.

The report concluded, “We believe there are ample grounds for challenging the electors from Ohio as being unlawfully appointed.”¹³⁴ Specifically, the report noted “considerable doubt” that controversies were lawfully resolved by the safe harbor deadline because the secretary of state had “intentionally delayed” certifying the electors until December 6, which made a recount before the safe-harbor deadline, or even the December 13 meeting of the electors, impossible.¹³⁵ Additionally, state election law had been violated (in several instances) such that the election could not be said to comply with Ohio law and therefore the electors were not lawfully certified under state law within the meaning of 3 U.S.C. § 5.¹³⁶

Despite the report’s conclusion that there were grounds to challenge the electors, the debate in the House clearly suggested the House would reject the objection. Even Democrats who thanked Representative Tubbs Jones for raising the objection talked about the debate as an opportunity to spur election reform to protect the right to vote, more than a debate about whether Congress should accept Ohio’s electoral votes.¹³⁷ And some Republican members not only argued against the objection, but suggested the Democrats supporting the objection were conspiracy theorists and that the House should not be engaged in the debate at all.¹³⁸ Ultimately, the House voted 267 to 31 to reject the objection, with 132 representatives not voting.¹³⁹

In the Senate, a summary of the report of the Democratic staff of the House Judiciary Committee was entered into the record.¹⁴⁰ Several Democratic senators used their allotted time to address the irregularities in Ohio and to call for congressional action to support improved election administration in the states. Even while doing so, as in the House, many senators indicated they would vote to reject the objection and believed the outcome of the election in Ohio was not in doubt.¹⁴¹ Ultimately, the Senate voted 74 to 1 to reject the objection, with Senator Boxer the only one supporting the objection to Ohio’s votes.

¹³⁴ *Id.* at 217.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See, e.g., id.* at 220.

¹³⁸ *See, e.g., id.* at 235.

¹³⁹ *Id.* at 241.

¹⁴⁰ *Id.* at 160.

¹⁴¹ *Id.* at 157–73.