

# THECOUNT.

A practical guide to defending the  
Constitution in a contested 2020 election

by

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# PREFACE

*“Get rid of the ballots and you’ll have a very peaceful — there won’t be a transfer, frankly. There will be a continuation.” – Donald Trump, September 23, 2020*

*“Rule #1: Believe the autocrat.” – Masha Gessen, *Autocracy: Rules for Survival**

Introduction written October 11, 2020

We are days away from the most important election of our lifetimes.

If everyone is able to vote and every vote is counted, Donald Trump will lose this election. But, if Joe Biden doesn’t win in a landslide, a narrow margin of victory may not be sufficient to ensure that Biden is sworn in as our next president.

We believe that in a close election, Trump is likely to try to overturn the results of the election by disrupting the normally perfunctory process of casting and counting Electoral College votes. If that happens, we will be in dangerous and uncharted waters.

Many people are skeptical that it will come to this. They argue that Trump will try to save face by claiming the election was rigged against him but won’t try to hang on to power after losing an election.

After all, there’s no precedent for a president attempting to seize power in spite of losing an election. In the United States, none of our elections have been fully free and fair – many people have been and continue to be denied full voting rights – but after every presidential election in our history a loser has conceded to a winner and worked to accomplish a peaceful transition of power.

Further, the skeptics argue, Trump can’t steal the election by himself. He’ll need lots of Republican accomplices and a few Democratic appeasers in swing states and Congress.

As public concern about the possibility of a disputed election has grown, many of those Republicans have been unequivocal in promising to respect the results of the election and to ensure a peaceful transition of power.

We hope they will, and we hope that whoever the winner is the 2020 election ends with both candidates accepting the results of the election.

But we aren't optimistic. Over the last four years, whatever anti-Trump opposition existed in the Republican Party before the 2016 election has collapsed. Republicans at all levels of government have defended Trump and loyally advanced his agenda. In fact, they seem to fear his base.

As for Trump, it's clear that he's willing to do anything to win.

**The premise of this guide is that we should take Donald Trump's threat that he won't accept the results of the election at face value and prepare for a protracted conflict after Election Day.** This is a guide to the constitutional crisis we'll face if Trump follows through on his threats and Republicans back him, and a strategy for how ordinary people and Democratic elected officials can stop an attempted coup.

We would like to believe that if Trump and the Republicans attempt to overturn the results of the election, the law and shared political norms will be enough to stop him. But it would be dangerous to believe such a thing.

Our system runs on mutual good faith, on the shared commitment of leaders in both parties to prioritize national unity over partisan goals. Trump's presidency has shown that political norms and even the laws themselves are only as durable as those elected to uphold them. Trump has open contempt for democracy and, so far, our laws and norms haven't restrained him.

If the results of this election are contested, it won't be a legal battle that determines the outcome. It will be a contest of political will and power. **Pleading with courts and Republican officials to do the right thing is akin to continuing to play a board game that the opposition has set on fire.**

We aren't confident that Democratic officials at any level of government – from Joe Biden and the DNC to local election administrators – are prepared for this kind of conflict.

In 2000, the last time the country had a contested presidential election, Democrats put their faith in the courts while Republicans fought a dirty war to prevent Democratic voters' ballots from being counted. The result was eight years of George W. Bush in the White House.

This time, Democrats need to be prepared to play hardball: **If Trump tries to overturn the results of the election, 2020 will no longer be an election between two candidates. It will be an all-out war between the American people and a would-be autocrat seeking to destroy our country. Democrats must be prepared to use all the legal tools at their disposal to ensure that the election results reflect the will of the people.**

We want to be very clear: The nightmare scenario we describe below isn't inevitable. If there's one thing that we've learned in the last four years, it's that none of us has a crystal ball. Our claim isn't that the Republicans will inevitably try to overturn the results of the election – only that it's possible that they will, and that if they do we have to be ready.

The thought of a disputed election is disturbing, even terrifying. It should be. But we want to be clear: **Don't despair. We have the power to stop Trump from stealing the election. We can win this fight.**

Trump's most dangerous weapon is paralysis induced by shock and chaos. The purpose of this guide is to help our readers – from ordinary people to Democratic Party officials at every level – prepare psychologically and materially for a high stakes battle to defend our constitutional government.

To save our country in a crisis, we will need to act quickly and decisively. And to do that we need to have a clear understanding of Trump's strategy and what we can do to counter it.

If millions of ordinary people organize their communities, protest at an unprecedented scale, and execute a targeted strategy to win, and if Democrats in swing states and Congress take determined action, we will thwart Trump's autocratic ambitions. As concerned as we are about the odds of the crisis described below, we are just as certain that a supermajority of Americans will fight to defend the Constitution – and win.

In solidarity,

Zack Malitz  
Brandon Evans  
Becky Bond

# WHO WE ARE

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## KEY DATES

|               |   |
|---------------|---|
| <b>NOV 3</b>  | <b>Election Day:</b> In a close election, we are unlikely to know which candidate won on election night.  |
| <b>DEC 8</b>  | <b>The “Safe Harbor” Deadline:</b> States must resolve disputes over which ballots to count and report final vote totals or risk their Electoral College votes not being counted by Congress.   |
| <b>DEC 14</b> | <b>Deadline for Governors to Report Election Results to Congress:</b> In each state, the governor must send a “certificate of ascertainment” to Congress reporting which candidate won the state and which slate of electors has been appointed to the Electoral College.<br><br><b>The Electoral College Meets:</b> In each state, the winning candidate’s slate of pledged electors meet, cast their votes, and send a record of their votes to Congress. |
| <b>JAN 3</b>  | <b>Start of the 117th Congress:</b> All newly elected or reelected senators and representatives are sworn in.   |
| <b>JAN 6</b>  | <b>Congress Counts Electoral College Votes:</b> Congress convenes in a joint session held in the House chambers to count Electoral College votes and choose the next president.   |
| <b>JAN 20</b> | <b>Inauguration Day:</b> The newly-elected President is sworn in. If Congress hasn’t chosen a new president, the newly-elected Vice President is sworn in as the acting president. If Congress hasn’t chosen a new Vice President, the Speaker of the House is sworn in as the acting president.  |

# I.

## Understanding the System: How the United States Actually Elects Presidents

### THE ELECTORAL COLLEGE

*“According to sources in the Republican Party at the state and national levels, the Trump campaign is discussing contingency plans to bypass election results and appoint loyal electors in battleground states where Republicans hold the legislative majority. With a justification based on claims of rampant fraud, Trump would ask state legislators to set aside the popular vote and exercise their power to choose a slate of electors directly.” – Barton Gellman, The Election That Could Break America, The Atlantic, September 23, 2020*

Donald Trump knows that he’s losing. According to the polls, he’s likely to lose both the popular vote and the Electoral College vote – possibly by huge margins.

Assuming the polls are correct, the only option he has left if he wants to stay in office is to cheat. Unfortunately, there’s a real possibility that Trump and his allies can overturn a Biden victory.

In a country with universally well designed and competently administered processes for voting and counting ballots, it would be impossible for a candidate like Trump to overturn the results of the election.

But that isn’t the country we live in. The combination of an arcane system by which Electoral College votes are cast and counted, the administration of ballots and elections by individual counties instead of the federal government, and a global pandemic make our system vulnerable to a candidate like Trump who will do anything to win.

There are two common misconceptions about how presidential elections work: (1) that the candidate who receives the most votes wins; and (2) that each voter votes directly for a presidential candidate. Neither of these are true. **Under our Constitution, citizens don’t vote directly for a presidential ticket, even if that is the box they check on their ballot. They vote for what are called electors.**

Electors are actual people chosen by the chairs of state political parties who have pledged to vote for that party's presidential candidate in what is called the Electoral College. When you cast your ballot for Joe Biden, you are actually voting for a state-level slate of Biden electors who, when the Electoral College votes on December 14th, will cast their votes for Joe Biden.

There are 538 total Electoral College votes and a candidate needs a majority to win. As we know from George W. Bush's victory in 2000 and Donald Trump's in 2016, a candidate can receive fewer votes nationally than their opponent, even millions fewer, and still win if they receive a 270 vote majority in the Electoral College.

### **WHAT IF NEITHER CANDIDATE WINS?**

It's unlikely that neither candidate gets 270 electoral college votes, but you're still likely to hear a lot about this scenario. Even Trump has mentioned it.

If neither candidate gets 270 electoral college votes, the Senate votes to choose the vice president and the House of Representatives votes to choose the president. In this special House vote, members don't cast votes individually; instead each state delegation gets a single vote.

Although Democrats have a majority in the current Congress, Republicans control 26 of the 50 state delegations, meaning in 26 states there are more Republican members of the house than Democratic members. While Democrats may control more state delegations after November 2020 than they do currently, even in the most optimistic scenario they are unlikely to control more than 25.

If the House vote is a tie – as it likely would be if Democrats and Republicans each controlled 25 delegations – the vice president chosen by the Senate would be sworn in as acting president on January 20.

In almost every case, after a state finishes counting its ballots, its governor certifies the results and sends an official document to Congress notifying it of which electors will vote in the Electoral College. The winning candidate's electors meet, vote, and send a record of their vote to Congress, which counts the votes and determines which candidate won the Electoral College vote.

This whole process is largely ceremonial and uncontroversial – except when it isn't. In very rare but important instances, there has been serious disagreement over the outcome of the election in a given state. In these cases, state legislatures have appointed a second, competing slate of electors in addition to the slate appointed by the governor. Both slates of electors vote and send their votes to Congress, forcing Congress to decide which Electoral College votes to count and who will be the next president.

This isn't how it's supposed to work. It's a violation of the normal process and, in many cases, state law. But there's nothing that can stop a state legislature from appointing a competing slate of electors and, once it does, Congress can determine which slate of electors should be counted to determine who wins the presidency. A candidate's electors can even meet on their own authority to cast their votes for the candidate to whom they're pledged. It's rare, but it's happened before.

### **THE DISPUTED ELECTION OF 1876**

It may seem implausible that Republican legislators would appoint fraudulent electors, but it's happened before. In 1876, the country faced a major constitutional crisis after multiple states sent competing slates of electors to Congress.

That year, Florida, Louisiana, and South Carolina sent competing sets of Electoral College votes to Congress, each with one set pledged to Republican Rutherford B. Hayes, and the other to Democrat Samuel Tilden. Oregon also had a dispute over the eligibility of one of its electors.

At the time, no law addressed how Congress should decide which slates to accept and the country faced a real risk of not being able to choose a president. Following protracted negotiations, which concluded only days before the Inauguration, Congress reached a political compromise to determine the winner. Hayes was sworn in as president in return for withdrawal of federal troops from the South – thus effectively ending Reconstruction and ushering in a century of Jim Crow.

When we talk about Trump refusing to accept the results of the election, many people imagine his refusing to leave the White House and being dragged out by the Secret Service. That won't happen. If Trump overturns the results of the election, his coup will be spun as a fair and legitimate legal process.

This is the nightmare scenario: Trump disrupts and delays the ballot count in order to undermine public faith in the election and create a perception of chaos and fraud. Republican state legislatures in key swing states like Michigan, Wisconsin, and Pennsylvania – each of which has a Democratic governor and a Republican-led state legislature – will declare that the election has been corrupted by fraud, that an accurate ballot count is impossible, and that Trump is the rightful winner based on the partial count. They'll use this pretext to send a second, fraudulent slate of electors to Congress.

To prevent this Republican strategy from succeeding, we have to understand the system that it's designed to exploit and five key dates: November 3, December 8, December 14, January 6 and January 20. Those five dates and the 77 day period between Election Day and the Inauguration could determine the future of our democracy.

## **NOVEMBER 3 – ELECTION DAY**

Unlike most recent presidential elections, we most likely won't know the winner of the 2020 race on election night. The reason is simple: because dramatically more people will vote by mail in this election as a result of the COVID-19 pandemic.

In recent presidential elections, it's been possible to declare one of the candidates the winner on election night because there haven't been enough outstanding mail-in ballots in battleground states to affect the outcome of the election.

This year, however, the mail-in ballots will be a large enough share of the total votes that a candidate could win the Election Day count but lose by a large margin once all of the ballots are counted.

And it's almost certain that Biden will win a substantially larger share of mail-in ballots than Trump.

Some key states, like Florida, begin counting mail-in ballots before November 3, and many of these votes will already be tabulated by election night. In other key states, like Pennsylvania and Wisconsin, election officials are prevented by law from even beginning to process mail-in ballots before Election Day. Michigan can only start preprocessing mail-in ballots 10 hours before Election Day.

Assuming a close election, it's likely that there will be enough mail-in ballots to make it impossible to know the winner until they're all counted in the days and weeks after November 3, making it nearly impossible to declare a winner on election night.

Because the American electoral system is highly decentralized and run by state and local authorities, this counting of votes takes place in thousands of different county boards of elections offices across the country. This means that Republicans have hundreds of opportunities to disrupt and delay the count in key states.

We are used to the scenario in which enough of the total ballots are counted on election night in order to let us know who will win the presidential election. That may not be true this year. Due to the unprecedented number of mail-in ballots, a full and fair count of all votes may take up to several weeks or longer to complete. This unavoidable time lag between when votes are cast and when we will know the results is one of the key vulnerabilities that Trump and the Republicans will almost certainly exploit to destroy confidence in the election and hold on to power.

### **THE "BLUE SHIFT"**

In recent elections, Democrats have been far more likely than Republicans to vote by mail. As a result, the vote count shifts in favor of Democratic candidates as mail-in ballots are counted after Election Day. This phenomenon is called the "blue shift."

For the 2020 election, many more Democrats than Republicans have requested mail-in ballots, strongly indicating that Democrats will again be more likely to vote by mail than Republicans. Consequently, in a close election, it's likely that the November 3 count will show Trump leading – and that Biden will take the lead as mail-in ballots are counted.

Trump has already been peddling a conspiracy theory that the blue shift is evidence of non-existent voter fraud and that the election night returns – which are likely to show him in the lead – should be certified and used to decide the election.

This narrative is central to his strategy for creating chaos and confusion after the election and for attempting to overturn the results.

## **DECEMBER 8 – SAFE HARBOR DEADLINE**

Each state is required by federal law to resolve any disputes over which ballots qualify and to finalize a ballot count by December 8 or risk not having its Electoral College votes counted.

If a state hasn't counted all ballots by this date and certified a winner, its Electoral College votes are in danger of not being counted by Congress.

This date is referred to as the “safe harbor” deadline, meaning that if a state completes its count and certifies its results by this date, its electoral votes are “safe” and will be included in the tally that elects the president.

This deadline is a key pressure point that Trump and the Republicans can use to create chaos and prevent every ballot from being fairly counted. Between Election Day and December 8, we should expect a multi-state legal battle over which ballots to count and which to throw out. In key swing states, it may even be possible for Trump's campaign to use legal and administrative challenges to delay the complete ballot count until after the December 8 deadline.

## **DECEMBER 14 – THE ELECTORAL COLLEGE MEETS**

Each state's governor must certify the official results of their state's election by December 14. They do this by sending what is called a “certificate of ascertainment” to Congress, notifying it of which candidate's slate of electors will vote in the Electoral College, a vote which takes place on this same day.

The winning slate of electors meets on December 14 in each individual state – not as a collective national group. They vote for the presidential candidate they are pledged to, and they send a record of their vote to Congress.

If Republicans appoint a competing, fraudulent slate of Trump electors, those electors will meet separately and vote on this day, as well. At that point, the fight moves to Congress, which ultimately chooses the president.

## FAITHLESS ELECTORS

One subject that has received a lot of attention is so-called “faithless electors.” These are people who pledge themselves to vote for Biden or Trump in the Electoral College but change their minds and cast a different vote. The Supreme Court recently ruled that states can prohibit electors from doing this, although not all states have laws that do prohibit it. Pennsylvania, for example, allows faithless electors. Still, faithless electors are very rare and it’s extremely unlikely that they will play a decisive role in the 2020 election. Other dangers to the vote counting itself and the Electoral College process are far more likely to be determinative.

## JANUARY 6 – CONGRESS COUNTS ELECTORAL COLLEGE VOTES

The vote of the Electoral College is not the moment either Biden or Trump will legally win the presidency. All electoral votes must still be accepted as qualifying votes and then counted.

In our Constitution, this power belongs to the Congress. On January 6, 2021, the new Congress elected in November 2020 – not the current Congress – will hold a joint session of the House of Representatives and the Senate in the House Chamber.

During this session, Congress officially accepts the Electoral College votes of each state and counts them. Under ordinary circumstances, this is a ceremonial event in which the already-settled results of the November election are made official.

But let us be clear: there is nothing ceremonial about the *power being exercised* on this date. It is the result of this vote count, and no other, that determines who will be the next president.

Congress – not voters, not county election officials, not governors and legislatures – ultimately chooses the president. **If the election is disputed, the final battle will be fought in Congress.**

## **HOW DOES CONGRESS RESOLVE DISPUTES OVER ELECTORAL COLLEGE VOTES?**

Congress chooses the president by counting Electoral College votes and determining who won the election.

Normally this is uncontroversial. There hasn't been a battle in Congress to decide the outcome of a presidential election in over a century – but it has happened.

The Constitution provides no guidance in a situation where Congress is faced with competing slates of electors from a single state. The Twelfth Amendment is the only part of the Constitution that addresses the counting of Electoral College votes. What it says is quite limited: “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[.]”

After the contested 1876 election, Congress passed the Electoral Count Act which was intended to create a process for settling disputes over competing slates of electors.

Unfortunately, the law is famously convoluted and virtually untested. Legal scholars disagree on how to interpret it and it has never been invoked to settle a disputed election. Some legal scholars even argue that it is unenforceable or unconstitutional.

So how does Congress resolve disputes over Electoral College votes? The answer is: we just don't know, but it's likely that politics and public perception will play a key role in shaping how Congress and the Supreme Court interpret the Electoral Count Act and the Twelfth Amendment.

## **JANUARY 20 – INAUGURATION DAY**

At noon on January 20, 2021, the next president will be sworn into office. If Congress hasn't finished counting Electoral College votes, the Speaker of the House – Nancy Pelosi – will be sworn in as the acting president.

If it is not possible for the rightfully elected president to be sworn in on January 20, and faced with an alternative of allowing Trump to win an illegitimate victory, Democrats

should ensure that the Electoral College count cannot be completed by January 20 so that Nancy Pelosi becomes president.

Trump must not be allowed to win an illegitimate victory under any circumstances. To stop him, Democrats will have to be prepared to go as far as Republicans in casting aside political norms and playing political hardball – something they’ve failed repeatedly to do when it matters most.

Over the last decade, Republicans in Congress, led by Senate Majority Leader Mitch McConnell, have effectively shut down the legislative branch. While Democrats have attempted to negotiate bipartisan compromises, Republicans have shut down the government, blocked virtually every piece of legislation Democrats have proposed, rammed through massive tax cuts for millionaires and billionaires, packed the federal courts with ultra-conservative judges, and even denied President Obama the opportunity to appoint a justice to the Supreme Court in 2016.

**Republicans have shown that they’re more willing to be ruthless, to play hardball, to violate political norms to win, and to take advantage of Democrats when they try to negotiate in good faith.**

We don’t have to speculate about how this dynamic would play out if Trump tries to steal the 2020 election. It’s happened before, in Florida in 2000, when George W. Bush stole the presidential election from Al Gore.

Before we move on to describe in detail what Trump could do to steal the election, we want to pause and draw some lessons from recent history.

## **FLORIDA 2000 – A CAUTIONARY TALE**

The outcome of the presidential election in 2000 hinged on Florida. We now know that Al Gore won more votes in Florida than George W. Bush did. If all of the votes had been counted, Al Gore would have been sworn in as our 43rd president.

But that’s not what happened. Bush’s team waged a scorched-earth campaign to overturn the will of Florida voters by preventing all of Gore’s voters’ ballots from being counted – and, by doing so, stole the 2000 election.

The day after the 2000 election, Florida election officials announced that Bush's razor-thin margin of victory was small enough to trigger an automatic machine recount, which further narrowed his lead to a mere 327 votes.

Gore's campaign requested a manual recount in four counties where over 170,000 ballots couldn't be read by machine. Bush's campaign sued to stop the manual recount.

Gore's campaign put its faith in the legal system and urged Democratic organizations not to organize mass protests because Gore feared it would undermine public faith in the legal system.

Bush's campaign, on the other hand, knew that it was in a battle of political will and public perception, not a legal battle. It launched a national public relations campaign to paint Gore as a sore loser. The Republican Party even flew in paid Republican operatives to a violent riot at the Miami Dade Board of Elections – an event now referred to as the “Brooks Brothers Riot” – which is widely seen as a pivotal moment in publicly discrediting the recount.

On December 12, the Supreme Court halted the recount, ensuring that Bush retained his narrow lead. The next day, intent on maintaining national unity following a bitterly-contested election, Gore conceded.

It didn't have to be this way. Many of Gore's advisors, including his top lawyer Ron Klain, wanted to convene Gore's electors to cast rival votes to Bush's and take the fight to Congress.

We don't know what would have happened if Gore had matched Bush's determination to win and willingness to take the fight to the streets and to Congress. What we do know is that **Gore fought at a major disadvantage because he valued national unity and political norms over the voters who cast a ballot for the Democratic ticket** – voters whose families would bear the brunt of the worst abuses of a Bush administration, from austerity at home to wars of choice abroad. Meanwhile, Bush fought dirty to win, and his supporters were rewarded with tax cuts, deregulation, and corporate welfare.

There's no limit to what Trump will do to win. If Democrats aren't willing and ready to go as far as Trump will to win, they are doomed to repeat the mistakes of the past and suffer the very real consequences.

## II.

# Understanding the Threat: How Trump Could Disrupt the Election

*“[T]he most direct threat to the electoral process now comes from the president of the United States himself.” – David E. Sanger, Tuesday’s Debate Made Clear the Gravest Threat to the Election: The President Himself, The New York Times, September 30th, 2020*

If Trump and the Republicans attempt to overturn the results of the election, we know what playbook they will use:

1. Make it harder for Democrats to vote, create violence at the polls, and intimidate voters.
2. Prevent Democratic votes in swing states, especially mail-in ballots, from being fully and accurately counted. They can do this by exploiting legal and administrative processes to challenge ballots, delaying the count past the December 8 safe harbor deadline, and even physically disrupting the vote count.
3. Convince Republican legislators to overturn the results of the election by appointing fraudulent competing slates of Trump electors in order to throw the election to Congress.

To stop this plan, we need to protest by the millions, but that won’t be enough. Joe Biden, along with Democratic elected officials in swing states and Congress, will need to play brutal hardball. If they flinch, they’ll lose.

There are three steps Democrats must take to win:

1. Democrats must fight to ensure that every ballot is accurately counted by December 8. Unless and until a fair and complete vote count shows that Biden lost the election, he must not concede to Trump.
2. If Republican legislators try to stop Biden from winning a state’s Electoral College votes by appointing fraudulent Trump electors, the Democratic governor

in that state must appoint a competing slate of Biden electors, even if Republicans succeed in preventing all of the ballots from being counted and Trump has a lead based on the partial count.

3. Democrats in Congress must use every procedural and legal means available to ensure that Biden wins the Electoral College vote count. If that is not possible, they must ensure there is a deadlock and the Speaker of the House becomes president on January 20.

The following section describes what the Trump campaign and its allies could do at each step of the process between Election Day and the Inauguration to overturn the results of the election, and what Democrats must do at each stage to fight back.

This scenario will play out in one or a handful of swing states that, individually or in combination, will decide which candidate wins the election.

Throughout this section, we will assume that the contested states that will decide the election are some combination of Pennsylvania, Michigan, and Wisconsin.

All three states have a Democratic governor, who is responsible for reporting to Congress which candidate won the state. Pennsylvania and Michigan have Democratic Secretaries of State, who are responsible for compiling and reporting the final vote count. Wisconsin has a six-member Elections Commission that is split 3-3 by party and is responsible for compiling and reporting the final vote count. Each state also has a Republican-controlled legislature that, for Trump to overturn the results of the election, would have to vote to appoint fraudulent Trump electors before December 14.

In the sections below, when we refer to “vote counts” or “the popular vote,” we mean the voting results in contested swing states, not the national popular vote. As he did in 2016, Trump will almost certainly lose the national popular vote, and he’ll again likely blame non-existent voter fraud, but the national popular vote is immaterial to who wins the election. All of the action that matters will happen in a handful of contested swing states.

### **NOVEMBER 3: VOTER SUPPRESSION**

Republican efforts to suppress the vote are nothing new. A cornerstone of the Republican Party’s electoral strategy is to make it harder for people of color, young people, and poor people to vote. They’ve done this by passing strict voter ID laws,

closing polling locations, purging voter rolls, erecting barriers to voter registration, stripping people with felony convictions of their right to vote, and gerrymandering legislative and congressional districts.

Trump, however, has supercharged the Republicans' voter suppression strategy. In 2016, Trump's campaign ran a massive digital misinformation and disinformation program intended to convince Democrats not to vote. Since COVID-19, Trump and the Republican Party have launched a scorched earth legal campaign to block the expansion of mail-in voting.

Meanwhile, Trump's campaign is recruiting over 50,000 "poll watchers" – likely including people drawn from the military and law enforcement – to intimidate voters at the polls. In the first presidential debate, Trump even called on his supporters "to go into the polls and watch very carefully."

While we can't predict the scale of disruption that right-wing vigilante "poll watchers" will cause at the polls or while states are counting ballots, we should expect many of them to be armed and to engage in illegal voter intimidation.

Again, Republican voter suppression is not new, even if the Trump campaign is taking it to new levels. Voter suppression can chip away at Biden's margin of victory, but it can't on its own reverse the results of an election. Democrats can overwhelm voter suppression with massive voter turnout. We do it in elections all the time.

But what chaos and violence at the polls can do is begin to create a pretext for Republican legislators to appoint fraudulent electors. Actually suppressing votes is a secondary goal. The primary goal is to undermine public faith in the election.

Trump supporters will instigate chaos and violence at the polls. Trump and his allies will immediately claim that it's actually "Black Lives Matter," "antifa," or some other convenient scapegoat that is instigating violence, and that his supporters are acting in self-defense. Right-wing media will amplify these assertions while mainstream media draws false equivalencies between right-wing militias and progressive protesters.

**Chaos favors Trump, even if his supporters are to blame. Anything that casts doubt on the integrity of the election is a step towards justifying intervention by Republican legislators.** To counter this strategy, we must ensure that voter turnout is historically high and maintain calm in the face of right-wing intimidation.

## **ACTION STEPS BEFORE THE ELECTION**

*For Democratic officials everywhere:*

—**Prepare the public:** Publicly acknowledge the danger that Trump and the Republicans will try to overturn the results of the election. Speak with your constituents, members of the media, other government officials, and your staff about the possibility of a contested election. Your voice carries further than most, and you have a responsibility to psychologically prepare people in your community for a constitutional crisis. Encourage people to vote no matter what. Massive voter turnout is the best way to avert a crisis.

—**Pledge to defend the Constitution:** Publicly pledge to use all of the powers of your office to protect ballots and protesters from right-wing extremists and from illegal action by the federal government.

—**Pressure Republicans:** Make your Republican colleagues take sides publicly. Republicans should state plainly that every ballot should be counted, that mail-in ballots are safe and secure, that concerns about fraud are unwarranted, and that Republican legislatures in swing states should not intervene in the election. Paying lip service to a “peaceful transition of power” isn’t enough. Republicans must make specific, concrete commitments to ensuring that this is a fair and free election.

*For the rest of us:*

—**Vote:** Vote however is most convenient for you as early as possible. Encourage and help your neighbors, friends, and members of your community to vote. The best and only antidote to the first phase of Trump’s campaign to disrupt the 2020 election is for us to vote in massive numbers.

—**Volunteer as a poll worker:** The COVID-19 pandemic may make it harder to fully staff the polls with volunteers. If you can do so safely, volunteer to become a poll worker.

—**Volunteer:** Support Get Out The Vote and election protection efforts in all swing states. If Biden wins in a landslide, Trump won’t be able to overturn the results of the election.

—**Remain calm and challenge misinformation and disinformation:** Republicans are spreading lies and conspiracy theories about voter fraud and barriers to voting. Only repeat information about voting that comes from credible sources.

—**Prepare for a contested election:** Share this document with your friends, family, and people in your community; read and discuss it together.

## **DECEMBER 8: DISRUPTING THE BALLOT COUNT**

*“The Florida Election should be called in favor of Rick Scott and Ron DeSantis in that large numbers of new ballots showed up out of nowhere, and many ballots are missing or forged. An honest vote count is no longer possible — ballots massively infected. Must go with Election Night!” – Donald Trump, November 12, 2018*

*“The only way they can take this election away from us is if this is a rigged election.” – Donald Trump, August 24, 2020*

Trump is already accusing Democrats of rigging the election. He has repeatedly said that the only way he will lose is if Democrats commit massive voter fraud with mail-in ballots, and that he may not accept election results that show him losing to Biden because, he says, they will be fraudulent.

This is all a ridiculous conspiracy theory and a transparent attempt to undermine faith in the election, but if Trump convinces enough people that it’s true he will create an opening for Republican state legislatures to steal the election.

The key period during which Trump can undermine public faith in the integrity of the election is between Election Day and December 8 while the ballots are being counted. December 8 is the deadline for states to certify the results of the election. The more chaos Trump can create while the ballots are being counted the more likely people are to believe that the results are fraudulent.

In a close election, Trump may lead Biden in must-win swing states on election night because so many Democrats are voting by mail and mail-in ballots will take longer to count in key swing states. Only after mail-in ballots have been counted in the following days and weeks will it become clear that Biden won the battleground states.

If the election night totals show Trump in the lead because Democratic mail-in ballots haven't been counted yet, he will likely demand that those results be certified and that the election be called in his favor. As mail-in ballots are counted and Biden takes the lead, Trump will accuse Democrats of fraud and double down on his demand for the election night results to be certified.

This is exactly what Trump did in 2018 during a statewide recount in Florida. As the recount was underway, Trump called for election officials to certify Ron DeSantis and Rick Scott as the winners in the gubernatorial and senate races because they each held a lead over their Democratic opponents on election night.

During the ballot count, Trump will have two goals. Achieving either one will help him cast doubt on Joe Biden's victory:

First, create delays and prevent as many Democratic voters' ballots from being counted before the December 8 deadline as possible. If he does this on a large enough scale, the partial count on December 8 may even show him ahead in some states that he actually lost to Biden. This is what George W. Bush did in Florida in 2000 and, by doing so, he won the electoral college vote.

Second, create a perception of chaos to delegitimize the election results. If he fails to stop Democratic voters' ballots from being counted before the deadline he can still kick up enough dust to create a perception that the final ballot count is illegitimate and fraudulent.

Unfortunately, there's a lot that Trump and his allies can do to disrupt and delay the ballot count:

- Launch an onslaught of legal and administrative challenges to disqualify mail-in ballots and demanding recounts.
- Convince election administrators in Republican-dominated counties to prematurely halt their ballot count.
- Order the Department of Justice, US Post Office, or other federal agencies to open investigations into election administrators, Democratic organizations, and elected officials. Trump may even order federal agents to halt ballot counts or seize ballots.

- Encourage his supporters to organize armed protests to intimidate election administrators or directly disrupt ballot counts.
- Declare martial law and deploy federal troops in response to protests.

Some of these actions are illegal, but it may not matter to Trump or to those who enable him.

There will also be situations where administrative barriers create delays in Trump's favor. For example, in response to the COVID-19 pandemic, Pennsylvania changed its voting rules and adopted a process for counting a large number of paper ballots. As a result, the state took several weeks to count the 2020 primary ballots. It may simply not be possible for Pennsylvania to complete a presidential ballot count before the safe harbor deadline because the state has been prevented by Republican lawsuits from beginning the count of paper ballots before November 3. If a ballot isn't counted before December 8, there's no do-over, even if the delay was a result of illegal action by the Trump campaign.

We want to be clear: **What matters most in this period may not be how many ballots are counted, but public perception of the integrity of the election.** Republican legislators can send slates of electors to Congress even if *Trump loses the popular vote in their state. And a state's electors can even meet on their own and send a record of their votes to Congress independent of the governor or state legislature.*

**Winning the ballot count by preventing Democrats' votes from being counted is a political tactic not a legal strategy.** Public perception of who won a given state may matter more to Republicans in a power struggle over elector slates than who actually won the December 8 ballot count.

If Trump loses a complete ballot count but the public believes that he lost because of fraud, he has achieved his goals.

If, on the other hand, Trump wins an illegitimate and incomplete ballot count, but the public knows that Trump cheated to take the lead, we still have a chance to stop him.

Republican legislators will be far less likely to intervene in the election if a huge majority of Americans understand that Trump lost and is trying to steal the election.

Even federal judges and the Supreme Court are sensitive to public pressure, and if it is clear that the country is unified in outrage at what Trump is doing it's unlikely that even conservative judges will save his doomed campaign.

## **DECEMBER 8 THROUGH DECEMBER 14: THE ELECTORAL COLLEGE**

By December 8, all states are required to resolve disputes over which ballots to count and to complete their ballot count or risk having their Electoral College votes not counted by Congress, so we should expect a statewide vote total to be certified in every state by this date. States are allowed to complete their counts before this date, but December 8 is the deadline to ensure that their Electoral College votes are counted.

The Electoral College meets to vote on December 14. Before that happens, the governor of each state must notify Congress of which candidate won the state.

Hopefully, every state will have finished a complete and accurate count of every ballot by December 8, but we have to be prepared for a scenario in which some states only partially count their ballots because Republicans succeed in delaying the disrupting the count.

If most of the ballots are counted and Biden holds the lead on December 8, we can assume that Democratic governors will follow the rules and appoint Biden's electors.

If, on the other hand, the counts have been sufficiently disrupted and Trump holds an illegitimate lead in the count at this date, Republicans will pressure the Democratic governor to appoint Trump's electors to the Electoral College.

**Even Democratic governors may be tempted to appoint Trump's electors if he holds an illegitimate lead in the count on December 8. We can't let that happen.** In any fair game, cheating disqualifies you. Our elections should operate on the same standard.

If Trump takes the lead by preventing all of Biden's voters' ballots from being counted, the Democratic governor in Pennsylvania, Michigan and/or Wisconsin must appoint Biden's electors to the Electoral College. If they cave to Republican pressure not to, we lose and Trump gets to steal the election.

## HOW WILL WE KNOW BIDEN WON IF ALL THE VOTES AREN'T COUNTED?

Pre-election polls have consistently shown Biden in the lead in key swing states, so it's very unlikely that Trump will win a majority of votes in these unless he cheats and stops a large number of Democratic voters' ballots from being counted. Pre-election polls shouldn't be used to decide the winner of the election – that responsibility is reserved for each state's governor and, ultimately, Congress – but if Trump prevents us from counting all of the ballots, the pre-election polls can give us some indication of whether Trump won a state legitimately or through fraud.

Further, if Trump succeeds in preventing all of the ballots from being counted before December 8, Democrats should demand that the count continue after the safe harbor deadline. Ballots counted after December 8 may not be included in the official statewide count, but even a complete, unofficial record proving that Joe Biden won can be taken into account by Congress when it counts Electoral College votes on January 6.

However, if the count is never completed, the uncomfortable truth is that we won't be able to prove for certain that Biden won. There are two reasons why Democratic governors should nonetheless move swiftly to appoint Democratic electors if Trump disrupts the ballot count:

**First, appointing electors doesn't mean that Biden will be awarded the state's electoral college votes when the votes are counted.** It is up to Congress to count votes and make the final decision about who won the state. Even if it is not yet clear which candidate won the majority of votes in a contested battleground state, sending a slate of Biden electors to Congress gives Congress the option to determine that Biden was the valid winner.

Appointing Biden's electors even though it is not yet certain that Biden won is an unusual action to take. But it is fully justified and necessary if the count hasn't been completed because Trump and his allies deliberately prevented the ballots from being counted. In that scenario the only responsible thing for a governor to do is give Congress more time to consider which candidate is the rightful winner by giving it the option to award the state's electoral votes to Biden.

**Second, if Trump disrupts the election, if he takes deliberate actions to prevent everyone's ballots from being counted and every voice from being heard, and he**

**does it because he wants to prevent Joe Biden from winning the election, he is effectively forfeiting his right to be awarded an Electoral College majority by Congress.**

Even brutal dictatorships hold sham elections and report vote counts that purportedly show the dictator winning a majority of the votes. That doesn't mean that the dictator is democratically elected. The only ballot count that counts is one that's fair and free. If it becomes impossible to hold a fair and free election because Trump disrupts the ballot count, Democrats must take every available action to prevent him from usurping the presidency.

American democracy can only survive if our leaders want it to. A presidential candidate who takes premeditated action to usurp the presidency, circumvent the will of the people, undermine our institutions, and short circuit democratic processes ceases to be a legitimate presidential candidate and becomes a threat to the American people. Such a candidate cannot be allowed to win.

Trump's goal in this phase is to ensure that, no matter how many votes he wins or which ballots are counted, electors meet on December 14, vote for him, and send a record of their votes to Congress.

This phase of the fight is likely to be confusing, but the most important thing to remember is that **Congress makes the final decision about which Electoral College votes to count and which ones to discard.** The Constitution gives Congress the power to decide if a slate of electors was legally or illegally appointed.

There are three important scenarios that may result in Congress needing to use its power to settle disputes about electors:

First, a governor may not award the state's electors to the candidate who won the most votes. That governor may act unilaterally to send a different candidate's slate of electors to Congress.

Second, no matter who wins the election or what the governor does, the state legislature may convene and vote to appoint a second, competing slate of electors, who will then vote for the candidate to which they are pledged.

Third, a given candidate's electors may meet without being authorized by either the governor or legislature, vote, and send a record of their vote to Congress, even if their candidate lost the election.

To be very clear: **These actions may be illegal or merely outrageous and unfair, but that doesn't mean they won't happen. All three of these things happened before.** In these scenarios, majorities in Congress can act decisively and decide which Electoral College votes to count.

**The specific trigger for a constitutional crisis is if, in a state that Biden wins, Trump's electors – likely illegally appointed by the state legislature – meet, vote for Trump, and send a record of their votes to Congress.**

This may happen after the Democratic governors in contested states certify that Biden won the election, or Trump and his allies may act preemptively. In either case, once two groups of electors have met and voted in the same state on December 14, the battle moves to Congress, which makes the final determination of who the next president is.

### **ACTION STEPS BETWEEN NOVEMBER 3 AND DECEMBER 14**

*For Democratic officials everywhere:*

—**Biden must not concede:** Unless it is clear that Biden lost a fair election, Democratic officials must publicly call on Biden not to concede. If Biden concedes, we all lose and millions of voters' voices will never be heard.

—**Declare victory:** Unless it's clear that Biden lost, immediately declare that Biden will be the winner once all of the ballots are counted. Elected officials should also advocate for every vote to be counted, but we will be at a major disadvantage if Trump declares victory while we say it's not clear who won or that we should let the process play out. We have to say that Biden is the winner and that the final count will prove that. All the polls and what we know about the blue shift indicate Biden will be the eventual winner of a fair vote count, even if Trump leads in the election night count. It is essential Trump not be allowed to entrench the narrative that he won while Biden and his allies wait for the process to play out.

—**Call out Republican fraud:** Cry foul as soon as Trump or the Republicans attempt to disrupt the vote count and appoint fraudulent electors. Explain that what Trump

and his allies are doing is an attempt to steal the election.

—**Protect ballots:** Democrats must do everything to the limit of their power to ensure a full and accurate count of all ballots, in-person and mail-in, including physically preventing right-wing militias from halting vote counting, and continuing any Republican-delayed vote counts after December 8th until they are complete.

—**Protect the First Amendment:** Democrats must defend the rights of pro-democracy protesters in the streets and also in and around government buildings. This includes not prosecuting nonviolent protesters and/or bringing charges against federal agents who break local law by harming or kidnapping protestors. Join protests and make your presence known by alerting reporters and posting pictures and videos on your social media accounts.

—**Rally the public:** Democrats must say clearly that this battle will be unlike anything we have seen in our lifetimes and that extraordinary measures may be required to prevent authoritarian rule.

—**Speak out against Republican election fraud:** If Trump succeeds in preventing all of the ballots from being counted before the December 8 deadline and an incomplete vote count shows him leading Biden, Democrats must make it clear that Trump didn't win and that he committed fraud. They must explain to the American people that committing fraud disqualifies him from winning, and that the only way to honor the will of the people is to appoint Biden electors even if a complete ballot count is no longer possible.

*For Democratic officials in swing states:*

—**Count the ballots:** Demand that the ballot count be completed even if it must continue after December 8 so that Congress can take the complete results of the election into consideration when deciding which slates of electors to count in January. The American people deserve to know who won every single state and by how many votes.

—**Protect ballots:** Democrats must do everything to the limit of their power to ensure a full and accurate count of all ballots, in-person and mail-in, including physically preventing right-wing militias from halting vote counting, and continuing any Republican-delayed vote counts after December 8 until they are complete.

—**Governors:** If it becomes impossible to complete a ballot count by December 8 or Republican legislators appoint their own slates of electors, governors must appoint a Biden slate of electors so that Congress has the option of giving the state’s electoral college votes to Biden.

—**State legislators:** Use every procedural tactic available to stop Republicans from voting to appoint Trump electors. If it’s not possible to stop them, try to delay votes until the December 14 deadline has passed. If you can’t delay the vote past the deadline, shut down the chambers by assisting nonviolent protesters in taking over the building. If you can’t stop the vote, boycott it to deny quorum or, at the very least, signal the vote isn’t legitimate.

—**Investigations:** State and local authorities should open investigations into right-wing militias and illegal actions by Republicans to suppress the vote and prevent ballots from being counted.

*For people everywhere:*

—**Protest:** Don’t wait for advocacy groups, Biden’s campaign, or the Democratic Party to take the lead. Organize protests in your community immediately. Prepare yourself for the long haul: sustained, daily pressure will be required until Trump publicly concedes or leaves office

—**Organize:** Connect with all groups you are part of – political, civic, professional, religious, work-based – and implore them to join you in public protest. We need participation by people from all walks of life if we want to demonstrate that the public will not tolerate Trump’s fraud.

—**Hold teach-ins / political education:** Use this guide to educate others in the community about how the process works between November 3 and January 20, where the levers of power are, and how everyone can play a role in stopping Trump and Republicans from stealing the election.

—**Local elected officials:** Urge your city and county governments to pass a resolution denouncing Trump and the Republicans for attempting to overturn the results of the election. We need local elected officials in every community in the country to express solidarity with protesters.

—**Congress:** Urge your Representative and Senators to open investigations into Trump and the Republicans’ efforts to prevent every vote from being counted.

—**Law enforcement:** Call your police chief, county sheriff, and local National Guard Bureau and urge them to protect protesters’ First Amendment rights. Specific things you can ask for include: protect protesters from right-wing militias and give them medical care if they’re injured; do not use chemical weapons (e.g., tear gas, pepper spray) rubber bullets, or crowd control measures intended to induce pain or discomfort; do not arrest nonviolent protesters; do not use surveillance technology to identify protest participants or to spy on organizers; and do not open investigations into protest leaders.

—**District Attorney / County Prosecutor:** Your district attorney or county prosecutor decides who to charge with a crime, what to charge them with, what plea offers to make, and what sentence to seek. Prosecutors have the power to decline to prosecute any protester and to prosecute federal agents who break the law. Call them and urge them to do so.

—**Boards of Elections:** Call your local board of elections and urge them to make a complete, impartial, and timely count of all ballots cast in the election.

—**Federal Courts:** Call the federal district and circuit courts that serve your community, as well as the Supreme Court. Urge them to respect a fair and impartial process of counting ballots and not to intervene on Trump’s behalf.

*For people in contested swing states:*

—**Your governor:** If Republicans make it impossible to count every ballot or move to appoint illegitimate electors, call on your governor to honor the will of the people by sending a Biden slate of electors to Congress.

—**Your state legislators:** Call your state legislators and tell them not to appoint fraudulent electors to the Electoral College.

—**Write to your local paper:** Send a letter to the editor of your local paper calling for every ballot to be counted and denouncing Republican efforts to disrupt and delay the count.

—**Local government:** Urge your city and county governments to pass a resolution calling for every ballot to be counted and denouncing Republican efforts to disrupt and delay the count.

—**Board of elections:** Organize rallies at your local board of elections and call on election officials to count every ballot. If there is a process to do so, volunteer to help “cure ballots” which often involves collecting additional information from voters who were forced to vote provisionally or whose vote-by-mail ballots need additional verification.

—**Mayor and city council members:** Ask your local elected officials to take their case to the local media, appearing on television, radio and in print declaring victory for Joe Biden and explain how Trump and Republicans are delaying the count in order to try and steal the election.

## **JANUARY 6: CONGRESS AND THE ELECTORAL COLLEGE COUNT**

On January 3, each newly elected or reelected member of the Senate and House of Representatives is sworn in and seated, and the 117th Congress begins.

It’s the 117th Congress, not the current Congress, which meets on January 6 in a joint session held in the House chamber to count the Electoral College votes and choose the next president. The current vice president – Mike Pence – presides over this joint session.

The best case scenario is that the count in Congress is largely ceremonial, as it has been in presidential elections going back for over a century, and the candidate who legitimately won the election is awarded the most Electoral College votes.

But we must prepare for other scenarios, including:

- A Republican state legislature sends a competing slate of electors to Congress, forcing Congress to choose between the Democratic governor’s slate of electors and the Republican legislature’s slate of electors – or to discard both of them.
- A Republican governor in a state with a Republican legislature – for example, Florida – appoints a slate of Trump electors even though Biden won the state’s

popular vote. Biden’s electors in that state respond by meeting, voting for Biden, and sending a record of their vote to Congress. Congress must then decide whether to accept one of the slates or discard both of them.

- In a state that Biden won and in which state officials, including the legislature, certify Biden as the winner through a legitimate process, Trump’s electors meet, vote for Trump, and send a record of their vote to Congress. Congress must then decide whether to accept one of the slates or discard both of them.
- In any of the scenarios above, Mike Pence asserts that he alone has the authority to determine which candidate won the most Electoral College votes and asserts that he and Trump are the winners.
- The Supreme Court agrees to consider legal challenges to the validity of the “certificate of ascertainment” submitted by Democratic governors.
- The Supreme Court agrees to consider legal challenges to the Electoral Count Act or to any other process Congress uses to resolve a dispute over electors.
- A Republican-controlled Senate votes to award the majority of electors to Trump while the Democratic controlled House votes to award the majority of electors to Biden.

The Constitution doesn’t prescribe a process for resolving a dispute over electors. The Electoral Count Act of 1887 offers some guidance but legal scholars disagree about how to interpret it. In the past, we’ve counted on respect for institutions and precedent to navigate around issues of governance not clearly delineated in the Constitution. But we cannot count on that with Trump. For example, Trump and his administration have flat out refused to comply with subpoenas from Congress. He’s even promised to pardon officials who break the law under his orders.

### **THE ELECTORAL COUNT ACT OF 1887**

After the contested 1876 election, Congress passed a law called the Electoral Count Act which was intended to create a clear process for resolving disputes over electors. Unfortunately, the law is famously vague, convoluted, and difficult to interpret.

We aren’t legal scholars, and it is far beyond the scope of this guide to fully

summarize the legal debates about the Electoral Count Act. For our purposes, there are several things worth noting:

**First**, the Electoral Count Act is virtually untested in court and has never been used to resolve a contested election.

**Second**, it's unclear how or whether the Supreme Court would intervene to interpret the law.

**Third**, some scholars argue that the law itself is unconstitutional or unenforceable.

**Fourth**, if there is a dispute over electors, each chamber of Congress meets separately to vote to determine what to do with the competing slates of electors.

If both chambers agree, it's generally accepted that their concurring decision will determine how to count the votes in question. This makes it much more likely that Democrats will win a congressional fight if they win back a majority in the Senate and, as they seem likely to do, hold their majority in the House.

If the chambers disagree, most scholars argue that electoral votes certified by a state's governor should be counted, and the competing votes should be discarded. In a fight over electors, it's most likely that a Democratic governor will have appointed Biden's electors, so this interpretation is most likely to favor Biden.

Some scholars, however, argue that both slates should be discarded. If that happens, it's unclear whether the total number of electoral college votes needed to win is reduced from 270 – or if it's still necessary to get 270 to win.

**Fifth**, how the Electoral Count Act is used to resolve a contested election will be inherently political.

The lack of legal or congressional precedent leaves a lot of room for Congress and the Supreme Court to interpret the law in a way that responds to the mood of the country.

If public opinion is overwhelmingly on our side, it's more likely that the law will be interpreted in a way that prevents Trump from stealing the election.

A law like the Electoral Count Act of 1887 can only settle a dispute over an electoral outcome if all parties agree to act in good faith, observe norms, and follow precedent. **In a contested election, Republicans in Congress won't give a thought to the valid interpretation of the law or norms of Congressional conduct.**

Trump and his Republican allies have shown that they are willing to exploit not just procedures but the law itself for political outcomes. If they have succeeded in keeping the outcome of the election in dispute on January 6, they will advocate whichever farfetched and unprecedented interpretation of the Constitution and federal law makes it most likely that Congress will count Trump's Electoral College votes and discard Biden's.

Democrats and their allies prefer to hold themselves above the political fray in situations like this, delegating the fight to their legal teams while making proclamations about letting the process work. **If Democrats act like legal scholars while Republicans fight a guerilla war to make Trump the president at any cost, Democrats will risk losing a presidency despite winning the majority of electoral votes at the polls.**

### **WHAT ABOUT THE SUPREME COURT?**

No one knows if the Supreme Court would intervene in a Congressional fight over Electoral College votes, but it's not inconceivable that it would. In fact, the president and his allies have repeatedly invoked this scenario in arguing that the successor of late Associate Justice Ruth Bader Ginsburg must be confirmed before Election Day,

There's a misconception that the court makes objective decisions about the law. This is wrong. The court has become increasingly ideologically divided but at the same time sensitive to public perception and pressure, and its decisions can be shaped by public opinion.

The Bush v. Gore decision badly damaged its reputation and undermined the legitimacy of the court. If the Supreme Court intervenes in the 2020 election, we need to put overwhelming public pressure on it not to rule on Trump's behalf.

If it does, Democrats must be prepared to adapt their strategy, abandon its institutionalist preference, and continue the fight to prevent Trump from becoming president, even if it means going public with growing concerns about the court's legitimacy.

The court can't give legitimacy to an illegal effort to usurp the presidency, especially if the two, possibly three, justices that Trump appointed to the court participate in the ruling. No matter what, we have to continue to fight, even if it leads to a high stakes game of chicken between the three co-equal branches of government. Democrats in Congress cannot be the first to blink.

Democrats have to understand two things to win a fight over electors in Congress:

First, Republicans will not compromise, act in good faith, give any consideration to national unity or the stability of the country, or attempt to follow the law. Their only objective will be to win at any cost.

Second, **in a battle of political will and raw power, whoever rallies the American people to their side will have a huge advantage in how the inside game plays out.** If tens of millions of Americans protest, strike, commit mass civil disobedience, and demand an end to the Trump regime, Republicans will have a much harder time exploiting arcane processes to make Trump president, either through a vote in Congress or a ruling by the Supreme Court.

The legitimacy of a democracy rests on the consent of the governed. If Trump and the Republicans try to destroy democracy and reorganize our government as an autocracy, our job is to withdraw that consent and shut the country down. We have to make it clear that if Trump usurps the presidency, he won't be able to govern or remain in office for long.

Joe Biden and Democrats in Congress must commit themselves to this strategy and rally the American people. If, like Gore in 2000, they urge the public to stand down and wait for the legal process to play out, Trump will have the advantage. **We can't treat a Congressional fight over which Electoral College votes to count like a legitimate legal process – it's a coup and we must act accordingly.**

Democrats in Congress must use every constitutional, procedural, and political means necessary to delegitimize Trump's attempt to usurp the presidency, up to and including voting in unison against any Republican effort to count Trump's Electoral College votes, ordering the Sergeant at Arms remove Republicans from the House chamber, boycotting the Electoral College count, and staging protests inside of the Capitol to make it physically impossible for Congress to meet.

If Democrats in Congress can't win the fight to count Biden's lawfully-chosen electors, then its strategy should be to delay the count and, if possible, prevent it from ever being completed. If the votes haven't been counted by January 20, then Nancy Pelosi will be sworn in as the acting president. Throughout the fight, we must demand that Trump concede.

We hope that none of this ever happens. If it does, even defeating Trump will badly damage our democracy. Repairing the damage will require a long period of national healing and reform to correct the flaws in our system that made it possible for an autocrat to attempt to overturn the results of an election. But anything is preferable to allowing Trump to seize the presidency by force.

### **ACTION STEPS ONCE THE FIGHT MOVES TO CONGRESS**

*For Democrats in Congress:*

—**Use procedural tactics to delay:** Democrats have a wide variety of procedural maneuvers they can use to slow down Congressional proceedings, especially in the Senate. They should use every procedural tactic possible to shut down Congress.

—**Call a House recess and delay the count:** House Speaker Nancy Pelosi should declare that the House is in recess and order the Sergeant at Arms to remove Mike Pence and members of the Senate from the chamber. The House should refuse to convene until Trump concedes.

—**Delay seating incoming senators:** 35 Senate seats are up for election in 2020. Those senators will need to be seated before they can vote on a dispute over electors. Before the Senate seats those incoming senators, Democrats will briefly have a 35-30 majority. If Democrats don't win a majority in the Senate in this election, Democrats should delay the seating of those senators until after the joint session to count Electoral College votes, ensuring that Democrats have a majority in the Senate during the Joint Session.

—**Organize and participate in mass civil disobedience at the Capitol:** Lead the public in staging mass civil disobedience protests in the Capitol with the goal of making it impossible for Congress to meet or vote.

—**Deadlock is preferable to a Trump coup:** If they can't win a vote to give Biden the majority of Electoral College votes, Democrats' goal should be to delay until House Speaker Nancy Pelosi is sworn in as acting president on January 20. They should then refuse to allow an Electoral College vote count until Trump concedes.

*For Democratic officials everywhere:*

—**Biden must not concede:** Once the fight moves to Congress, Biden should refuse to concede under any circumstances unless a complete and fair ballot count proves that Trump is the legitimate winner.

—**Refer to Trump as an autocrat, not a candidate:** Do not grant Trump legitimacy by referring to him as a candidate. If the fight moves to Congress, we are fending off a coup by Trump and his allies not settling a legitimate dispute over a presidential election.

—**Call on Republicans in Congress to vote against Trump:** We will only need a handful of Republicans in the Senate to vote for democracy instead of Trump.

—**Publicly and vocally back any tactics Democrats in Congress must use:** Democrats may have to use unprecedented procedural tactics to block Trump's presidency and they will need public support. Your constituents look to you for leadership, especially in a crisis, and it's your job to explain why Democrats are justified in taking extraordinary measures to prevent Trump from usurping the presidency.

—**Call on the military to remain neutral and reject illegal orders:** Some people may call on the military to remove Trump from office. We should unequivocally oppose this and urge military leaders to remain neutral while civilians settle the outcome of the election and to reject illegal orders from Trump.

*For people everywhere:*

—**Shut Down the Country:** As the fight moves to Congress, we have to bring the country to a complete halt with massive protests, civil disobedience and strikes. We must remain in the streets and engage in mass civil disobedience until Trump is removed from the White House.

—**March on Congress and the White House:** Those who can should go to Washington, D.C., to ensure there is a massive presence that Democrats and the media cannot ignore.

—**Back the Democrats in Congress:** Protest alone isn't sufficient. We need to use protests to support Congressional Democrats' targeted strategy to prevent Trump from getting an Electoral College majority. We have to balance a general anti-Trump message with a focused message supporting the fight in Congress.

—**Pressure the Supreme Court to back Biden or remain neutral:** Put public pressure on the Supreme Court to stay out of the fight in Congress unless it is to support Biden. The Supreme Court's first duty is to the Constitution. In a fight with a would-be autocrat, no interpretation of the law that supports the autocrat's ambitions is valid.

—**Trump must concede:** Organize your community – your elected officials, local media, faith leaders, business owners, government officials, etc. – to call on Trump to concede.

### III.

## Conclusion: Defending Democracy

*“[T]his may well be a street fight, not a legal battle; technocratic solutions, courts, and a reliance on elites observing norms are not the answer here ... A show of numbers in the streets- and actions in the streets- may be decisive factors in determining what the public perceives as a just and legitimate outcome.” – The Transition Integrity Project, Preventing a Disrupted Presidential Election and Transition, August 3, 2020*

As we write this, it seems likely that Biden will defeat Trump in a landslide. If that happens, Trump will have little choice but to accept the results of the election. He may not go quietly, but he'll go.

But if Biden wins a narrow victory and Trump tries to overturn the results, we have to be psychologically prepared to act quickly and decisively, and we have to have a plan.

We encourage you to share this guide with your friends, family, and community, to read it together and to decide now what you can do if Trump and his allies refuse to accept the results of the election.

We've painted a bleak picture of post-election mayhem and subversion of democracy, but we can't afford to feel hopeless. Americans have faced greater challenges to our democracy, overcome them, and built stronger, more democratic institutions.

**Trump is weak and lacks political support. That's why he's losing.** The only way he can win is if we don't understand the threat we face, we abandon the playing field after November 3, and we rely on the courts, laws, norms, and Congressional procedure to save us.

We all have a part to play. Elected officials at every level of government must do their part to ensure that we have a fair and free election, speak out if Trump tries to disrupt the election, and side with and protect pro-democracy protesters. The rest of us have to make sure they do their jobs and protest by the tens of millions and stay in the streets until Trump leaves office.

America is a democracy because people have fought throughout its history to make it one. There's never been a time when our country wasn't threatened from within by people who preferred autocracy and oppression to democracy and freedom. We've defeated them before. We will do it again.