

**PART III. PROCEDURES FOR THE
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**PART III. PROCEDURES FOR THE RESOLUTION OF
A DISPUTED PRESIDENTIAL ELECTION**

1 **Introductory Note:** These Procedures for the Resolution of a Disputed Presidential
2 Election (hereinafter “Procedures”) address the unique challenges that exist when a presidential
3 election remains unsettled more than 24 hours after the polls have closed and, despite the reporting
4 of preliminary returns on Election Night and into the next day, one (or both) of the two leading
5 candidates has issued a public statement proclaiming that the race is not yet over. This situation
6 raises the possibility that the unsettled election will turn into a disputed election, as occurred in
7 2000, with the candidates and their campaigns using available procedures, including judicial
8 litigation, in an effort to secure a victory. Although the phenomenon of candidates and their
9 partisan supporters fighting over the counting of ballots is hardly unique to presidential elections,
10 the imperative of resolving this kind of dispute in a presidential election within the limited time
11 constraints imposed by the federal Constitution and related statutory provisions of federal law
12 presents a scheduling difficulty inapplicable to any other elective office. These Procedures address
13 that difficulty.

14 *Constitutional background.* The relevant parts of the U.S. Constitution are sparse. Article
15 II says that “[e]ach State shall appoint” its presidential electors “in such Manner as the Legislature
16 thereof may direct,” but goes on to provide that “Congress may determine the Time of chusing the
17 Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout
18 the United States.” The Twelfth Amendment, adopted after the crisis over the election of 1800,
19 states:

20 The Electors shall meet in their respective states and vote by ballot for President
21 and Vice-President, . . . and they shall make distinct lists of all persons voted for as
22 President, and of all persons voted for as Vice-President, and of the number of votes
23 for each, which lists they shall sign and certify, and transmit sealed to the seat of
24 the government of the United States, directed to the President of the Senate;--The
25 President of the Senate shall, in the presence of the Senate and House of
26 Representatives, open all the certificates and the votes shall then be counted;--The
27 person having the greatest number of votes for President, shall be the President, if
28 such number be a majority of the whole number of Electors appointed; and if no

1 person have such majority, then from the persons having the highest numbers not
2 exceeding three on the list of those voted for as President, the House of
3 Representatives shall choose immediately, by ballot, the President. But in choosing
4 the President, the votes shall be taken by states, the representation from each state
5 having one vote; a quorum for this purpose shall consist of a member or members
6 from two-thirds of the states, and a majority of all the states shall be necessary to a
7 choice.

8 The Twentieth Amendment, adopted during the Great Depression to shorten the gap between the
9 November date on which voters cast their ballots and the inauguration of the new President,
10 specifies that “[t]he terms of the President and the Vice President shall end at noon on the 20th
11 day of January.” Although the Twentieth Amendment goes on to provide for the contingency of
12 an Acting President “[i]f a President shall not have been chosen before the time fixed for the
13 beginning of his term,” the Constitution clearly creates the expectation that any dispute over a
14 presidential election be conclusively resolved before the new President is to take office at noon on
15 January 20.¹ Moreover, in the modern era, the political urgency of resolving a disputed presidential
16 election before Inauguration Day would make untenable the contemplation of any procedures
17 thereafter to change the result of that particular presidential election.

18 Even apart from the outer limit of Inauguration Day, the weight of history suggests that
19 compliance with the federal Constitution requires a state to resolve any dispute over the choice of
20 its presidential electors, including any controversy over counting of ballots cast by citizens for a
21 presidential candidate’s slate of electors, before the nationally uniform day on which the
22 presidential electors in all states must meet to cast their official Electoral College votes. This point
23 turned out to be the decisive one in the resolution of the disputed 1876 presidential election. To
24 facilitate the resolution of that dispute, Congress adopted a special Electoral Commission

¹ The text of the Twentieth Amendment contains a potentially confusing distinction between the possibility that by noon on January 20 “a President shall not have been *chosen*” and the possibility that “the President elect shall have failed to *qualify*” (emphasis added in both instances). Having made this distinction, the Amendment goes on to state that “the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have *qualified*, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have *qualified*.” But the Amendment does not go on to state what happens if neither a President nor Vice President shall have been *chosen*. Presumably, the same power of Congress to provide by law “who shall then act as President” would apply in this circumstance.

1 comprising five Senators, five Representatives, and five Justices. The composition of the
2 Commission was evenly balanced between five Republicans and five Democrats from Congress,
3 two Justices perceived as Republican and two perceived as Democrats, with the fifth Justice to be
4 an independent. When the Justice expected to fill the independent slot declined to serve, Justice
5 Joseph Bradley was called upon to play this role. With the other members splitting seven-seven
6 along partisan lines as anticipated, Justice Bradley’s determination became dispositive. Justice
7 Bradley’s pivotal reasoning rested on the proposition that any proceedings that occur in a state
8 after the constitutionally uniform date for the casting of votes by the presidential electors are null
9 and void. “To allow a State legislature in any way to change the appointment of electors after they
10 have been elected and given their votes, would,” Justice Bradley explained, “subvert the design of
11 the Constitution in requiring all the electoral votes to be given on the same day.”² Justice Bradley
12 also made clear that his reasoning applied to judicial proceedings, as well as legislative enactments,
13 within a state: “No tampering of the result can be admitted after the day fixed by Congress for
14 casting the electoral votes.”³

15 Justice Bradley’s opinion is not binding on Congress in future elections in any formal
16 sense. Indeed, in 1960, Hawaii engaged in recount proceedings after the nationally uniform date
17 for the meeting of presidential electors that year. Whereas the state’s official votes as of that date
18 were cast for Nixon, the subsequent recount proceedings purported to change the state’s electoral
19 votes to Kennedy. But Hawaii’s electoral votes did not matter one way or the other to the outcome
20 of the 1960 presidential election; Kennedy had a majority even if Hawaii was awarded to Nixon.
21 When it came time for Congress to count the electoral votes from the states on January 6, 1961,
22 Nixon himself as the sitting Vice President—and thus President of the Senate—announced that he
23 was accepting the electoral votes from Hawaii in favor of Kennedy. In this respect, Nixon acted
24 directly contrary to the precedent set by Justice Bradley; the Hawaii votes for Kennedy were
25 entirely null and void under Bradley’s dispositive reasoning. But Nixon also publicly announced
26 that his acceptance of the Hawaii votes for Kennedy was “without the intent of establishing a
27 precedent.”⁴ Thus, what happened regarding Hawaii—inconsequential as it was to the outcome of

² THE ELECTORAL COUNT OF 1877: PROCEEDINGS OF THE ELECTORAL COMMISSION 1020, 1025 (GPO 1877).

³ *Id.* at 1024. For a discussion of the dispute over the 1876 election, see EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016), ch. 5.

⁴ 107 Cong. Rec. 290 (Jan. 6, 1961).

1 the 1960 election—cannot be seen as undermining Justice Bradley’s constitutional reasoning that
2 determined the result of the 1876 election. At the present point in U.S. history, then, the best
3 constitutional analysis is that (as Justice Bradley explained) a state is obligated to resolve all
4 disputes regarding the appointment of its presidential electors before the nationally uniform date
5 on which they must cast their official Electoral College votes.

6 *Congressionally specified dates for presidential elections.* Exercising the authority granted
7 it in Article II, Congress has set as the date for the appointment of the presidential electors “the
8 Tuesday next after the first Monday in November”⁵—what is commonly known as Election Day,
9 since it is the same day on which voters cast their ballots in congressional elections, and because
10 all states have chosen to appoint their presidential electors by a popular vote of the same electorate
11 that casts congressional ballots. Also pursuant to its Article II authority, Congress has made “the
12 first Monday after the second Wednesday in December” the nationally uniform day on which
13 “[t]he electors of President and Vice President of each State shall meet and give their votes.”⁶ The
14 arithmetic of the calendar means that there is always an interval of six weeks minus one day
15 between the Tuesday in November on which citizens cast their popular votes for presidential
16 candidates—technically, votes for presidential electors who have pledged to support their party’s
17 presidential candidate—and the Monday in December on which the duly appointed presidential
18 electors, pursuant to that popular vote in November, cast their official Electoral College votes for
19 president.

20 Six weeks (minus one day) is not a lot of time for resolving a dispute over the counting of
21 ballots in a major statewide election. Recent history confirms this commonsense point. In 2004,
22 Washington State had a disputed gubernatorial election. The state’s voters cast their ballots for
23 governor at the same time as they voted for president that year, on Tuesday, November 2. Six
24 weeks (minus one day) later, on Monday, December 13, when the presidential electors in the state
25 and all across the country met to cast their Electoral College votes, Washington’s gubernatorial
26 election remained unresolved. It was still in the midst of a statewide manual recount. That recount
27 would not end until over two weeks later, on Thursday, December 30, and the candidate who
28 prevailed in that manual recount (Christine Gregoire, the Democrat) was *not* the candidate who
29 had prevailed in the previous machine recount (Dino Rossi, the Republican). Thus, if the dispute

⁵ 3 U.S.C. § 1.

⁶ 3 U.S.C. § 7.

1 had involved a presidential rather than a gubernatorial election, and if all proceedings after
2 December 13 had been constitutionally void pursuant to Justice Bradley’s dispositive reasoning,
3 then the prevailing candidate would have been the opposite of the one whom the manual recount
4 showed the voters to have actually elected.

5 Moreover, the dispute over Washington’s 2004 gubernatorial election did not end upon
6 completion of the manual recount on December 30. Instead, a subsequent judicial contest of the
7 election was litigated in a state trial court until the following June 6, 2005, when the trial judge
8 confirmed the winner of the manual recount. The dispute could have lasted even longer, but at that
9 point the losing candidate (Rossi) declined to pursue an appeal of the trial court’s decision and
10 conceded the race.

11 Washington’s experience with its 2004 gubernatorial election was not aberrational.
12 Minnesota encountered almost exactly the same situation in its 2008 U.S. Senate election. That
13 year the state’s voters cast ballots for Senator at the same time as they voted for President, on
14 Tuesday, November 4. Six weeks (minus one day) later, on Monday, December 15, when
15 presidential electors in the state and around the nation were casting their official Electoral College
16 votes, Minnesota was still conducting its statewide manual recount of the Senate election.
17 Moreover, under Minnesota law, the effect of undertaking the manual recount was to negate the
18 previous certification of vote totals after completion of the canvass. Thus, the official count of the
19 Senate election on Monday, December 15, was zero-zero.⁷ If the election at issue had been
20 presidential rather than senatorial, then according to Justice Bradley’s analysis, Minnesota would
21 have failed to appoint any presidential electors by the constitutionally mandated date and thus
22 could cast no official Electoral College votes in the presidential election—and, most importantly,
23 could not constitutionally remedy this deficiency by any subsequent proceedings, including
24 completion of its manual recount, after December 15.

25 Minnesota’s disputed 2008 senatorial election, in fact, continued long after December 15.
26 The results of the manual recount were not certified until January 5, 2009. Then, as in Washington,
27 there followed a judicial contest in state court, which was not complete until June. This contest,
28 like that other one, confirmed the result of the manual recount, but in this case the contest

⁷ Technically, the official count stood at zero-zero-zero, since there was a significant third-party candidate who had polled about 16 percent of the vote, as well as the two major-party candidates (Al Franken, the eventual winner and a Democrat, and Norm Coleman, the Republican incumbent).

1 encompassed an appeal to the state’s supreme court as well as the litigation in the trial court. When
2 the state supreme court affirmed the trial court’s dismissal of the contest on June 30, the losing
3 candidate conceded the election.

4 Thus, in a future disputed presidential election, if a state is to comply with Justice Bradley’s
5 edict that it must settle the appointment of its presidential electors by the date on which they meet
6 to cast their Electoral College votes, the state will need to streamline the kind of recount and contest
7 procedures that Washington and Minnesota employed in 2004 and 2008, respectively. Such
8 streamlining obviously will be a daunting challenge. It will be hard enough for a state to make sure
9 that it completes all of its recount procedures by the first Monday after the second Wednesday in
10 December. But it will be especially difficult for a state to complete any judicial contest of the
11 election that might be filed after certification of the recount’s results.

12 *Congressional “Safe Harbor” provision.* If this time pressure upon states were not enough,
13 Congress has given states a compelling reason to settle a disputed presidential election even
14 sooner. In a statutory provision dating back to the Electoral Count Act of 1887 (adopted in the
15 aftermath of the disputed 1876 election), and now codified at 3 U.S.C. § 5, Congress has pledged
16 that it will accept as “conclusive”—and thus not overturn—the resolution of a disputed presidential
17 election in a particular state if two conditions are satisfied: first, the state’s “final determination”
18 of the dispute must be “made at least six days before the time fixed for the meeting of the electors”;
19 and second, “such determination” must “be made pursuant to” state “laws enacted prior to the day
20 fixed for the appointment of the electors.” The incentive that this Safe Harbor provision creates is
21 considerable: the congressional pledge to honor the state’s resolution of the dispute as “conclusive”
22 means, at least in principle, that neither the Senate nor the House of Representatives will attempt
23 (based on partisan or other considerations) to undo the state’s own determination of its presidential
24 election.⁸ But this incentive imposes an even more excruciatingly tight timetable on states. The
25 same arithmetic of the calendar means that the Safe Harbor Deadline—that is, the deadline
26 necessary for a state to obtain the benefit of the congressional pledge—is always the Tuesday in

⁸ In other words, if a state in compliance with the Safe Harbor provision has determined that Candidate X is entitled to the state’s electoral votes, and the state sends Congress a single certificate of this determination, then both houses of Congress—unless they violate the pledge in 3 U.S.C. § 5—will count the state’s electoral votes in accordance with this certificate and, accordingly, will refrain from either awarding the state’s electoral votes to a different candidate or declaring the state’s presidential election null and void and thus refusing to award the state’s electoral votes to any candidate.

1 December that is exactly five weeks after the Tuesday in November on which the citizens cast
2 their popular votes in the presidential election.

3 Obviously, resolving a disputed presidential election in five weeks is even harder than
4 doing so in six. Florida was unable to complete its proceedings within that timeframe in 2000, at
5 least not in a way compliant with the requirements of equal protection as identified by the U.S.
6 Supreme Court in *Bush v. Gore*. Whether Florida could have completed constitutionally acceptable
7 proceedings with the addition of six more days is ultimately unknowable, since the Court in *Bush*
8 *v. Gore* also ruled that Florida intended to obtain the benefit of the Safe Harbor Deadline and
9 consequently all of the state's proceedings must cease at the end of the five-week period. (Those
10 six days are 15 percent of the 41 days between Election Day in November and the day of the
11 Electoral College meeting in December.)

12 The extreme difficulty that any state would have in meeting *either* the purely statutory Safe
13 Harbor Deadline *or* Justice Bradley's constitutionally mandated deadline, which under the current
14 congressional schedule follows six days later, has caused some commentators to argue that
15 Congress should adjust the schedule to give states more time to resolve any disputed presidential
16 election that might arise in the future. One argument is that Congress should shorten or eliminate
17 the six-day period between the Safe Harbor Deadline and the date for the meeting of the
18 presidential electors. Another argument is that Congress should push back the meeting of the
19 presidential electors until late December or early January. Some observers advocate both changes.
20 Opponents of these arguments, conversely, contend that presidential transitions are difficult
21 enough as it is, with the uncertainty of a disputed presidential election causing increasing harm to
22 the country for each additional day that it remains unsettled. On this view, no change in federal
23 law should encourage a disputed presidential election to last longer than five weeks; rather, every
24 effort should be made to shorten that period to the extent possible.

25 This ALI project takes no position on these arguments and counterarguments concerning
26 the current congressional calendar for presidential elections. Instead, this ALI project accepts those
27 dates as given and endeavors to adopt a framework for the otherwise almost impossible task of
28 resolving a disputed presidential election within the existing calendar. Moreover, this ALI project
29 assumes that a state will wish to obtain the benefit of Safe Harbor status if the state is capable of
30 doing so. Although recognizing that this Safe Harbor status is optional, a state will perceive a
31 compelling case for striving to take advantage of it. In the context of a disputed presidential

1 election, there is the obvious temptation for partisanship to dictate the outcome. The Safe Harbor
2 provision is, in effect, a promise that partisanship in Congress will not override whatever the state
3 determines about its own electoral votes. Presumably, a state would find that promise intensely
4 attractive and thus try to comply with the condition necessary to activate that congressional
5 obligation. Thus, the presumption underlying this project is that a state would prefer to complete
6 its procedures for resolving a disputed presidential election within five weeks, if it is at all possible
7 for the state to do so, rather than having an extra six days to finish the task but without the benefit
8 of the congressional pledge to be bound to the outcome.

9 Consequently, the Procedures for the Resolution of a Disputed Presidential Election set
10 forth in this Part of the project endeavor to enable a state to complete all relevant proceedings
11 within the five-week period specified in the congressional Safe Harbor provision. Developing
12 these procedures has required a kind of engineering endeavor: the task has been to determine how
13 to make several interrelated components of an overall dispute-resolution process work together as
14 efficiently and expeditiously as possible, so that collectively they have a reasonable chance of
15 completion without missing the five-week Safe Harbor Deadline. Immediately following this
16 Introductory Note (and thus before § 301) are three charts designed to aid in understanding the
17 engineering choices reflected in these Procedures and the overall design that results from these
18 choices. The first is a detailed calendar of the key deadlines and other events associated with these
19 Procedures, while the other two are more general and less detailed (and thus easier to comprehend
20 on first glance). Anyone wishing to visualize the structural architecture of these Procedures would
21 be well served by consulting these charts at the same time as reading its black-letter text and
22 corresponding Comments and Reporters' Notes.

23 *The engineering challenge of enabling a state to meet the Safe Harbor Deadline.* These
24 Procedures have three main components. The first is a *recount*, defined specifically (and more
25 narrowly than in some other uses of the term) to mean solely the reexamination of ballots initially
26 counted on or before Election Day and reported as part of the Election Night preliminary returns.
27 As such, a recount does *not* include determinations concerning the eligibility of ballots not counted
28 as part of the Election Night preliminary returns. These uncounted—but still potentially eligible—
29 ballots include provisional ballots and some absentee ballots, both (a) those arriving too late for
30 inclusion in the Election Night returns but still timely under relevant state law and (b) those
31 previously deemed uncountable but whose eligibility remains subject to review.

1 The determinations concerning the eligibility of these previously uncounted ballots
2 constitute a large portion of the second main component of these Procedures, the *canvass*. Also
3 encompassed within the canvass are the review and correction of any tabulation errors or
4 discrepancies in the preliminary returns that are not corrected as part of the recount. For example,
5 in a process often referred to as “reconciliation,” the number of ballots cast at a precinct is
6 compared with the number of voters who signed the precinct’s poll books (and in many
7 jurisdictions received tickets authorizing them to cast a ballot). When these two numbers are not
8 identical, state law often authorizes local election officials to make a determination as to how the
9 discrepancy should be handled. Sometimes, the discrepancy is resolved in favor of retaining the
10 number of ballots cast, based on a judgment that the error must have been in the failure to record
11 in the poll books the presumably valid voters who cast the extra ballots. In other instances, the
12 discrepancy is resolved by randomly withdrawing from the precinct’s pool of countable ballots—
13 the figurative (or literal) ballot box—a number equal to the excess of ballots over voters. Whatever
14 state law provides for this situation, the determinations that local election officials make in this
15 regard are part of the canvass. The sum of all ballot-eligibility, reconciliation, tabulation-
16 correction, and other determinations made during the canvass results in a *certification* of the
17 canvass and its vote totals. The initial certification is made by each Local Election Authority that
18 conducts the canvass, and all of these local certifications are then accumulated in a single statewide
19 certification by the state’s Chief Elections Officer.

20 The third main component of these Procedures is the possibility of a judicial *contest* to the
21 results of the certified canvass. State law provides the grounds available for contesting the certified
22 results in an election, and these grounds can vary somewhat from state to state. But generally these
23 grounds include claims that votes counted on Election Day and included in both the preliminary
24 returns and the certified canvass were fraudulent or ineligible in some way; perhaps, for example,
25 they were ballots cast by ineligible felons (as was the case in Washington’s 2004 gubernatorial
26 election), or perhaps they were absentee ballots procured through illegal means (as in Miami’s
27 1997 mayoral election). A judicial contest is also the procedure in which to raise a claim, if such
28 a claim is available in the state at all, that sufficient disenfranchisement of eligible voters or other
29 serious mishap in the conduct of the election requires voiding the certified results in their entirety
30 (or perhaps, alternatively, statistically adjusting those results in some way).

1 To fit all three of these proceedings—recount, canvass, and contest—within the five-week
2 Safe Harbor period, some significant “engineering” innovations must be pursued. One of the most
3 significant of these is the triggering of an expedited recount, as provided in
4 § 303, upon a finding of certain specified factual conditions to exist 24 hours after the polls have
5 closed in the November presidential balloting. This expedited recount differs from the typical
6 recount, which customarily follows the certification of the canvass. This custom is based on the
7 understandable premise that there is little reason to undertake the ordeal of a recount unless and
8 until certification of the canvass shows the result of the election to be close enough to justify the
9 undertaking. But in the context of the limited five-week timeframe for a state to achieve Safe
10 Harbor status in a presidential election, waiting until the conclusion of the canvass before
11 beginning the recount is an unaffordable luxury. In fact, the first week after the polls have closed
12 is a period of time in which local election officials can recount ballots initially counted on or before
13 Election Night and, furthermore, it is a period of time in which local officials are often waiting for
14 other events to take place before they can complete the certification of the canvass. For example,
15 local election officials must give provisional voters a period of time after Election Day in which
16 to provide supplementary information that may establish the eligibility of their provisional ballot
17 to be counted. Likewise, absentee voters are often given a window of opportunity to correct clerical
18 errors concerning information that they supply on their absentee-ballot envelopes. While local
19 election officials are waiting for the receipt of such supplementary information from provisional
20 or absentee voters in the first few days after Election Day, they can undertake the task of recounting
21 ballots that already have been counted once—a task that does not require any additional
22 information. In a disputed presidential election, when every day of the short five-week Safe Harbor
23 period is precious, these first few days after Election Day can be used productively by beginning
24 the recount then, rather than waiting for the customary certification of the canvass. (The advantage
25 of reordering these two procedures in this way was brought to the attention of this American Law
26 Institute project by experienced local election officials.)

27 Another engineering decision was to prioritize ahead of the contest, both temporally and
28 in legal status, the distinct procedure for reviewing determinations made during the canvass. One
29 potential source of delay, which easily could jeopardize a state’s capacity to comply with the Safe
30 Harbor Deadline, is the duplication of litigation that can occur when issues are raised, first, in a
31 lawsuit that is denominated a judicial review of the administrative decisions that local election

1 officials make during the canvass and then, second, in a subsequent judicial contest of the certified
2 results of the canvass. Disputed elections often entail both rounds of litigation, especially because
3 one side will perceive an advantage of attempting to prevail during a judicial review of the canvass,
4 so as to avoid the heavy burden of proof usually associated with attempting to overturn the certified
5 result of the canvass in a judicial contest. Indeed, often a candidate will attempt to have a court
6 undertake a judicial review of the canvass even before its results are certified, thereby delaying the
7 certification until these judicial-review proceedings are complete. These Procedures endeavor to
8 avoid this delay, as well as the inefficient duplication of litigating the same issues twice, by
9 funneling into the judicial review of the canvass those issues suitable for such review. Once so
10 funneled, these issues are precluded from relitigation in a subsequent contest. Moreover, these
11 Procedures incentivize their funneling in this way, by eliminating any burden of proof associated
12 with certification of the canvass *as long as the issues are raised in the special procedure for review*
13 *of the canvass*. There is no need to delay certification, since appropriate issues can be raised equally
14 by either of the two competing candidates, regardless of which one is ahead in the count at the
15 time of certification.

16 The Procedures also make a single Presidential Election Court the sole forum for
17 adjudicating issues either in the special procedure for judicial review of the canvass or in the
18 subsequent contest. Thus, there is no incentive to engage in forum-shopping in the hope of finding
19 a more favorable tribunal to litigate particular claims. In this way, once the canvass is complete,
20 the overall process can move immediately to judicial review of the canvass in a streamlined
21 procedure suitable for such issues, leaving to a contest only those issues that did not arise in the
22 canvass itself and thus potentially need some additional factual development before they are ready
23 for judicial adjudication.

24 Even when the sequencing of these procedures—the recount, the canvass, and the
25 contest—is engineered in this way, these procedures are inevitably truncated compared to how
26 they would occur in a nonpresidential election not subject to the Safe Harbor or other Electoral
27 College deadlines. Truncating these procedures obviously entails a cost in terms of the ability of
28 litigants to pursue factual matters to the extent that they might if they had more time. But there is
29 no way to avoid such truncating and still finish all the procedures within the five-week Safe Harbor
30 period. The only alternative would be to abandon the effort to achieve Safe Harbor status, and even
31 so significant truncating of the recount, canvass, and contest procedures would still be necessary

1 to finish by the date of the Electoral College meeting six days later. Only by extending beyond this
2 constitutionally prescribed date, and running up towards Inauguration Day on January 20, could a
3 state avoid significant truncation of these procedures. But, again, the premise of this ALI project
4 is that a state would not wish to engage in such constitutionally treacherous conduct, and thus the
5 engineering effort has been to engage in the minimal amount of truncating necessary to enable a
6 state to obtain Safe Harbor status (since a state would want to meet the Electoral College deadline
7 of six days later anyway, and would not wish to lose the benefit of Safe Harbor status just to have
8 an extra six days of vote-counting litigation).

9 *The adoption of these Procedures into state law.* These Procedures, as set forth herein as
10 Part III of this project, have been drafted to be consistent with the Principles set forth in Part I,
11 dealing with principles of non-precinct voting, and Part II, concerning principles applicable to
12 disputed elections generally. But these Procedures also have been drafted so that they may be
13 adopted in law independently, without adoption of either Part I or II. A state thus may choose to
14 adopt these Procedures in order to address the calendaring challenge of completing a presidential
15 recount, along with ancillary litigation, by the Safe Harbor Deadline, and the state's decision to do
16 so may be entirely separate from any consideration the state might wish to give to adoption of the
17 Principles set forth in Part I or II.

18 For any state that wishes to adopt these Procedures as a means to address the challenge of
19 meeting the Safe Harbor Deadline in a disputed presidential election, it is highly preferable that
20 the method by which the state does so is to have its legislature enact a statute containing these
21 Procedures. The reason for this preference is that the state's legislature is the institution explicitly
22 empowered in Article II of the federal Constitution to adopt the procedures for the appointment of
23 a state's presidential electors. Moreover, a statute enacted by the state's legislature is the most
24 straightforward method by which a state may enact into law before Election Day a set of
25 procedures capable of earning Safe Harbor status under 3 U.S.C. § 5. Even if a state completes all
26 of its procedures concerning a disputed presidential election by the five-week deadline in 3 U.S.C.
27 § 5, the state risks losing the benefit of the congressional Safe Harbor pledge if the state's
28 procedures were not enacted into state law prior to Election Day. (As addressed in the Comment
29 to § 302, such a post-voting change in the state's ballot-counting law also risks violating the Due
30 Process Clause of the Fourteenth Amendment.) The best and most obvious way for a state to avoid

1 this risk is for its legislature to enact a statute, before Election Day, that puts these Procedures into
2 legal effect for any future presidential election.

3 If, however, a state’s legislature has failed to adopt these Procedures into legislation, it
4 conceivably may still be possible for a state to achieve Safe Harbor status if the state’s supreme
5 court previously has been authorized by state law to promulgate procedural rules for the
6 adjudication of disputes that involve the state’s judiciary. In this situation, the state’s supreme
7 court prior to Election Day in an exercise of its rulemaking authority could promulgate these
8 Procedures, thereby placing them into legal effect in the state before Election Day. If the state’s
9 supreme court did so, there would be a strong argument that the status of the Procedures in state
10 law in advance of Election Day would give these Procedures the necessary “safe harbor” status
11 under 3 U.S.C. § 5, such that the congressional pledge would be operative as long as the state
12 complied with these Procedures within the five-week deadline.

13 Accordingly, these Procedures have been drafted in a form amenable to adoption either as
14 statutory legislation or as a set of procedural rules promulgated by a state supreme court pursuant
15 to rulemaking authority (provided state law already has granted this rulemaking authority). But,
16 again, the far preferable method of adoption is a statute enacted by the state’s legislature.
17 Moreover, in either case the Procedures themselves must be adopted into state law prior to Election
18 Day if the state wishes to take advantage of the “safe harbor” benefit provided by 3 U.S.C. § 5.

1 **§ 301. Definitions**

2 (a) “Canvass” means the administrative procedure that encompasses verification of
3 the vote tabulations contained in the preliminary Election Night returns as well as
4 determination of the eligibility of previously uncounted ballots, including provisional ballots
5 and absentee ballots not included in the preliminary returns.

6 (b) “Certification” means the official declaration of the results from a counting of
7 ballots and occurring, at separate stages, both after the canvass and after completion of all
8 proceedings under these Procedures.

9 (c) “Chief Elections Officer” means the state’s highest authority, often the Secretary
10 of State and in some states a multimember body, responsible for supervising the
11 administration of elections in the state.

12 (d) “Chief Justice” means the presiding judge of the State Supreme Court.

13 (e) “Contest” means a judicial procedure that occurs after certification of an
14 election’s results, in which a candidate other than the certified recipient of the most votes
15 challenges the certified results and seeks a judicial decree either to declare the contestant the
16 duly elected winner or to void the election.

17 (f) “Day” means any and all calendar days.

18 (g) “Election Day” means the traditional day on which citizens go to the polls in their
19 neighborhood polling locations to cast ballots in a presidential election, which Congress has
20 specified to be the first Tuesday after the first Monday in November, as provided in 3 U.S.C.
21 § 1.

22 (h) “Electoral College” means the totality of all presidential electors in the United
23 States, who pursuant to the U.S. Constitution meet in their respective states on the same
24 congressionally appointed day to cast their votes for the presidency.

25 (i) “Election Night” means the nighttime hours of Election Day, after the polls have
26 closed in the state, as well as the predawn hours of the following day insofar as the state (and
27 the nation) still awaits preliminary returns of votes counted on or before Election Day and
28 expected to be reported before the night is over as part of the initial count of ballots from all
29 precincts in the state.

1 (j) “Email” means electronic transmission of written documents, using either current
2 internet-based technology or any future technology that provides a similar electronic
3 capacity to transmit written documents.

4 (k) “Local Election Authority” means the agency of government, whether a single
5 officer or a multimember body, with authority to canvass local returns, including
6 determining the eligibility of locally cast provisional ballots.

7 (l) “Preliminary returns” means the report of vote totals of ballots cast and counted
8 on Election Day at each polling location in the state, together with the report of any early
9 and absentee votes counted on (or, if permitted, before) Election Day, all of which are
10 aggregated by the Chief Elections Officer into a single set of statewide preliminary returns.

11 (m) “Presidential election” means a quadrennial general election at which the eligible
12 electorate of the state chooses a slate of presidential electors, who in turn cast their Electoral
13 College votes for the presidency.

14 (n) “Recount” means a reexamination and retallying of ballots initially counted and
15 reported as part of preliminary returns.

16 (o) “Safe Harbor Deadline” means the date, specified in 3 U.S.C. § 5, by which a state
17 must resolve any vote-counting disputes in a presidential election in order for the state to
18 receive the benefit of the congressional pledge to accept whatever resolution the state
19 achieves.

20 (p) “State” means all 50 states of the United States as well as the District of Columbia
21 (but, specifically for the purposes of these Principles, not U.S. territories, which lack
22 Electoral College votes).

23 (q) “State Supreme Court” means the state’s highest court, even if denominated other
24 than “supreme court” (as is New York’s Court of Appeals).

25 **Comment:**

26 *a. Certification.* As discussed more fully in the Comment to § 318, these Procedures entail
27 two distinct certifications, at separate stages of the overall process. The first certification occurs at
28 the end of the canvass. The second occurs upon completion of all possible proceedings under these
29 Procedures, including judicial review of the canvass and a contest of the results as certified at the
30 end of the canvass. This second certification is the final certification of the election’s outcome and

1 serves as the basis for declaring which slate of presidential electors is entitled to cast the state's
2 Electoral College votes.

3 *b. Chief Elections Officer.* In some states, a multimember body rather than a single
4 individual may exercise the statewide responsibility of supervising the administration of elections.
5 In these cases, the term “Chief Elections Officer” as used in these Procedures is intended to
6 encompass these multimember bodies.

7 *c. Day.* In counting the number of days for purposes of any deadline, these Procedures
8 include all calendar days and not solely business days. In counting the number of days after an
9 event, one day after (that is, the first day after) is the day immediately following the event. Thus,
10 for example, to determine the eighth day after an event, one starts by counting the first day after
11 the event and proceeds accordingly. If a deadline falls on the eighth day after an event, as specified
12 by the phrase “x must occur *no later than the eighth day after*” the event, then it would be
13 noncompliant with the deadline for x to occur on the ninth day; conversely, under this deadline it
14 would be permissible for x to occur on any day after the event up to and including the eighth day
15 after that event.

16 On page 192 (immediately after the Introductory Note and before § 301), the “Procedures
17 for the Resolution of a Disputed Presidential Election: Calendar of Deadlines” is provided to
18 illustrate, in calendar format, exactly on which day in relationship to Election Day and the Safe
19 Harbor Deadline each deadline established by these Procedures falls (assuming that compliance
20 with each deadline consumes the maximum available time); in so doing, the calendar format also
21 illustrates the relationship of these various deadlines to each other. In addition to this calendar, two
22 more schematic (and less detailed) charts, on pages 193 and 194, illustrate what happens during
23 each week of this five-week period, from the perspective of both the relevant government bodies
24 and the attorneys that must appear before these bodies on behalf of the competing candidates.

25 *d. Election Day.* As elaborated in Part I of this project, the traditional single day on which
26 most voters cast their ballots in an election has recently evolved into a menu of varying practices
27 among the states enabling voters to cast in-person early ballots at some specified locations (usually
28 different from their traditional neighborhood polling locations, where voting occurs on Election
29 Day), or to cast an absentee ballot in advance of Election Day without need to provide any
30 particular excuse or justification for doing so, or some combination of early and open absentee
31 voting. Election Day, however, remains the last day on which voters are permitted to cast a ballot

1 (although in some states absentee ballots cast on Election Day are permitted to arrive by mail at
2 the offices of their relevant Local Election Authority some number of days afterwards and still
3 remain eligible to be counted). For presidential (and congressional) elections, Congress has fixed
4 the date of Election Day, and accordingly these Procedures define Election Day to be the same as
5 the date designated by Congress.

6 *e. Local Election Authority.* The definition here is consistent with, but somewhat narrower
7 than, the use of the same term in Part I. Here it is necessary to define the term to refer specifically
8 to the government body's power regarding the counting of ballots, whereas in Part I it was
9 necessary to define the relevant government body as having administrative powers over the casting
10 as well as counting of ballots. Some states use separate local government bodies to administer the
11 casting and counting of ballots. For example, a state may employ a County Canvassing Board to
12 canvass the election returns and to conduct any recount that might be necessary, while the state
13 simultaneously delegates authority to administer the casting of ballots to a County Clerk (or some
14 other local office). The use of the term here is intended to apply solely to the government body
15 that engages in the functions covered by these Procedures, leaving the state free to employ a
16 different agency of local government for those aspects of election administration not covered by
17 these Procedures.

18 *f. Presidential elections.* This definition intentionally excludes presidential primaries,
19 which are not subject to the same Safe Harbor Deadline, and which raise their own distinct issues
20 concerning the timing and methods for resolving ballot-counting disputes. Ultimately, a major
21 party's presidential candidate is chosen at a national nominating convention, and the relationship
22 of that convention to antecedent primaries and caucuses is a complicated one, beyond the scope of
23 these specific Procedures.

24 *g. Recount, canvass, and contest.* These three types of proceedings, already discussed
25 preliminarily in the Introductory Note above, are defined specifically for the purpose of the
26 engineering endeavor necessary for a state to meet the Safe Harbor Deadline. Accordingly, the
27 specific definitions of these three terms, as used in these Procedures, may not conform exactly to
28 their uses in other contexts (as already noted in Part II). An understanding of how these three terms
29 are used in these Procedures is best achieved by examining the details of the following Sections
30 insofar as they employ these terms and elaborate on what is to occur in each of the three
31 proceedings.

REPORTERS' NOTE

1
2 *f. Presidential elections.* The Framers of the federal Constitution intended for the
3 mechanics of presidential elections to function very differently from the way that they quickly
4 came to function. Article II required a state's presidential electors to meet in person to cast their
5 electoral votes, and this meeting requirement was intended to facilitate the goal—and
6 expectation—of the Framers that the electors would deliberate, and then exercise independent
7 judgment, about who should become president. This meeting requirement was carried forward in
8 the Twelfth Amendment, even after partisanship prevented the original design from working as
9 intended in the election of 1800. For a discussion of the constitutional crisis over the 1800 election,
10 see EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED*
11 *STATES 70-71* (2016), and sources cited therein.

12 Notwithstanding the original design, a deeply rooted expectation has arisen that a state's
13 presidential electors are partisan agents that are supposed to vote for their party's presidential
14 candidate. Indeed, the political parties—sometimes even backed by the force of state law—have
15 required their presidential electors to pledge, under oath, to cast their official Electoral College
16 ballots on behalf of their party's presidential nominee. See *Ray v. Blair*, 343 U.S. 214 (1952)
17 (permitting state law to impose this pledge as part of the state's law for presidential primaries). A
18 "faithless elector" is one who breaks this pledge and, as this pejorative term implies, it has come
19 to be considered dishonorable for a presidential elector to exercise the kind of independent
20 judgment that the Framers originally intended. Although historically there have been isolated
21 instances of faithless electors from time to time, no presidential election has turned on the official
22 Electoral College vote of a faithless elector, and the Supreme Court has never had occasion to rule
23 on whether a faithless elector could be required to recast an official Electoral College vote so that
24 it conformed to an antecedent partisan pledge. (*Ray v. Blair* did not involve such a scenario, but
25 instead concerned only whether a party's candidate to be a presidential elector could be required
26 to make the partisan pledge in the first instance.) The 2016 presidential election involved an
27 unusually large number of faithless electors, five deviating from their pledge to support the
28 Democratic candidate Hillary Clinton and two abandoning their pledge to support the Republican
29 candidate Donald Trump (as well as three additional Democratic electors whose attempts to be
30 faithless were thwarted pursuant to applicable state laws). See Kyle Cheney, *Electoral College*
31 *sees record-breaking defections*, POLITICO, Dec. 19, 2016,
32 <https://www.politico.com/story/2016/12/electoral-college-electors-232836>. Nonetheless, given
33 the organized and unprecedented effort to convince Republican electors to choose a candidate
34 other than Trump, the fact that only two did so is a strong confirmation of the expectation that
35 electors are supposed to vote in accordance with their pledge.

36 Part III of this project, and the Procedures it sets forth, do not apply to the potential issue
37 of a faithless elector. Part III does not purport to govern the casting of official Electoral College
38 votes by the state's appointed presidential electors. Nor does it purport to govern the processes that
39 Congress itself uses, pursuant to the Twelfth Amendment and the Electoral Count Act of 1887, to
40 conduct its review and counting of the Electoral College votes as received by the states. Rather,

1 the sole focus of Part III and its Procedures is the method by which a state conclusively determines
2 which party's slate of presidential electors is the authoritatively chosen one, when the method of
3 appointment is a popular vote of the state's eligible citizenry and there is a dispute over the
4 outcome of that popular vote.

5 Bush v. Gore confirmed that a state need not appoint its presidential electors by means of
6 a popular vote. In the early years of the Republic, some state legislatures chose to retain this
7 authority for themselves, and under the Constitution a state could revert to that method of
8 appointment. For well over a century, however, the universal practice among states has been to
9 employ a popular vote of the eligible citizenry as the method of appointing a state's presidential
10 electors. Part III and its Procedures are predicated on the assumption that states will continue to
11 use this method of appointment. Part III and its Procedures would have no applicability in a state
12 that decided, in advance of the next presidential election, to change its method of appointment so
13 that the state's legislature chose the state's presidential electors directly.

14 Part III and its Procedures, however, do apply to a state that permits its legislature to
15 appoint the state's presidential electors as a fallback remedy if and when the popular vote in
16 November fails to identify a winning slate of presidential electors.⁹ Indeed, Part III and its
17 Procedures are designed to avoid reliance on that kind of fallback remedy to the greatest degree
18 possible by identifying as accurately and expeditiously as feasible which slate of presidential
19 electors is the true winner of the popular vote in November—and to do so in the circumstance in
20 which there is doubt and a potential dispute about this outcome. But simultaneously Part III and
21 its Procedures are designed to determine, also with as much clarity and legitimacy as is feasible in
22 the circumstances, when reliance on that kind of fallback remedy is unavoidable—and thus when
23 the only way for the particular state to participate in the official Electoral College vote for president
24 is for the state legislature to intervene and to appoint the state's presidential electors directly.

25 For example, suppose on the day of the Safe Harbor Deadline, the State Supreme Court
26 declares that there is a systemic problem that affected the November popular vote, such that it is
27 impossible to identify a winner of the presidential election in the state. At that point, the state faces
28 the choice of *either* not participating in the official Electoral College vote for the presidency six
29 days later *or* having the state's legislature appoint the state's presidential electors directly as a
30 fallback.¹⁰ Part III and its Procedures do not dictate which of these two options a state should
31 choose. But if implemented as designed, these Procedures will enable a state to exercise the latter

⁹ For states providing this kind of fallback, see page 302, footnote 25.

¹⁰ In this circumstance, it would be logistically infeasible for the state to hold a new popular election, which itself could be disputed, even if there were adequate time to cast, count, canvass, and potentially recount these new ballots in the six days remaining before the meeting of the presidential electors. (Conceivably, rather than appointing the state's presidential electors itself, the legislature could authorize some other body to quickly exercise this appointment authority. The legislature even could lodge this appointment authority in the Presidential Election Court, although the exercise of this appointment authority would not be a traditionally judicial or adjudicatory function. These Procedures have been drafted to give a state maximum flexibility in its choice of a particular fallback mechanism in the event it is necessary to appoint the state's presidential electors because the November election failed. Consistent with the overall approach of these Procedures, the state legislature should make this choice concerning the fallback mechanism in advance of the November election.)

1 option if the circumstance arises in which the November popular vote has been rendered
2 inoperable.

3 It should be noted, moreover, that Part III and its Procedures are usable in a state that
4 chooses not to employ a statewide winner-takes-all popular vote as its method of appointing its
5 presidential electors, but instead opts for some sort of districting or proportional basis for allocating
6 its Electoral College votes. Currently, all states but two (Maine and Nebraska) use a statewide
7 winner-take-all scheme for appointing presidential electors, and these Procedures have been
8 designed with the expectation that this scheme will continue to predominate. Nonetheless, with
9 minor modifications to the mechanism for triggering an Expedited Presidential Recount set forth
10 in § 303, these Procedures would be fully functional in a state, like Maine or Nebraska, that
11 allocates at least some of its Electoral College vote on the basis of the state's congressional
12 districts. If there were a dispute about which presidential candidate won the popular vote in that
13 congressional district, and if determining the result of the presidential election in that district was
14 necessary to identify which presidential candidate won a majority of (pledged) Electoral College
15 votes, then the triggering mechanism of § 303 could apply just as it would if the dispute concerned
16 presidential electors appointed based on the result of a statewide winner-take-all popular vote. The
17 Procedures, with modest revision, could also work if some state in the future chose to allocate its
18 Electoral College votes, not on the basis of congressional districts, but instead on a proportional
19 share of the statewide popular vote (rather than winner-take-all).

20 These Procedures also are potentially employable if enough states adopt the pending
21 National Popular Vote plan for the plan to take effect. Under that plan, a participating state agrees
22 to award all of its Electoral College votes *not* to the winner of its own statewide popular vote, but
23 instead to the winner of the overall national popular vote. That plan purports to take effect when
24 agreed to by enough states, whose combined allotment of Electoral College votes equals or exceeds
25 the margin of 270 currently necessary for an Electoral College majority under the Twelfth
26 Amendment.¹¹ Were that to occur, then any state's popular vote could be relevant to determining
27 whether a presidential candidate won a majority of Electoral College votes. If there were doubt
28 about the total popular vote for the competing candidates in a particular state sufficient to cast
29 doubt on which candidate would win an Electoral College majority, then under § 303 these
30 Procedures could be triggered in any state contributing to that doubt. To be sure, potentially that
31 could be a large number of states, and these states need not themselves be the ones that are
32 signatories to the National Popular Vote pact. Still, any state that adopted these Procedures could
33 employ them to resolve uncertainty about the outcome of a presidential election in which the
34 National Popular Vote plan was in effect. (This observation is not intended to express an opinion
35 on the merits of the National Popular Vote plan as a matter of electoral policy; rather, it is simply
36 to note the extent of Part III's potential applicability.)

37 One final note on terminology relevant to presidential elections: the term "Electoral
38 College" does not appear in the Constitution. But, by longstanding common usage, the term has

¹¹ Currently, 11 states and the District of Columbia, amounting to 172 Electoral College votes, have enacted legislation to adopt the National Popular Vote plan: <http://www.nationalpopularvote.com>.

1 come to stand for the mechanism that the Constitution, including the Twelfth Amendment, uses
2 for presidential elections. This Part reflects that common usage and, where appropriate, employs
3 it accordingly. Often, the term “Electoral College” is used to refer collectively to all 538 electoral
4 votes, and this Part does the same. But, of course, all 538 presidential electors never meet
5 altogether in one place at the same time. Instead, as discussed above, the presidential electors of
6 each state meet separately in their own respective states—although all these meetings occur on the
7 same day, as required by Article II of the Constitution. Thus, the term “Electoral College meeting”
8 refers to these state-specific events, although in plural form it can refer collectively to all 51 of
9 these distinct meetings that occur on the same date. For purposes of Part III and its Procedures, it
10 is intended that the particular context in which the term “Electoral College” is used provide
11 additional clarity, as necessary, on its intended meaning.

12 § 302. Applicability and Objective

13 (a) **The provisions of these Procedures shall take effect as the law of the state upon**
14 **their explicit enactment by the state legislature or, in the event that the State Supreme Court**
15 **has the requisite rulemaking authority under the state’s constitution and laws, upon their**
16 **explicit promulgation by the State Supreme Court pursuant to this rulemaking authority,**
17 **whichever method of adoption has been employed, and are fully applicable to the next**
18 **presidential election thereafter.**

19 (b) **In any particular presidential election, the specific expedited elements of these**
20 **Procedures become operational immediately upon the declaration of the Chief Elections**
21 **Officer, as set forth in § 303.**

22 (c) **The overriding purpose of these Procedures is to enable the state to complete a**
23 **recount, canvass, and any contest of a presidential election, including all related**
24 **administrative and judicial proceedings concerning the counting of ballots in a presidential**
25 **election, in compliance with the Safe Harbor provision of 3 U.S.C. § 5.**

26 (d) **Whenever an expedited recount has been declared under § 303, it shall be the**
27 **highest priority of every state official involved with the implementation of these Procedures**
28 **to comply with the Safe Harbor Deadline of 3 U.S.C. § 5 and with every subsidiary deadline**
29 **set forth in these Procedures, all of which are aimed at assuring Safe Harbor compliance.**

30 (e) **Whenever an expedited recount has been declared under § 303, completion of**
31 **these Procedures takes precedence over any other recount, canvass, contest, or other**
32 **proceeding that may be necessary for any other election on the same ballot, and any ballot-**
33 **eligibility or other determinations made as part of these Procedures that have applicability**

1 **to another election shall be binding on that other election unless state law elsewhere expressly**
2 **provides otherwise.**

3 **(f) The adoption of these Procedures into state law in advance of the first presidential**
4 **election to which they shall be applicable, as required in subsection (a), has the objective of**
5 **maintaining consistency with the principle that the rules for counting ballots remain**
6 **unchanged after the ballots to be counted have been cast.**

7 **Comment:**

8 *a. Adoption of these Procedures as the law of the state.* As stated in the Introductory Note,
9 it is highly preferable that these Procedures become adopted as the law of the state by means of
10 legislative enactment. Nonetheless, it is also possible that they may become adopted as state law
11 through promulgation by the state’s supreme court as an exercise of the court’s rulemaking
12 authority, if such authority exists. Regardless of the particular method of their adoption, it is
13 imperative that these Procedures take effect as the law of the state prior to the casting of ballots by
14 voters in the presidential election to which these Procedures shall apply. (If a state ordinarily delays
15 the effective date of an enacted statute for some period of days, that delay is not problematic for
16 the purposes of these Procedures as long as the delay does not extend until Election Day of the
17 next presidential election. When such a situation would occur, and if the state has the capacity to
18 enact legislation on an expedited or emergency basis, so that the legislation takes effect
19 immediately upon enactment, it is hereby recommended that a state employ this special method of
20 legislation so that these Procedures take effect before Election Day.) Having these Procedures in
21 effect as part of state law prior to Election Day is necessary to assure that utilization of the
22 Procedures will enable the state to take advantage of the Safe Harbor provision of 3 U.S.C. § 5,
23 which requires that a state’s “laws” for resolving “any controversy or contest concerning the
24 appointment of all or any of the [state’s] electors” be “enacted prior to the day fixed for the
25 appointment of the electors” in order for them to be conclusively binding upon Congress in its
26 counting of Electoral College votes under the Twelfth Amendment.

27 This Section draws a distinction between, *first*, the Procedures collectively becoming
28 effective prior to Election Day, and thus being consistent with the requirements for Safe Harbor
29 status, and, *second*, particular expedited elements of these Procedures becoming operational only
30 upon a declaration of the state’s Chief Elections Officer. There is no reason for a state to undertake
31 the extraordinary and hugely arduous effort of these expedited proceedings unless the state—and

1 the nation as a whole—confronts the situation of an unsettled presidential election 24 hours after
2 Election Day. Otherwise, as almost always is the case, a state can proceed with the canvass in a
3 presidential election according to its normal timetable. If there happens to be the need for a recount
4 in a nonpresidential race on the ballot in a presidential-election year, the state can hold that recount
5 after completion of the canvass (if that is the state’s customary practice). The state can also permit
6 a subsequent judicial contest of the nonpresidential race to extend indefinitely for months—as was
7 the case in Washington for its 2004 gubernatorial election and in Minnesota for its 2008 U.S.
8 Senate election. Part II of this project, among its concerns, addresses the issue of extended
9 litigation of vote totals in nonpresidential elections. But whatever policy choice a state wishes to
10 make concerning the amount of time available for litigating the result of a nonpresidential
11 election—including the specific policy choice of whether or not to adopt Part II of this project—
12 the conventional practices (as reflected by Washington in 2004 and Minnesota in 2008) are simply
13 not feasible in a presidential election.

14 Thus, there needs to be a mechanism for distinguishing between the ordinary elections, for
15 which the conventional practices can continue to occur (if a state so chooses, even after considering
16 alternatives as discussed in Part II), and the extraordinary situation of an unsettled presidential
17 election, which requires special expedited proceedings. (Even if a state chooses to adopt some form
18 of expedited procedures to resolve a vote-counting dispute in a particular type of nonpresidential
19 election—for example, a gubernatorial election—it is unlikely that the state would wish the
20 timetable to be as accelerated as Congress has required for presidential elections. In other words,
21 suppose a state were to enact expedited procedures that required the resolution of a disputed
22 gubernatorial election to occur conclusively by December 31. Those expedited procedures would
23 achieve resolution over six months sooner than the process that Washington used for its
24 gubernatorial election in 2004. Yet even accelerating the process that much would reach closure
25 *24 days after the Safe Harbor Deadline that year (and thus over three weeks later)*. Thus, even a
26 state that set December 31 as the deadline for resolving a disputed gubernatorial election, and
27 designed special procedures accordingly, would still need to adopt the distinct Procedures set forth
28 here in Part III of this project in order to handle the special exigencies of a disputed presidential
29 election.)

30 Moreover, by definition, it is impossible to know whether the winner of a presidential
31 election remains undetermined after Election Night (and thus whether there is need for the

1 expedited elements of these Procedures) until after ballots have been cast on Election Day.
2 Accordingly, the triggering of these expedited proceedings (upon declaration of the state’s Chief
3 Elections Officer) cannot possibly occur prior to Election Day. Even so, it need not be the case
4 that the triggering of these expedited proceedings inherently deprives a state of any possibility of
5 obtaining Safe Harbor status. On the contrary, as long as the triggering of these expedited
6 proceedings occurs pursuant to state law specified in advance of Election Day—so that the law
7 makes clear when such triggering shall occur—then the triggering itself satisfies the Safe Harbor
8 requirement that it occur pursuant to state law adopted and in effect before Election Day.
9 Moreover, and even more importantly, the specific expedited procedures that are triggered in this
10 way are themselves set forth in advance of Election Day, with all the notice that such advance
11 promulgation provides, and thus are not an instance of law for the adjudication of ballot-counting
12 disputes adopted only after the disputed ballots have been cast. In sum, this Section provides that
13 these Procedures will be in effect as state law in advance of Election Day, with the triggering of
14 expedited proceedings to occur after Election Day according to specifically identified conditions
15 set forth in § 303 of these Procedures, which shall have been adopted and in effect prior to Election
16 Day.

17 *b. Compliance with due process.* The requirement that these Procedures be adopted in
18 advance of the first presidential election to which they will apply is necessary not only to enable
19 the state to take advantage of Safe Harbor status under 3 U.S.C. § 5, but also to assure compliance
20 with the Due Process Clause of the U.S. Constitution. Federal courts have interpreted the due-
21 process requirement to include a principle that constrains a state from changing the rules for
22 counting ballots after they have been cast. The concern is that such change, in addition to deviating
23 unfairly from the expectations of voters about the rules governing their ballots, may reflect an
24 effort to manipulate the count in favor of a particular party or candidate. These Procedures have
25 been drafted to maintain fidelity to this fundamentally important due-process principle. They
26 embody the goal of detailing as clearly and specifically as possible in advance the procedures that
27 will apply in the event that a ballot-counting dispute arises in the context of a presidential election,
28 so that there are no surprises about the applicable procedures to candidates and voters, and so that
29 these procedures cannot be manipulated to the partisan advantage of one candidate or another.
30 Accordingly, adoption and implementation of these Procedures should minimize the risk that a

1 federal court would find warrant for holding that the state has violated due process in its
2 adjudication of a presidential ballot-counting dispute.

3 *c. The role of the federal judiciary and the importance of non-disruption of these*
4 *Procedures insofar as they operate as anticipated.* The possibility that a federal court might invoke
5 due process as the basis for invalidating a state's procedures for adjudicating a ballot-counting
6 dispute is one element of a broader point concerning the relationship of potential proceedings in
7 both state and federal court regarding the same disputed ballots. Simultaneous, even conflicting,
8 litigation in both state and federal court entails the probability of disruption that will cause a state
9 to miss the Safe Harbor Deadline and even jeopardize the state's ability to hold the meeting of its
10 presidential electors on the constitutionally required day. In light of this concern, these Procedures
11 are intended to provide an orderly mechanism to enable a state to adjudicate a disputed presidential
12 election without need for federal-court intervention.

13 In this regard, Part III and its Procedures have been crafted with the recognition that, in a
14 genuinely disputable presidential election (where there are credible issues worthy of litigation that
15 could determine which candidate is the winner of the White House), the competing candidates will
16 consider employing—and likely end up employing—every avenue of judicial process that is
17 potentially available for the adjudication of these issues, with each candidate focusing especially
18 on those forums perceived to be more favorable to the candidate (or the candidate's political party).
19 One of the most important recent developments in American election law, epitomized by *Bush v.*
20 *Gore* itself, is the power of the federal judiciary to invoke the Fourteenth Amendment as a ground
21 for supervising the counting of ballots by institutions of state governments, including state courts.
22 These Procedures, insofar as they are adopted as elements of state law, are of course subject to the
23 supremacy of federal law; and the jurisdiction of the state judiciary, including the state supreme
24 court, is ultimately subject to the jurisdiction of the U.S. Supreme Court on any issue of federal
25 law, as *Bush v. Gore* also illustrates. Thus, these Procedures in no way purport to do what they
26 obviously could not do given federal supremacy: deprive the federal judiciary of the authority that
27 it possesses to require that state vote-counting processes comply with the demands of the
28 Fourteenth Amendment.

29 Even so, it is important to recognize that federal-court interference with a state's vote-
30 counting procedures may be controversial and perhaps counterproductive in terms of the values of
31 producing a fair and accurate count in a timely manner. *Bush v. Gore* itself was intensely

1 controversial, and other instances of federal-court intervention in a state's vote-counting
2 procedures have caused considerable delay in the resolution of the affected elections. Delay, of
3 course, is particularly problematic in the context of the limited 35-day period for a state to achieve
4 Safe Harbor status in a disputed presidential election—or the slightly longer 41-day period before
5 the constitutionally required meeting of the presidential electors in all states. To be sure, if a state's
6 procedures for resolving a disputed presidential election fall below the standards of the Fourteenth
7 Amendment, then it may be incumbent upon the federal judiciary to intervene to invalidate and, if
8 possible, rectify the Fourteenth Amendment violation, even recognizing the delay (including
9 potential jeopardy to Safe Harbor status) that the federal-court intervention causes. But an essential
10 component of these Procedures is that they are designed with the aim of satisfying applicable
11 Fourteenth Amendment standards. Thus, if a state employs these Procedures and adheres to them
12 in their implementation, then the state reasonably should be able to expect that the federal judiciary
13 will not interfere with their operation.

14 To reiterate and underscore this point for emphasis, given its particular importance, a
15 federal court should do nothing to delay any element of these Procedures insofar as they are being
16 followed by the relevant institutions of state government, including the state's Presidential Election
17 Court, according to their provisions. A federal court should not issue a Temporary Restraining
18 Order (or preliminary injunction) that disrupts the anticipated operation of these Procedures, even
19 for a brief period of time. All of the deadlines included in these Procedures have been carefully
20 considered, are intricately connected with each other, and have no margin of adjustability, given
21 all that needs to occur within the limited 35-day period. For a federal court to disrupt the schedule
22 set forth in these Procedures, even if only by 24 hours, is to undo the entire engineering endeavor
23 that these Procedures embody. Thus, there would need to be particularly good reasons for a federal
24 court to engage in such disruption, and such sufficient grounds presumably would exist only if
25 these Procedures were *not* being followed as intended.

26 In the heat of the battle over the outcome of a presidential election, the federal judiciary
27 undoubtedly can expect one side to seek its assistance in disrupting the operation of these
28 Procedures. One side, after all, will perceive itself to be in the weaker position under the relevant
29 vote-counting provisions of state law. As long as these Procedures are faithfully followed,
30 however, the federal judiciary should refrain from interfering with an effort to obtain Safe Harbor
31 status. Rather, the federal judiciary should let the Procedures play out to the end of their 35-day

1 schedule. If at that point the federal judiciary firmly believes that some fundamental unfairness in
2 violation of the Fourteenth Amendment taints the vote-counting resolution achieved by these
3 Procedures, then the federal judiciary can provide a remedy.

4 A federal court's alteration of a state's procedures for adjudicating a ballot-counting
5 dispute would deprive the state of Safe Harbor status. This is true even if the federal court were to
6 complete its intervention well in advance of the 35-day Safe Harbor deadline. The reason is that
7 the federal court's alteration of the state's rules would be a change from the state's rules as they
8 existed on Election Day. Accordingly, the state would fail to comply with the independent
9 condition set forth in 3 U.S.C. § 5 necessary for achieving Safe Harbor status: the use of the rules
10 that existed on Election Day. Completion of the adjudication within 35 days would make no
11 difference. (Only if a federal court's intervention into a state's adjudicatory proceeding would *not*
12 cause a deviation from preexisting state law concerning the counting of the presidential ballots
13 would this separate problem under the Safe Harbor provision not arise.) Given this reality, a federal
14 court should provide a state with every chance of achieving Safe Harbor status and intervene only
15 after the state has deprived itself of this opportunity, by missing the 35-day deadline. At that point,
16 with Safe Harbor status no longer a possibility, the federal court can issue a decree to enforce
17 whatever federal interests are at stake in the adjudication of the dispute over the counting of the
18 state's presidential ballots. (As long as the federal court did not disrupt the state's proceedings, the
19 federal court could hold parallel proceedings for the purpose of apprising the federal court of
20 potential issues and relevant facts, so that the federal court would be in a position to issue a decree
21 shortly after expiration of the Safe Harbor Deadline yet still in advance of the meeting of the state's
22 presidential electors.)

23 Depending upon the particular federal issue raised, the federal court's remedy, if issued
24 within the six-day period after the Safe Harbor Deadline but before the meeting of the state's
25 presidential electors, could be to declare certain ballots counted, which would make a particular
26 candidate the winner of the presidential election in the state. If so, absent further intervention from
27 the state's legislature, then the federal-court order would have the effect of determining which
28 presidential electors were duly authorized to cast the state's Electoral College votes on the
29 congressionally appointed day. Alternatively, the federal-court decree conceivably might void the
30 result of the state's presidential election, thereby forcing the state legislature to invoke its authority
31 to provide for an alternative means of appointing the state's presidential electors. In any event, the

1 federal judiciary, especially after 2000, should recognize the danger of being drawn into the
2 partisan fight between the two presidential campaigns and thus should be wary of finding the
3 existence of a Fourteenth Amendment violation except when the federal-court ruling commands
4 sufficient judicial consensus to avoid being itself characterized as tainted by partisanship.

5 *d. Relationship of these Procedures to other recounts or disputed elections occurring at*
6 *the same time.* It is possible that a state may have multiple unresolved elections simultaneously,
7 with the same ballots needing to be recounted for one election also needing to be recounted for a
8 different election (or the question of a ballot's eligibility relevant to both elections). Indeed, when
9 one considers all the different elections that occur in a state on the same Election Day, it is quite
10 probable that if the presidential election remains unresolved, then so too does some other election
11 somewhere in the state. This other unresolved election, after all, need not involve a statewide office
12 (like governor), but instead easily could involve a local office (like mayor or a seat on a city
13 council).

14 Quite clearly, an unresolved presidential election is more urgent than any other type of
15 unresolved election. This would be true even if the other unresolved election was a gubernatorial
16 or U.S. Senate race, but it is certainly true for local races. Accordingly, these Procedures explicitly
17 establish that they have priority over whatever proceedings might be applicable to other unresolved
18 elections at the same time. Those other proceedings must remain suspended until completion of
19 these Procedures concerning the presidential election. That said, the results of these Procedures
20 can be incorporated into the proceedings concerning nonpresidential elections to avoid duplication
21 of effort. For example, as part of the canvass under § 310, each Local Election Authority will make
22 a determination concerning the eligibility of all provisional ballots within its jurisdiction. Those
23 determinations may also be relevant to another unresolved election, either another statewide race
24 or a local race. If so, then there is no need for a separate proceeding to determine whether these
25 same provisional ballots will be counted in that other election. Rather the determination made
26 under § 310 concerning their eligibility for the presidential election can also govern in the counting
27 of ballots for that other election. This Section provides that such rulings made pursuant to these
28 Procedures will apply in this way to other unresolved races—unless a separate provision of state
29 law expressly declares otherwise.

30 To be sure, some determinations made concerning the presidential election will not be
31 applicable to other races. For example, in a recount of the presidential election an examination of

1 optical-scan ballots to determine whether ovals contain a mark that constitutes a vote for a
2 presidential candidate will not apply to any other election on the same ballot that also may be
3 unresolved and thus require a recount. For sake of efficiency, a Local Election Authority may wish
4 to conduct the nonpresidential recount at the same time as it conducts the presidential recount
5 under § 307. (Suppose the state needs to conduct both a presidential and gubernatorial recount.
6 Each Local Election Authority might prefer to examine each ballot once, looking at both the
7 presidential and gubernatorial vote on that ballot, rather than conducting two entirely separate
8 recounts of the same set of ballots.) These Procedures permit a Local Election Authority to conduct
9 a presidential and nonpresidential recount simultaneously *only to the extent that the Local Election*
10 *Authority is able to do so in compliance with all the provisions of these Procedures, including*
11 *meeting all of the strict deadlines in these Procedures.* If there is any risk that the Local Election
12 Authority would be unable to meet the deadlines in these Procedures if it conducts both the
13 presidential and nonpresidential recounts simultaneously, then it must defer conducting the
14 nonpresidential recount until after it completes the presidential recount.

15 In some instances, there may be an inevitable scheduling conflict between these Procedures
16 and proceedings necessary for another unresolved election. The same ballots cannot be in two
17 different courtrooms at the same time. Thus, for example, pursuant to these Procedures, the
18 Presidential Election Court may be conducting a review of disputed ballots under § 308 or § 313.
19 If so, then another court that may have jurisdiction over a ballot-counting dispute in a
20 nonpresidential election will have to wait until the Presidential Election Court has completed its
21 review of the ballots under these Procedures.

22 **REPORTERS' NOTE**

23 *a. The potential role of federal courts in the resolution of a state's vote-counting dispute.*
24 No issue looms larger over the ability of a state to complete all of its proceedings for a disputed
25 presidential election by the Safe Harbor Deadline—whether the state uses these Procedures or
26 otherwise—than the possibility that the federal judiciary will intervene in the middle of the state's
27 proceedings. If the federal court does intervene, then a state is no longer in control over whether it
28 will be able to complete its own proceedings before the Safe Harbor clock runs out. The federal
29 judiciary can order the state to redo some of its proceedings, thereby taking extra time that would
30 push the state beyond the Safe Harbor Deadline. (Indeed, that kind of “redo” order is what the four
31 dissenters in *Bush v. Gore* wanted, instead of the majority's decree to shut the process down in
32 order to finish before Safe Harbor time expired.) Or a lower federal court might enjoin certification
33 of the canvass, notwithstanding a deadline to do so under state law, in order to give the federal

1 court time to rule on constitutional claims raised about the counting of ballots during the canvass.
2 That kind of federal-court injunction is what halted an Ohio election for more than 20 months—
3 obviously long past what would have been the Safe Harbor Deadline if it had been a presidential
4 election. See *Hunter v. Hamilton County Board of Elections*, 850 F. Supp. 2d 795 (S.D. Ohio)
5 (appeal dismissed July 12, 2012).

6 The competing presidential candidates, of course, will attempt to use the federal judiciary
7 to their advantage if they perceive it in their strategic interest to do so. Consequently, there
8 inevitably is potential tension between the jurisdiction of the federal judiciary and the state's own
9 institutions in resolving a dispute over the counting of ballots in the presidential election—and this
10 tension is susceptible to manipulation and exploitation for partisan purposes. Although the power
11 of the federal judiciary under the federal Constitution cannot be negated simply by the
12 improvement of state procedures under state law, the occasion for the exercise of those federal
13 powers may diminish, as a state amends its law to put its own ballot-counting house in order (so
14 to speak). Insofar as Part III and its Procedures reflect a concerted effort to make the mechanism
15 for a state's counting of presidential ballots as sound as possible, adoption of these Procedures by
16 a state should be a signal to the federal judiciary to think carefully before intervening in a manner
17 that would disrupt the state's efforts to complete its ballot-counting process in time (and in a
18 manner) to obtain Safe Harbor status.

19 With this general observation in mind, it is worth reflecting on the historical status of the
20 proposition that the federal judiciary might involve itself in a ballot-counting dispute. Although
21 anticipated by Justice John Marshall Harlan in dissent in 1900, see *Taylor v. Beckham*, 178 U.S.
22 548, 585 (1900), this proposition did not become governing law until the end of the 20th century.
23 Moreover, even as it took root, it was potentially tempered by the availability of the abstention
24 doctrine (and other gate-keeping) devices in order to protect the ability of a state to administer its
25 own ballot-counting process without undue interference.

26 Prior to the transformation of the political-question doctrine in *Baker v. Carr*, 369 U.S. 186
27 (1962), and with it the flourishing of the one-person-one-vote requirement of the Fourteenth
28 Amendment as interpreted in *Reynolds v. Sims*, 377 U.S. 533 (1964), there was no role for the
29 federal judiciary in the litigation of vote-counting controversies. Indeed, the U.S. Supreme Court
30 explicitly repudiated any such role for the federal judiciary in *Taylor v. Beckham*, which involved
31 a claim that ballot-box stuffing in Kentucky's 1899 gubernatorial election amounted to a
32 Fourteenth Amendment violation. The Court confirmed this jurisdiction-negating interpretation of
33 the Fourteenth Amendment in *Snowden v. Hughes*, 321 U.S. 1 (1944), and the unequivocal
34 command of these precedents is what caused Justice Hugo Black to order dismissal of the federal-
35 court suit that sought to overturn the ballot-box stuffing on behalf of Lyndon Johnson in his 1948
36 bid for the Senate. See EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED*
37 *ELECTIONS IN THE UNITED STATES* 214-215 (2016).

38 This longstanding jurisprudence, however, did not survive the transformation in election
39 law that *Baker v. Carr* and *Reynolds v. Sims* wrought. Although those Warren Court precedents
40 specifically concerned the apportionment of seats in a state's legislature, and not the counting of

1 ballots, the essential principle that all eligible voters equally deserve fair electoral rules—which is
2 what underlies those precedents—eventually was applied in the context of vote-counting
3 controversies, thereby empowering federal courts to supervise a state’s vote-counting fairness.
4 See, e.g., *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (state-court invalidation of absentee
5 ballots after they are cast violates the Fourteenth Amendment when state election officials, relying
6 on explicit state statutes, instructed voters that they were entitled to cast those absentee ballots);
7 *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995) (to count an absentee ballot that is invalid under
8 explicit state law violates the Fourteenth Amendment). In *Bush v. Gore*, the U.S. Supreme Court
9 itself would apply those Warren Court precedents in this way for the first time, but the lower
10 federal courts already had done so for over two decades.

11 Moreover, in adjudicating these Fourteenth Amendment claims concerning a state’s vote-
12 counting fairness, the lower federal courts sidestepped various procedural issues raised in an effort
13 to prevent their consideration of the merits of these claims. For example, the so-called “*Rooker–*
14 *Feldman* doctrine” was raised, arguing that federal-court adjudication of the Fourteenth
15 Amendment claims would amount to an attempt to revise a state-court judgment in an original,
16 rather than appellate, federal-court suit. But the *Rooker–Feldman* argument was defeated simply
17 by filing the federal-court suit in the name of voters who were not parties to the state-court
18 proceedings. See, e.g., *Roe v. Alabama*, 43 F.3d at 580.

19 The argument was also made that a federal court should abstain from adjudicating
20 Fourteenth Amendment claims concerning the counting of ballots while state-court litigation over
21 the counting of those same ballots remains pending. This argument carried some force, but only
22 deferred the federal court’s ultimate ruling on the Fourteenth Amendment claims. Moreover, the
23 federal court could retain jurisdiction while the matter remained under consideration in state court,
24 and the federal court could even go so far as to enjoin certification of the election until after the
25 court was finished adjudicating the Fourteenth Amendment issues. See, e.g., *Roe v. Alabama*, 43
26 F.3d at 582-583.

27 In the disputed presidential election of 2000, there was lower federal-court litigation of
28 Fourteenth Amendment claims as well as the U.S. Supreme Court’s review of the Florida Supreme
29 Court’s rulings in both *Bush v. Palm Beach Canvassing Board* and *Bush v. Gore*. In *Siegel v.*
30 *Lepore*, 234 F.3d 1163 (11th Cir. 2000) (en banc), the Bush campaign on Fourteenth Amendment
31 grounds sought a federal-court injunction against the manual recounts that the Gore campaign had
32 asked the canvassing boards of four Florida counties to undertake. On December 6, 2000, the
33 Eleventh Circuit (in an 8-4 vote) affirmed the denial of the requested injunction, but it did so not
34 for jurisdictional reasons but rather specifically on the ground that the Bush campaign, at least at
35 that stage of the proceedings, had failed to demonstrate an irreparable injury that would justify
36 enjoining the recounting of ballots. “At the moment, the candidate Plaintiffs (Governor Bush and
37 Secretary Cheney) are suffering no serious harm, let alone irreparable harm, because they have
38 been certified as the winners of Florida’s electoral votes notwithstanding the inclusion of manually
39 recounted ballots.” *Id.* at 1177.

1 In this federal-court lawsuit, the Eleventh Circuit considered—but rejected—jurisdictional
2 arguments raised against its reaching the merits of Bush’s claim for injunctive relief. As to the
3 *Rooker–Feldman* doctrine, the Eleventh Circuit ruled it inapplicable because there was no pending
4 state-court judgment that the federal-court plaintiffs were attempting to undo (the U.S. Supreme
5 Court, as of that date, having already vacated the first Florida Supreme Court decision in *Bush v.*
6 *Palm Beach Canvassing Board*). See *Siegel v. Lepore*, 234 F.3d at 1172. The Eleventh Circuit also
7 observed: “The parties to this case are not the same parties that appeared before the Florida
8 Supreme Court.” *Id.* n.5.

9 The abstention doctrine was also raised in the Eleventh Circuit litigation over the 2000
10 presidential election, but the Eleventh Circuit found no basis to abstain—and on this point, as
11 concerning the *Rooker–Feldman* doctrine, the Eleventh Circuit was unanimous. The Eleventh
12 Circuit considered both the *Burford* and *Pullman* strands of the abstention doctrine, but found both
13 strands inapplicable. *Burford* abstention concerns the protection of state administrative processes
14 from federal-court interference. The Eleventh Circuit saw no risk of the Bush campaign’s lawsuit
15 interfering with Florida’s administration of its recount laws, since “the crux of Plaintiffs’
16 complaint is the absence of strict and uniform standards for initiating or conducting such recounts.”
17 *Siegel v. Lepore*, 234 F.3d at 1174. *Pullman* abstention exists to give state courts the chance to
18 resolve a matter without need for federal-court involvement. The Eleventh Circuit acknowledged
19 that *Pullman* presented “the most persuasive justification for abstention” in the specific context of
20 the case, but ultimately concluded that abstention was “inappropriate” because “Plaintiffs allege a
21 constitutional violation of their voting rights.” *Id.* at 1174. If the Eleventh Circuit is correct on this
22 point, it would mean that *Pullman* abstention is never justified when one side in a campaign claims
23 a Fourteenth Amendment violation in the counting of ballots.

24 Since 2000, the lower federal courts have been mixed on whether to abstain in vote-
25 counting cases when disputes over the same ballots are pending in state court. The Sixth Circuit,
26 for example, following the Eleventh Circuit’s lead, refused to abstain from addressing Fourteenth
27 Amendment claims concerning the rejection of provisional ballots in a 2010 Ohio election. *Hunter*
28 *v. Hamilton County Board of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). The Sixth Circuit said
29 that *Pullman* abstention “is appropriate only when state law is unclear” and the state supreme court
30 had already clarified that under state law the disputed provisional ballots should not be counted.
31 *Id.*

32 By contrast, in the litigation over the counting of write-in ballots in Alaska’s 2010 U.S.
33 Senate election, the federal district court invoked *Pullman* abstention to wait until state tribunals
34 had resolved state-law claims concerning those same ballots. *Miller v. Treadwell*, 736 F. Supp. 2d
35 1240, 1242 (D. Alaska 2010). The federal court, however, enjoined certification of the election
36 until after completion of both the state and federal judicial proceedings over the ballots. Once the
37 Alaska Supreme Court conclusively resolved all state-law issues over the write-in ballots, ruling
38 them eligible to be counted even if they contain misspellings of incumbent Senator Murkowski’s
39 name, *Miller v. Treadwell*, 245 P.2d 867 (Alaska 2010), the federal district court went on to

1 consider (and reject) the pending Fourteenth Amendment claims. At that point, the federal court
2 lifted its injunction against certification of the election.

3 The litigation over Alaska's election ended relatively quickly. The Alaska Supreme Court
4 issued its decision on December 22, with the federal district court's dissolution of its injunction
5 on December 28. Thus, there was no judicial barrier to Senator Murkowski presenting her
6 certificate of election at the beginning of the new Congress on January 3, 2011. But that speed
7 would not have been sufficient for a presidential election. December 22 was 50 days after Election
8 Day that year (November 2)—nine days later than the date for the meeting of the presidential
9 electors if it had been a presidential-election year, and a full 15 days after what would have been
10 the Safe Harbor Deadline (again, always 35 days after Election Day). The federal-court ruling
11 came 21 days, or a full three weeks, after what would have been the Safe Harbor deadline.

12 The federal-court litigation over provisional ballots in Ohio's 2010 election did not end
13 until July 12, 2012—more than 20 months after Election Day in 2010! The federal court had
14 enjoined certification of the election throughout that period, thus requiring the elective office to be
15 filled temporarily by appointment. (The office was a seat on a local juvenile court.) During that
16 time, the federal district court conducted a trial on the treatment of provisional ballots, including
17 testimony from poll workers and local election officials. Obviously, nothing like that could have
18 occurred in a presidential election, at least not without warp-speed expedition that would have
19 rendered the federal-court proceedings altogether different than what in fact occurred. On Monday,
20 December 13, the date Ohio's presidential electors would have been constitutionally required to
21 meet if the litigation over provisional ballots had involved a presidential election, the Ohio
22 Supreme Court had not yet issued its own ruling on the status of the disputed provisional ballots
23 under state law; that ruling would not come until January 7. *State ex rel. Painter v. Brunner*, 128
24 Ohio St. 3d 17, 941 N.E.2d 782 (2011). When the Sixth Circuit ruled on January 21 that it did not
25 need to abstain because the Ohio Supreme Court had clarified the relevant state-law issues, that
26 non-abstention ruling was entirely inapposite to a presidential election; indeed, had it occurred in
27 a presidential-election year, the inauguration of the new president would have occurred one day
28 earlier, on January 20.

29 Thus, when considering the possible applicability of the abstention doctrine to future
30 Fourteenth Amendment litigation over the counting of ballots in a presidential election, it is worth
31 distinguishing those circumstances in which a state has adopted procedures designed to achieve
32 Safe Harbor status from those in which a state has made no such effort to do so. Indeed, when a
33 state's own procedures run the risk of missing the constitutionally mandated date for the meeting
34 of the presidential electors (again, six days after the Safe Harbor deadline), federal-court
35 intervention may assist a state in enabling its Electoral College votes to comply with this
36 constitutional deadline. As *Siegel v. Lepore* in 2000 indicates, not all federal-court lawsuits over
37 the counting of presidential ballots seek to delay certification of the election—and thus not all such
38 lawsuits threaten a delay of certification that would deprive the state of Safe Harbor status.
39 Accordingly, in those circumstances, as in *Siegel v. Lepore* itself, federal-court abstention may not
40 be warranted.

1 But when a state has adopted procedures designed to achieve Safe Harbor status—in
2 particular, when a state has adopted these Procedures, which have that achievement as their
3 paramount objective—then a federal court should invoke the abstention doctrine in order to
4 prevent the federal court from causing the state to fail in achieving its Safe Harbor objective.
5 Consider the possibility that a federal district judge enjoins certification of a state’s presidential
6 election pending a federal-court hearing on the counting of provisional ballots in that state’s
7 election. Consider, too, that this federal-court hearing is not scheduled in a way that permits its
8 completion prior to the Safe Harbor deadline. One might think that sacrificing compliance with
9 Safe Harbor status may be necessary to protect Fourteenth Amendment rights in the context of
10 counting provisional ballots. But the federal district judge’s belief that the Fourteenth Amendment
11 claims have potential merit may be erroneous. In recent years, federal district judges have a track
12 record of frequent reversals in high-profile Fourteenth Amendment cases involving the counting
13 of ballots and related voting rules.¹² Imagine the circumstance in which a federal judge has caused
14 a state to lose Safe Harbor status, only to be reversed on appeal—but too late in order to regain the
15 possibility of Safe Harbor compliance. In this circumstance, the federal court has erroneously—
16 and irreparably—interfered with the state’s ability to participate in the presidential election as it
17 was entitled to do under the applicable provisions of the federal Constitution and congressional
18 enactments.

19 Another point worth emphasizing is that the very intervention of the federal court may
20 deprive the state of Safe Harbor status even if the federal court completes its adjudication well in
21 advance of the 35-day Safe Harbor Deadline. To illustrate this point, consider a state law that
22 requires invalidation of provisional ballots cast in a precinct other than the one in which the
23 provisional voter resides (so-called “out-of-precinct” provisional ballots). Suppose in the
24 circumstances of a presidential election, a federal court holds that compliance with this state law
25 violates the Fourteenth Amendment and accordingly orders that these disputed ballots be counted
26 notwithstanding the state statute that requires their disqualification. Cf. *Hunter v. Hamilton County*
27 *Board of Elections*, 850 F. Supp. 2d 795 (S.D. Ohio 2012) (in a nonpresidential election, ordering
28 the counting of out-of-precinct provisional ballots because their disqualification pursuant to state
29 law violates the Fourteenth Amendment). In this situation, the federal-court order would alter the
30 state’s law for the adjudication of the ballot-counting dispute from the state’s law as it existed at

¹² *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), rev’d and vacated in part, _____ F.3d _____ (5th Cir. 2016); *Frank v. Walker*, 141 F. Supp. 3d 932 (E.D. Wis. 2015), vacated, 819 F.3d 384 (7th Cir. 2016); *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis.), rev’d, 768 F.3d 744 (7th Cir. 2014); *North Carolina NAACP v. McCrory*, 997 F. Supp. 2d 322 (M.D.N.C.), rev’d in part, 769 F.3d 224 (4th Cir. 2014); *Ohio NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio), vacated pursuant to stay granted, 135 S. Ct. 42 (2014); *Fair Elections Ohio v. Husted*, 47 F. Supp. 3d 607 (S.D. Ohio), vacated, 770 F.3d 456 (6th Cir. 2014); *SEIU v. Husted*, 906 F. Supp. 2d 745 (S.D. Ohio), vacated pursuant to stay granted, 698 F.3d 341 (6th Cir. 2012); *SEIU v. Husted*, 887 F. Supp. 2d 761 (S.D. Ohio), rev’d in part, 696 F.3d 580 (6th Cir. 2012); *Ohio ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 819 (S.D. Ohio), vacated, 549 F.3d 468 (6th Cir. 2008); *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957 (S.D. Ohio), vacated, 555 U.S. 5 (2008); *Florida NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) (rev’g unpublished district-court decision); *ACLU v. Santillanes*, 506 F. Supp. 2d 598 (D.N.M. 2007), rev’d, 546 F.3d 1313 (10th Cir. 2008); *NEOCH v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) (staying TRO granted by district court).

1 the time the ballots were cast on Election Day. Consequently, the state no longer would be
2 compliant with the separate requirement for attaining Safe Harbor status under 3 U.S.C. § 5 that
3 the laws “for its final determination of any controversy or contest concerning the appointment of
4 all or any of the electors of such State” be “laws enacted prior to the day fixed for the appointment
5 of the electors.” Even if it were somehow debatable that the state had not changed its own laws for
6 adjudication of a presidential ballot-counting dispute, surely Congress would be entitled to
7 consider that the federal court’s alteration of the state’s rules for the counting of provisional ballots
8 deprived the state of Safe Harbor status. In this way, Congress would not be bound to accept the
9 result of the federal court’s intervention, and the federal court could not insist otherwise.

10 Moreover, it is worth recognizing that even if the federal district court is correct in
11 identifying a Fourteenth Amendment violation in a state’s counting of ballots cast by voters in a
12 presidential election, the federal court cannot force the state to appoint its presidential electors in
13 accordance with the court’s interpretation of the Fourteenth Amendment. The state legislature
14 could choose to supersede the federal court’s ruling and appoint the state’s presidential electors
15 directly under Article II of the federal Constitution—as the Florida legislature was taking steps to
16 do in 2000. Although such a move undoubtedly would lack Safe Harbor status (being law adopted
17 after Election Day), and likely would provoke the argument that this new piece of state legislation
18 itself violates the Due Process Clause of the Fourteenth Amendment, Congress would need to be
19 the institution of the federal government to resolve the controversy pursuant to its role in receiving
20 the Electoral College votes from the states under the Twelfth Amendment. Almost certainly, no
21 federal district court would have the power to order Congress to accept one certificate of Electoral
22 College votes from a state (the one that the federal court believed to reflect a constitutionally proper
23 counting of provisional ballots cast in the November election), while simultaneously ordering
24 Congress to reject a different certificate of Electoral College votes from a state (the one stemming
25 from the state legislature’s reassertion of Article II power to appoint the state’s presidential electors
26 directly). Even after the alteration of the political-question doctrine in *Baker v. Carr*, the receipt of
27 a state’s Electoral College votes under the Twelfth Amendment—like an impeachment
28 proceeding—presumably qualifies as a matter textually committed to Congress and thus beyond
29 the purview of the federal judiciary. See *Nixon v. United States*, 506 U.S. 224 (1993).

30 For these reasons, a federal district court should be hesitant to intervene in a state’s vote-
31 counting proceedings in a way that potentially interferes with the state’s particular Article II power
32 over the appointment of the state’s presidential electors. Article II, in this way, presents an
33 additional reason for federal-court caution and even abstention that simply is inapplicable in any
34 nonpresidential election. At the very least, when a state has undertaken a concerted effort to
35 maximize its ability to comply with the Safe Harbor Deadline—an undertaking that is itself an
36 exercise of the state’s unique Article II authority—the federal judiciary should avoid undermining
37 the state’s objective in this regard.

§ 303. Declaration of Expedited Presidential Recount

(a) No later than 24 hours after the polls close in the state's presidential election, the Chief Elections Officer shall declare publicly, including by means of notice on an official website as well as email notification to all presidential candidates on the ballot in the state, the need for an Expedited Presidential Recount in the state if either of the following two circumstances exist:

(1) **CANDIDATE-SOUGHT:** when *both* (A) a presidential candidate, in a statement publicly released on the candidate's official campaign website and transmitted to the Chief Elections Officer between the hours of 12:00 noon and 5:00 p.m. (Eastern time) on the day immediately following Election Day, asserts that uncertainty about the outcome of the presidential election in the state provides grounds (either by itself or together with similar uncertainty in one or more other states) for believing that the national winner of the presidency remains unsettled, *and* (B) preliminary returns show the leading presidential candidate in the state to be ahead of one or more other presidential candidates by a margin of less than one percent of all presidential ballots preliminarily counted in the state; or

(2) **NOT-CANDIDATE-SOUGHT:** when, notwithstanding no public statement by a candidate of the kind set forth in subsection (a)(1), *both* (A) no presidential candidate can reach a majority of Electoral College votes by relying solely upon states where the candidate's margin of victory in each of those states according to available preliminary returns is greater than one-half of one percent of all presidential ballots preliminarily counted in each of those states; *and* (B) in this state (where the Chief Election Officer is evaluating the need for an Expedited Presidential Recount under this Section), preliminary returns show the leading presidential candidate in the state to be ahead of one or more other presidential candidates by a margin of less than one-half of one percent of all presidential ballots preliminarily counted in the state, and the state's Electoral College votes, either alone or in combination with the Electoral College votes of other states where the margin of victory according to preliminary returns is also less than one-half of one percent, would provide a presidential candidate with a majority of Electoral College votes if added to the Electoral College

1 **votes of the states in which that particular candidate leads by more than one-half of**
2 **one percent.**

3 **(b) For purposes of subsection (a)(1)(A), a presidential candidate may make the public**
4 **assertion of uncertainty about the outcome of the presidential election only if the candidate**
5 **is in a position to win the presidency if some or all of the asserted uncertainty is resolved in**
6 **that candidate’s favor.**

7 **(c) In addition to the obligation to declare an Expedited Presidential Recount in either**
8 **of the two circumstances set forth in subsection (a), the state’s Chief Elections Officer may**
9 **declare an Expedited Presidential Recount in any other situation that the Officer believes**
10 **warrants it, including when the number of provisional, absentee, or other uncounted ballots**
11 **might cause the winning presidential candidate in the state to be different from the leading**
12 **candidate based on preliminary returns and this difference might affect which candidate is**
13 **the winner of a majority of Electoral College votes.**

14 **Comment:**

15 *a. When expedition is necessary.* As discussed in the Comment to § 302, the need for a
16 mechanism to trigger expedited proceedings arises when a presidential election remains unsettled
17 24 hours after the polls close on Election Day. The specific conditions for triggering the expedited
18 proceedings, therefore, should be based on factors that make a presidential election still in play 24
19 hours after the polls have closed. The first key factor is that there is no clear winner of an Electoral
20 College majority, as required by the Twelfth Amendment. Where there is a clear Electoral College
21 majority, it is irrelevant that there may be uncertainty concerning the winner in a state whose
22 Electoral College votes are unnecessary to establish the majority—and thus there is no need for
23 expedited proceedings in this situation. (Of course, a state whose votes are unnecessary to
24 determine the Electoral College winner still would be free to use these expedited proceedings if it
25 wished, in the case where the winner of its own electoral votes remained in doubt even though
26 inconsequential to the overall Electoral College majority.)

27 Even if there is no clear Electoral College majority, there may be no need for an expedited
28 recount in a particular state; this would be true if the reason for the absence of a majority was three
29 different candidates clearly splitting the Electoral College votes in such a way that none obtains a
30 majority. In this situation, the outcome in every state may be unambiguous on Election Night—
31 with no need for a recount in any state—and yet no candidate able to accumulate a majority of

1 Electoral College votes. Under the Twelfth Amendment, this presidential election would proceed
2 to the House of Representatives, with the House empowered to elect the President using the special
3 procedure provided therein, whereby each state’s delegation in the House has one vote.

4 Thus, in order to trigger an expedited recount under these Procedures, it is necessary *both*
5 that there be no clear winner of an Electoral College majority *and* that there be uncertainty in the
6 outcome of the presidential election in a particular state that contributes to the absence of a clear
7 Electoral College majority. Another way to put this point is to say that if there is uncertainty about
8 the outcome of the presidential election in one or more states, and if resolution of that uncertainty
9 would cause a particular candidate to reach an Electoral College majority, then the situation exists
10 where expedited proceedings are necessary in each uncertain and potentially outcome-
11 determinative state. In 2000, Florida was the single state presenting this kind of situation. It is
12 important to recognize, however, that in a future unsettled presidential election, there may be
13 multiple states contributing to the condition of uncertainty as to whether or not a candidate is able
14 to obtain an Electoral College majority—as was the case in 1876, when four states (Florida,
15 Louisiana, South Carolina, and Oregon) contributed to this kind of situation. Under these
16 Procedures, an expedited recount would be triggered in each of the states contributing to overall
17 uncertainty concerning whether or not a candidate was capable of winning an Electoral College
18 majority.

19 **Illustrations:**

20 1. On Election Night, Candidate A is the clear winner of 281 Electoral College
21 votes, and Candidate B the indisputable winner of 251, with only Nevada and its six
22 electoral votes “too close to call.” Because 270 electoral votes are sufficient for a majority,
23 Candidate B graciously concedes that Candidate A is the winner in a publicly televised
24 address. In this situation, there is no need for Nevada to trigger expedited procedures to
25 determine which candidate won its six electoral votes.

26 2. On Election Night, Candidate A is the clear winner of 263 Electoral College
27 votes, and Candidate B the indisputable winner of 253. Both New Hampshire with its four
28 electoral votes, and Ohio, with its 18 electoral votes, are “too close to call.” Neither
29 candidate makes a concession speech on Election Night; instead, both campaigns vow to
30 carry on until all the votes, including provisional ballots, have been counted. In this
31 situation, there is a need for Ohio—but not New Hampshire—to trigger expedited

1 procedures to determine the winner of its 18 electoral votes. Whichever candidate wins
2 Ohio will win a majority of electoral votes and thus the presidency: if Candidate A wins
3 Ohio, then A will have 281; if Candidate B wins Ohio, then B will have 271. Either way,
4 New Hampshire is irrelevant to determining which candidate will win an Electoral College
5 majority, and therefore there is no need for New Hampshire to conduct expedited
6 procedures. It is imperative, however, for Ohio to begin immediately to conduct all
7 procedures to determine conclusively which candidate won the state.

8 3. On Election Night, Candidate A is the clear winner of 263 Electoral College
9 votes, and Candidate B the indisputable winner of 251. Both Nevada, with its six electoral
10 votes, and Ohio, with its 18 electoral votes, are “too close to call.” Neither candidate makes
11 a concession speech on Election Night; instead, both campaigns vow to carry on until all
12 votes are counted. In this situation, it is necessary for *both* Ohio *and* Nevada to trigger
13 expedited procedures to determine which candidate won each state’s electoral votes. The
14 ultimate winner of the White House may hinge on either state. If Candidate B wins Ohio’s
15 18 electoral votes, that gives B 269, still one short of an Electoral College majority, making
16 Nevada outcome-determinative. Likewise, were it to become apparent that Candidate A
17 wins Nevada, but Ohio still remains in play, then Candidate A would be just shy of an
18 Electoral College majority with 269, and expedited procedures would remain necessary in
19 Ohio. (If Candidate B were the one to quickly win Nevada, with Ohio still unsettled, then
20 the count would stand as A having 263, B with 257, and both needing Ohio to prevail.) It
21 is true that in this scenario, Candidate A needs only one of the two unsettled states, Ohio,
22 to cross the threshold of an Electoral College majority. But because Candidate B needs to
23 prevail in both Ohio and Nevada to reach the magic number of 270, expedited procedures
24 are necessary in both.

25 *b. Criteria for triggering expedition.* Even if it is conceptually clear that expedition is
26 necessary when uncertainty in one or more states causes uncertainty over whether a candidate has
27 obtained an Electoral College majority, there need to be specific criteria for determining when the
28 requisite uncertainty exists in a state.

29 The most important factor, but not the only one, is whether the candidates themselves
30 believe that such uncertainty exists. Especially after 2000, no candidate is likely to concede if he
31 or she believes that there still may be a chance of winning in overtime. Thus, subsection (a)

1 provides two distinct methods for identifying when expedited proceedings must occur, depending
2 on whether or not a candidate still potentially capable of winning the presidency is publicly
3 claiming that the race is not yet over.

4 *b(1). Expedition when a viable candidate claims uncertainty.* Under subsection (a)(1), if a
5 presidential candidate asserts on the next afternoon following Election Day that the outcome of
6 the election remains unsettled because one or more identified states are “too close to call,” the
7 Chief Elections Officer in each of those states must trigger that same day an Expedited Presidential
8 Recount in the state if, based on preliminary returns available at that time, the margin between the
9 leading candidates in the state is less than one percent of total presidential votes preliminarily
10 counted in that state.

11 This provision combines both a non-numerical and a numerical component for determining
12 when the Chief Elections Officer of a state must trigger expedited proceedings. The non-numerical
13 component is the assertion of a candidate. The assertion must be public so that there is no doubt
14 that the candidate is claiming that the race is not over. Moreover, to obtain the benefit of the
15 numerical measure for a mandatory expedited recount under subsection (a)(1), which is more
16 lenient than the measure under subsection (a)(2), the candidate’s public statement must identify
17 each state that the candidate believes is contributing to the uncertainty over whether any candidate
18 has won enough states to reach a majority of Electoral College votes. For any state so identified in
19 the candidate’s public statement, a mandatory Expedited Presidential Recount must commence if
20 the margin in that state meets the numerical threshold of less than one percent—rather than the
21 more difficult numerical threshold contained in subsection (a)(2).

22 Subsection (a)(1) contains its more lenient numerical threshold, rather than no numerical
23 threshold at all, so that a candidate cannot force a state to conduct an expedited recount simply
24 because the candidate seeks one. A candidate who believes that the race is not over might seek
25 expedited recounts in more states than numerically objective conditions would warrant. Even if
26 the candidate is reasonable in believing that the winner of the presidency remains unsettled, and
27 even if the candidate is reasonable in believing that other states contribute to this uncertainty, the
28 candidate might be unreasonable in seeking expedited recounts in an excessive number of states.
29 The numerical condition that the margin separating the leading candidates in each identified state
30 must be less than one percent of total presidential votes counted is sufficiently generous to capture

1 all states for which the candidate's power to force the state to undertake a mandatory expedited
2 recount is reasonable.

3 Note: the candidate who identifies a state as contributing to uncertainty over the winner of
4 the presidency need not be one of the candidates within the one percent margin.

5 **Illustration:**

6 4. Candidate A claims that the race is not over and identifies Iowa as being one of
7 several states contributing to this uncertainty because Candidate B cannot reach 270
8 Electoral College votes without winning Iowa. Based on preliminary returns, Candidate B
9 is in the lead in Iowa, ahead of Candidate C by a margin of 0.98 percent. Candidate A is
10 running a distant third in Iowa, well over 20 percent behind both Candidates B and C.
11 Nonetheless, in this situation subsection (a)(1) requires Iowa to trigger a mandatory
12 Expedited Presidential Recount. (This situation is one where it is *not* immediately clear
13 that the presidential election will fall to the House of Representatives under the Twelfth
14 Amendment. Rather, it still might be possible for Candidate B to reach 270 Electoral
15 College votes if Candidate B ends up winning Iowa. Or it might be possible that Candidate
16 A reaches 270 if Candidate A wins another state besides Iowa that also remains in play (for
17 example, Ohio). Or, indeed, it might be possible that no candidate reaches 270 if Candidate
18 C wins Iowa, and Candidate A fails to achieve a necessary win elsewhere (again, for
19 example, Ohio). Regardless of the eventual outcome of the presidential election, this
20 situation is one that would require Iowa to conduct an Expedited Presidential Recount.)

21 The numerical threshold of one percent is not too onerous. This is true in part because the
22 Chief Elections Officer has discretion under subsection (c) to trigger an Expedited Presidential
23 Recount even if it is not required by subsection (a). Thus, if a candidate makes a publicly
24 compelling case for an expedited recount despite the margin in the state being greater than one
25 percent, there will be tremendous public pressure on the Chief Elections Officer in the state to
26 trigger expedited proceedings as sought by the candidate.

1 Illustration:

2 5. Preliminary returns in Ohio show Candidate A in the lead, with Candidate B
3 having the next highest vote total. These two candidates are separated by 75,000 votes,
4 which is 1.3 percent of all presidential votes preliminarily counted in the state. (No other
5 candidate is anywhere close to these two.) This margin is too large to trigger a mandatory
6 recount under subsection (a)(1). Nonetheless, preliminary returns also show that Ohioans
7 cast 150,000 provisional ballots in this presidential election, and these provisional ballots
8 have yet to be evaluated and thus are potentially countable. Likewise, Ohio law permits
9 absentee ballots to be counted if postmarked before Election Day as long as they arrive by
10 mail to Local Election Authorities within 10 days after Election Day. Estimates vary on
11 the number of such additional absentee ballots that may end up being counted, but it could
12 be as high as another 100,000 ballots or more. In this circumstance, if the outcome of the
13 presidential election in Ohio could determine which candidate reaches 270 Electoral
14 College votes, the Chief Elections Officer in Ohio should exercise discretion under
15 subsection (c) to trigger an Expedited Presidential Recount because there is a nontrivial
16 possibility that the large volume of uncounted, but potentially countable, ballots could alter
17 the outcome of the election in the state, notwithstanding the present lead of more than one
18 percent.

19 Subsection (b) requires that a candidate asserting that the outcome of the presidential
20 election remains unsettled be in a position to win the presidency if some or all of the uncertainty
21 is resolved in this candidate's favor. This requirement avoids the possibility that the candidate
22 seeking an expedited recount in a state have no chance whatsoever of winning the presidency.

23 Illustration:

24 6. Apart from Colorado, Candidate A indisputably has 266 Electoral College votes,
25 and Candidate B has 263. Whichever of the two wins Colorado wins the White House.
26 Preliminary returns show Candidate B trailing Candidate A in the state by 20,000 votes,
27 which amounts to 0.8 percent of the total votes preliminarily counted—less than one
28 percent, *but not less than one-half percent, as required for the separate method of a*
29 *mandatory trigger of expedited proceedings under subsection (a)(2)*. On Election Night,
30 and into the next day, Candidate B ultimately determined that Colorado was unwinnable

1 because Candidate B was just too far behind. Accordingly, on Wednesday afternoon,
2 Candidate B makes a public concession, recognizing Candidate A as the winner of the
3 presidency. In this situation, Colorado is *not* required to conduct a mandatory Expedited
4 Presidential Recount. This conclusion holds even if a third candidate, Candidate C, publicly
5 asks for one and publicly asserts a belief that Candidate B would prevail in an expedited
6 recount. Candidate C, who unlike Candidate B has no conceivable chance of winning the
7 presidency regardless of what happens in Colorado, should *not* be in a position to obligate
8 Colorado to conduct a mandatory expedited recount. This is so even though Candidate B
9 could have obligated Colorado to conduct a mandatory expedited recount if Candidate B,
10 rather than conceding the election to Candidate A on Wednesday afternoon, instead had
11 publicly declared the race unsettled because of Colorado; in that alternative circumstance,
12 the margin of 0.8 percent would have been close enough to trigger a mandatory expedited
13 recount under subsection (a)(1). Of course, it remains the case that the Chief Elections
14 Officer of the state has the discretion to trigger an expedited recount, even though
15 Candidate B has publicly conceded the election. Thus, if Candidate C offers the Chief
16 Elections Officer a compelling reason why there should be an expedited recount in
17 Colorado, despite Candidate B's public concession of defeat, the Chief Elections Officer
18 can go ahead and trigger one. It is just the case, however, that Candidate C (unlike
19 Candidate B) cannot force the Chief Elections Officer to trigger an expedited recount in
20 this situation.

21 *b(2). Expedition even when no viable candidate claims uncertainty.* As the preceding
22 Illustrations show, in some circumstances it is necessary to trigger a mandatory expedited recount
23 even when no candidate requests one and, instead, the only candidate in a position to request one
24 has publicly conceded defeat. The presidency is so important, the national scrutiny is appropriately
25 so intense, and the pace of events is so rapid, that sometimes it is better to start an expedited recount
26 on the day after Election Day, only later to call it off, rather than delaying its start and losing
27 precious days at the beginning of the 35-day period available. After all, a candidate who publicly
28 concedes defeat on Election Night, or even the next day, might retract that concession several days
29 later. (Although Al Gore did not publicly concede defeat on Election Night in 2000, he did
30 telephone a concession to George W. Bush, only to retract that private concession before making
31 a public statement.)

1 Accordingly, subsection (a)(2) sets forth a purely numerical basis for triggering a
2 mandatory Expedited Presidential Recount. It does not depend at all on what any candidate, or
3 anyone else, publicly asserts or requests. If preliminary returns in a state show the margin between
4 the two leading candidates to be less than one-half of one percent of total presidential votes
5 preliminarily counted, and if that state is necessary for a candidate to be able to reach 270 Electoral
6 College votes (meaning that no candidate can reach 270 based on preliminary margins greater than
7 one-half of one percent), then the Chief Elections Officer of the state must trigger an Expedited
8 Presidential Recount. Nothing more is required for this obligation to take hold.

9 **Illustration:**

10 7. On the day after Election Day, preliminary returns show that Candidate A is
11 ahead by more than one-half of one percent, on a state-by-state basis, in states having a
12 combined total of 266 Electoral College votes. Candidate B is ahead by more than one-half
13 of one percent, on a state-by-state basis, in states having a combined total of 263 Electoral
14 College votes. In Colorado, which has nine Electoral College votes and thus enough to put
15 either Candidate A or B over the top, Candidate A leads Candidate B by 10,000, which is
16 0.4 percent of the total presidential votes preliminarily counted in the state. Because this
17 margin is less than one-half of one percent, and because no candidate can achieve 270
18 Electoral College votes without Colorado, subsection (a)(2) requires, without more, that
19 Colorado's Chief Election Officer trigger an Expedited Presidential Recount in the state.
20 This obligation applies even if Candidate B publicly conceded defeat, and acknowledged
21 Candidate A the winner of the presidency, earlier that same day. After the mandatory
22 expedited recount has commenced, if upon reflection Candidate B really wants to call it
23 off, then Candidate B can invoke the specific procedures of § 319 for terminating expedited
24 proceedings that have been triggered under this Section.

25 One-half of one percent is an appropriate numerical threshold to trigger a mandatory
26 expedited recount when a candidate who otherwise would be in a position to seek such a recount
27 has conceded defeat, or remained silent, or otherwise declined to pursue a recount. A one percent
28 threshold would be unduly permissive in this context. Conversely, a lower threshold (one-quarter
29 of one percent, for example) might prove too stringent, blocking the start of a recount when the
30 public interest indicates that one should get underway. One-half of one percent is neither too

1 stringent nor too lax. It would only rarely require a state to commence an expedited recount
2 although the relevant candidate is not even seeking one. But a margin of only 10,000 votes in a
3 state with 2.5 million ballots cast, for instance, when that state would determine the winner of the
4 presidency, is close enough to obligate the state to at least begin the process of conducting an
5 expedited recount—if only until all concerned, including the nation’s electorate as a whole,
6 recognize that the need to continue an expedited recount no longer exists. In this way, the
7 numerical threshold of subsection (a)(2) strikes an appropriate balance of competing
8 considerations, in the overall public interest.

9 Moreover, as already indicated, the Chief Elections Officer retains discretion to trigger an
10 expedited recount even in a situation not required by subsection (a)(2). Thus, to take the same
11 Colorado example again, if the margin between Candidate A and Candidate B is 20,000—rather
12 than 10,000—the Chief Elections Officer can trigger an expedited recount even if Candidate B has
13 not called for one. But this margin, while close but now twice as large, is not close enough to force
14 the state to undertake the burden of an expedited recount when *neither* the relevant candidate *nor*
15 the state’s Chief Elections Officer believes that one is warranted.

16 Note: Subsection (a)(2) can require an expedited recount in one state at the same time that
17 subsection (a)(1) requires an expedited recount in a different state.

18 **Illustration:**

19 8. Preliminary returns show Candidate B trailing Candidate A in Florida, Ohio, and
20 Virginia by only 500, 1000, and 2000 votes respectively. If Candidate B ends up prevailing
21 in any of these three battleground states, Candidate B will reach 270 Electoral College
22 votes. Candidate A must remain ahead in all three states in order to achieve 270. Candidate
23 B has publicly declared the presidential election unsettled and identified these three states
24 as the reason. Because Candidate A’s lead in each of these three states is well below the
25 numerical threshold of one percent, subsection (a)(1) requires an Expedited Presidential
26 Recount in each of these three states. At the same time, preliminary returns show Candidate
27 A leading Candidate B in Colorado by 10,000 votes, which is 0.4 percent of total
28 presidential votes preliminarily counted in the state. Crucially, Candidate A also must win
29 Colorado to achieve 270. Without winning Colorado, Candidate A ends up with only 266
30 Electoral College votes even if Candidate A stays ahead in Florida, Ohio, and Virginia.
31 Thus, subsection (a)(2) requires an Expedited Presidential Recount in Colorado even

1 that a final determination of the same and judgment shall be rendered at least six days before the
2 first Monday after the second Wednesday in December.” IOWA CODE § 60.5.

3 Even the little express statutory language that California and Iowa provide regarding
4 expediting a presidential contest—making it a “priority” or starting it as soon as “practicable”—is
5 more than what Indiana law provides. Indiana’s applicable statute states only:

6 As required under 3 U.S.C. 5, any recount or contest proceeding concerning the
7 election of presidential electors must be concluded not later than six (6) days before
8 the time fixed by federal law for the meeting of the electors.

9 IND. CODE § 3-12-11-19.5. This simple decree, however, is no assurance of compliance. In 2000,
10 after all, Florida wanted to complete its judicial contest of the presidential election before the Safe
11 Harbor Deadline (according to the Florida Supreme Court’s interpretation of the applicable
12 statutes, thereby making them essentially equivalent on this point to Indiana’s minimalist decree).
13 But Florida was unable to complete its contest procedures by that deadline, at least in a way that
14 contained sufficient safeguards of due process and equal protection according to the standards set
15 by the U.S. Supreme Court.

16 Part III and its Procedures take a dramatically different approach. They do not merely assert
17 an obligation to finish by the Safe Harbor Deadline. Instead, they set forth a mechanism designed
18 to accomplish this directive. The fundamental judgment that underlies Part III is that, based on the
19 experience of not only Florida in 2000 but also recent high-profile disputes in nonpresidential
20 elections, specifying this kind of structural mechanism is necessary and that otherwise it is illusory
21 to expect compliance with a purely minimalist decree of the type that Indiana’s statute
22 exemplifies.¹³

23 Tennessee, by contrast, takes expedition of a presidential election to an extreme. It requires
24 the resolution of a contest to occur “before the last day of November”—well before the expiration
25 of the Safe Harbor Deadline. TENN. CODE § 2-17-103. But the state vests authority over the contest
26 of a presidential election in a nonjudicial body “composed of the governor, secretary of state and
27 attorney general.” *Id.* Given the partisan nature of this “presidential electors tribunal,” any
28 questionable decision it might reach concerning the counting of ballots cast by citizens would
29 invite litigation in some judicial forum, either state or federal, based on the constitutional principles
30 articulated in *Bush v. Gore* and related cases.¹⁴

¹³ Connecticut law requires a contest of a presidential election to end “before the first Monday after the second Wednesday in December” but does not endeavor to take advantage of the Safe Harbor provision. CONN. GEN. STAT. ANN. § 9-323. Delaware law likewise empowers the Superior Court of Kent County to constitute “a special board of canvass to hear and determine all contests of elections of electors of President and Vice-President” with the authority to adopt procedures as necessary to comply with “the Act of Congress fixing the day of the meeting of electors.” 15 DEL. CODE § 5927. (Delaware, however, has not updated the specific dates contained in its election code to comport with the congressional calendar for the Electoral College. Thus, when Delaware law says that certification of the results of a contested presidential election must occur “on or before January 1,” § 5928, that date is inconsistent with the state’s own requirement in § 5927 of the obligation to comply with the applicable Act of Congress.)

¹⁴ Texas, even more surprisingly, vests authority to adjudicate a contested presidential election solely in the hands of the state’s governor, TEX. CODE §§ 221.002(e), 243.012(a), thereby inviting even more than Tennessee a lawsuit on the ground of arbitrariness under *Bush v. Gore*.

1 Georgia requires expedition for judicial contests of elections generally. As the Georgia
2 Supreme Court has observed, “[t]he legislature has demonstrated that election contests are to be
3 heard with the greatest of expedition.” *Swain v. Thompson*, 635 S.E.2d 779, 781 (Ga. 2006). This
4 observation has caused the state supreme court to strictly enforce filing deadlines associated with
5 the litigation of a contest, including requiring dismissal of a contest for failure to comply with tight
6 deadlines.¹⁵ Nevada law expressly provides as a general matter: “Election contests shall take
7 precedence over all regular business of the court in order that results of elections shall be
8 determined as soon as practicable.” NEV. REV. STAT. § 293.413(2).

9 It is perhaps surprising that more states have not adopted specific procedural mechanisms
10 for the expedited adjudication of disputes over the counting of ballots in a presidential election.
11 See also Joshua Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 31 (2013)
12 (“Surprisingly, not every state spells out how to decide election contests for presidential
13 electors.”). Even after the experience of Florida in 2000, states generally have not undertaken the
14 effort to promulgate detailed procedures designed to maximize the chances of resolving a disputed
15 presidential election within the five or six weeks necessary in light of the congressional Electoral
16 College calendar. Indeed, Florida itself has adopted no such expedited process for a contested
17 presidential election, despite being the state that ran out of time to conduct its proceedings in 2000,
18 as justices of its own supreme court then lamented. See *Gore v. Harris*, 770 So. 2d 1243, 1273
19 (Fla. 2000) (Harding, J., joined by Shaw, J., dissenting) (quoting Vince Lombardi’s aphorism: “We
20 didn’t lose the game, we just ran out of time.”). To be sure, after 2000, Florida eliminated the
21 punch-card machines and their “hanging chads,” which caused the particular vote-counting dispute
22 that prevented the state from completing adjudication of the pending judicial contest of the election
23 before the 2000 Safe Harbor Deadline. But Florida, like other states, has not created an expedited
24 judicial process that would enable it to complete a contest of a presidential election that involved
25 other issues, like those concerning provisional or absentee ballots.

26 *Virginia’s procedures for a disputed presidential election.* One state to have undertaken an
27 effort to coordinate recount and contest procedures in a presidential election so as to enable the
28 state to meet the Safe Harbor Deadline is Virginia. (Ohio, as discussed in the Reporters’ Note to
29 § 315, has eliminated the availability of judicial contests for a presidential election, but this
30 elimination is not coordination and, as explained therein, presents additional problems.) Virginia
31 Code § 24.2-801.1 sets forth a special recount procedure for a presidential election, requiring the
32 recount to be “completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before
33 the time fixed for the meeting of the electors.” Virginia Code § 24.2-805, in turn, sets forth a
34 special contest procedure for a presidential election, also requiring the contest to be “completed,
35 in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the
36 meeting of the electors.”

¹⁵ At least two states, Arizona and Ohio, have specific procedures for expedited appellate- or supreme-court consideration of election-related litigation, although these procedures are designed for emergency matters that need to be settled before the casting of ballots in an election. See *Ariz. Rev. Stat. Civ. App. Proc. Rule 10*; *OHIO S. CT. PRAC. R. 12.08*.

1 Moreover, these two provisions cross-reference each other in an effort to work together to
2 achieve an expeditious resolution of a disputed presidential election. Both the recount and contest
3 proceedings must commence within two days after certification of the election by the State Board
4 of Elections (and are commenced by a candidate who is not the certified winner filing a petition to
5 initiate a recount or contest¹⁶). Section 805 explicitly mandates that “the contest shall not wait
6 upon the results of any recount.”

7 In addition, § 801.1 provides that the recount shall be supervised by a specially constituted
8 three-judge court, just as § 805 provides for the adjudication of a contest of a presidential election.
9 This presidential-contest court, under § 805, is “composed of the chief judge of [the Richmond]
10 circuit court and two circuit court judges of circuits not contiguous to the City of Richmond
11 appointed by the Chief Justice of the Supreme Court of Virginia.” Similarly, § 801.1 states:

12 As soon as a [presidential recount] petition is filed, the chief judge of the
13 [Richmond] Circuit Court shall promptly notify the Chief Justice of the Supreme
14 Court of Virginia, who shall designate two other judges to sit with the chief judge,
15 and the court shall be constituted and sit in all respects as a [presidential-contest]
16 court appointed and sitting under § 24.2-805.

17 This statutory language does not exactly say that the three judges who supervise the recount will
18 be the same individuals as the three judges who will adjudicate the contest. Under the two
19 provisions, the chief judge of the Richmond circuit court must be one of the three judges, so the
20 recount and contest panels must overlap at least to that extent. But the statutory language does not
21 entirely rule out that the Chief Justice of the Virginia Supreme Court could appoint two circuit
22 judges, A and B, to supervise the recount panel and two different circuit judges, C and D, to
23 adjudicate the contest. That reading of the statute would defeat the efficiency to be gained from
24 having all three judges be identical for both the recount and contest of a presidential election, and
25 thus that interpretation of the statute should be disfavored for that reason alone. In any event, there
26 is nothing in the statute to prevent the Chief Justice from serving the value of efficiency by
27 exercising the appointment authority to make all three judges identical for both functions (even if
28 the statute does not strictly so require).

29 Virginia is certainly to be commended for undertaking an effort to coordinate its recount
30 and contest procedures for a presidential election in a way to enable the state to meet the Safe
31 Harbor Deadline. And Virginia is a state with particularly noticeable success in resolving high-
32 profile disputes in statewide elections. From a U.S. Senate election in 1978 to a gubernatorial
33 election in 1989 to two Attorney General elections, one in 2005 and another in 2013, Virginia has
34 managed to reach closure of these disputed elections with relative dispatch—by mid-December in
35 all four instances—and without contentious or protracted litigation. See FOLEY, BALLOT BATTLES

¹⁶ To initiate a recount, the margin between the petitioning candidate and the certified winner must be “not more than one percent of the total votes cast for the two such candidates.” VA. CODE § 24.2-800(B).

1 at 248, 334-336 & Appendix. With this solid track record, Virginia deserves to have its special
2 procedures for a disputed presidential election evaluated with deference and respect.

3 Nonetheless, for several reasons the particular provisions that Virginia has adopted, while
4 superior to those in other states, remain less than optimal. First and foremost, contrary to the
5 approach reflected in this Part III and especially in this particular Section of its Procedures,
6 Virginia does not begin to implement its special provisions tailored to the exigent circumstances
7 of a disputed presidential election until two weeks after Election Day. There is no statutory
8 mechanism in Virginia for triggering expedition in a disputed presidential election immediately
9 after Election Day in the circumstance when the nation and world know that the presidential
10 election “is too close to call” and the outcome hangs on Virginia. Even in this situation, Virginia
11 law expends the first two-fifths of the five-week period available under the Safe Harbor Deadline
12 by proceeding as if the situation involved a conventional nonpresidential election. Only during the
13 latter three-fifths of the five-week period do special procedures for a disputed presidential election
14 begin to kick in. Waiting two-fifths of the way through the five-week period available is unwise,
15 given the urgency of an unresolved and potentially litigation-filled presidential election. One
16 cannot predict exactly what issues might arise during the five-week period, and there easily might
17 end up being not enough time available at the back end because of the failure to enter into a special
18 expedited mode at the beginning of the process.

19 Both § 801.1, the presidential-recount provision, and § 805, the presidential-contest
20 provision, explicitly refer to the certification of the election under § 24.2-679 as the predicate for
21 commencing special expedited proceedings in a disputed presidential election. A candidate cannot
22 formally request a recount, and thus start the official recount process, until there has been a
23 certification of the election under § 679 and it is determined that the candidate is within one percent
24 of the certified winner. See § 800. Likewise, a candidate cannot contest a presidential election
25 under § 805 until after it has been certified under § 679.

26 But § 679 applies to all elections not just presidential ones. And it provides that the State
27 Board of Elections shall meet to certify a November election “on the third Monday in November.”
28 This day will always be 13 days after Election Day, which is the first Tuesday after the first
29 Monday. Thus, there will always be a passage of essentially two weeks before the particular
30 presidential provisions of §§ 801.1 and 805 apply. Virginia law sets forth rules for what must occur
31 prior to the State Board’s certification under § 679—rules that govern what this Part III terms the
32 conduct of the canvass. But these pre-certification rules apply generally to presidential and
33 nonpresidential elections alike, and there is no provision for special expedition of the canvass
34 solely as it pertains to an unresolved and disputable presidential election. Thus, Virginia law fails
35 to take advantage of the possibility of expediting proceedings in an unresolved presidential election
36 immediately after Election Day (and certainly before the canvass is certified two weeks later).

37 Somewhat acknowledging this deficiency, § 801.1—the provision for a presidential
38 recount—contains this hortatory request: “Presidential candidates who anticipate the possibility of
39 asking for a recount are encouraged to so notify the State Board by letter as soon as possible after
40 election day.” But this kind of supplicating language—almost beseeching or imploring—is odd

1 for a statute. It certainly is no substitute for the kind of mandatory trigger of an expedited
2 presidential recount that this Part III and its Procedures contain. All of the research and analysis
3 undertaken as preparation for this Part III, including meetings with local and statewide election
4 officials experienced with the conduct of high-profile recounts, has led to the judgment that all
5 states, including Virginia, would benefit from a provision that triggers expedition in an unresolved
6 presidential election immediately after Election Day. This expedition, as provided by this Part III
7 and its Procedures, entails immediate commencement of the recount, rather than treating the
8 canvass as if it were a conventional nonpresidential election and waiting until certification of the
9 canvass before beginning the expedited presidential recount.

10 A second and somewhat related concern about Virginia's procedures for a disputed
11 presidential election is their omission of any specified process for addressing issues that arise
12 concerning the eligibility of disputed ballots, like those that afflicted Washington's 2004
13 gubernatorial election or Minnesota's 2008 U.S. Senate election. Section 24.2-802, which governs
14 presidential as well as nonpresidential recounts, expressly states: "a recount shall be based on votes
15 cast in the election and shall not take into account any absentee ballots or provisional ballots sought
16 to be cast but ruled invalid." Presumably, if evidence showed that enough invalidated absentee or
17 provisional ballots had been wrongly invalidated to make a difference in the outcome of the race—
18 the kind of claim at the heart of Minnesota's 2008 election and also prominent in Washington's
19 2004 dispute—this claim could be litigated in a contest under § 805. But as discussed more fully
20 in the Reporters' Note to § 312 (see also the Comment to § 310), experience shows that in a high-
21 profile disputed election, there will be overwhelming pressure to litigate the eligibility of these
22 ballots prior to certification of the canvass, rather than waiting for a judicial contest. This pressure,
23 already intense in a U.S. Senate or gubernatorial election, would be withering if the presidency is
24 on the line. Thus, during the two weeks prior to certification of the canvass in Virginia, if there
25 were a serious dispute over uncounted but potentially eligible ballots, as in Minnesota or
26 Washington, the candidates would pursue all possible avenues to litigate the eligibility of those
27 ballots immediately, in some sort of pre-certification proceeding. Virginia, however, has no
28 provision to handle this contingency. Accordingly, the inevitable litigation—perhaps seeking a
29 writ of mandamus or invoking some other form of emergency judicial relief—will be more
30 disorderly and chaotic than would be the case if a statute specified a procedure to handle this kind
31 of claim. This disorder and chaos invites the kind of delay that risks the inability to complete
32 proceedings within the Safe Harbor Deadline, thereby defeating Virginia's explicit goal for its
33 special recount and contest procedures for a disputed presidential election. Consequently, like
34 other states, Virginia would be better served by having a special proceeding for judicial review of
35 ballot-eligibility determinations made during the canvass, like the special proceeding set forth in
36 § 312 of these Procedures.

1 Finally, it is unclear whether Virginia permits an appeal to the state’s supreme court in a
2 contest under § 805. Virginia expressly precludes any appeal in a recount under § 801.1. See
3 § 802 (“The recount proceeding shall be final and not subject to appeal.”) But the relevant statutes
4 appear to contain no comparable provision, one way or the other, regarding the possibility of an
5 appeal in a judicial contest of a presidential election. Given the explicit obligation of the three-
6 judge contest court to complete its adjudication of the contest by the end of the Safe Harbor
7 Deadline, but not sooner, there would be no time for an appeal if the contest court used up all the
8 time available to it under § 805. Yet in a disputed presidential election, if a candidate thought an
9 issue of substance might interest the members of the Virginia Supreme Court, the candidate is
10 likely to knock on that court’s door by way of a writ of mandamus or otherwise, unless explicitly
11 prohibited from doing so. Cf. *Kirk v. Carter*, 117 S.E.2d 135 (Va. 1960) (mandamus granted by
12 Virginia Supreme Court of Appeals to require convening of three-judge contest court). Thus, if
13 such a mandamus petition were filed in the Virginia Supreme Court, the state’s statutes leave
14 uncertain whether the state could complete its available judicial proceedings in a disputed
15 presidential election by the end of the Safe Harbor Deadline, as evidently desired.

16 **§ 304. Presidential Election Court: Appointment**

17 **(a) Prior to Election Day, the Chief Justice shall designate three judges for**
18 **appointment to the Presidential Election Court in the event that a declaration of an**
19 **Expedited Presidential Recount occurs under § 303.**

20 **(b) No later than 24 hours after the Chief Elections Officer’s declaration pursuant to**
21 **§ 303, the Chief Justice publicly shall convene the Presidential Election Court and confirm**
22 **the appointment of its three members pursuant to the previously made designations under**
23 **subsection (a).**

24 **(c) If for whatever reason there has been a failure to designate one or more of the**
25 **three judges for appointment to the Presidential Election Court prior to Election Day, the**
26 **Chief Justice shall immediately appoint the number necessary for three judges to serve as**
27 **the Presidential Election Court in order to comply with the obligation under subsection (b)**
28 **to convene the Court no later than 24 hours after the declaration of an Expedited Presidential**
29 **Recount under § 303.**

30 **(d) In identifying judges to serve on the Presidential Election Court, the Chief Justice**
31 **shall employ an appointment process designed to (1) result in a three-member panel**
32 **structured to be impartial regarding the candidates and political parties competing to win**
33 **the presidential election, and (2) select individuals to serve as judges on the Presidential**

1 Election Court who satisfy the highest standards of integrity, excellence, and
2 evenhandedness applicable to other jurists in the state.

3 (e) In the event it becomes necessary to replace a judge appointed to the Presidential
4 Election Court (due to death, resignation, removal under subsection (f), or other reason for
5 a vacancy), the Chief Justice shall immediately appoint a replacement subject to the
6 following provisions:

7 (1) The replacement shall maintain the structural impartiality of the three-
8 member panel as required by subsection (d)(1) and the individual standards specified
9 in subsection (d)(2); and

10 (2) If a list of alternate judges to serve as potential replacements in the event
11 of a vacancy has been developed in advance of Election Day, the Chief Justice shall
12 select a replacement from that list.

13 (f) Once appointed under subsection (a), a judge's term of service on the Presidential
14 Election Court lasts until the inauguration of a new president following the election, and
15 during this term of service the judge may not be removed from the Presidential Election
16 Court except by a unanimous vote of the State Supreme Court and only upon a showing that,
17 after the appointment, demonstrable evidence has surfaced that negates the judge's ability
18 to serve according to the requirement of structural impartiality in subsection (d)(1) or the
19 standards of individual character specified in subsection (d)(2).

20 **Comment:**

21 *a. Timing of appointment.* Subsection (a) reflects the judgment that the selection of the
22 judges to serve on the Presidential Election Court should occur before, not after, the casting of
23 ballots that the Court might be called upon to review. This is true for several reasons. First, in
24 keeping with the basic philosophy of the congressional Safe Harbor provision of 3 U.S.C. § 5, the
25 procedures that will be used to resolve a ballot-counting dispute in a presidential election should
26 be determined in advance of the election itself. This basic idea is also applicable to the identity of
27 the judges who will be called upon to adjudicate the dispute. If both major political parties embrace
28 the appointment of specific individuals to serve on this panel before the ballots are cast, then
29 neither side should be heard to complain about the identity of the panel after the ballots are cast,
30 when the two sides now have very specific strategic interests depending on who is ahead and
31 behind in the count. Prior appointment also permits the selected judges to develop expertise and

1 otherwise prepare for the adjudicatory role they may be called upon to play, whereas there is no
2 time available for on-the-job training in the fast-paced, high-stakes litigation that would occur in
3 a disputed presidential election.

4 Despite the great desirability of selecting the judges in advance, a state might find itself in
5 the situation where it had failed to do so. Because appointing the Presidential Election Court's
6 members after Election Day would not deprive these Procedures of Safe Harbor status under 3
7 U.S.C. § 5 *as long as the appointment is made pursuant to law in place prior to Election Day*,
8 subsection (c) is written to provide the failsafe of authorizing immediate appointment of the three-
9 judge Presidential Election Court so that it can begin its work upon triggering of an expedited
10 recount under § 303. Nonetheless, it remains the strong recommendation that the selection of the
11 three judges, as well as the development of a list of alternate judges in the event of a vacancy,
12 occur in advance of the election.

13 *b. The Presidential Election Court as a judicial court of the state.* These Procedures are
14 drafted to give states great flexibility in the design of the institution to serve the functions of the
15 Presidential Election Court under these Procedures. The Presidential Election Court is envisioned
16 as a judicial court of law, because some of its key functions are those traditionally associated with
17 courts—most obviously, the judicial contest of an election, but also judicial review (whether by
18 means of a writ of mandamus or otherwise) of the administration of the canvass, as well as judicial
19 review of the recount. Moreover, in a disputed presidential election, it is virtually inevitable that
20 the courts will become involved in litigation over the ballots, whatever particular form the
21 litigation takes. The Presidential Election Court is designed to be an institution that can handle
22 whatever state-court litigation occurs under state law during the five-week period between Election
23 Day and the Safe Harbor Deadline.

24 The simplest way for a state to fit this Presidential Election Court within the existing
25 structure of a state's judiciary is to have the Chief Justice select three state judges, all of whom are
26 already members of the state's judiciary, to serve on this special-purpose court. They could be
27 appeals judges or trial judges, or a combination. Special-purpose judicial panels often are
28 assembled for particular cases: complex or multidistrict litigation, for example. Thus, appointing
29 a special panel to adjudicate the distinctively challenging litigation that arises in the context of a
30 disputed presidential election would be well within the judicial tradition of appointing special-
31 purpose panels for a variety of distinctive kinds of cases.

1 These Procedures, however, would permit a state to experiment with different ways of
2 appointing its Presidential Election Court. If a state wished to confine selection to the pool of
3 retired rather than active judges, for example, nothing in these Procedures would preclude the state
4 from doing so. Indeed, if (insofar as permitted by other provisions of state law) the state wished to
5 look beyond the members of its own judiciary, active or retired, for possible service on its
6 Presidential Election Court—perhaps believing that there are esteemed public figures best suited
7 for the delicate role of adjudicating a disputed presidential election—the Procedures are drafted in
8 a way to accommodate that alternative as well. A state could also experiment with different
9 procedural devices to constrain the appointment of the Presidential Election Court. For example,
10 the state could require the Chief Justice to select three individuals from a list deemed acceptable
11 to the majority and minority caucuses within the state legislature. Although no such requirement
12 is part of these Procedures as drafted, a state that adopted these Procedures would be free to
13 supplement them with additional provisions concerning the appointment of the Presidential
14 Election Court if the state wished. Absent any such additional specifications, however, it should
15 be assumed that the Chief Justice is to select three active state judges for special assignment to the
16 Presidential Election Court.

17 *c. Three members, rather than five or one (or some other number).* These Procedures call
18 for a three-member Presidential Election Court. Obviously, with minor adjustment, a state could
19 employ these Procedures with a five-member panel instead. A state even could give the assignment
20 of all the functions to be performed by the Presidential Election Court to a single judge.

21 The Procedures, however, use three as the optimal number for several reasons. First, it must
22 be an odd number to avoid the possibility of a tie. Second, one judge alone does not enable the
23 increased confidence in the outcome that potentially comes when several members of a
24 multimember body agree in their rulings. Obviously, dissent within a multimember body creates
25 the converse problem, generating public concern about the basis for the dissent. But on balance
26 the upside of consensus is preferable to the downside of dissent. With a single judge, from the
27 outset the state is deprived of this potential upside. Third, having five judges rather than three
28 significantly increases the risk of dissent, lowering the likelihood of consensus. Five also increases
29 coordination challenges, a concern when the time pressure is acute, as it is during this five-week
30 period. As a related point, it is more difficult to generate collegial working relationships among a
31 five-member, rather than three-member, panel, especially one that is a single-purpose entity that

1 exists only for a short duration. The state's supreme court also has a major role under these
2 Procedures, and it is likely to have more than three members. Thus, there is little to be gained from
3 another larger judicial body involved in the adjudication of disputed presidential ballots. On
4 balance, it is best to have a three-member panel with appeal to the existing state supreme court.

5 *d. The importance of impartiality.* In order for the outcome of a disputed presidential
6 election resolved pursuant to these Procedures to have legitimacy, it is imperative that the
7 Presidential Election Court be structured to be as impartial as possible towards the candidates and
8 political parties competing in the election, and for it to be perceived as such. The process for the
9 appointment of its members must guard against bias in the composition of the court. It is also
10 important that each of the three individuals selected to serve as judges of the Presidential Election
11 Court have impeccable reputations and will strive to be fair-minded.

12 The nation's historical experience shows that, as a practical matter, the greatest risk of
13 public dissatisfaction—and thus public turmoil—following a disputed election occurs if the public
14 perceives that the tribunal responsible for adjudicating the dispute was structurally biased to favor
15 one side. For example, if the tribunal has two members of one major party and only one member
16 of the other major party, it will be perceived as biased against the latter party even though that
17 party has a seat at the table and a voice in the deliberations.

18 The great challenge is to create a body with an odd number of members so as to avoid the
19 deadlock of a tie vote, yet maintain an even balance between the political parties whose candidates
20 are involved in the dispute. The Presidential Election Court should not follow the model of the
21 Federal Election Commission, which is structured to have three Democrats and three Republicans
22 and which routinely deadlocks in 3-3 partisan splits. When the outcome of a presidential election
23 turns on resolving a vote-counting dispute in one or more states, the nation urgently needs to know
24 which candidate won the state (or states) that will give one of them the requisite majority of
25 Electoral College votes. It would be unacceptable to have the Presidential Election Court stymied
26 by an intractable tie vote.

27 The goal, then, is to design ahead of an election a tribunal with an odd number of members
28 that is likely to maximize the appearance of impartiality. One approach to this end is to have a
29 tribunal with an equal number of partisans, but also with a neutral tiebreaker in the event that the
30 partisans on each side split along party lines. It undeniably is a challenge to find an individual to
31 sit on the court whom both sides to the dispute would accept as genuinely neutral. This is

1 particularly true in a presidential election, when presumably every person who otherwise possesses
2 the qualities appropriate for membership on the body responsible for adjudicating the dispute—
3 intelligence, civic-mindedness, public-spiritedness, and the like—would be knowledgeable about
4 the competing candidates and their campaigns and likely would have formed a personal opinion
5 on which of the two would make a better president. Nonetheless, in a nation of over 300 million
6 citizens, it would be overly cynical to maintain that no one could be found whom both sides would
7 accept as impartially fair-minded as well as competent to the task of adjudicating the vote-counting
8 dispute. Especially if the pool of potential candidates for this position is not confined to currently
9 sitting judges—but instead extends to retired judges or even to highly regarded individuals from
10 various professional backgrounds (university presidents, journalists, doctors, scholars, engineers,
11 and so forth)—one can begin to imagine eminent public figures whom partisans on both sides
12 would trust as being capable of resolving the dispute as fairly and impartially as humanly possible.
13 It would not be necessary for a state to confine its search for such individuals to within its own
14 borders. Instead, precisely because the entire nation elects the president and thus has an intense
15 stake in the outcome, a state facing an outcome-determinative dispute over the winner of its
16 Electoral College votes should be free, if it wishes, to look to other states for candidates suitable
17 for appointment to its Presidential Election Court.

18 A state might employ a variety of different methods to achieve the goal of structural
19 impartiality for its Presidential Election Court. The following Illustrations provide some
20 suggestions but are not intended to be exclusive.

21 **Illustrations:**

22 1. The state's Chief Justice requires the two candidates to the dispute to agree upon
23 the three members to serve on the court. The Chief Justice of Minnesota used this method
24 for the state's disputed gubernatorial election of 1962. The two candidates selected one
25 judge having an identifiable background associated with one party, a second judge having
26 an identifiable background associated with the opposite party, and a third judge whose
27 background was not identifiably associated with either party and thus who was perceived
28 by both sides as credibly neutral and impartial. (All three were deemed to have the character
29 and temperament to be able to set aside partisan considerations.) This method has the virtue
30 of assuring that the three-member panel is acceptable to both candidates. Its disadvantage
31 is that it is more difficult to employ in advance of the election and the existence of an actual

1 dispute. Requiring the presidential candidates to agree in advance of the election to the
2 members of three-judge courts in all states where there could be an outcome-determinative
3 election dispute would be cumbersome and inefficient, especially if there were more than
4 two credible presidential candidates.

5 2. Before Election Day, the state's Chief Justice announces the selection of two
6 distinguished jurists to the state's Presidential Election Court, each clearly identified as
7 having different partisan backgrounds—for instance, one Democratic, the other
8 Republican—and calls upon these two jurists to choose a mutually acceptable third
9 member of the panel. This method of appointment is similar to one frequently employed in
10 labor-management or other arbitrations. It has the distinctive advantage that the third
11 member is structurally neutral between the other two members, given their bilateral
12 agreement to select this third member. If the two members selected by the Chief Justice are
13 perceived as equally representative of the two political parties, then the parties are
14 positioned to perceive the third member as credibly neutral towards them.

15 With this appointment method, the Chief Justice obviously must take great care in
16 selecting the first two members of the panel. If one of the two is perceived as a thoroughly
17 committed partisan, while the other is perceived as only a token or ersatz member of the
18 other party, the panel will be perceived as lopsided, and the third member will also be
19 perceived as tilted to one side. Consequently, it is essential that the two members appointed
20 by the Chief Justice be perceived by both sides as equally loyal to their respective parties.
21 Yet it is also important to the sound functioning of America's legal system that judges *not*
22 be considered as representatives of political parties, and certainly not in the same way as
23 are members of the state's legislature. Instead, the obligation of a judge in all cases is to
24 adjudicate disputes fairly and impartially, without regard to party affiliation. Accordingly,
25 in appointing these two members of the Presidential Election Court, the Chief Justice
26 should be seeking two individuals, although one a Democrat by background and the other
27 a Republican, who have equivalent reputations for having the character and temperament
28 to be able to set aside partisan considerations. Both of these individuals must endeavor
29 faithfully to adjudicate fairly and impartially according to the applicable law and
30 evidence—and *not* simply seek to protect their respective parties, adjudicating the vote-
31 counting dispute solely based on partisan considerations. If the Chief Justice selects well,

1 these two will pick a third member of the panel who, in addition to being acceptable to the
2 two parties, is also temperamentally predisposed to decide the case as fairly and impartially
3 as possible. This method of selection thus creates the possibility of an adjudication of the
4 dispute that is both genuinely evenhanded towards both sides and, even more importantly,
5 perceived as such by both sides.

6 Although this method of appointment has this prospect for success, it is less well-
7 suited for handling a dispute that involves a third-party or independent candidate. If the
8 Chief Justice has appointed a Democrat and a Republican to the panel, and the two of them
9 pick a nonpartisan neutral, but it turns out that the disputed election is between a Democrat
10 and a third-party candidate, this third-party candidate and other members of that party may
11 perceive the panel as biased in favor of the Democratic candidate and party. The risk of
12 this kind of problem arising, however, diminishes if the Chief Justice exercises care in
13 timing. On or around Labor Day, public opinion polls may give the Chief Justice a
14 sufficient sense of the likelihood that there might be a disputed presidential election
15 involving a candidate other than those of the two major parties. If so, between Labor Day
16 and Election Day, the Chief Justice can select panel members accordingly. If there are more
17 than two presidential candidates in serious contention, the Chief Justice could make
18 contingent appointments of two members to more than one prospective Presidential
19 Election Court. In each case, the Chief Justice would leave it to the two appointees to select
20 the third member of the panel. These selections also could be made before Election Day,
21 with the particular panel to be officially convened as the operative Presidential Election
22 Court under this Section depending on the dispute that actually arises after Election Day.

23 3. In a state where a third party has a robust presence, the Chief Justice announces
24 the appointment to the Presidential Election Court of three members, each of whom reflects
25 a different partisan background. Minnesota employed a version of this appointment method
26 for its disputed 2008 U.S. Senate election: one judge had come to the bench from a
27 Democratic background, the second from a Republican background, and the third had been
28 appointed to the bench by Governor Jesse Ventura, an Independent. (Ventura had been the
29 candidate of Minnesota's Independence Party.) The resulting three-member panel was
30 characterized as the "tripartisan" court by journalists in the state. The local press also
31 perceived that this method of appointment caused the court to achieve structural

1 impartiality towards the two disputing candidates, one a Democrat and the other a
2 Republican. There had also been a candidate of the Independence Party, Dean Barkley, in
3 this same U.S. Senate election. Presumably the same tripartisan panel also would have
4 achieved the same structural neutrality if the dispute had been between the Independent
5 and either the Democrat or the Republican—or even an unusually close election that had
6 involved a vote-counting dispute among all three candidates.

7 4. In a state where it is well known that the state’s supreme court is closely and
8 sharply divided along partisan lines (for example, a 4-3 split between Republican and
9 Democratic justices on the court), the Chief Justice announces that the supreme court’s
10 members unanimously support the appointment to the state’s Presidential Election Court
11 of the three individuals whom the Chief Justice has designated for this service. This
12 unanimity signals to both parties that the three-member panel should be equally acceptable
13 to both sides and has been selected to be structurally impartial towards both sides. Indeed,
14 with this method of appointment it is unnecessary that the resulting panel be seen as having
15 an identifiable Democrat and an identifiable Republican. Instead, if all three members of
16 the panel are perceived as unaffiliated and neutral between the two parties, the unanimity
17 of the supreme court despite the strong and divided partisanship of its members could
18 provide adequate assurance that the panel is structurally unbiased and impartial, coming to
19 the case collectively open-minded and ready to let the evidence and applicable law dictate
20 their decision.

21 5. A state adopts a two-step process whereby the Chief Justice first designates a
22 Nominating Committee tasked with selecting the three individuals to serve on the
23 Presidential Election Court and then, upon receipt of these three nominees, officially
24 appoints them as the members of this court. Regardless of the partisan composition of the
25 state supreme court, this type of Nominating Committee can be structured to give equal
26 representation to different political parties. For example, the Chief Justice could appoint
27 two Democrats, two Republicans, and two independents to the Nominating Committee,
28 and could require all six of them to agree unanimously on three nominees to serve as the
29 Presidential Election Court judges. Although there would be a risk that the Nominating
30 Committee would deadlock over selection of the three nominees for the court, on the
31 assumption that the Nominating Committee deliberates in good faith the risk should be

1 relatively small since they would not be deciding the disputed election itself. Moreover,
2 because the Nominating Committee would be doing its work in advance of Election Day
3 (with no actual dispute at hand), the committee would have less incentive to risk the public
4 shame and humiliation of being unable to perform the single task of identifying three
5 individuals to serve on the Presidential Election Court.

6 As long as the members of the Nominating Committee were well selected by the
7 Chief Justice—with the committee itself publicly perceived as fair and impartial towards
8 the competing political parties—then the three-judge panel unanimously chosen by the
9 committee should also be perceived as fair and impartial to the parties and candidates
10 involved in a dispute after Election Day. Once again, it would not be necessary for any of
11 the three nominees to themselves have identifiably partisan or nonpartisan backgrounds.
12 Instead, the presence of identifiable partisans (or independents) on the Nominating
13 Committee should suffice to provide the Presidential Election Court with the requisite
14 character of structural impartiality and evenhandedness.

15 These Illustrations are not intended to be exhaustive. States adopting these Procedures are
16 free to experiment with other methods of appointment reasonably designed to achieve
17 subsection (d)(1)'s overarching objective of structural impartiality.

18 **REPORTERS' NOTE**

19 *a. Specialized election courts.* The idea of a special court to adjudicate a dispute over the
20 counting of ballots in an election is not novel. Minnesota used special three-judge courts to
21 adjudicate contests of its 1962 gubernatorial election and its 2008 U.S. Senate election, as
22 described in the Illustrations to Comment *d*.

23 Several states have provisions similar to Minnesota's for the appointment of special courts
24 to adjudicate election contests. Kansas vests the adjudication of a contested presidential election
25 in a three-judge court appointed by the Kansas Supreme Court (not its Chief Justice alone). KAN.
26 STAT. ANN. §§ 25-1437 & 25-1443. For a contested presidential election, as discussed in the
27 Reporters' Note to § 303, Virginia also uses a special three-judge court, two members of which
28 are appointed by the state's Chief Justice and the third is the chief judge of the circuit court in
29 Richmond. VA. CODE ANN. § 24.2-805. North Dakota employs a three-judge panel, one of whom
30 is the state's Chief Justice and the other two are district judges designated by the state's governor.
31 N.D. CENT. CODE § 16.1-14-07.¹⁷ Maryland will empanel a three-judge court for a contested
32 presidential election upon request of a party or at the discretion of the trial court in which the

¹⁷ "If the chief justice is unable to attend at such trial, the next senior judge on the supreme court shall preside in place of the chief justice." *Id.*

1 contest is filed. MD. CODE ANN., ELEC. LAW § 12-203. Iowa uses a special five-judge panel,
2 consisting of the Chief Justice and four district-court judges that the supreme court selects. IOWA
3 CODE § 60.1. For a valuable discussion of these provisions, see Joshua A. Douglas, *Procedural*
4 *Fairness in Election Contests*, 88 IND. L.J. 1 (2013).¹⁸

5 Connecticut assigns the litigation of a disputed presidential election to a special panel of
6 three Supreme Court judges, two of which are chosen by the “Chief Court Administrator” and the
7 other selected by the candidate “who claims . . . that there was a mistake in the count of the votes.”
8 C.G.S.A. § 9-323. Two states vest original jurisdiction over a contested presidential election
9 directly in the full State Supreme Court: Colorado and Hawaii.¹⁹ This project considered adopting
10 this approach, thereby dispensing with a separate appeal to the State Supreme Court. Doing so has
11 the obvious benefit of saving time, no small consideration in the context of a disputed presidential
12 election. But even if original jurisdiction over a contested presidential election is vested directly
13 in a State Supreme Court, that court is likely to designate a special master or some similar
14 subsidiary authority to conduct any trial or other factfinding hearing that involves the presentation
15 of testimony. Indeed, Missouri expressly authorizes its State Supreme Court to appoint a
16 commissioner to assist its adjudication of a contested election (a provision applicable to other
17 statewide offices but not expressly to presidential elections). MO. STAT.
18 §§ 115.555, .561.²⁰ Thus, in the adjudication of any ballot-counting dispute there inevitably are
19 two component parts of the process: the finding of facts based on the receipt of evidence, and the
20 determination of applicable legal rules. Given this reality, there are benefits of employing a
21 Presidential Election Court to conduct the factfinding trial and make a preliminary ruling on the
22 applicable legal issues, before permitting an appeal to the State Supreme Court. For one thing, in
23 recent years a number of state supreme courts have become mired in political controversy. A state
24 can reduce the risk of such controversy engulfing the adjudication of a disputed presidential
25 election by setting up a special Presidential Election Court for this purpose, rather than vesting this
26 adjudication directly in its State Supreme Court. In addition, employment of a Presidential Election
27 Court rather than a single special master or commissioner to engage in the necessary factfinding
28 is likely to inspire greater public confidence (for the same reason that a three-judge panel is
29 preferable to a single judge for this kind of case, as discussed in the Comment above). But if a
30 state wishes to vest original jurisdiction over a disputed presidential election in its Supreme Court,

¹⁸ For contests of certain kinds of nonpresidential elections, West Virginia employs a procedure in which the contestant chooses one judge, the contestee another, and the governor the third. W. VA. CODE § 3-7-3. Pennsylvania has a rather odd provision, applicable to a presidential election and some (but not all) other elections in the state, pursuant to which jurisdiction over the contest lies in a court of *two* judges. PA. STAT. §§ 3291, 3351.

¹⁹ See Joshua Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013) (appendix), citing COLO. REV. STAT. § 1-11-204 & HAW. REV. STAT. §§ 11-171 to -175. Maine similarly vests an appeal of a recount in its state supreme court. ME. REV. STAT. tit. 21-A, § 737-A(10).

²⁰ Nevada has a similar provision: “The court may refer the contest to a special master in the manner provided by the Nevada Rules of Civil Procedure, and such special master shall have all powers necessary for a proper determination of the contest.” NEV. REV. STAT. § 293.413(3).

1 rather than relying on a Presidential Election Court for this purpose, then a state can modify these
2 Procedures to eliminate the appeals provided in §§ 309, 314, and 317.²¹

3 One important point to note when considering the relative advantages of using a special
4 Presidential Election Court, rather than vesting original jurisdiction in the State Supreme Court, is
5 that Part III of this project recognizes that any election contest is but one particular form of judicial
6 procedure to be invoked in a disputed presidential election. As discussed in the Introductory Note,
7 there are also, potentially, petitions seeking judicial review of the recount or canvass. Without a
8 special Presidential Election Court, either the State Supreme Court will be tied up with original
9 jurisdiction over all these forms of procedure or else various trial courts in the state may have
10 conflicting jurisdiction over different forms of litigation (for example, one trial court hearing
11 claims concerning the recount and another hearing claims concerning the canvass). An advantage
12 of the approach adopted in these Procedures is that it vests all of these potential judicial
13 proceedings in a single Presidential Election Court, achieving the benefits of channeling all this
14 litigation to a single judicial body while simultaneously freeing up the State Supreme Court to
15 consider only appeals of the Presidential Election Court's rulings as necessary (so that the State
16 Supreme Court is not burdened with every detail of all this litigation).

17 *b. Impartiality.* Recognition of the necessity for the tribunals that adjudicate major vote-
18 counting disputes to be structurally impartial and evenhanded toward the two competing political
19 parties and their candidates goes back in American history to 1792. In that year New York had a
20 disputed gubernatorial election between incumbent George Clinton, representing the nascent
21 Jeffersonian party, sometimes called Democratic-Republicans, and John Jay, representing the
22 emerging Federalist party. The outcome of the election turned on disputed ballots from
23 Cooperstown. The tribunal with exclusive and final authority to resolve the dispute was a
24 legislative canvassing committee comprising nine Democratic-Republicans and only three
25 Federalists. The committee split along party lines to disqualify the Cooperstown ballots, which all
26 understood would have elected Jay as governor. The reason given by the committee's partisan
27 majority, that the individual who delivered the ballots under seal to the Secretary of State was no
28 longer the lawful sheriff of the county from which they came because his commission as sheriff
29 had expired, was seen by the Federalists as a pretext for outright partisan theft of the election as
30 well as the disgraceful disenfranchisement of innocent eligible voters. The outrage of the
31 Federalists led to serious civil unrest. In the midst of all the turmoil, a young James Kent—who

²¹ It would also be possible for a state to vest original jurisdiction in the Presidential Election Court and then expressly preclude any right of appeal to the State Supreme Court, making the Presidential Election Court's judgments absolutely final and conclusive. This option was also seriously considered for purposes of this project but ultimately, on balance, these Procedures retain appellate jurisdiction for the State Supreme Court. The reason for doing so is the belief that the public more likely will believe the entire process (and thus the result the process reaches) more legitimate if the traditional State Supreme Court is not entirely divested of a role in reviewing the legal issues that arise. If, however, a state wishes to use these Procedures to structure litigation in the Presidential Election Court, but simultaneously preclude any appellate review in the State Supreme Court, a state could simply eliminate the appellate provisions of §§ 309, 314, and 317—just as it could if it vested original jurisdiction in the State Supreme Court. (Doing so would permit some adjustment of the deadlines to give the Presidential Election Court additional time within the five-week Safe Harbor period.)

1 would later write leading legal commentaries as “America’s Blackstone”—made the prescient
2 observation that the membership of the legislative canvassing committee should have been evenly
3 split between the two political parties. Although Kent did not address the need for a neutral
4 tiebreaker, to avoid the potential of a 6-6 deadlock, he did articulate the need that the tribunal for
5 adjudicating this electoral dispute—which functioned as a special-purpose court, as he saw it—be
6 structured to be evenly balanced towards both sides. For details see FOLEY, *BALLOT BATTLES*, ch.
7 2; see also Foley, *The Founders’ Bush v. Gore: the 1792 Election and Its Continuing Importance*,
8 44 *IND. L. REV.* 23 (2010).

9 American history is replete with episodes of the adjudication of important vote-counting
10 disputes that failed to abide by Kent’s call for evenhanded justice. One relatively recent example
11 involved the 1984 election to Indiana’s eighth congressional district. The House of Representatives
12 empowered a panel of two Democrats and one Republican to handle the dispute. This panel split
13 2-1 along party lines to adjust the vote-counting rules to achieve a four-vote victory for the
14 Democratic candidate. The Republicans in the House perceived the change of rules in the midst of
15 the counting process as a partisan theft of the election. See FOLEY, *BALLOT BATTLES*, ch. 10.

16 The country’s two disputed presidential elections, in 1876 and 2000, confirmed Kent’s
17 wisdom about the importance of the decisionmaking body’s composition. Rutherford Hayes was
18 ridiculed by Democrats as “Rutherfraud” or “His Fraudulency” because he was perceived as
19 having been put into office by an 8-7 partisan vote of a structurally flawed Electoral Commission.
20 George W. Bush’s title to the presidency was also questioned by many Democrats who perceived
21 the Supreme Court’s ruling in *Bush v. Gore* as partisan.

22 Consequently, § 304(d) requires a state to use a method of appointing members of the
23 Presidential Election Court that will result in that body being as structurally impartial as possible
24 in its adjudication of all issues coming before it. Section 304(d) does not require that a state adopt
25 any particular method of appointment of the Presidential Election Court in order to achieve this
26 structural impartiality. Comment *d*, in a series of Illustrations, offers a nonexhaustive set of
27 methods that a state might choose to fulfill this obligation of evenhandedness in the appointment
28 of the Presidential Election Court. For several of these Illustrations, Comment *d* draws upon the
29 particular methods that Minnesota employed for its 1962 gubernatorial election and its 2008 U.S.
30 Senate election.

31 **§ 305. Presidential Election Court: Authority**

32 **(a) The authority of the Presidential Election Court, as specified in these Procedures,**
33 **is exclusive, to be exercised without interference from any other body, except insofar as a**
34 **right of appeal to the State Supreme Court is provided pursuant to these Procedures.**

35 **(b) The Presidential Election Court, as a court of law, has the power to enter orders**
36 **common to any ordinary court of law within the state, including orders to permit parties to**

1 its proceedings to conduct discovery to assist any factfinding the Court may undertake,
2 provided that any such orders be consistent with the expedited nature of these Procedures.

3 (c) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for
4 an Expedited Presidential Recount, no court or other tribunal or agency of this state may
5 extend or otherwise delay any deadline set forth in these Procedures.

6 (d) The Presidential Election Court and the State Supreme Court may set subsidiary
7 deadlines and promulgate other subsidiary rules in order to facilitate implementation of
8 these Procedures, provided that all such subsidiary deadlines and rules are consistent with
9 these Procedures and do not alter any of its deadlines and provisions.

10 (e) If in contravention of these Procedures, the Presidential Election Court has missed
11 any of its deadlines, the State Supreme Court may issue a remedial order calculated to enable
12 compliance with the remaining deadlines and successful completion of all proceedings
13 necessary to achieve Safe Harbor status under 3 U.S.C. § 5.

14 (f) *Standard of Review on Appeal.* In all appeals under §§ 309, 314, and 317, the State
15 Supreme Court shall affirm the Presidential Election Court's decision unless the appellant
16 establishes the decision to be contrary to law or resting upon a clearly erroneous finding of
17 fact.

18 **Comment:**

19 *a. Each state's Presidential Election Court as a single body to handle multiple functions.*
20 These Procedures channel all litigation that may arise within a state concerning disputed
21 presidential ballots to a single institution for adjudication. In order to engineer an efficient
22 procedure that will enable a state to meet the five-week Safe Harbor Deadline, a single court must
23 be empowered to hear all issues arising over the ballots. There is too great a risk of unnecessary
24 delay if some additional body needs to reconcile potentially conflicting rulings and
25 pronouncements from multiple judicial bodies within the state.

26 For this essential reason, these Procedures give the Presidential Election Court the authority
27 to adjudicate any judicial contest over the presidential election in the state, and also to conduct any
28 judicial review of administrative decisions that occur during the canvass, as well as to resolve all
29 disputes that occur in the context of the recount itself.

30 *b. A Presidential Election Court in each state.* It should be clear from the scope of its
31 powers under these Procedures that the Presidential Election Court is a state court, and not a federal

1 one. It derives its adjudicatory authority from state law, although the state's own power to grant
2 one of its courts this adjudicatory authority ultimately stems from the state's power to appoint
3 presidential electors, vested by Article II of the federal Constitution. A state's Presidential Election
4 Court has jurisdiction solely over disputes arising from the November balloting to appoint that
5 particular state's presidential electors. Its jurisdiction does not extend to similar disputes that may
6 arise over the appointment of a different state's presidential electors.

7 Thus, it is possible that there may be simultaneously two or more different Presidential
8 Election Courts conducting separate adjudicatory procedures in separate states. Just as the Chief
9 Elections Officer of two or more states may need to trigger an Expedited Presidential Recount in
10 their respective states, as explained in the Comment to § 303, so too may the Chief Justices of
11 these multiple states need to announce the appointment of a Presidential Election Court in each of
12 these states. Thus, for example, if expedited proceedings are occurring simultaneously in both
13 Ohio and Nevada, it will be necessary to distinguish between the Presidential Election Court of
14 Ohio (PEC-OH) and the Presidential Election Court of Nevada (PEC-NV). A state might also
15 choose to give an alternative name to the judicial panel that functions as the Presidential Election
16 Court under these Procedures. For example, a state wishing to be especially precise could
17 denominate this judicial body as the Court for the Adjudication of Disputes over the Appointment
18 of Presidential Electors. But one goal of these Procedures is to be as accessible and understandable
19 to the general public as possible. Given this goal, Presidential Election Court seems a more
20 straightforward name.

21 *c. The relationship of the Presidential Election Court and the state's supreme court.* These
22 Procedures give a crucial role both to the special Presidential Election Court as the single court of
23 original jurisdiction empowered to adjudicate all issues arising over the counting of the state's
24 ballots in the presidential election and to the state's supreme court insofar as it is empowered to
25 exercise appellate jurisdiction over the Presidential Election Court. In this respect, these
26 Procedures repose great trust in both of these state judicial institutions. It is up to those institutions
27 to show themselves worthy of this trust, or else risk the intervention of the federal judiciary
28 notwithstanding the presumption against federal-court interference (described in the Comment to
29 § 302) as long as the state courts comply with these Procedures.

30 The State Supreme Court is bound by these Procedures and should consider itself so bound
31 even if it was the institution that promulgated them into state law. Safe Harbor status requires

1 following the law as it existed on Election Day, and the State Supreme Court should endeavor
2 faithfully to follow the state law then in effect, including these Procedures. Insofar as a State
3 Supreme Court *sua sponte* deviates from these Procedures, the State Supreme Court risks not only
4 depriving the state of Safe Harbor status but also inviting federal-court involvement since the
5 presumption of regularity no longer applies.

6 Like the Presidential Election Court, the State Supreme Court is empowered to promulgate
7 supplementary rules consistent with these Procedures, in an effort to enhance their effectiveness.
8 When both courts promulgate supplementary rules in this way, those of the State Supreme Court
9 take precedence, given the court's higher authority within the state's judicial system.

10 *d. Standard of appellate review.* Subsection (f) is written to embody the conventional
11 standard of appellate review, pursuant to which the reviewing court is empowered to exercise an
12 independent judgment on questions of law, while deferring to findings of fact that are not clearly
13 erroneous. Nonetheless, subsection (f) is deliberately drafted so that the default position is to leave
14 the decision of the Presidential Election Court standing unless on appeal the State Supreme Court
15 pursuant to this standard of review finds reason to reverse that decision. This default position
16 reflects the important principle that, pursuant to these Procedures, the Presidential Election Court
17 is required to be structured to be as impartial and nonpartisan as possible, with the particular
18 sensitivities of a presidential-election dispute taken into consideration, whereas a state supreme
19 court is not specially designed to adjudicate this particular type of dispute. Thus, while the State
20 Supreme Court has the power to reverse the Presidential Election Court pursuant to the ordinary
21 standard of appellate review, a wise exercise of that power in the particular context of a contentious
22 presidential election will call upon the justices of the State Supreme Court to consider especially
23 carefully whether in the particular context there is indeed sufficient reason to reverse the decision
24 of the deliberately designed Presidential Election Court.

25 **REPORTERS' NOTE**

26 *d. Standard of appellate review.* It is no disparagement of the integrity or conscientiousness
27 of the justices who serve on state supreme courts, or any other appellate body, to recognize that
28 vote-counting disputes in high-stakes elections put a particular kind of pressure on the judiciary, a
29 pressure that stresses the judiciary's objective to secure impartial and nonpartisan justice for all
30 litigants. In the context of adjudicating which ballots to count and thus potentially which candidate
31 will win, the objective of impartiality and nonpartisan adjudication dovetails with the need to
32 maintain the legitimacy of the electoral system itself, and this legitimacy in turn depends upon the
33 public's perception that the adjudication of the vote-counting dispute is not tilted in favor of one
34 partisan side or the other. There is a reason why historically the political-question doctrine was

1 designed to keep judges out of the so-called “political thicket,” as Justice Frankfurter put it, and
2 even as the judiciary inevitably plays an essential role in the adjudication of a high-stakes vote-
3 counting dispute, there remains the ongoing need for the wise exercise of judicial power to
4 recognize the dangers to the values of impartiality, nonpartisanship, and legitimacy that arise if
5 and when the judiciary itself appears divided along partisan lines in these adjudications.

6 How this affects appellate review depends upon the structural relationship of the trial-level
7 court and the supervisory court exercising appellate review. If there is no reason to believe that the
8 trial-level court has any distinctive attribute or advantage with respect to the values of impartiality,
9 nonpartisanship, and legitimacy, then there would be no reason for the appellate court even as an
10 informal matter in the exercise of wise judgment to be particularly deferential to the decision or
11 deliberations of the trial-level tribunal. Conversely, if the trial-level tribunal has been deliberately
12 designed to be as impartial and nonpartisan as feasible, and if there is a general consensus within
13 the judiciary and the public that its design has been successful in this respect, then the posture of
14 a vote-counting dispute on appeal is somewhat different as a practical matter with respect to the
15 paramount value of democratic legitimacy.

16 Consider a three-judge elections court that is widely understood to be as balanced as
17 possible, with one Democratic appointee, one Republican appointee, and one independent
18 appointee. Suppose that this specially designed three-judge court adjudicates a high-stakes vote-
19 counting dispute and manages to maintain public unanimity for all of its rulings. Now the same
20 dispute on appeal moves to the state’s supreme court. If the state supreme court were to reverse
21 the unanimous decision of the specially-designed three-judge panel, *and if this reversal were to be*
22 *rendered in a fractured ruling by the justices of the state supreme court divided along apparently*
23 *partisan lines*, this reversal as a practical matter would risk undermining whatever legitimacy had
24 been achieved by the unanimity of the three-judge court that had been specially designed to
25 maximize the objective of achieving impartiality, nonpartisanship, and legitimacy in the
26 adjudication of this high-stakes vote-counting dispute. Under the ordinary standard of appellate
27 review, in this situation the state supreme court undoubtedly would have the power to render this
28 reversal. Nonetheless, in exercising that ordinary standard of appellate review, wise justices on the
29 state supreme court would consider whether reversal was indeed the legally correct outcome.
30 Perhaps, upon further deliberation, the three-judge court actually reached the legally correct result
31 in a case that was not “open-and-shut” on initial examination—and thus affirmance, rather than
32 reversal, is the legally correct disposition on appeal. Appellate judges, in the exercise of wise
33 judgment, have been known to change their views concerning the correct disposition of a case,
34 from their initial inclination, after further reflection on its merits.

35 These considerations are not merely theoretical. In the litigation over Minnesota’s 2008
36 U.S. Senate seat, the Minnesota Supreme Court was called upon to adjudicate different issues at
37 different stages. In the first stage, which occurred before the empaneling of the special three-judge
38 court for the contest of that election, the Minnesota Supreme Court rendered a fractured 3-2 ruling
39 perceived to fall along partisan lines. Although there was no reason to think that this ruling was
40 rendered in anything other than utmost conscientious good faith, it was widely perceived within
41 the state to be a low moment during the entire dispute over the U.S. Senate seat. The distress over
42 this ruling stemmed in large measure from its fractured nature, where partisanship seemed a reason
43 for the fracture even if there was no partisan intent underlying the ruling.

44 In the subsequent stage of the dispute, the Minnesota Supreme Court had before it the
45 appeal of the contest rendered by the special three-judge court empaneled for that contest. As
46 described in the Comment to § 304, that three-judge court had been handpicked by the Minnesota

1 Supreme Court itself with the goal of maximizing the three-judge court’s impartiality and
2 nonpartisanship. Throughout the trial of the contest, the media routinely referred to the three-judge
3 court as the “tripartisan” court because it had one Democratic appointee, one Republican
4 appointee, and one Independent appointee. Moreover, that “tripartisan” court managed to be
5 unanimous in all of its many rulings publicly issued throughout the trial of the contest. Thus, once
6 the contest was on appeal, the posture of the case was that the Minnesota Supreme Court was
7 reviewing the unanimous rulings of its handpicked “tripartisan” court. The Minnesota Supreme
8 Court, rather than dividing again 3-2 (along partisan lines or otherwise), instead unanimously
9 affirmed the “tripartisan” court’s determinations. Although as a formal matter the Minnesota
10 Supreme Court exercised ordinary appellate review over the “tripartisan” court, and while the
11 Minnesota Supreme Court’s own unanimous opinion affirming the “tripartisan” court is
12 conventional in its legal reasoning (explaining why it reached its conclusions on the merits of each
13 legal issue in the case), the members of the Minnesota Supreme Court were undoubtedly aware of
14 their previous 3-2 ruling and the public reaction to it. They knew the consequences of a similar 3-
15 2 reversal along partisan lines of the unanimous judgment of the “tripartisan” court. Without
16 relinquishing their formal authority to review (and if necessary reverse) the rulings of the
17 “tripartisan” court, the Minnesota Supreme Court exercised their appellate power wisely in
18 achieving a unanimous affirmance of the unanimous judgment under review. The result was
19 greater public perception of the legitimacy of the adjudication of the vote-counting dispute than
20 otherwise would have been the case. For further details, see FOLEY, BALLOT BATTLES, ch. 12.

21 § 306. Electronic Filing and Service

22 **To facilitate compliance with all deadlines provided in these Procedures, both the**
23 **Presidential Election Court and the State Supreme Court shall establish and maintain a**
24 **website and email system to enable instantaneous communication as follows:**

25 **(a) All court orders and announcements shall immediately be posted on the**
26 **court’s website and simultaneously transmitted by email to all candidates who are**
27 **parties to the court’s proceeding, as well as to the state’s Chief Elections Officer and**
28 **to any other parties to the court’s proceeding.**

29 **(b) Whenever a party is subject to a filing deadline caused by the release of a**
30 **court order or announcement, including the deadline of filing a notice of appeal, the**
31 **time for calculating the deadline shall begin as soon as the party receives from the**
32 **court an email notifying the party of the court’s order or announcement.**

33 **(c) All notices of appeal must be timely filed with both the Presidential Election**
34 **Court and the State Supreme Court, and the appellant must email the notice of appeal**
35 **to all other parties to the proceeding that produced the order being appealed.**

36 **(d) Whenever a party files a motion, brief, or other document in a pending**
37 **court proceeding or appeal, the filing shall be by electronic transmission with the**

1 **document immediately posted on the court’s website established under this Section,**
2 **and the party shall serve by email a copy of the filing to all other parties to the court’s**
3 **proceeding.**

4 **(e) Each party to a proceeding or appeal shall designate a single attorney to**
5 **receive all service of documents pursuant to subsection (d), and this attorney shall**
6 **specify the single email address to use for this service; and for each proceeding or**
7 **appeal, a list of all such attorneys and email addresses shall be publicly posted on the**
8 **website of the court with jurisdiction over the proceeding or appeal.**

9 **(f) Whenever the Presidential Election Court has consolidated several**
10 **proceedings, or the State Supreme Court has consolidated several appeals, the parties**
11 **to each case so consolidated shall serve documents under subsection (d) upon the**
12 **parties to all other cases that are part of the same consolidation.**

13 **(g) Both the Presidential Election Court and the State Supreme Court are**
14 **empowered to adopt additional rules to facilitate the efficient operation of this website**
15 **and email system and to maximize its effectiveness as a means of instantaneous**
16 **communication of all relevant legal documents.**

17 **(h) *Consequences of noncompliance with electronic filing requirements.***

18 **(1) The failure of a party to file a timely notice of appeal within the**
19 **specified deadline causes forfeiture of the party’s right to that appeal, thereby**
20 **barring the State Supreme Court’s consideration of that appeal.**

21 **(2) Pursuant to the authority granted in subsection (g), both the**
22 **Presidential Election Court and State Supreme Court may impose such**
23 **sanctions as each finds warranted for a party’s failure to meet a deadline for**
24 **filing a document as required in subsection (b), including the sanction of**
25 **dismissal of the particular proceeding or appeal; provided that in no**
26 **circumstance may the Presidential Election Court or State Supreme Court**
27 **waive a party’s forfeiture of an appeal for failure to timely file a notice of**
28 **appeal as required in subsection (h)(1).**

29 **Comment:**

30 *a. Electronic filing and service.* Experience in previous high-stakes vote-counting disputes
31 demonstrates the feasibility of creating an electronic filing and service system of this kind.

1 Moreover, the specialized bar that handles these cases when they arise is familiar with filing briefs
2 and other documents electronically, on an extremely expedited basis. As necessary, they can work
3 with the Presidential Election Court and its staff to make this electronic filing and service system
4 function as smoothly and efficiently as feasible.

[No Reporters' Note]

5 **§ 307. Initial Phase of Presidential Recount by Local Authorities**

6 **(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for**
7 **an Expedited Presidential Recount, each Local Election Authority shall immediately begin**
8 **the process of administering a recount of all ballots in its jurisdiction that were counted as**
9 **part of the preliminary returns of the presidential election.**

10 **(b) No later than eight days after Election Day, each Local Election Authority shall**
11 **complete its recount.**

12 **(c) As part of the local recount, any presidential candidate whose preliminary vote**
13 **totals statewide were within five percent of the leading presidential candidate statewide,**
14 **along with this leading candidate, may designate representatives to observe the recount**
15 **conducted by the Local Election Authority.**

16 **(1) When a recount involves manual inspection of ballots to determine if a**
17 **marking on the ballot qualifies as a vote under state law, the observation to which a**
18 **candidate's representative is entitled must take a form that allows the candidate's**
19 **representative to examine the markings on the ballot.**

20 **(2) When a recount involves only the use of machines to verify the accuracy of**
21 **the initial count, a candidate's representative shall be entitled to examine the Local**
22 **Election Authority's inspection of the machines for the purpose of determining that**
23 **they operate properly.**

24 **(3) As part of the right to observe the recount, a candidate's representative**
25 **may also examine any document relevant to the conduct of the recount, including a**
26 **ballot, if doing so will not disrupt or delay the recount.**

27 **(d) A candidate's designated representative may object to any decision made by the**
28 **Local Election Authority during the recount if, but only if, reversal of the decision upon**
29 **review by the Presidential Election Court would alter the number of ballots counted for any**
30 **candidate.**

1 **(e) The Presidential Election Court shall have whatever authority is necessary to**
2 **assure that each Local Election Authority is able to complete its recount within the eight-day**
3 **deadline specified in subsection (b).**

4 **(1) The Court’s authority under this subsection includes the authority to**
5 **remove a candidate’s representative from observation of the recount if the**
6 **representative has become unduly disruptive.**

7 **(2) Whenever the Court removes a candidate’s representative pursuant to this**
8 **authority, the candidate shall have the right to designate a substitute representative**
9 **to continue observing the recount, but if the substitute also becomes unduly**
10 **disruptive, the Court in its discretion may declare that the candidate has forfeited the**
11 **right to designate another substitute.**

12 **Comment:**

13 *a. The conduct of the recount.* What happens in a recount depends on the particular type of
14 voting technology used to cast and count the ballots initially. The Procedures that form Part III of
15 this project do not require a state to adopt any particular type of voting technology; nor do they
16 mandate certain recounting methods insofar as alternative recounting methods might be employed
17 for any single type of voting technology. Thus, whether a manual rather than machine recount is
18 required in a presidential election is a function of voter technology and state law that is beyond the
19 scope of these Procedures. Part II of this Project, however, provides Principles for conducting a
20 recount, which a state may wish to employ for presidential as well as nonpresidential elections.

21 Notwithstanding the discretion that states have under these Procedures in how to conduct
22 a recount, states still must undertake a recount—rather than merely a retabulation of returns—to
23 comply with these Procedures. Insofar as a state does not already provide for a recount rather than
24 just a retabulation, adoption of these Procedures will entail a change of the state’s law in this
25 respect. This change would be consistent with 3 U.S.C. § 5 and due process as long as done in
26 advance of the election, for reasons elaborated in the Comment to § 302. Whether in the state this
27 particular change could occur only by means of a statutory enactment by the legislature, or instead
28 by a rule promulgated by the State Supreme Court, is a matter to be resolved by examining the
29 relevant laws of the particular state.

30 To qualify as a recount, rather than a retabulation, some form of reexamination of the
31 ballots themselves must occur. In the case of paper ballots, this reexamination can take the form

1 of running the ballots through a counting machine again, in order to verify the accuracy of the
2 initial count, or it can take the form of manual inspection of each initially counted ballot. In the
3 case of Direct Recording Electronic (DRE) voting machines that do not produce a paper ballot—
4 or paper record of any type, such as a Verified Voter Paper Audit Trail (VVPAT)—a recount can
5 take the form of examining the computer memory of each voting machine and rerunning the
6 computer software to recalculate the vote totals on each machine based on the electronically cast
7 ballots stored in the machine. By contrast, what does *not* suffice as a recount under any
8 circumstances is to take the initially reported vote totals produced from each machine and simply
9 add up all of those machine totals into a single statewide total for each candidate; that kind of re-
10 addition of the initially reported vote totals from each machine is a retabulation of returns, and not
11 a recount of ballots.

12 *b. Full statewide recount.* Whatever type of recount is employed (depending on a state's
13 voting technology and applicable laws), in a presidential election it is necessary that the *scope* of
14 recount encompass *all* the ballots cast statewide and initially counted as part of Election Night
15 returns. Each Local Election Authority shall conduct the recount for its share of all these statewide
16 ballots in the presidential election, and no Local Election Authority shall be omitted from this
17 statewide recount. The obligation of each Local Election Authority to perform its portion of the
18 statewide recount is nondiscretionary, once the Chief Elections Officer has made the necessary
19 declaration under § 303.

20 In some states, for nonpresidential offices, a recount proceeds in multiple stages: first, a
21 random sample of precincts is recounted and, only if there is a sufficient discrepancy between the
22 recount and the initial count, is it necessary to conduct a full recount of all ballots initially counted.
23 That kind of sampling and multiple-stage process is inappropriate for a presidential election for
24 which an expedited recount is necessary after a § 303 declaration. Given the importance of a
25 presidential election to the nation, and in the condition of uncertainty that causes the triggering of
26 expedited procedures under § 303, it is imperative to recount all initially counted presidential
27 ballots in the state—not just a sampling of them—whatever particular method of recounting ballots
28 is employed. Likewise the expedited nature of the recount required under these Procedures
29 precludes a multi-stage recount process. From the outset of the Chief Executive Officer's
30 declaration under § 303, each Local Election Authority must understand that its obligation will be
31 to recount all the initially counted presidential ballots within its jurisdiction and that, given the

1 exigency, it must do so within the specified deadline: one week after the declaration under § 303,
2 which is eight days after Election Day.

3 As stated in the Introductory Note, however, and as further explained in the Comments to
4 §§ 310 and 312, a full statewide recount under this Section encompasses only the reexamination
5 of ballots initially counted and reported as part of the preliminary returns on Election Night, which
6 formed the basis of the declaration under § 303. This statewide recount does *not* encompass
7 evaluating the eligibility of any ballots not counted as part of those preliminary returns. Rather,
8 issues concerning the eligibility of those previously uncounted ballots are resolved during the
9 canvass under § 310 and, potentially, through judicial review of the canvass under § 312. (Thus,
10 overseas and military ballots not counted on Election Night, but entitled to be counted later during
11 the canvass, will not be part of the recount under this Section.)

12 *c. Specific focus and goal of a recount in context of these Procedures overall.* Accordingly,
13 defined in this precise way, the recount under this Section serves a specific function in the overall
14 operation of these Procedures: to confirm that a ballot included in the preliminary count as
15 containing a vote for a particular candidate does indeed contain a vote cast for that candidate. With
16 certain types of voting technology, this confirmation is a fairly straightforward undertaking. For
17 example, one innovative form of voting technology enables voters to touch the name of their
18 chosen candidates on a computer screen and, then, after they are finished making their choices, the
19 technology prints out a paper version of their ballot with the names of their chosen candidates for
20 the voters to review; the choices as marked on the paper are then tabulated by a separate counting
21 machine. With this technology, there is no ambiguity about the voter's choices as marked on the
22 paper version of the ballots. A recount, thus, can easily confirm the choices as so marked, and can
23 verify the initial count of those ballots by running these paper ballots through the counting
24 machines again.

25 By contrast, if the voting technology in use involves older optical-scan paper ballots, on
26 which the voters themselves mark their choices by hand with a pen or pencil, then a recount
27 inevitably will involve the issue of how to handle ambiguous marks made by voters. An
28 exclusively machine-based recount of these ballots would require the ballot markings to be
29 readable by machine in order to count, whereas a manual recount of these ballots would permit
30 human evaluation of the markings to resolve the ambiguity. As indicated above, however, it is for

1 a separate provision of state law—based on the state’s policy choice—to determine what type of
2 recount it wishes to use to handle the issue of ambiguity on voter-marked optical-scan ballots.

3 Many issues that might arise in a disputed presidential election would be beyond the scope
4 of the recount, as defined for the purpose of this Section. In addition to issues concerning the
5 eligibility of previously uncounted ballots, which are left to the canvass (as already mentioned),
6 other issues would need to be left to a judicial contest of the election under
7 § 315. For example, the so-called “butterfly ballot” issue that arose in Florida in 2000—where
8 faulty ballot design induced some voters to cast their ballots erroneously for a candidate who was
9 not their actual choice—would be an issue beyond the scope of a recount, as defined for purposes
10 of this Section, but instead would need to be raised in a contest under § 315. (Whether or not there
11 would be a remedy under § 315 for faulty ballot design is a separate matter, to be determined by a
12 provision of state law that is beyond the scope of these Procedures.) In a recount under this Section,
13 a ballot clearly marked as cast for Candidate A would count for Candidate A, even if an argument
14 might be pursued in § 315 that faulty ballot design caused the voter to cast the ballot for Candidate
15 A when actually Candidate B was the voter’s choice.

16 **Illustration:**

17 1. In one particular locality within a state, the printed optical-scan ballots
18 inadvertently omitted the names of Jane Smith and Richard Roe, the Republican Party’s
19 nominees for President and Vice President, who by law were entitled to be included among
20 the candidates listed on the ballot. The number of ballots cast in the state that were mistaken
21 in this way is over 10,000, while the complete preliminary returns of initially counted
22 ballots at the end of Election Night showed the Republican presidential nominees trailing
23 the Democratic nominees by less than 1000 votes. The Republicans publicly argue that if
24 their names had not been wrongly omitted from the faulty ballots, enough of these ballots
25 would have been cast for them (rather than for minor-party candidates on the ballot) that
26 they would have prevailed over the Democrats statewide. This argument, even if valid
27 under state law, must be raised in a contest under § 315, and is not cognizable in the recount
28 under this Section. For the purposes of the recount specifically, the faulty ballots must be
29 counted as cast. If there is no ambiguity in how those faulty ballots were marked by
30 voters—for example, clearly marked on behalf of minor-party candidates even though in
31 rates disproportionately high compared to the rest of the state—then the recount will count

1 those ballots as marked, leaving for the contest the issue of how to handle the fact that the
2 Republican candidates were improperly omitted from these ballots, in violation of state
3 law.

4 *d. The right of candidates to observe the recount.* The threshold for a candidate to
5 *participate* in a recount should be easier to meet than the threshold for *triggering* the recount in
6 the first place. Nonetheless, and especially in an expedited Presidential Recount, it is undesirable
7 to permit every candidate to participate in the recount, no matter how low the candidate's chances
8 of winning as a result of the recount. Some minor-party or independent candidates might
9 participate in a recount solely to be disruptive, which is especially counterproductive when the
10 need for speed is mission-critical. In this situation, their status should be equivalent to any other
11 member of the public. A threshold of a five percent margin for participation in a recount represents
12 a reasonable balance between including candidates who are close to the leader and not unduly
13 expanding participation.

14 *e. A candidate's examination of ballots during a recount.* Subsection (c)(1) gives a
15 candidate's representative the right to examine the markings on a ballot in order to make a
16 judgment about whether those markings constitute a countable vote on behalf of a candidate in the
17 election. The specific form of that examination, including whether it encompasses the right of the
18 candidate's representative to touch the actual ballot and physically handle it, depends on the
19 particular technology and other circumstances involved. For example, the desire to conduct the
20 recount as rapidly as possible may cause a Local Election Authority to project images of each
21 ballot on a screen for the candidate's representatives (and public) to review. These projected
22 images may be entirely sufficient for a candidate's representative to make a judgment on whether
23 the ballot contains a countable vote in the presidential election. If so, then the candidate's
24 representative would have no right to touch the ballot itself; observation of the projected images
25 would constitute examination of the ballot's markings. In other circumstances, however, it may be
26 necessary for a candidate's representative to hold a paper ballot to examine its relevant markings.
27 For example, if there is an issue concerning whether a voter made one written mark on top of, and
28 thus after, a different written mark, it may be necessary to make a close inspection of the ballot
29 while holding it in one's hand. In this instance, observation of a projected image on a screen would
30 not suffice in terms of the right of the candidate's representative to examine the ballot markings.

1 *f. The Presidential Election Court’s authority to remove a candidate’s representative.* The
2 necessity of making sure that each Local Election Authority is capable of completing its recount
3 within the eight-day deadline requires giving the Presidential Election Court the power to remove
4 a candidate’s representative who is unduly disruptive. A candidate must be permitted to substitute
5 a new representative for one who has been so removed. But if the substitute also becomes so
6 disruptive as to require removal, then the Court has the power to declare that the candidate has
7 forfeited the right to have a representative at that particular local recount. Such forfeiture would
8 not apply statewide but solely to the particular locality where the disruption occurred.

[*No Reporters’ Note*]

9 **§ 308. Presidential Election Court’s Review of Local Recount Rulings**

10 **(a) No later than 24 hours after completion of each recount by a Local Election**
11 **Authority under § 307, each candidate seeking the Presidential Election Court’s review of**
12 **decisions objected to under § 307(d) must file a petition for review to the Court containing**
13 **an enumeration of the objections for review.**

14 **(b) Any objection not timely presented for review, as required by subsection (a), is**
15 **forfeited and unreviewable.**

16 **(c) For each objection, the Court’s jurisdiction extends to the Local Election**
17 **Authority’s decision that is the subject of the objection, and the Court is empowered to**
18 **review and where necessary reverse the decision according to the following principles:**

19 **(1) the Local Election Authority’s decision is presumptively valid regardless of**
20 **which candidate it favored and which candidate objects to it;**

21 **(2) the candidate objecting to the decision bears the burden of showing it to be**
22 **either contrary to law or factually incorrect in light of the available evidence, in which**
23 **case the Court shall set aside the erroneous decision;**

24 **(3) upon setting aside an erroneous decision under subsection (c)(2), the Court**
25 **shall make its own determination of the matter based on the applicable law and**
26 **available evidence, without remanding the matter to the Local Election Authority for**
27 **further consideration; provided, however, that the Court may remand a particular**
28 **factual issue to the Local Election Authority for its determination if (but only if) a**
29 **remand on the specific issue is absolutely necessary to resolve a dispute concerning a**
30 **particular ballot under review in the recount.**

1 **(d) In the interest of expediting the recount and avoiding a remand whenever**
2 **possible, the Court is empowered to conduct whatever additional factfinding and**
3 **evidentiary proceedings it considers necessary, including receiving testimony from**
4 **the Local Election Authority in order to obtain the benefit of its knowledge and**
5 **expertise.**

6 **(e) No later than 14 days after Election Day and prior to the completion and**
7 **certification of the canvass under §§ 310 and 311, the Court shall complete its review**
8 **of all objections to recount decisions presented for its consideration and publicly**
9 **announce its determinations, including any specific issues unavoidably remanded to**
10 **a Local Election Authority for additional factfinding.**

11 **(f) Any candidate who observed the recount under § 307(c) is entitled to**
12 **participate in the Presidential Election Court’s proceedings under this Section,**
13 **including offering to the Court reasons to sustain a Local Election Authority’s**
14 **decision made during the recount, provided that such participation shall be consistent**
15 **with the Court’s obligation to complete its review as specified in subsection (e), and**
16 **the Court in its discretion may issue orders detailing the terms of such participation**
17 **as it deems necessary in order to meet this obligation.**

18 **(g) Unless the Presidential Election Court has provided otherwise under**
19 **subsection (f), any candidate filing a petition under subsection (a) shall electronically**
20 **serve, pursuant to § 306(d), a copy of that petition on all other candidates entitled to**
21 **participate under subsection (f).**

22 **Comment:**

23 *a. Plenary authority of Presidential Election Court.* The Presidential Election Court has
24 jurisdiction over the decisions made during the recount by a Local Election Authority, if those
25 decisions affected the vote totals for any candidate. But it takes an objection to one of these
26 decisions to invoke the Court’s jurisdiction. Once invoked, the Court’s jurisdiction is over the
27 decision itself and not merely the objection to the decision, meaning that the Court has the power
28 to substitute its own decision for that of the Local Election Authority rather than remanding the
29 decision for further consideration by the Local Election Authority. This point is important, given
30 the acute time pressure of a presidential recount. Ordinarily, the far better course is for the Court
31 to make the final recount decision with respect to a particular ballot or category of ballots, rather

1 than remanding for further deliberation by the Local Election Authority. The Court therefore has
2 this power and is expected to use it to the full extent feasible. There may, however, be some
3 instances in which a remand to the Local Election Authority is unavoidable. In those instances,
4 every effort should be made to complete the limited remand and the Court’s further review of the
5 remand by the date on which the panel itself is scheduled to render its final judgment under
6 subsection (e). If absolutely necessary, the Court may make a limited remand part of its final
7 judgment, and this limited remand can be pursued after the opportunity for an appeal under
8 § 309. Such a limited remand, like an appeal under § 309, should not delay completion and
9 certification of the canvass under §§ 310 and 311; rather, the completion and certification of the
10 canvass can continue to proceed as scheduled, with any additional adjustments as necessary
11 reflected in the final certification of the election before the end of the Safe Harbor Deadline, as
12 provided in § 318.

13 *b. The status of non-petitioning candidates.* Whenever a candidate seeks the Presidential
14 Election Court’s review of a Local Election Authority’s ruling regarding a ballot during a
15 recount—for example, a ruling that counts the ballot for an opposing candidate rather than treating
16 it as a “no vote”—the opposing candidate will have an interest in, and thus desire, to defend the
17 Local Election Authority’s ruling in the Presidential Election Court’s proceeding to review that
18 ruling. Accordingly, subsection (f) provides that, whenever a candidate files a petition for review
19 under this Section, an opposing candidate who participated in the Local Election Authority’s
20 recount is entitled also to participate in the Presidential Election Court’s review under this Section.
21 The opposing candidate’s right of participation encompasses a right under § 309 to appeal a
22 Presidential Election Court’s decision that is favorable to the petitioning candidate (and thus
23 adverse to this opposing candidate). At the same time, however, subsection (f) explicitly grants
24 the Presidential Election Court discretion to tailor the nature and scope of non-petitioning
25 candidates in its review proceedings under this Section in order to enable the Court to meet the
26 deadline specified in subsection (e). The reason for this discretion is grounded in historical
27 experience concerning the conduct of recounts. It will always be in the interest of at least one
28 candidate to delay recount proceedings in an effort to “run out the clock” before the authoritative
29 adjudicatory body is able to complete its review of the recount. Consequently, non-petitioning
30 candidates may endeavor to use their right to participate in the review proceedings under this
31 Section as a way to delay the conduct of the review. Giving the Presidential Election Court the

1 power to structure the participation of non-petitioning candidates so that their participation does
2 not become a means of inappropriate delay addresses this well-founded concern, while
3 simultaneously assuring that non-petitioning candidates have an adequate opportunity to
4 participate so that they may appropriately raise legitimate points about a Local Election
5 Authority's recount ruling both before the Presidential Election Court itself and potentially on
6 appeal to the State Supreme Court.

7 **REPORTERS' NOTE**

8 In a statewide election, a fundamental distinction exists between a recount in which a single
9 statewide institution has final authority over the disposition of a disputed ballot and, by contrast,
10 a recount conducted entirely by local election officials without the supervision of a single statewide
11 institution. The role of the Presidential Election Court under this Section puts the recount mandated
12 by these Procedures within the former, rather than the latter, category. The review of all disputed
13 ballots by the Presidential Election Court enables uniform treatment of equivalent ballots, thereby
14 avoiding the problem that arose in *Bush v. Gore* of locally disparate treatment.

15 The recount of Minnesota's 2008 U.S. Senate election benefited immensely from this kind
16 of single supervisory statewide institution. There, it was the State Canvassing Board that played
17 this role. Although the Board technically was not a court, it functioned much like one. Four of its
18 five members were state judges, including two justices from the state's supreme court, as required
19 by state law. One of the justices, moreover, was the Chief Justice, who was particularly effective
20 in bringing a precedent-based system of adjudication to the ballot-by-ballot review undertaken by
21 the Board. One method that the Chief Justice employed to assure uniform treatment of equivalent
22 ballots was to keep a set of drawings for each type of ballot marking that the Board encountered
23 during the review. The sheet of paper containing these drawings became a reference point for all
24 members of the Board as they deliberated about specific ballots. Indeed, this sheet of paper was so
25 influential that it was redeployed two years later when Minnesota faced another major statewide
26 recount in its 2010 gubernatorial election. See FOLEY, *BALLOT BATTLES* at 321 (photo of Chief
27 Justice's hieroglyphic sheet, reproduced by permission).

28 There are additional lessons to be learned from Minnesota's 2008 recount, especially in
29 comparison with Florida's in 2000. One major lesson is the paramount importance of public
30 transparency. Minnesota's State Canvassing Board televised over the internet its deliberation on
31 each ballot subject to its review—and did so in such a way that viewers could see each ballot,
32 make their own judgment on its proper disposition, and compare their judgment with the one
33 reached by the Board itself. This transparency was a major factor in causing public confidence that
34 the Board was deliberating fairly and not attempting to rig the election in favor of one candidate
35 or the other. Contrast the Board's behavior in this regard with that of Miami's canvassing board
36 during the Florida recount in 2000. The Miami recount, while it was underway, occurred behind
37 closed doors, away from public view. As a result, the so-called "Brooks Brothers riot" ensued,
38 causing the Miami board to abandon its recount efforts (which were not resumed). See FOLEY,

1 BALLOT BATTLES at 240, 320. See also JAY WEINER, THIS IS NOT FLORIDA: HOW AL FRANKEN
2 WON THE MINNESOTA SENATE RECOUNT (2010). Anyone responsible for conducting a statewide
3 recount in a high-profile election, or responsible for promulgating the specific rules for the scrutiny
4 of ballots during the recount, would benefit from a study of Minnesota's 2008 recount. While these
5 Procedures provide the basic structure for a presidential recount to replicate the exemplary features
6 of Minnesota's 2008 recount, it will remain necessary to operationalize these Procedures with the
7 kind of guiding spirit that animated the Minnesota Canvassing Board's deliberations in 2008. That
8 spirit is captured not only in Jay Weiner's narrative, *supra*, but also in Foley, *Lake Wobegon*
9 *Recount*, 10 ELEC. L.J. 129 (2010); cf. Foley, *How Fair Can Be Faster: The Lessons of Coleman*
10 *v. Franken*, 10 ELEC. L.J. 187 (2011).

11 **§ 309. Appeal to State Supreme Court of Recount Review**

12 **(a) Any candidate seeking an appeal in the State Supreme Court of the Presidential**
13 **Election Court's recount review under § 308 must file a notice of appeal no later than 24**
14 **hours after the Presidential Election Court makes its public announcement under § 308(e).**

15 **(b) No appeal filed under subsection (a) shall delay certification of the canvass**
16 **pursuant to § 311.**

17 **(c) If the State Supreme Court chooses to hold oral argument on a recount appeal**
18 **filed under subsection (a), the State Supreme Court shall do so no later than 17 days after**
19 **Election Day.**

20 **(d) No later than 20 days after Election Day, the State Supreme Court shall resolve**
21 **any appeal filed under subsection (a).**

22 **(e) If the State Supreme Court's resolution of an appeal requires additional recount**
23 **proceedings on remand,**

24 **(1) each Local Election Authority required to conduct such additional recount**
25 **proceedings must complete these proceedings no later than 27 days after Election**
26 **Day;**

27 **(2) the Presidential Election Court must complete any additional recount**
28 **proceedings of its own, including all review of additional proceedings conducted by**
29 **each Local Election Authority under subsection (e)(1), no later than 30 days after**
30 **Election Day; and**

31 **(3) the State Supreme Court must complete any post-remand review of the**
32 **Court's proceedings under subsection (e)(2) at least 24 hours prior to the expiration**
33 **of the Safe Harbor Deadline under 3 U.S.C. § 5.**

1 **(2) The correction of any tabulation errors discovered upon review of the**
2 **preliminary returns or during the recount conducted under § 307;**

3 **(3) Any adjustment in the counting of ballots required by the Presidential**
4 **Election Court’s review of the recount under § 308; and**

5 **(4) Insofar as required by other provisions of state law, any adjustment in vote**
6 **totals as part of the reconciliation of discrepancies in the number of ballots cast at a**
7 **polling location and, according to polling-place records, the number of voters who**
8 **cast ballots at the polling place.**

9 **(c) With respect to any ballot that a Local Election Authority determines eligible to**
10 **be counted under subsection (b)(1), the Local Election Authority may examine the ballot to**
11 **ascertain whether it contains a vote in the presidential election and, if so, may add that vote**
12 **for the purpose of calculating the vote totals for each presidential candidate as part of the**
13 **certification of the canvass under § 311, PROVIDED THAT the Local Election Authority**
14 **must not commingle the ballot with other ballots, but instead shall preserve the ballot**
15 **separately in the event upon review under § 312 the Presidential Election Court reverses the**
16 **Local Election Authority’s determination and the ballot is ruled ineligible to be counted.**

17 **(d) For all ballot-eligibility determinations under subsection (b)(1), the Local Election**
18 **Authority shall make publicly available upon or before completion of the canvass a written**
19 **explanation for why it determined the ballot eligible or ineligible, provided that**

20 **(1) the Authority may aggregate ballots for which the explanation is the same,**

21 **and**

22 **(2) the Presidential Election Court may specify further the form that these**
23 **publicly accessible written explanations must take.**

24 **Comment:**

25 *a. Previously uncounted ballots.* Since 2000, there has been a dramatic rise in the number
26 of ballots that are not counted and reported as part of the preliminary returns on Election Night,
27 but instead are considered—and potentially counted—during the canvassing of the returns. These
28 uncounted ballots fall primarily into three categories. First are provisional ballots, now required in
29 all states by the Help America Vote Act of 2002. By their very nature, provisional ballots are not
30 supposed to be counted on Election Day, but instead are set aside for evaluation of their eligibility
31 during the canvass. The percentage of voters who cast provisional rather than regular ballots varies

1 considerably from state to state, and from county to county within states, as does the percentage
2 of provisional ballots that eventually are counted rather than rejected as ineligible. Nonetheless, in
3 many states, including some so-called “battleground states” in recent presidential elections, the
4 volume of provisional ballots that are cast and counted potentially could determine which
5 candidate wins a close presidential election in the state (just as they have determined the winners
6 of some close races for other offices in recent years). Certainly, the inherent disputability of
7 provisional ballots—by their very nature, they are of uncertain status—requires states to have well-
8 structured procedures to evaluate provisional ballots in a presidential election that may turn on
9 them.

10 A second category of uncounted ballots is absentee ballots that arrive too late to be counted
11 as part of the preliminary returns on Election Night but are still timely under a state’s election law
12 (which may permit them to arrive by a certain specified date after Election Day). State laws vary
13 on this point. Some states require absentee ballots to arrive by Election Day, and therefore this
14 category of uncounted ballots for these states is limited solely to those that might arrive on Election
15 Day itself at a time too late to be included in Election Night preliminary returns. Other states, by
16 contrast, may permit absentee ballots to arrive up to a week or 10 days after Election Day, as long
17 as they were postmarked by Election Day or, with respect to military and overseas ballots, comply
18 with the special rules for returning those subcategories of absentee ballots. Part I of this project
19 more specifically addresses a state’s rules for the casting, returning, and counting of absentee
20 ballots. Part III of this project takes as a given whatever these state rules might be, *as long as*
21 *procedurally they can fit within the schedule and deadlines provided in the Procedures set forth*
22 *in Part III*. For example, a state that wishes to adopt these Procedures as its method of handling an
23 unresolved presidential election cannot permit absentee ballots to be eligible to be counted if they
24 arrive more than two weeks after Election Day; such a rule would be inconsistent with the
25 obligation set forth in this Section of these Procedures that a state complete its review of all
26 uncounted ballots within 14 days after Election Day. Apart from this outer constraint, however,
27 for the purposes of these Procedures a state can choose how permissive it wishes to be on this
28 point. Consistent with this Section, for example, a state may choose to permit absentee ballots to
29 arrive up to a week (or even 10 days) after Election Day, as long as each Local Election Authority
30 within the state is capable of completing its review of the eligibility of these late-arriving ballots
31 no later than 14 days after Election Day. But consistent with this Section, a state alternatively could

1 choose to permit absentee ballots to arrive no later than three days after Election Day, and a state
2 could also distinguish between domestic absentee ballots, on the one hand, and military and
3 overseas ballots, on the other, for the purpose of the deadline by which they must arrive to be
4 counted. For example, consistent with this Section, a state could set three days after Election Day
5 as the deadline for domestic absentee ballots but set seven days after Election Day as the deadline
6 for military and overseas ballots.

7 The third category of uncounted ballots is absentee ballots rejected before Election Day
8 but believed by a candidate to have been rejected erroneously and thus potentially countable upon
9 reconsideration during the canvass. This category of ballots figured prominently in both
10 Washington's 2004 gubernatorial election and Minnesota's 2008 senatorial election. Thus, it is
11 easily conceivable that this category of ballots could become an issue in a future presidential
12 election. Indeed, this category of ballots did receive considerable attention during the disputed
13 2000 presidential election, but ultimately did not become the primary focal point of litigation that
14 year because of strategic choices made by the political campaigns. In the future, however, a state
15 must be prepared for the possibility that an unresolved presidential election may end up focusing
16 on claims that a potentially outcome-determinative number of absentee ballots were rejected
17 incorrectly prior to Election Day and should subsequently be counted during the canvass. In theory,
18 this category of uncounted ballots could be excluded from the canvass under this Section, and
19 confined instead to the contest under § 315, but it is far more efficient to consider this category of
20 ballots as part of the canvass. The experiences of Washington and Minnesota teach, among other
21 things, that intense pressure can arise to litigate the eligibility of these rejected ballots during the
22 canvass, rather than waiting for a contest after certification of the canvass, and this pressure can
23 produce collateral lawsuits with the capacity of causing significant delays. It is much preferable to
24 have an orderly procedure for the consideration of these ballots during the canvass, at the same
25 time as the consideration of provisional ballots and any other uncounted ballots. Because the
26 canvass inevitably includes determining the eligibility of some uncounted ballots, streamlining the
27 overall process in an effort to meet the Safe Harbor Deadline requires combining all the eligibility
28 determinations regarding uncounted ballots into a single proceeding as part of the canvass.

29 *b. Reconciliation.* A standard practice of election administration is to compare, for each
30 polling location, the number of ballots cast and the number of voters recorded as casting those
31 ballots. In principle, these two numbers should be the same. In practice, they often can be off by

1 one or two, usually as a result of a minor administrative error in the operation of the polling
2 process. These errors, tending to be random, also tend to cancel each other out, especially in a
3 statewide election that covers a large number of polling places. Larger discrepancies between these
4 two numbers are more disconcerting, as they potentially signal either more significant
5 administrative problems or even manipulation of the voting process in an effort to alter the result.

6 As with other aspects of election administration, states differ in their rules governing the
7 practice of comparing these two numbers, often called “reconciliation” among election
8 professionals. An older approach, prevalent in the 19th century, was to require a process of
9 “random withdrawal” as a method of redressing discrepancies found during reconciliation. If a
10 precinct had more ballots cast than recorded voters, then random withdrawal called for removing
11 from the ballot box the same number of ballots as the excess between ballots and voters. Random
12 withdrawal, however, has become more disfavored in recent decades; one argument against it is
13 that, if the excess between ballots and voters is just a recording error (meaning that the number of
14 eligible voters actually was identical to the number of ballots cast, but the administrative error
15 failed to accurately record this equivalence), then removing a ballot from the ballot box detracts
16 from the accuracy of what is in the box in terms of reflecting the preference of the eligible voters
17 who cast ballots at the precinct.

18 Part III of this project takes no position on whether or not a state ever should employ
19 random withdrawal and, if so, in what circumstances. Part II of this project, in § 209(b), addresses
20 this topic. But the Procedures of Part III are designed to work with whatever policy choice a state
21 makes on the matter of reconciliation. States should be able to make different policy choices on
22 this point and still use the Procedures of Part III to handle an unresolved presidential election.

23 The variability of state law on this topic extends to methods that states use to record the
24 number of voters at each polling location. One common method is simply to count the number of
25 signatures of voters who signed the poll books at that location as a prerequisite to casting a ballot.
26 But another method sometimes employed is to count the number of “authorized to vote” tickets
27 handed to voters after they have checked in and their eligibility has been verified. (Where used,
28 these “authorized to vote” tickets are then handed to poll workers as a prerequisite for using a
29 voting machine to cast a ballot.) These two methods can diverge in their results, as Minnesota
30 recognized during its 2010 gubernatorial recount.

1 Changes in voting technology likely will cause additional variation in the way states and
2 localities might conduct reconciliation. If in the future voters must scan a pre-marked electronic
3 ballot in order to receive a printed ballot capable of being counted, reconciliation might consist in
4 matching the number of electronic ballots with printed ballots. But whatever reconciliation entails
5 in a particular state, this Section specifies that it be conducted as part of the canvass and thus
6 subject to the schedule and deadlines associated with all parts of the canvass.

7 *c. The need for practical reversibility.* The prohibition against commingling ballots ruled
8 eligible for the first time during the canvass is critically important.

9 Consider the situation in which a Local Election Authority during the canvass rules a ballot
10 eligible to be counted. Perhaps it was a provisional ballot, and there was some significant doubt
11 about its eligibility, but the Local Election Authority ruled in its favor. Suppose the Presidential
12 Election Court then disagrees with the Local Election Authority on the point and determines the
13 ballot ineligible. In this situation, in order to undo the Local Election Authority's contrary ruling,
14 it is imperative that the Presidential Election Court be able to exclude the ballot from the count. If
15 before the Presidential Election Court has a chance to review the Local Election Authority's ruling,
16 the Authority has irretrievably commingled the ruled-upon ballot with all other counted ballots,
17 then the Authority has irreversibly frustrated the existence and purpose of the Presidential Election
18 Court's review.

19 To be sure, most ballots in the election will have been counted on or before Election Day
20 in a way that they are irretrievably commingled, and thus if the Local Election Authority made an
21 erroneous eligibility determination that led to their being counted, the Presidential Election Court
22 will be unable to simply order an undoing of those ballots being counted. It would require a major
23 change in the practice of American elections for ballots cast and counted at polling places on
24 Election Day to have serial numbers, whereby each one could be individually retrieved from the
25 count if subsequently determined to have been ineligible. The fear of contravening the voter's right
26 to anonymity in the choices cast on the ballot has historically precluded such a practice.

27 But ballots not counted until after Election Day present a different dynamic. By definition,
28 their eligibility will be considered only once it is known what the vote margin is in the state
29 between the two leading candidates. If the gap for example is 100 votes, every ballot will be
30 examined with the eye to whether it brings the trailing candidate one ballot closer to closing that
31 100-vote margin.

1 Given this dynamic, if the Local Election Authority’s decision on the ballot is irreversible
2 as a practical matter, then the litigation pressure to get the matter in the hands of the reviewing
3 court, and then the State Supreme Court, before the Local Election Authority even has a chance to
4 rule on the ballot, will be especially intense. In a disputed presidential election, where the stakes
5 are the highest, this litigation pressure will be intolerable. Motions for emergency Temporary
6 Restraining Orders will fly immediately, once the preliminary returns are known—or perhaps even
7 beforehand if they are anticipated to be close. The race to the courthouse will be chaotic, and any
8 attempt to maintain adjudicatory order will break down, seriously risking noncompliance with the
9 Safe Harbor Deadline.

10 Consequently, to diffuse this intense pressure, the system must have the built-in feature
11 that no decision of a Local Election Authority that potentially could affect the counting of ballots
12 is irreversible. From the outset, instead, all such decisions will be preserved in a posture that
13 enables the Presidential Election Court to undo those decisions if the Court concludes that those
14 decisions were erroneous. Likewise, the Presidential Election Court’s decisions will be preserved
15 in a way that they are reversible if found erroneous by the State Supreme Court. With this assurance
16 to the candidates and their partisan supporters that nothing is undoable until the entire process is
17 final at the end of the five-week period, the ballot-eligibility determinations during the canvass as
18 well as the subsequent judicial review of them can proceed in a logical and orderly way, without
19 a chaotic and deadline-threatening race to the courthouse.

20 *d. Methods of practical reversibility.* As a practical matter, the easiest way to make sure
21 that the ballot-eligibility rulings of a Local Canvassing Authority remain reversible is to keep these
22 ballots sealed and uncounted throughout the time available for seeking judicial review of those
23 rulings. If the ballots stay uncounted in their ballot-secrecy envelopes until after the time is over
24 for any review proceedings before either the Presidential Election Court or the State Supreme
25 Court, then there is no risk of irretrievable commingling. Of course, keeping these eligible ballots
26 separate and uncounted complicates the certification of the canvass and, potentially, the litigation
27 of a judicial contest that challenges the certification. One way to handle this difficulty would be to
28 have the Local Election Authority, at the time of certifying the canvass based on all counted ballots
29 up to that point, make a simultaneous companion certification of the number of eligible-but-as-
30 yet-uncounted ballots that exist alongside the certified count. A judicial contest of that certification
31 could then proceed, recognizing that the additional ballots ruled eligible during the canvass will

1 be added to the count at the end of the contest. It is acceptable under these Procedures for a state
2 to adopt that approach to handling this detail concerning the certification of the canvass.

3 The Procedures, however, also permit the state to handle the point in a different way, as
4 long as the state can do so in a way that is consistent with its duty not to irretrievably commingle
5 the ballots ruled eligible during the canvass. Suppose, for example, that using innovative
6 technology the state could conditionally count these ballots in a way that would enable them to be
7 uncounted if subsequently ruled ineligible. In these circumstances, the Procedures would permit
8 the state to conditionally count these ballots in this way and to include the conditional count of
9 them in the vote totals reported as part of certifying the canvass.

10 To be sure, the state presumably would wish to employ this innovative technology only if
11 doing so would be consistent with the value of protecting the voter's anonymity regarding the
12 content of the voted ballot. If conditionally counting the ballot risked violating the voter's
13 anonymity at a subsequent time when it might be necessary to undo its counting, then most states
14 likely would forgo use of the technology—and keep the ballots separate and uncounted until the
15 time for any litigation over the canvass had expired. Nonetheless, from the perspective of these
16 Procedures, that is a separate policy choice for the states to make. As long as the state complies
17 with the no-commingling requirement, it satisfies the requirement of this Section.

18 *e. Explanation of ballot-eligibility rulings.* The Local Election Authority's obligation in
19 subsection (d) to supply a written statement of reasons for its ballot-eligibility determinations is
20 not intended to be onerous, but instead simply to provide a basis upon which the Presidential
21 Election Court can review these determinations. Unless otherwise specifically directed by the
22 Presidential Election Court, these written explanations can take whatever form is most convenient
23 to the Local Election Authority, as long as they are publicly accessible and timely. If it is more
24 convenient to group ballots by category of explanation, rather than listing each ballot seriatim, the
25 Local Election Authority may do that, unless otherwise directed by the Presidential Election Court.

26 **REPORTERS' NOTE**

27 *a. Ballot impact versus anonymity.* The imperative not to commingle ballots that remain
28 disputable after certification of the canvass raises a question about whether there is a tradeoff, at
29 least theoretically, between (a) the value of including presumptively eligible ballots in the certified
30 count and (b) the value of preserving voter anonymity. With respect to the first value, a voter
31 suffers when the voter's ballot has been deemed eligible by the relevant Local Election Authority
32 and yet that ballot is set aside and not actually counted until after certification of the canvass and

1 all potential proceedings concerning judicial review of that ballot's eligibility have conclusively
2 expired. Even assuming that this voter's ballot is eventually counted as part of the final certification
3 of the election—and counts equally with all other eligible ballots in this final certification—the
4 ballot (along with its voter) has been deprived of having equal influence over the certification of
5 the canvass itself. Because that certification is consequential, especially for determining which
6 candidate bears the burden in a subsequent contest of overturning that certification, this ballot
7 (along with its voter) suffers a kind of second-class status if it is not counted as part of the
8 certification of the canvass.

9 It is one thing to exclude from the certification of the canvass a ballot that the relevant
10 Local Election Authority has determined to be *ineligible*. To be sure, that ruling of ineligibility
11 may be subsequently reversed after certification of the canvass but before final certification of the
12 election—in which case this ballot also would have been deprived of having equal influence over
13 certification of the canvass, when given its eventual status as eligible it should have been able to
14 have that equal influence at the earlier stage. Still, at the time of certifying the canvass, this ballot
15 was presumptively ineligible and accordingly should be kept out of the certified count at the close
16 of the canvass. But a ballot that the Local Election Authority has determined to be *eligible* is in
17 exactly the opposite posture. Although that ruling of eligibility might be reversed subsequently, in
18 the meantime the presumptively eligible ballot deserves to be part of the certified count at the close
19 of the canvass. It does an injustice to the ballot, and thus to its voter, to leave this presumptively
20 eligible ballot out of the certified count at this stage of the overall process.

21 There would be no difficulty associated with counting this presumptively eligible ballot in
22 the certification of the canvass were it not for the paramount obligation under these Procedures to
23 prevent the commingling of this still-disputable ballot. Furthermore, even given this paramount
24 obligation, there would be no difficulty with counting this presumptively eligible ballot were it not
25 for the separate concern about preserving voter anonymity. A Local Election Authority easily
26 could count the ballot and keep it separate and traceable to make sure that it was not commingled
27 with other counted ballots. But this separation and traceability is what raises a concern about a risk
28 to voter anonymity.

29 Which is more important: protecting voter anonymity, or permitting a presumptively
30 eligible ballot to have equal influence over the certified count at the close of the canvass? Ideally,
31 state law would not be forced to make this choice, if it can find ways to achieve both goals. Whether
32 through new technology or creative and sound administrative practices, a Local Election Authority
33 may be able to count a ballot and make sure that it never becomes public knowledge how a
34 particular voter voted—and to do so without irretrievably commingling the ballot. But it is
35 conceivable that in some circumstances doing all this may not be possible.

36 Ultimately, these Procedures let a state make its own policy choice regarding the tradeoff
37 between voter anonymity and the equal influence of presumptively eligible ballots. The Procedures
38 are structured to give a state implicit encouragement to explore the development of methods and
39 practices to avoid this tradeoff. But if this tradeoff cannot be avoided, the Procedures allow each
40 state to decide how to handle the issue. What the Procedures do not permit, however, is abandoning

1 the obligation to prevent the commingling of ballots ruled eligible during the canvass. For the
2 reasons elaborated in the Comment, this prohibition against commingling must remain paramount
3 however the state chooses to handle the resulting potential tradeoff between the two other values.

4 **§ 311. Certification of Canvass**

5 **(a) Immediately upon completion of the local canvass as required by**
6 **§ 310, each Local Election Authority shall certify the results of its local canvass, including**
7 **vote totals for each presidential candidate and the explanations for its ballot-eligibility**
8 **determinations, and shall electronically transmit this certification to the Chief Elections**
9 **Officer so that the Chief Elections Officer receives this certification at or before noon on the**
10 **14th day after Election Day.**

11 **(b) At or before 11:59 p.m. on the 14th day after Election Day, after compiling into a**
12 **single certification of the statewide canvass all certifications of local canvasses received from**
13 **Local Election Authorities, the Chief Elections Officer shall**

14 **(1) display on a publicly available website the statewide certification as well as**
15 **all the local certifications from which it has been compiled; and**

16 **(2) send by email to all presidential candidates on the ballot in the state an**
17 **electronic copy of this statewide certification and its underlying local certifications.**

18 **(c) Once a Local Election Authority has certified its local canvass under subsection**
19 **(b), the Local Election Authority may not alter the certification, except as ordered by the**
20 **Presidential Election Court pursuant to a proceeding under § 312.**

21 **Comment:**

22 *a. Importance of canvass certification.* The certification of the canvass is not a final
23 certification of the election, but it is an important point in the process, providing a basis for both
24 judicial review (under § 312) of vote-counting decisions made during the canvass and a contest
25 (under § 315) of the vote totals contained in the certification of the canvass. The certification of
26 the canvass represents a transition from the preliminary returns on Election Night to the final
27 certification of the election upon completion of all possible proceedings under these Procedures.
28 Like the Election Night preliminary returns, certification of the canvass consists of both an initial
29 step at the local level and then an aggregation of all such local results into a single statewide result.

30 Under these Procedures, it is imperative that the certification of the canvass not be delayed.
31 Even if additional factfinding is required as part of the recount, and even as judicial review of the

1 canvass may identify mistakes made during the canvass that require correction, the certification of
2 the canvass can and must occur on time, allowing the subsequent error-correction processes to
3 move forward according to the overall structure of these Procedures. If these Procedures operate
4 as designed, nothing that occurs during the canvass is irreversible as a result of certification, and
5 therefore no justification exists for delaying certification in order to avoid a potentially irreversible
6 consequence.

7 For similar reasons, once certification occurs, there is no need to “reopen” the canvass in
8 order to undo it or to correct an error within it. Section 312 is the procedure for correcting errors
9 that occur in the canvass, and it would simply amount to a duplication of effort to permit a
10 candidate to ask the Local Election Authority to reopen the canvass and then ask the Presidential
11 Election Court to review the canvass. Given the time constraints associated with the Safe Harbor
12 Deadline, there is no room for such duplication of effort. Thus, once the certification of the canvass
13 occurs, the canvass itself is closed, and the process is to move on to the next step, which is judicial
14 review of the canvass under § 312. The Presidential Election Court under that Section can require
15 a Local Election Authority to fix a mistake that occurred in the canvass, but after certification the
16 Local Election Authority cannot fix the mistake on its own initiative.

17 *[No Reporters’ Note]*

18 **§ 312. Presidential Election Court’s Review of Canvass: Petition and Participants**

19 **(a) No later than 24 hours after receiving email notification of the statewide and local**
20 **certifications as specified in § 311(b)(2), a presidential candidate entitled to participate in a**
21 **presidential recount under § 307 may petition the Presidential Election Court for review of**
22 **any decision made during the local canvass concerning the eligibility of ballots, or counting**
23 **of votes, in the presidential election.**

24 **(b) A candidate who fails to file a timely petition within the deadline specified in**
25 **subsection (a) forfeits the right of petition under this Section, thereby barring the**
26 **Presidential Election Court’s consideration of the petition.**

27 **(c) Any candidate petitioning under this Section, at the same time as electronically**
28 **filing the petition with the Presidential Election Court pursuant to the method of electronic**
29 **transmission established under § 306, shall serve electronic notice of the petition upon all**
30 **other candidates entitled to participate in the presidential recount under § 307, as well as**
31 **upon any Local Election Authority whose decisions are the subject of the petition.**

1 **(d) A petition under this Section shall specifically identify:**

2 **(1) each ballot for which the Local Election Authority made an eligibility**
3 **determination that the candidate requests the Presidential Election Court to review;**
4 **and**

5 **(2) any other decision made by the Local Election Authority that the petition**
6 **claims is erroneous and, if reversed by the Presidential Election Court, would alter**
7 **the vote totals certified under § 311.**

8 **(e) A petition under this Section may request the Presidential Election Court to**
9 **classify as eligible to be counted a ballot that the Local Election Authority classified as**
10 **ineligible to be counted, or may request that the Presidential Election Court classify as**
11 **ineligible to be counted a ballot that the Local Election Authority classified as eligible to be**
12 **counted, and a candidate may include both types of requests within the same petition.**

13 **(f) The petition shall specify, for each ballot the candidate requests the Presidential**
14 **Election Court to review, the reasons why the candidate believes the Local Election**
15 **Authority's eligibility determination to be erroneous.**

16 **(g) The Presidential Election Court, in its sole discretion, may join the state's Chief**
17 **Elections Officer to any proceedings pursuant to this Section.**

18 **(h) Any candidate entitled to receive notice under subsection (c) is also entitled to**
19 **participate as a respondent in the proceeding initiated by the petitioning candidate under**
20 **subsection (a), but there shall be no other parties to a proceeding under this Section other**
21 **than the petitioning candidate, respondent candidates pursuant to this subsection, and the**
22 **Chief Elections Officer pursuant to subsection (g).**

23 **(i) The Presidential Election Court, in its sole discretion, may decide whether to**
24 **permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section, but**
25 **in the absence of an exercise of this discretion the ordinary rules and procedures for the filing**
26 **of briefs *amicus curiae* in the State Supreme Court shall apply.**

27 **(j) Any party's motions or briefs in support of, or in opposition to, a petition under**
28 **this Section must be filed with the Presidential Election Court and served upon all other**
29 **parties no later than 48 hours after the filing of the petition, and the parties must submit any**
30 **responsive briefs within the next 24 hours.**

1 **Comment:**

2 *a. The distinctiveness of this specific proceeding, relative to the recount and potential*
3 *contest.* A key structural element of these Procedures overall is to create a distinct proceeding for
4 judicial review of the canvass, governed by this and the next Section—a proceeding separate from
5 both the judicial review of the recount under § 308 and a judicial contest of the election under
6 § 315. Timing is a major reason for this structural arrangement. Judicial review of the recount can
7 occur in the second week after Election Day, while the canvass remains underway within each
8 Local Election Authority. There is no need for judicial review of the recount to wait until the Local
9 Election Authority completes the canvass.

10 Conversely, there are some issues suitable for a judicial contest of the election that may
11 take more than two weeks to investigate or, in some instances, even uncover. Suppose, for
12 example, that a presidential election experiences substantial absentee-ballot improprieties, of the
13 kind that tainted Miami's mayoral election of 1997. An adequate understanding of the facts
14 concerning such improprieties might not come to light before certification of the vote totals at the
15 end of the canvass, two weeks after Election Day. It would not have been the purpose of the
16 canvass to investigate those sorts of improprieties, such as monetary payments to absentee voters
17 by so-called ballot brokers. Under § 316, the trial of factual allegations raised in a contest can
18 occur in the fourth week after Election Day, based on evidence gathered after certification of the
19 canvass.

20 There is no reason, however, to have judicial review of the canvass itself await the trial of
21 the contest. Instead, claims of errors made during the canvass are immediately ripe for judicial
22 review upon certification of the canvass. Given the time pressure of completing all proceedings
23 within the Safe Harbor Deadline, it makes good sense—as an engineering proposition—to start
24 judicial review of the canvass immediately upon these claims becoming ripe. Hence, the decision
25 to separate judicial review of the canvass under this Section from a judicial contest of the election
26 under § 315, which by its nature must proceed at a somewhat later stage of the overall process.

27 *b. The structure of litigation under this Section.* Substantively, what distinguishes litigation
28 under this Section from a judicial contest of the election under § 315 is that this Section concerns
29 all challenges to decisions actually made by a Local Election Authority during the canvass under
30 § 310. If a presidential candidate wishes to challenge a decision made during the canvass, then the
31 presidential candidate needs to make that challenge using this Section, and that challenge is

1 governed by the specific deadlines and provisions of this and the following Section. As provided
2 in § 315, if an issue could have been raised under this Section (because it concerns a challenge to
3 a decision made during the canvass), then it is precluded from being raised in a subsequent judicial
4 contest under § 315.

5 It is advantageous, however, to pursue a claim under this Section, rather than under
6 § 315, because (as provided in § 313 and further explained in the Comment thereto) the burden of
7 proof on claims brought under this Section is specific to each particular ballot or other issue raised.
8 No candidate bears a burden of proof under this Section as a consequence of the certification under
9 § 311. Instead, the burden is simply associated with the effort to undo the particular decision made
10 during the canvass. By contrast, with respect to a petition to contest the certification under § 315,
11 the petitioner bears the burden of overturning the certification based on the grounds asserted.

12 *c. Streamlining the litigation under this Section.* It is important to limit participation in the
13 litigation under this Section to only those parties essential to the adjudication of the claims raised.
14 For the same reason, although the Presidential Election Court can permit the filing of briefs by
15 *amici curiae* if the Court so chooses, the Court can also preclude the participation of *amici* if
16 necessary to achieve compliance with the expedited nature of these proceedings.

17 **REPORTERS' NOTE**

18 The issue of ballot eligibility is the one that bedeviled Minnesota's 2008 U.S. Senate
19 election. Specifically, the issue was whether absentee ballots that initially had been rejected by
20 local election officials, and thus not counted as part of Election Night returns, had been rejected
21 erroneously and in fact were eligible to be counted. With only 215 votes separating the incumbent
22 and the challenger, and with the number of wrongly rejected absentee ballots potentially exceeding
23 1000, it was evident that the election might hinge on these ballots. For an account of this election,
24 see FOLEY, *BALLOT BATTLES*, ch. 12, and sources cited therein.

25 Once this issue emerged, the procedural question became how it would be handled. What
26 would be the forum for adjudicating the question of whether absentee ballots had been rejected
27 erroneously and, if so, how many and what difference would they make to the vote totals for each
28 candidate? One possible forum was the recount proceeding, except that Minnesota law (like the
29 law in some other states) appeared to confine a recount to the review of ballots initially counted
30 on Election Night, excluding consideration of ballots never counted because they had been deemed
31 ineligible. Alternatively, the decision not to count these ballots, if wrongful, could be raised in a
32 subsequent judicial contest of the election, after completion of the recount. But at the time the
33 recount was getting underway, the prospect of a subsequent judicial contest was far down the road,
34 and the issue of wrongfully rejected absentee ballots seemed pressing and urgent—a U.S. Senate
35 seat hinged on their consideration. Moreover, because a contest would occur after certification, the

1 contestant would bear the burden of proof in overturning the certification, and the wrongly
2 excluded absentee ballots would not be part of the certified count. The certification, in other words,
3 might reflect the wrong outcome—imposing this significant burden of proof on the wrong
4 candidate—just because absentee ballots had been wrongly rejected. That consequence of the
5 certification seemed potentially unfair, both on the candidate who should have been certified the
6 winner but was not and on the voters who cast the wrongly excluded ballots and who were thus
7 deprived of having their ballots included in the certified totals as they should have been. Thus,
8 there was intense pressure to figure out a way to litigate the issue of wrongful exclusion prior to
9 certification.

10 As a result, the Minnesota Supreme Court concocted an ad hoc procedure that did not exist
11 within the state’s statutory scheme. The procedure was to let previously uncounted absentee ballots
12 become part of the recount if, but only if, both candidates and the relevant Local Election Authority
13 agreed that the ballots had been wrongly rejected. This invented procedure seemed reasonable
14 when the court announced it: what could be objectionable about letting a ballot count if all
15 concerned agreed that it should be counted; why wait for a post-certification contest to include
16 such a consensus-based ballot within the official vote totals of the election? In practice, however,
17 the ad hoc procedure did not operate as intended. By giving each candidate an effective veto over
18 the ballots to be reconsidered, while requiring the candidates to reconsider over 10,000 rejected
19 absentee ballots, the Minnesota Supreme Court inadvertently created a particularly contentious,
20 laborious, and time-consuming process. As two dissenters on the Minnesota Supreme Court argued
21 at the time, it might have been better just to let the Local Election Authority decide on its own
22 initiative which absentee ballots had been rejected in error—and then, later, let a contestant bear
23 the burden of proving that the Local Election Authority’s reconsideration of a ballot was in error
24 (in other words, that its original decision had been correct). Even if the dissenters’ position was no
25 more in accord with the statutory scheme than the majority’s ad hoc procedure, once the judiciary
26 was going to be in the business of making up new vote-counting procedures for the specific
27 election at hand, then it might as well invent administratively workable ones.

28 Minnesota’s 2008 U.S. Senate election is hardly the first in which a court has faced intense
29 public pressure to develop new procedures to handle a vote-counting problem more fairly than
30 existing statutory procedures would seem to allow. Indeed, the Washington Supreme Court also
31 felt similar pressure in the state’s 2004 gubernatorial election over wrongly excluded absentee
32 ballots, and it too found a way to have those ballots reconsidered prior to certification. (Its method
33 was closer to that of the dissenters in the Minnesota case.) Moreover, Minnesota itself faced
34 essentially the same issue in its 1962 gubernatorial election, and there too the Minnesota Supreme
35 Court issued a divided ruling that permitted deviation from the statutory scheme in order to enable
36 Local Election Authorities to correct obvious vote-counting errors before certification of the
37 canvass. A half-century earlier, the Kansas Supreme Court faced the exact same issue in that state’s
38 disputed gubernatorial election of 1912. (There, however, the court refused to reopen the canvass
39 to permit correction of a conceded vote-counting error, requiring instead that the error be corrected
40 in a subsequent contest. In this way, the earlier case reflected a stricter attitude about adherence to

1 statutory procedures, even when those procedures appeared to undermine achieving an electoral
2 outcome that accurately reflected the electorate’s choice.)²²

3 Part III avoids the difficulties that beset these other elections, including Minnesota’s in
4 2008, by creating a distinct process for judicial review of ballot-eligibility determinations,
5 including reconsideration during the canvass of ballots excluded from Election Night returns based
6 on an initial determination of ineligibility. Part III neither forces these ballot-eligibility issues into
7 a recount, which is more appropriately reserved for reviewing initially counted ballots (especially
8 in the expedited context of a presidential recount, which must occur before all ballot-eligibility
9 determinations have been made), nor requires these issues to await a subsequent contest with its
10 attendant burden of proof. Instead, these ballot-eligibility issues get their own distinct process,
11 tailored to its particular purpose. In this way, Part III and its Procedures reflect lessons learned
12 from previous high-stakes disputed elections.

13 **§ 313. Presidential Election Court’s Review of Canvass: Deadline and Proceedings**

14 **(a) No later than 21 days after Election Day, the Presidential Election Court shall**
15 **complete its review of any petition filed under § 312.**

16 **(b) The Presidential Election Court may consolidate into a single adjudicatory**
17 **proceeding any or all petitions filed under § 312.**

18 **(c) The Presidential Election Court may hold any hearing, with or without oral**
19 **argument, to facilitate its review of any petition filed under § 312, provided that the hearing**
20 **does not interfere with the Court’s compliance with the deadline in subsection (a).**

21 **(d) At any point during a hearing, the Presidential Election Court may issue an**
22 **interim ruling on legal or factual issues if, in the Court’s judgment, doing so will help to**
23 **expedite its review of a petition.**

24 **(e) The Presidential Election Court is empowered to receive any relevant evidence**
25 **(including the testimony of any witness, or any document) that will assist the Court in**
26 **determining the eligibility of any ballot, or reviewing any ruling during the canvass, that is**
27 **the subject of a petition; provided, however, in deciding whether or not to receive any**
28 **evidence offered by a party, the Court shall balance the potential value of the evidence**
29 **against the need to complete its review within the deadline in subsection (a), and the Court’s**
30 **weighing of this balance shall be committed to its sole discretion.**

²² The 2000 election is also one in which the state supreme court deviated from the existing statutory scheme in an attempt to achieve what it perceived as greater electoral accuracy and fairness, although the specific issue there (unlike in Minnesota and Washington) concerned how to treat imperfectly marked ballots, not issues of ballot eligibility.

1 **(f) For any ballot subject to a petition filed under § 312, the petitioner shall bear the**
2 **burden of proving that, more likely than not, the Local Election Authority’s determination**
3 **regarding the ballot’s eligibility or ineligibility is erroneous.**

4 **(g) For any claim raised in a petition not covered by subsection (f), the petitioner shall**
5 **bear the burden of proving that the Local Election Authority’s determination caused the**
6 **vote totals certified under § 311 to be incorrect and, insofar as the petition asks the Court to**
7 **adjust the certified vote total, shall further bear the burden of proving that the requested**
8 **adjustment is more likely than not correct.**

9 **(h) As part of completing its review of all petitions pursuant to the deadline in**
10 **subsection (a), the Presidential Election Court shall publicly announce its ruling on each**
11 **ballot-eligibility determination submitted for its review.**

12 **(1) The Court shall declare whether, in its judgment, each ballot is eligible or**
13 **ineligible and whether this judgment affirms or reverses the Local Election**
14 **Authority’s determination with respect to the ballot;**

15 **(2) For each ballot, the Court shall specify the grounds in law or evidence upon**
16 **which it relies for its determination of whether the ballot is eligible or ineligible to be**
17 **counted.**

18 **(3) The Court’s grounds may include the petitioner’s failure to meet the**
19 **burden of proof with respect to the particular ballot.**

20 **(4) The Court may report its grounds in whatever format (either briefly or at**
21 **greater length) that it deems most conducive to the public understanding of its**
22 **rulings, including grouping together ballots that are subject to the same grounds of**
23 **decision.**

24 **(i) At the same time as the Presidential Election Court publicly announces its final**
25 **ballot-eligibility rulings on a petition under § 312, the Court shall also publicly announce its**
26 **final determinations on any other claims in the petition concerning the vote totals certified**
27 **in the canvass.**

28 **Comment:**

29 *a. Ballot-specific burden of proof under subsection (f).* This Section establishes that the
30 burden of proof in proceedings to review ballot-eligibility determinations in the canvass is ballot-
31 specific, meaning that the petitioning candidate bears the burden of overturning the Local Election

1 Authority's rulings challenged in that petition. If another candidate challenges the same Local
2 Election Authority's rulings on the eligibility of ballots, that other candidate bears the burden of
3 overturning those Local Election Authority's rulings. The burden of proof in proceedings under
4 this Section, in other words, does *not* depend on whether the petitioning candidate is ahead or
5 behind in the count of ballots as part of the statewide certification of the canvass under § 311. In
6 this respect, the judicial review of the canvass is different from a judicial contest of the election
7 under § 315. In a contest, the contestant bears the burden of proof on all issues necessary to
8 overturn the certification.

9 The reason for this distinction concerning the burden of proof relates to the point about
10 litigation pressures addressed in the Comment to § 310. If a candidate potentially faces a heavy
11 burden of proof to overturn ballot-eligibility rulings made during the canvass depending on
12 whether or not that candidate is behind in the count in the certification of the canvass, the candidate
13 will be highly tempted to file a preemptive lawsuit of some kind in an effort to control the ballot-
14 eligibility determinations made in the canvass before the certification occurs. These preemptive
15 lawsuits present a major risk of derailing, or at least significantly delaying, the entire process of
16 the canvass; in a presidential election, this risk presents a severe threat of preventing the state from
17 complying with the Safe Harbor Deadline. Consequently, to remove this pressure for preventive
18 litigation, the burden of proof for challenging ballot-eligibility determinations during the canvass
19 should not turn, for the entirety of ballots under review from the canvass, on which candidate is
20 ahead or behind. Instead, the burden of proof should apply ballot-by-ballot for each specific claim
21 that the Local Election Authority made an error in ruling a ballot eligible or ineligible.

22 In this regard, note also that the burden of proof does not depend on whether the Local
23 Election Authority's ruling being challenged is that the ballot is eligible or, instead, ineligible. In
24 either case, it is the candidate claiming that the ruling is erroneous who bears the ballot-specific
25 burden of overturning that particular ruling. Thus, if the Local Election Authority ruled the ballot
26 eligible, then the petitioning candidate bears the burden of proving that the ballot in question more
27 likely than not was ineligible. Conversely, if the Local Election Authority ruled the ballot
28 ineligible, then the petitioning candidate bears the burden of proving that the ballot in question
29 more likely than not was eligible.

30 The use of the "more likely than not" standard for this ballot-specific burden of proof,
31 rather than the more demanding "clear and convincing evidence" standard, also contributes to

1 diffusing pressure to sue in court over the conduct of the canvass before the canvass is concluded
2 and certified.

3 *b. Minimizing the necessity for a remand to a Local Election Authority.* As in the Comment
4 to § 308 concerning the Presidential Election Authority's reviewing authority over the recount,
5 here too it is important to note that the Court's reviewing authority over the canvass permits the
6 Court to make a final determination on whether or not a ballot is to be counted without need for a
7 remand to the Local Election Authority. Moreover, for the same reason as stated in the Comment
8 to § 308, the need for expeditious proceedings in order to meet the Safe Harbor Deadline creates
9 the expectation that ordinarily the Presidential Election Court will make these final determinations
10 and thereby avoid the risk of delay associated with a remand. Nonetheless, to the extent that a
11 limited remand on certain specific issues is unavoidable, the Court has the authority to order a
12 remand. The goal should be for any such limited remand, and any subsequent proceedings before
13 the Court itself, to be complete by the time the Court must issue its report concerning review of
14 the canvass under subsection (h). But insofar as it is impossible to complete the limited remand by
15 this deadline, then the limited remand ordered by the Court may be concluded during the time
16 available for a post-appeal remand under § 314.

[No Reporters' Note]

17 **§ 314. Appeal to State Supreme Court of Canvass Review**

18 **(a) No later than 24 hours after the Presidential Election Court's issuance of its final**
19 **ruling on a petition under § 313(i), a party to the proceeding may appeal the ruling to the**
20 **State Supreme Court.**

21 **(1) No appeal of any decision made by the Presidential Election Court as part**
22 **of a proceeding under § 312 can occur until after the Court has issued its final ruling**
23 **in that proceeding under § 313(i).**

24 **(2) The right of appeal under this Section is limited to contending that the**
25 **Presidential Election Court erred in ruling a ballot eligible or ineligible or otherwise**
26 **erred in a manner that affects the vote totals certified under § 311.**

27 **(3) No appeal can concern any intermediary decision of the Presidential**
28 **Election Court during the proceeding under § 312 except insofar as the decision**
29 **affects the eligibility of a ballot or otherwise affects the vote totals certified under**
30 **§ 311.**

1 **(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under**
2 **subsection (a), that oral argument shall occur no later than 24 days after Election Day.**

3 **(c) No later than 27 days after Election Day, the State Supreme Court shall resolve**
4 **any appeal filed under subsection (a).**

5 **(d) If the State Supreme Court’s resolution of an appeal under subsection (a) requires**
6 **additional proceedings on remand concerning the canvass,**

7 **(1) each Local Election Authority required to conduct such additional canvass**
8 **proceedings must complete these proceedings no later than 29 days after Election**
9 **Day;**

10 **(2) the Presidential Election Court must complete any additional proceedings**
11 **of its own concerning the canvass, including all review of additional proceedings**
12 **conducted by each Local Election Authority under subsection (d)(1), no later than 31**
13 **days after Election Day;**

14 **(3) the State Supreme Court must complete any post-remand review of the**
15 **Presidential Election Court’s proceedings under subsection (d)(2) at least 24 hours**
16 **prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.**

17 **Comment:**

18 *a. No interlocutory appeals permitted.* It is imperative that there be no interlocutory appeals
19 to the State Supreme Court concerning judicial review of the canvass. Such interlocutory appeals
20 would jeopardize the state’s ability to satisfy the Safe Harbor Deadline. Because the only
21 appealable issues concerning judicial review of the canvass involve the merits of a decision that
22 affects the counting of ballots, any appeal must await the Presidential Election Court’s final
23 determination of the merits in question.

24 The timing of an appeal under this Section is determined by the timing of the Presidential
25 Election Court’s final ruling on the merits of a petition pursuant to § 313(i). If a petition has *not*
26 been consolidated with any other similar petitions, then an appeal of the Court’s ruling on that
27 petition is ripe once the Court has finally determined all issues concerning that particular petition,
28 and its ripeness in this regard does not depend on the status of any other petition concerning the
29 canvass that may remain pending before the Court. Conversely, however, if the Court has
30 consolidated several petitions concerning the canvass, then the appeal of the Court’s decisions

1 concerning any of the consolidated petitions becomes ripe only when the Court has issued its final
2 ruling under § 313(i) on all issues concerning all of the consolidated petitions.

3 *b. Appeals limited to decisions affecting certified vote totals.* The only appealable rulings
4 of the Presidential Election Court concerning the conduct of the canvass are those rulings that
5 either sustain or reject a proposed change to the certified vote total for one or more candidates. A
6 ruling concerning the eligibility of a ballot is of this character. If the Presidential Election Court
7 rules a ballot eligible when the Local Election Authority had ruled the ballot ineligible, then the
8 Court's ruling will change the count of ballots. The same is true if the situation is the reverse: the
9 Court rules the ballot ineligible after the Local Election Authority had ruled it eligible. But it is
10 important to state explicitly that the Court's decisions to affirm a ballot-eligibility ruling by a Local
11 Election Authority have the same character: a decision by the Presidential Election Court to
12 confirm that a ballot is eligible, or ineligible, is a decision that affects the certified vote totals
13 precisely because if the decision had gone the other way then the certified vote totals would have
14 changed. Or, to put the same point somewhat differently, if the State Supreme Court reverses the
15 Presidential Election Court's confirmation of the Local Election Authority on the question of a
16 ballot's eligibility, then the certified vote counts will change accordingly.

17 Other decisions by the Presidential Election Court concerning the canvass have the same
18 character. Consider, for example, this kind of decision concerning the process of reconciliation:
19 suppose that the Local Election Authority has declined to make any adjustment in the counting of
20 ballots based on the fact that in a particular polling location the number of counted ballots exceeds
21 the recorded number of voters who cast ballots; suppose further that the Presidential Election Court
22 reverses the Local Election Authority's ruling on this point and orders the Local Election Authority
23 to randomly deduct from the number of counted ballots the same number as the excess. The
24 Presidential Election Court's decision on this issue would affect the certified vote totals and thus
25 would be appealable under this Section.

26 Conversely, however, rulings made by the Presidential Election Court as part of judicial
27 review of the canvass are *not* appealable if they do not have the essential character of confirming
28 or changing the certified vote totals. For example, suppose at issue is the question whether a
29 particular provisional ballot is eligible. As part of the adjudication of this issue, the Court declines
30 to permit a candidate to introduce into evidence the testimony of a particular witness, ruling that
31 the Court has adequate evidence upon which to make its eligibility determination. The Court's

1 decision to reject the proffer of this testimony is not appealable. Only the question of whether the
2 Court made the correct eligibility ruling with respect to the particular provisional ballot at issue is
3 appealable.

[No Reporters' Note]

4 **§ 315. Judicial Contest of Certified Vote Totals: Petition**

5 (a) No later than 24 hours after receiving email notification of the statewide and local
6 certifications as specified in § 311(b)(2), a candidate eligible to participate in a presidential
7 recount under § 307 may file with the Presidential Election Court a petition to contest the
8 validity of the vote totals declared in the statewide certification.

9 (b) A candidate who fails to file a timely petition within the deadline specified in
10 subsection (a) forfeits the right of petition under this Section, thereby barring the
11 Presidential Election Court's consideration of the petition.

12 (c) A candidate in the lead based on the statewide certification of the canvass may file
13 with the Presidential Election Court a conditional petition, for the Court to adjudicate if the
14 candidate loses the lead as a result of:

15 (1) proceedings concerning the recount that occur after certification, or

16 (2) adjustment in vote totals pursuant to a petition for judicial review of the
17 canvass under § 312, or

18 (3) the Court finding merit in a petition filed by another candidate under this
19 Section;

20 provided that the candidate in the lead must file the conditional cross-petition within the
21 same deadline as in subsection (a).

22 (d) Any candidate petitioning under this Section, at the same time as electronically
23 filing the petition with the Presidential Election Court pursuant to the method of electronic
24 transmission established under § 306, shall serve electronic notice of the petition upon all
25 other candidates entitled to participate in a presidential recount under § 307, as well as upon
26 the Chief Elections Officer.

27 (e) The petition may assert as grounds for contesting the certification any grounds
28 available under state law in a judicial contest of a certified gubernatorial election, except
29 those grounds the petitioning candidate had an opportunity to raise under § 308 or § 312.

30 (f) A petition under this Section may seek either:

1 **(1) a declaration that, upon the correction of errors affecting the validity of the**
2 **certification, the petitioner is entitled to be certified the candidate with the highest**
3 **statewide total of valid votes; or**

4 **(2) a declaration that the certification must be declared void, in which case the**
5 **Legislature of the state may appoint the state’s presidential electors directly, or**
6 **provide an alternative method of appointment of the state’s presidential electors,**
7 **pursuant to its authority under Article II of the U.S. Constitution.**

8 **(g) If a petition under this Section claims that the statewide certification is tainted by**
9 **the presence of more invalid ballots counted in the election than the difference in the vote**
10 **totals of the leading candidates, the Presidential Election Court shall have such powers, and**
11 **only such powers, to remedy this taint as would a state court in a contest of a gubernatorial**
12 **election premised on the same grounds.**

13 **(h) The Presidential Election Court, in its sole discretion, may join a Local Election**
14 **Authority to any proceedings pursuant to this Section.**

15 **(i) Any candidate entitled to receive notice of a petition (or conditional petition) under**
16 **subsection (d) is also entitled to participate as a respondent in the proceeding initiated by the**
17 **petitioning candidate, but there shall be no other parties to a proceeding under this Section**
18 **other than the petitioning candidate, respondent candidates pursuant to this subsection, the**
19 **Chief Elections Officer, and any Local Election Authority joined pursuant to subsection (h).**

20 **(j) The Presidential Election Court, in its sole discretion, shall decide whether to**
21 **permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.**

22 **Comment:**

23 *a. A contest’s relation to the recount and judicial review of the canvass.* A petition to
24 contest an election seeks to overturn the certification of the election’s results. A contest under this
25 Part of the project, and the Procedures that this Part sets forth, is limited to those issues that could
26 not have been raised under § 308, as part of the Presidential Election Court’s review of the recount,
27 or under § 312, as part of the Court’s review of the canvass. A presidential candidate who is behind
28 in the count after certification of the canvass thus may contest the certification on grounds that the
29 count is tainted by errors or improprieties that were not capable of being redressed in the recount
30 or canvass. An example would be a claim that absentee ballots cast in favor of the candidate ahead
31 after certification were invalid because they were cast in exchange for a payment of funds to the

1 voters who cast them—and that there were enough of these improper absentee ballots to put the
2 benefited candidate in the lead.

3 *b. The possibility of a conditional petition.* After certification of the canvass under
4 § 311, the lead may change under these Procedures for any of three reasons. First, some residual
5 proceedings concerning the recount may occur after certification of the canvass—for example,
6 when a remand is ordered under § 309—and these residual recount proceedings may alter the vote
7 totals for the candidates, causing the lead to change. Second, judicial review of the canvass under
8 § 312 may result in an adjustment of vote totals that causes the candidate ahead in the certification
9 to now trail another candidate. Third, a candidate behind at the time of the certification may file a
10 meritorious petition under this Section, causing the Presidential Election Court to order an
11 adjustment of the vote totals that puts the petitioning candidate ahead in the count.

12 Given these possibilities, the candidate in the lead at the time of certification must have an
13 opportunity to challenge the resulting vote totals if and when the lead changes in one or more of
14 these ways. The candidate ahead in the certification has no incentive to make such a challenge
15 unless and until this kind of lead change does occur. In a nonpresidential election, when the need
16 for speed is not so great, the relevant procedures can handle this situation by waiting for the lead
17 to change in actuality before requiring the candidate who was ahead to file such a challenge. But
18 in the accelerated circumstances of a presidential election, it is necessary for the candidate leading
19 at the time of certification to go forward with whatever challenges the candidate potentially would
20 bring if the lead were to change. There is not enough time to wait to see if the lead does in fact
21 change before requiring that candidate to raise these challenges.

22 Thus, the device of a conditional petition provides the way to handle this situation in the
23 context of a presidential election. The leading candidate's petition must be filed at the same time
24 as a trailing candidate's. But the Court does not need to render a decision on claims made in the
25 leading candidate's conditional petition unless and until the lead actually changes for one or more
26 of the three reasons just identified. In other words, at the time of certification, the leading candidate
27 must identify all claims that this candidate would raise in a contest if this candidate had been
28 behind in the certification; the candidate presents these claims in a petition as if the candidate were
29 behind instead of being ahead; but this particular petition does not become actively in need of the
30 Court's resolution unless and until this candidate actually falls behind in the course of the
31 proceedings under these Procedures.

1 In the interests of expedition and efficiency, the Presidential Election Court can undertake
2 steps to litigate the merits of a conditional petition while the petitioning candidate is still ahead in
3 the certified count, before the conditional petition becomes ripe for the Court’s ruling on the merits.
4 For example, evidentiary issues relating to a conditional petition may overlap considerably with a
5 regular (non-conditional) petition pending before the Court. Suppose, for instance, that the regular
6 petition contends that a large number of absentee ballots cast on behalf of the leading candidate
7 are tainted because they were procured through payment of funds; but suppose, further, that the
8 leading candidate counters that the petitioning candidate also benefited substantially from the same
9 kind of payments to absentee voters and that, in practice, there was widespread competition among
10 “ballot brokers” in certain neighborhoods in the state. The leading candidate raises this
11 counterclaim in a conditional petition, with the understanding that the Presidential Election Court
12 would not make a final determination of the merits of this counterclaim if either the Court rejects
13 the merits of the claim in the regular petition or the Court finds that the prevalence of absentee-
14 ballot fraud as alleged in the regular petition was in fact insufficient to change which candidate is
15 ahead in the count based solely on valid ballots. Thus, as the litigation of the regular petition
16 remains pending, there is the potential that the Court may never need to make a final determination
17 of the merits of the conditional petition. Even so, if testimony concerning the prevalence of “ballot
18 brokers” and their payments for absentee ballots relates to both the regular petition and the
19 conditional petition, and if it would be more efficient and expeditious for the Court to hear all such
20 relevant testimony at the same time, during the Court’s consideration of the regular petition, it is
21 perfectly proper for the Court to do so.

22 Similarly, the Presidential Election Court can entertain a motion to dismiss a conditional
23 petition at the same time that the Court considers a motion to dismiss a regular petition. For
24 example, one can imagine a regular petition claiming that the leading candidate’s vote total is
25 tainted by an outcome-determinative number of invalid ballots cast by ineligible felons. The
26 leading candidate, however, files a motion to dismiss this regular petition on the ground that under
27 the relevant state law a challenge cannot be made to the validity of a ballot on the ground that it
28 was cast by an ineligible felon if the felon was registered to vote in the state and no challenge had
29 been made to the voter’s registration status prior to Election Day on the ground of this ineligibility.
30 Meanwhile, the leading candidate has also filed a conditional petition alleging that a large number
31 of invalid ballots cast by noncitizens taints the opponent’s vote totals. The opponent, however,

1 files a motion to dismiss the conditional petition on the ground that under state law it is not
2 cognizable to contest a certified election on the ground that a ballot is invalid for being cast by a
3 noncitizen, because the state’s voter-identification law requires proof of citizenship at the time the
4 voter casts the ballot. In this situation, under this and the following Section, the Presidential
5 Election Court may receive briefs and hold an oral argument on both motions to dismiss
6 simultaneously.

7 *c. The baseline of the same substantive law as a gubernatorial contest.* This Section
8 establishes that the substantive law to apply in a judicial contest of a presidential election is the
9 same that would apply under state law to a judicial contest of a gubernatorial election, except
10 insofar as the expedited nature of these Procedures for a presidential election necessitates deviation
11 from this gubernatorial baseline. As already noted, claims that otherwise would be cognizable in
12 a contest of a presidential election (because they are cognizable in a gubernatorial contest) may
13 *not* be raised under this Section if they could have been raised in a proceeding to review the recount
14 under § 308 or a proceeding to review the canvass under § 312.

15 Establishing this gubernatorial baseline has several advantages. First, it recognizes the
16 discretion that states have to adopt their own substantive rules for judicial contests of major
17 statewide elections, including those for the highest executive officer of the state. The substantive
18 law governing judicial contests of a certified election is state, rather than federal, law. States can,
19 and do, differ in the substantive policy choices regarding these rules. For example, a state can
20 choose to make a voter’s status as an ineligible felon a non-cognizable issue in a judicial contest
21 or, alternatively, a state can choose to permit a certified election to be contested on the ground that
22 the outcome is tainted by enough ballots cast by ineligible felons to overturn the certified margin
23 of victory. Part III of this project, and the Procedures that Part III sets forth, do not dictate what
24 choice a state should make regarding these policy questions.

25 Instead, these Procedures establish parity between gubernatorial and presidential elections
26 regarding these policy choices. If ballots may be challenged as ineligible in a judicial contest of a
27 gubernatorial election, then so too may these same ballots be similarly challenged as ineligible in
28 a contest under this Section (unless they were issues susceptible to being raised under § 308 or §
29 312, as explained above). Similarly, if a particular claim or issue may not be raised in a
30 gubernatorial contest, then the same claim or issue may not be raised in a contest under this
31 Section. The standards for a gubernatorial contest also govern a presidential contest. A presidential

1 contest should not be disfavored under state law relative to a gubernatorial contest, but a
2 presidential contest also should not be more generous than a gubernatorial contest in terms of the
3 standards for overturning the election's certification.

4 One issue that can arise in a gubernatorial contest, as it did in Washington's 2004 election,
5 is the remedial authority of a court to order a statistical adjustment in vote totals when the certified
6 margin of victory is exceeded by the number of invalid ballots that should not have been counted
7 but which are impossible to extricate from the count because they have been commingled with all
8 other counted ballots. In the Washington case, the court ruled that state law did not permit a
9 statistical adjustment, at least not in light of the relevant evidence including expert testimony.
10 Subsection (g) makes explicit that the parity of gubernatorial and presidential contests applies to
11 this issue of remedial authority as well. When a court cannot make this kind of statistical
12 adjustment in a gubernatorial contest, it also cannot do so in a presidential contest. But, conversely,
13 were a court empowered to make this kind of statistical adjustment in a gubernatorial contest, then
14 it could do so as well in a presidential contest under this Section.

15 *d. Judicial authority to void a presidential election.* As specified in subsection (f)(2), the
16 parity between gubernatorial and presidential contests must be qualified in one particular respect:
17 the circumstance in which the court is authorized to order the certified election null and void. Even
18 in this particular context, the parity between gubernatorial and presidential contests applies up to
19 a point: deviation from parity occurs with respect to what follows from a judicial order to void the
20 election. In other words, if in a judicial contest of a gubernatorial election the court is empowered
21 to declare the election void, then on the same facts the Presidential Election Court under this
22 Section is also empowered to declare the presidential election void. But whereas in the
23 gubernatorial contest the court might also be empowered to order a new election after voiding the
24 initial one, not so the Presidential Election Court under this Section. Instead, under subsection
25 (f)(2), immediately upon the Presidential Election Court's order to void the certified vote totals in
26 the presidential election, the authority reverts to the state's legislature under Article II of the federal
27 Constitution to provide for an alternative method for appointment of the state's presidential
28 electors prior to the uniform date for the presidential electors to cast their votes. This alternative
29 method of appointment could be for the legislature itself to appoint the electors, or to authorize
30 another body to appoint the electors. In principle, the legislature could authorize the Presidential
31 Election Court to appoint the electors as equitably as the circumstances permit, although the

1 legislature may be reluctant to give a court this inherently political function, and the court might
2 be just as reluctant to undertake it. (Presumably, there would be insufficient time for the legislature
3 to order a new election as the alternative method of appointing the state’s presidential electors, but
4 in theory the legislature would have power under the U.S. Constitution to attempt a second
5 election—although if that election also ended up disputed, there almost certainly would be
6 insufficient time to resolve the dispute before the date on which the presidential electors were
7 constitutionally required to meet.)

8 **Illustration:**

9 1. Susan Smith and John Jones are presidential candidates in 2020. Smith leads
10 Jones by only 100 votes in the certification of New Mexico’s canvass under § 311, and
11 whichever candidate wins New Mexico will have an Electoral College majority. Jones has
12 filed a petition under this Section claiming that severe overcrowding at the polls in
13 Albuquerque, caused by a systemic technological failure with the rollout of the city’s new
14 electronic poll books, prevented thousands of eligible voters from casting ballots that
15 would have made a difference in the outcome of the presidential election in the state.
16 Suppose that this claim is cognizable under state law: if the same circumstances had
17 occurred in a gubernatorial election, the state’s judiciary would have found the claim valid
18 and voided the election, ordering a new one. Under this Section, the Presidential Election
19 Court of New Mexico has the same authority to void the certified result of the presidential
20 election in the state, based on the same facts; however, if the Presidential Election Court
21 so voids the election, the Court does *not* have the authority on its own initiative to order a
22 new presidential election in the state, but instead the state’s legislature has the authority to
23 appoint the state’s presidential electors in a manner the legislature chooses.

24 **REPORTERS’ NOTE**

25 *a. The relevance of Washington’s 2004 gubernatorial contest.* For anyone concerned about
26 what a judicial contest of a presidential election might look like today (in the aftermath of 2000),
27 there is no better precedent to examine than Washington’s 2004 gubernatorial election. There, the
28 state court faced the daunting challenge of dealing with the fact that the certified margin of victory
29 was only 129 votes, yet the evidence established that 1678 unlawful ballots were included in the
30 count that produced this certified result. In other words, the number of invalid ballots wrongfully
31 included in the count dwarfed the certified margin of victory by more than tenfold. (Most of these
32 invalid ballots had been cast by ineligible felons.) These invalid ballots clearly might have affected

1 the outcome of the election, but there was no way to tell for sure because they had been
2 commingled with all other counted ballots and could no longer be isolated from the
3 undifferentiated pool. For a discussion of this election, see FOLEY, *BALLOT BATTLES*, ch. 12.

4 Given this difficult situation, the state court had to consider the possibility under state law
5 of three less-than-ideal options: first, voiding the election on the ground that it had been
6 irretrievably tainted by the large number of invalid ballots in relationship to the certified margin
7 of victory; second, using a statistical procedure (often called “proportionate deduction”) to reduce
8 from each candidate’s counted votes in each precinct a number of invalid ballots cast in that
9 precinct equal to the candidate’s share of overall votes in that precinct; or third, letting the count
10 stand unless the contestant demonstrated through witness testimony which candidate received the
11 vote of an invalid ballot. Based on its analysis of applicable state law, the trial judge in the
12 Washington case chose the third option. But other states faced with the same situation would
13 confront applicable precedents that would dictate choosing either of the other options. For a
14 comprehensive analysis of the relevant precedents nationwide, see Steven F. Huefner, *Remedying*
15 *Election Wrongs*, 44 HARV. J. LEG. 265 (2007).

16 *b. Ohio’s elimination of a judicial contest in a presidential election.* In the aftermath of the
17 2004 election, when all eyes nationwide had been on Ohio as the pivotal state, the Ohio legislature
18 undertook a reform of election procedures that included the explicit elimination of the availability
19 of a judicial contest in a presidential election. See OHIO REV. CODE § 3515.08(A) (“The
20 nomination or election of any person to any federal office, including the office of elector for
21 president and vice president and the office of member of congress, shall not be subject to a contest
22 of election conducted under this chapter.”) Ohio evidently was concerned about its ability to
23 complete a contest, as well as recount and related proceedings, in a disputed presidential election
24 in time to satisfy the Safe Harbor Deadline. A separate provision of the same post-2004 electoral
25 reform contained an express requirement that a presidential recount be complete by this deadline:
26 “As required by 3 U.S.C. 5, any recount of votes conducted under this chapter for the election of
27 presidential electors shall be completed not later than six days before the time fixed under federal
28 law for the meeting of those presidential electors.” OHIO REV. CODE § 3515.041. If under state law
29 a recount is not finished until the date of the Safe Harbor Deadline, then there is no time afterwards
30 for a judicial contest of the election as certified upon conclusion of the recount. Eliminating the
31 availability of a post-recount contest thus, at least in theory, prevents the risk that a contest could
32 deprive Ohio of the benefit of Safe Harbor status.

33 In practice however, elimination of the contest option may not achieve this desired result.
34 Issues that previously would have been raised in a judicial contest, and which in other states would
35 still be raised in a contest, do not simply disappear. Candidates instead will search for other judicial
36 avenues in which to raise the same claims. Moreover, if the claims are perceived to have at least
37 potential merit, there will be intense public pressure for judges to acknowledge the availability of
38 some other type of judicial process in which to litigate the claims. For example, suppose that there
39 is credible evidence that the outcome of a presidential election in Ohio is tainted by substantial
40 absentee-ballot fraud (of the kind that tainted Miami’s 1997 mayoral election). If a judicial contest

1 of the election is unavailable as a vehicle for rescuing the presidential election from the apparent
2 perpetration of this nefarious fraud, then inevitably there will be a concerted effort to use the state's
3 recount procedures to undo this attempt to steal the presidency. Or there will be an effort to reopen
4 the canvass in order to cleanse the certification of the canvass from the taint of this absentee-ballot
5 fraud. These efforts will occur even if the recount, or reopening of the canvass, is not a well-
6 designed vehicle for adjudicating the claim of fraud. The imperative will be to find some way,
7 even if less than ideal, rather than none, to remedy the problem. One can foresee, for example, the
8 use of a writ of mandamus, or a writ of prohibition, filed as an original action in the Ohio Supreme
9 Court, seeking a decree to order the Secretary of State to amend the certification to free it from the
10 taint of fraudulent absentee votes. Cf. *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011)
11 (original writ of mandamus granted to prevent counting of provisional ballots in violation of state
12 law); *State ex rel. Skaggs v. Brunner*, 900 N.E.2d 982 (Ohio 2008) (same). And if relief from the
13 absentee-ballot fraud is not forthcoming in state court, there will be lawsuits filed in federal court,
14 based on the authority of *Roe v. Alabama* (discussed above) and related cases, as an alternative
15 way to save the presidential election from outright theft. Indeed, given Ohio's recent experience
16 with nonpresidential election litigation, it is likely that the federal-court lawsuits would be filed
17 without waiting to see if a state-court alternative would be successful.

18 The resulting flurry of simultaneous lawsuits would likely be chaotic and destabilizing.
19 Contrary to the intended goal of the relevant Ohio statutes, there would be a markedly increased
20 risk that the conflicting lawsuits, in state and federal court, would jeopardize the state's ability to
21 appoint a slate of presidential electors by the date they are required to meet—at least a slate that
22 represents the will of the state's electorate in November, cleansed of the fraud. And even if state
23 or federal courts undertook the challenge of retooling various forms of judicial procedure, like a
24 writ of mandamus, to hold a trial on the allegations and evidence of absentee-ballot fraud, the
25 courts on the fly would have to develop new schedules and practices for handling this ad hoc
26 process.

27 A much better process would be to have the claims of absentee-ballot fraud litigated in a
28 contest action specifically designed for the purpose and thus thought out in advance. For this
29 reason, these Procedures include the possibility of a contest action in a presidential election and
30 engineer it so that it can occur after the recount and canvass—and still permit the state to satisfy
31 the Safe Harbor Deadline.

§ 316. Contest of Certified Vote Totals: Deadline and Proceedings

(a) No later than 28 days after Election Day, the Presidential Election Court shall conclusively resolve any contest filed under § 315 and shall announce its resolution electronically pursuant to § 306.

(b) To facilitate compliance with the deadline in subsection (a), the Presidential Election Court shall adhere to an expedited schedule for adjudication of the contest, including issuing such orders for expedited discovery as necessary to enable a trial of the contest to commence no later than seven days after the filing of the contest.

(c) A motion to dismiss a contest petition filed under § 315, including a motion to dismiss a conditional petition filed under § 315(c), must be filed with the Presidential Election Court and served upon the petitioner no later than 48 hours after the filing of the contest.

(d) The Presidential Election Court may choose to hold an oral argument on a motion to dismiss the contest, provided that the argument shall occur no later than 72 hours after the filing of the motion.

(e) Unless the Presidential Election Court has previously granted a motion to dismiss, the trial of the contest will commence no later than seven days after the filing of the contest.

(f) While a contest petition or conditional petition is pending, the Presidential Election Court may permit the petitioner for good cause shown to amend the petition to add or supplement claims with facts that could not have been available to the petitioner at the time the petition initially was filed, provided that in no event shall the Court permit the amendment of a petition more than 21 days after Election Day; nor under any circumstances may the Court waive forfeiture for failure to timely file the original contest petition or conditional petition as required under § 315(a)-(c).

(g) Whenever a contest petition or conditional petition is pending at the same time as another contest petition, the Presidential Election Court may consolidate proceedings, including oral argument on motions to dismiss or trial of evidentiary issues, in the interest of completing adjudication of all pending petitions within the deadline in subsection (a).

(h) When considering whether to grant any motion to dismiss a contest petition or conditional petition, the Presidential Election Court in its discretion may defer ruling on the motion until after a trial on factual issues relating to the petition that is the subject of the motion to dismiss, and one factor that may weigh in favor of exercising this discretion is

1 **whether there would be sufficient time to hold a trial if a dismissal of the petition were**
2 **reversed on appeal by the State Supreme Court.**

3 **(i) With respect to the trial of any contest petition or conditional petition, the**
4 **petitioner bears the burden of proving by a preponderance of the evidence any issue of fact**
5 **necessary to sustain a legal claim made in the petition; provided that with respect to any such**
6 **issue of fact the burden of proof may be elevated to the standard of clear and convincing**
7 **evidence if but only if the same elevated standard would apply to the same factual issue in a**
8 **contest of a gubernatorial election.**

9 **Comment:**

10 *a. Additional time for discovery of contest-related evidence.* Like all other proceedings
11 concerning the resolution of a disputed presidential election, a judicial contest of the certified
12 results of the election must be complete by the Safe Harbor deadline if the state is to attain the
13 benefit of Safe Harbor status and, in any event, must be complete six days later when the state's
14 presidential electors meet to cast their official Electoral College votes. While these deadlines are
15 challenging to all aspects of these Procedures, including the recount and canvass, they are
16 especially challenging to the litigation of a contest. In a nonpresidential election, even an expedited
17 judicial contest would extend over many weeks or even months. The experience of both
18 Washington in 2004 and Minnesota in 2008 underscores this point.

19 These Procedures recognize this reality and address it by making the contest the last of the
20 proceedings to occur under the overall coordinated schedule that these Procedures collectively
21 establish. The Procedures build in the maximum allowable time for the development and
22 presentation of claims cognizable in a contest (claims that could not be pursued in the recount or
23 judicial review of the canvass) consistent with the objective of completing all proceedings by the
24 Safe Harbor deadline. The Procedures achieve this piece of engineering by permitting contest
25 petitions (and any conditional petition) to be amended for up to a week after filing of the initial
26 petition.

27 As provided in § 315, a contest petition or conditional petition must be filed initially within
28 24 hours after certification of the canvass under § 311. Thus, this initial deadline is immediate, and
29 the reason that it is not postponed until later is to put candidates, election officials, and the public
30 on notice that the certification will be contested. Litigation of claims capable of being raised at this
31 time, at least in a preliminary fashion, can begin—even if additional evidence is being gathered

1 that may determine the ultimate adjudication of the contest. Given the exigencies of the schedule,
2 there is no reason to delay for even a week any contest-related proceedings that can occur
3 immediately after certification. For example, motions to dismiss claims raised in a contest petition
4 or conditional petition need not await the gathering of additional evidence relevant to the claims.
5 The legal sufficiency of these claims can be litigated immediately upon certification of the canvass.
6 Factual allegations will be assumed true for purposes of the motions to dismiss and thus are not
7 dependent on the gathering and presentation of evidence. Thus, these claims can be pled in
8 petitions filed within 24 hours after certification, and the legal sufficiency of these claims tested
9 forthwith in motions to dismiss, while expedited discovery of relevant evidence gets underway.

10 As expedited discovery occurs, evidence accumulated may have either of two
11 characteristics. First, the evidence may straightforwardly support a claim already raised in a contest
12 petition. For example, if the contest petition claims absentee voters received illegal payments in
13 exchange for casting their absentee ballots, discovery proceedings may uncover evidence
14 establishing the time, method, and amount of these payments, thereby directly substantiating the
15 petition's claim. In this circumstance, the petition would not need to be amended in light of the
16 evidence obtained during discovery. Second, by contrast, evidence obtained during discovery
17 might raise issues not pled in the initial petition. To build upon the previous example, suppose now
18 that discovery reveals not only illegal payments made for absentee votes but also a practice of
19 fraudulently casting absentee ballots on behalf of registered voters who chose not to cast a ballot
20 in the particular election. This newly discovered evidence would go beyond the scope of what was
21 initially pled in the petition. Subsection (f) would permit amendment of the petition to add a new
22 claim of absentee-ballot fraud based on this subsequently discovered evidence. Subsection (f),
23 however, imposes two important constraints on the amendment of a petition based on new
24 evidence as described in the previous paragraph. First, the newly discovered evidence must not
25 have been available to the petitioner at the time the petition was initially filed. It must be genuinely
26 new. The reason for this constraint is to incentivize the pleading and litigation of claims as soon
27 as feasible, in keeping with the need to expedite proceedings as much as possible. The decision to
28 permit or deny amendment of a petition in light of new evidence is vested in the sound discretion
29 of the Presidential Election Court. In exercising this discretion, the Court should avoid engaging
30 in a mini-trial over whether the evidence is genuinely new or not. Rather when presented with an
31 application to amend a pending petition, the Court should quickly decide whether to grant or deny

1 the request based on information provided in the application, and then move on to the litigation of
2 the contest itself (whatever its resulting scope).

3 The second constraint is that the outer limit for an application to amend a petition based on
4 newly discovered evidence is 21 days after Election Day (which will be equivalent to one week
5 after the deadline for certification of the canvass). It is not much additional time. But it is all that
6 is available, given the exigencies of the overall objective of meeting the Safe Harbor Deadline.
7 Moreover, as the 2000 presidential election in Florida demonstrated, one additional week in the
8 context of the overall five-week schedule can make a huge difference. Thus, the ability to amend
9 a petition under subsection (f) is an important structural feature of these Procedures.

10 *b. Motions to dismiss and the timing of contest trials.* In ordinary litigation, it may be
11 efficient for a trial court to grant a motion to dismiss, recognizing the possibility that the dismissal
12 may be reversed on appeal and the case remanded for a trial on the reinstated claims. But in the
13 specific context of these expedited Procedures, as explained more fully in the Comment to the next
14 Section, there may be insufficient time to hold a trial on reinstated claims on remand after a
15 successful appeal of a decision by the Presidential Election Court to grant a motion to dismiss.
16 Thus, subsection (h) requires the Presidential Election Court to take account of this reality when
17 ruling on any motion to dismiss.

18 This reality does not mean that it is never appropriate for the Presidential Election Court to
19 grant a motion to dismiss a contest petition. On the contrary, if the Presidential Election Court
20 quickly determines that a contest petition lacks legal merit even if all its allegations of fact are true,
21 and if no trial is necessary on any other contest-related matters, then a quick dismissal of the contest
22 petition may be immediately appealed; and if the State Supreme Court disagrees with that
23 dismissal and does so expeditiously—so that the appeal is over by the end of the third week after
24 Election Day—then there still will be time to hold a trial on the contest petition during the fourth
25 week after Election Day, and the trial will have the benefit of the State Supreme Court’s guidance
26 from the appeal. But to be balanced against this possibility is the concern that, if the appeal extends
27 into the fourth week, time for holding the trial may evaporate. Likewise, dismissal of some claims
28 in a contest petition may still leave the necessity of holding a trial on other claims, and thus little
29 efficiency is to be gained from granting only a partial motion to dismiss.

30 Thus, subsection (h) leaves it to the sound judgment of the Presidential Election Court to
31 decide whether or not to grant a motion to dismiss, recognizing the time constraints involved. Even

1 if the Presidential Election Court might be inclined to grant a motion to dismiss, based on its
2 analysis of the legal issues involved, the better decision may well be to hold a trial of the facts
3 relevant to the dismissible claims anyway—because the trial can be conducted more efficiently in
4 advance of an appeal, rather than afterwards. In this respect, litigation of a contest under these
5 Procedures may differ from the ordinary expectation of how to handle a motion to dismiss.
6 Moreover, holding a trial on dismissible claims will especially make sense if the Presidential
7 Election Court knows that it must hold a trial on other claims raised in a contest petition, and these
8 other claims overlap factually with the dismissible claims, and thus the Court might as well hold
9 a trial on all contest-related claims simultaneously. The overarching goal remains to complete all
10 proceedings that may be required, including those that might be mandated by the State Supreme
11 Court as the result of an appeal, before expiration of the Safe Harbor deadline.

12 *c. Burden of proof in a contest.* A key distinguishing feature between judicial review of the
13 canvass under §§ 312-313 and a judicial contest under this and the previous Section is the nature
14 of the burden of proof that applies in each of the two proceedings. Even though judicial review of
15 the canvass under §§ 312-313 occurs after certification of the canvass, there is no burden of proof
16 imposed on any candidate as a consequence of the certification. Instead, the burden of proof under
17 § 313 is specific to each decision made by a Local Election Authority during the canvass, with the
18 candidate challenging the specific decision bearing the burden of proving that particular decision
19 incorrect. In this way, the burden of proof under § 313 shifts from ballot to ballot, or issue to issue,
20 as the candidates present their challenges to decisions made during the canvass. As the burden of
21 proof shifts in this way, it does not matter which candidate is ahead or behind after certification of
22 the canvass; the certification is not consequential to who bears the burden.

23 The burden of proof in a contest is different. The certification matters greatly here. The
24 nature of a contest is that the contestant is challenging the certified result, presenting claims that
25 the certification resulted from errors—and that if those errors are corrected, a different candidate
26 would emerge on top. Given all this, the contestant bears the burden of proving all elements
27 necessary to establish the merits of a claim raised in a contest. Moreover, historically, this burden
28 is understood to be a heavy one; a certified election is not lightly overturned. Thus, a candidate
29 who is behind in the count at the time of certification faces a high hurdle, and the candidate who
30 is ahead has the benefit associated with this presumption of victory.

1 Exactly how high this hurdle should be is, of course, a policy matter for state law to
2 determine. A state could choose to require a contestant to prove all facts necessary for a claim “by
3 clear and convincing evidence”—a standard significantly more onerous than the conventional
4 “preponderance of the evidence” standard. This Section leaves this policy choice for state law to
5 make, as long as the state maintains parity between gubernatorial and presidential elections (in
6 keeping with the overall principle of parity in this respect under this and the previous Section).
7 Thus, subsection (i) sets the traditional “preponderance of the evidence” standard as the default,
8 but if state law has elevated the burden to the “clear and convincing” standard in a gubernatorial
9 contest, then that elevated burden applies here as well.

10 It is important to note that the same burden of proof applies to a claim whether made in a
11 regular or conditional petition. For example, suppose a candidate alleges that an opposing
12 candidate has benefited from absentee votes procured through the improper payment of funds. It
13 does not matter whether that allegation is raised by a candidate trailing after certification in a
14 regular petition to contest the certified result, or instead is made by the leading candidate in a
15 conditional petition. If the burden of proof in the former is “clear and convincing evidence”
16 (because that is the same burden that would apply in a gubernatorial contest), then so too must the
17 conditional petitioner meet the same evidentiary standard if making these factual allegations.

18 As explained in the Comment to the previous Section, the conditional petition is treated as
19 if the petitioner were behind rather than ahead at the time of the certification. Indeed, this treatment
20 is the very essence of its conditional nature. It does not become actively ripe for the Presidential
21 Election Court’s adjudication unless and until the conditional petitioner does fall behind as a result
22 of other pending proceedings (as described above). At the point that the candidate who filed the
23 conditional petition does fall behind, it becomes entirely appropriate to treat this candidate as
24 bearing the same onerous burden of proof as a candidate behind at the time of certification. At this
25 point, in effect, as a result of the proceedings, the certified result has been altered, and the candidate
26 who was ahead in the initial certification is now behind in the altered certification. To be sure, the
27 altered certification is temporary and may shift back, especially if the conditional petition is
28 meritorious. But at the moment the conditional petition becomes actively ripe for adjudication, it
29 should be subject to exactly the same burden of proof as if it were a regular petition to contest the
30 initial certification. Consequently, at a point in the litigation of evidentiary issues under this
31 Section, if the Presidential Election Court considers a question concerning a conditional petition

1 prior to the time it becomes actively ripe for adjudication (in the interest of efficiency, as
2 previously discussed), the Court must apply the same burden of proof that would apply if the same
3 claim were raised in a regular rather than conditional petition.

4 [No Reporters' Note]

5 **§ 317. Appeal to State Supreme Court of Contest Determinations**

6 (a) No later than 24 hours after receiving by email the announcement of the
7 Presidential Election Court's resolution of a contest under § 316, a party to the contest may
8 appeal to the State Supreme Court.

9 (b) If the State Supreme Court chooses to hold oral argument on an appeal filed under
10 this Section, the argument shall occur no later than 48 hours after the filing of the appeal.

11 (c) The State Supreme Court shall resolve any appeal filed under this Section,
12 including the issuance of any orders necessary to adjust vote totals in the statewide
13 certification, no later than 24 hours prior to the expiration of the Safe Harbor Deadline
14 under 3 U.S.C. § 5.

15 (d) If in an appeal under this Section the State Supreme Court identifies any issue
16 requiring a remand for additional factfinding proceedings, the State Supreme Court shall
17 order such factfinding to be complete whenever feasible in such time as to permit final
18 resolution of the appeal in accordance with subsection (c).

19 **Comment:**

20 *a. Remand on appeal of judicial contest.* Given the overall structure of these Procedures,
21 the greatest risk of a development that prevents completion of all proceedings by the Safe Harbor
22 deadline is presented by an appeal of a contest. Under § 316, the trial of a contest is not required
23 to be complete until 28 days after Election Day, leaving only one week for the appeal of the contest,
24 including any additional proceedings that might be necessary on remand from the appeal.

25 Thus, when faced with an appeal of a contest, the State Supreme Court needs to consider
26 whether any sort of remand is truly necessary under applicable state and federal law (including
27 federal constitutional standards of equal protection and due process). If a remand is unavoidable
28 given the requirements of applicable law, then the State Supreme Court must calculate whether
29 there is any way to conduct the remand in time to meet the Safe Harbor Deadline. If so, then the
30 State Supreme Court should fashion the remand order accordingly; but if not, then the State

1 Supreme Court should assure that the state at least will complete the remand and all other
2 proceedings by the date on which the presidential electors are scheduled to meet.

3 Unfortunately, these Procedures cannot provide an absolute guarantee that the state will
4 always be able to meet the Safe Harbor Deadline. They can only maximize the likelihood that a
5 state will be able to do so. An issue may arise in an appeal of a contest that requires an unavoidable
6 remand, and this remand is of such scope and character that there is no way to complete it in time
7 to achieve Safe Harbor status. In that case, like a runner who must finish a race knowing that
8 second place is the best that can be achieved—but for whom second place is no sure thing unless
9 the runner still sprints to the end—the state still must expedite the remand proceedings in order
10 not to risk failing to complete a resolution of the contest by the date on which the presidential
11 electors must meet.

12 Thus, if there is a way for the State Supreme Court to resolve the appeal of the contest
13 without ordering a remand, the court should opt for that no-remand resolution. Obviously, the court
14 cannot avoid a remand when one is compelled by a proper understanding of applicable state and
15 federal law. But often the question of whether to hold a remand is a matter committed to the sound
16 discretion of the appellate court. In some instances, the record on appeal permits the appellate court
17 to make the relevant finding of fact after the appellate court reverses the trial court’s legal error.
18 In this situation, the State Supreme Court should go ahead and make the relevant finding of fact
19 itself, so as to enable resolution of the appeal by the Safe Harbor Deadline, thereby avoiding the
20 delay of an unnecessary remand.

21 **REPORTERS’ NOTE**

22 *a. Balancing accuracy and finality in a presidential election with a “statistical tie.”*
23 Depending on the particular claims involved in a disputed presidential election, a State Supreme
24 Court may conclude that the presidential election lies irreducibly within what social scientists
25 would view as a statistical “margin of error,” which might persist even if the court were to order
26 additional proceedings in an effort to improve the accuracy of the outcome. (The term “statistical
27 tie” has the same meaning as this statistical “margin of error”—that, beyond a certain level of
28 precision, all outcomes within a range are statistically equivalent in terms of their accuracy. Thus,
29 in an election with a million votes, and a margin of error of 0.01%, or +/- 100 votes, the outcome
30 that Candidate A won by 49 and the outcome that Candidate B won by 49 are equally accurate
31 from a social-science perspective. Hence the assertion that an election of this nature amounts to a
32 “statistical tie” and the implication that it is artificial to think that legal machinery can determine
33 with greater accuracy whether Candidate A or B in some sense “really” received more valid

1 votes.²³) When faced with this situation, as the Safe Harbor Deadline looms closer and closer the
2 court would need to weigh the value of ordering additional adjudicatory proceedings against the
3 risk that pursuing them would jeopardize meeting not only the Safe Harbor Deadline but also the
4 constitutionally required meeting of the Electoral College six days later.

5 The tension between accuracy and finality is addressed more fully in Part II of this Project,
6 as the tension affects nonpresidential elections as well. But the balance of competing
7 considerations weighs differently in presidential elections. For one thing, the impossibility of
8 holding a revote in a presidential election need not apply to other elective offices. Also, the
9 practical political consequence of a “statistical tie” in a presidential election is different than a
10 similar circumstance affecting a lesser office. The governance of a state can suffer tolerably well
11 the unfortunate situation in which an officeholder serves a term as a consequence of adjudicatory
12 proceedings that, because of their irreducible level of imprecision, amount to the equivalent of a
13 coin flip from a statistical perspective. But it is exponentially more problematic for the occupant
14 of the Oval Office to be determined in this essentially random way. Indeed, one of the most
15 memorable lines to emerge from the disputed presidential election of 1876 was Samuel Tilden’s
16 statement that he would refuse to let that election be decided “by lot,” as some in Congress were
17 considering. PAUL LELAND HAWORTH, *THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF*
18 *1876*, at 198-199. “I may lose the Presidency, but I will not raffle for it,” the candidate purportedly
19 exclaimed. *Id.* at 200. Given the much more awesome powers of the presidency now, including
20 the nuclear arsenal that the Commander-in-Chief wields, it would be even more disconcerting
21 today to settle a presidential election by a coin toss.²⁴

²³ For more background on this point, see Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 *STAN. L. & POL. REV.* 350 (2007). See also Michael Pitts, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 *CONN. L. REV.* 739 (2006).

²⁴ To be clear, the issue of how best to handle a “statistical tie” in a state’s presidential election (when that state’s Electoral Votes are pivotal to determining whether a candidate has attained a majority of pledged Electoral College votes) is analytically distinct from what happens if a state’s presidential election were to result in an exact mathematical tie. It is at least theoretically possible that a state’s presidential election could end up truly dead even. For example, if New Hampshire’s 1974 U.S. Senate election could end up with just a two-vote margin, 110,926 to 110,924—as in fact occurred—it is not inconceivable that New Hampshire (currently considered a presidential swing state) could have a presidential election that yields an exact tie, with something like 110,925 votes each for both the Democratic and Republican candidates. Were this situation to arise, the question would be whether state law requires the tie to be broken by lot. New Hampshire uses a lottery to break exact ties in some types of elections, including presidential *primaries*. N.H. REV. CODE § 660.23. Virginia has a statute that specifies using a lottery to break an exact tie in a November general election vote for presidential electors. VA. CODE § 24.2-674. If hypothetically there was no dispute about the fact that a state’s presidential election ended in an exact tie, and if it was clear (as in Virginia) that the applicable state statutes required breaking that tie with a coin flip, then as a formal proposition of law the use of that state statutory procedure would be entitled to Safe Harbor status (assuming of course that the required coin toss occurred within five weeks of Election Day).

Practically speaking, however, a situation in which a state’s presidential election might actually end in an exact tie would be one in which observers likely would also consider it to be within a margin of error that amounted to it being a statistical tie—meaning that it was just as likely that Candidate A actually won more votes, or that Candidate B won more votes, as that the “true” result was an exact numerical tie. If so, the sense of the election being a statistical tie might predominate—to the point of calling for a political resolution of the statistical tie, by means of invoking the fallback of legislative appointment of the state’s presidential electors, rather than proceeding to an actual coin toss as the statutorily prescribed method of breaking an exact numerical tie. The larger point, not to be lost in

1 For better or worse, the Constitution contains a mechanism for handling the situation when
 2 the result of the popular vote in a particular state is essentially indeterminate, despite the best
 3 efforts of the state’s adjudicatory processes to determine the outcome. That mechanism is the
 4 constitutional authority of the state’s legislature to invoke a fallback method of appointing the
 5 state’s presidential electors, including by means of the state’s legislature simply undertaking this
 6 appointment itself. Thus, if in the context of a particular presidential election, a State Supreme
 7 Court, with the date for the meeting of the presidential electors coming ever closer, finds the
 8 outcome of the popular vote essentially indeterminate, the court must entertain the possibility that
 9 the better course is simply to declare the November popular vote null and void and let the
 10 appointment of the state’s presidential electors revert to the legislature’s constitutional authority.²⁵

11 To be sure, these Procedures in their entirety are designed to avoid the State Supreme Court
 12 finding itself in that unpalatable situation. Their overarching aim is to enable the state to determine
 13 accurately the presidential choice that the eligible electorate made when casting ballots in
 14 November. But in a rare situation it may be necessary to recognize that this aim is not achievable,
 15 in which case it is better to invite the state legislature to exercise its constitutional authority rather

considering the distinction between a statistical tie and an exact tie, is the dynamic quality of a state’s effort to improve its vote-counting accuracy as the calendar moves ever closer towards both the Safe Harbor Deadline and the meeting of the presidential electors. Given this dynamic quality, at some point a State Supreme Court may be called upon to make a judgment concerning the balance between the effort to achieve greater vote-counting accuracy and the state’s expressed desire to appoint its presidential electors in accordance with the congressionally prescribed timetable.

²⁵ Delaware is one state with a statute that explicitly authorizes—and requires—its legislature to appoint the state’s presidential electors if the popular vote ends up inconclusive: “Whenever there shall be a failure to choose 1 or more of the electors of President or Vice-President at any general election, the General Assembly shall convene and choose such elector or electors and certify the appointment of the elector or electors so chosen.” 29 DEL. CODE § 704; accord 15 DEL. CODE § 7731. North Carolina has an even more elaborate statute on this point:

(a) Appointment by General Assembly if No Proclamation by Six Days Before Electors’ Meeting Day. - As permitted by 3 U.S.C. § 2, whenever the appointment of any Presidential Elector has not been proclaimed under G.S. 163-210 before noon on the date for settling controversies specified by 3 U.S.C. § 5, and upon the call of an extra session pursuant to the North Carolina Constitution for the purposes of this section, the General Assembly may fill the position of any Presidential Electors whose election is not yet proclaimed.

(b) Appointment by Governor if No Appointment by the Day Before Electors’ Meeting Day. - If the appointment of any Presidential Elector has not been proclaimed under G.S. 163-210 before noon on the date for settling controversies specified by 3 U.S.C. § 5, nor appointed by the General Assembly by noon on the day before the day set for the meeting of Presidential Electors by 3 U.S.C. § 7, then the Governor shall appoint that Elector.

(c) Standard for Decision by General Assembly and Governor. - In exercising their authority under subsections (a) and (b) of this section, the General Assembly and the Governor shall designate Electors in accord with their best judgment of the will of the electorate. The decisions of the General Assembly or Governor under subsections (a) and (b) of this section are not subject to judicial review, except to ensure that applicable statutory and constitutional procedures were followed. The judgment itself of what was the will of the electorate is not subject to judicial review.

(d) Proclamation Before Electors’ Meeting Day Controls. - If the proclamation of any Presidential Elector under G.S. 163-210 is made any time before noon on the day set for the meeting of Presidential Electors by 3 U.S.C. § 7, then that proclamation shall control over an appointment made by the General Assembly or the Governor. This section does not preclude litigation otherwise provided by law to challenge the validity of the proclamation or the procedures that resulted in that proclamation.

N.C. GEN. STAT. § 163-213.

1 than for the judiciary to conduct additional adjudicatory procedures that would risk the state having
2 no presidential electors on the date when they must cast their Electoral College votes.

3 **§ 318. Final Certification of Presidential Election**

4 **(a) Before noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5, the Chief**
5 **Elections Officer shall publicly issue a final certification of the presidential election, based**
6 **on a compilation of final orders in all proceedings concerning the presidential recount, any**
7 **review of the canvass, and any contest, including:**

8 **(1) any final post-remand orders concerning the recount under**
9 **§ 309;**

10 **(2) any final post-remand orders concerning the canvass under**
11 **§ 314; and**

12 **(3) any final orders resolving an appeal of a contest under § 317.**

13 **(b) If at noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5 the Chief**
14 **Elections Officer has failed to publicly issue a final certification of the presidential election**
15 **as required in subsection (a), the State Supreme Court shall have the authority to issue any**
16 **orders necessary to assure compliance with the Safe Harbor Deadline, including directly and**
17 **immediately issuing the final certification of the election on its own authority.**

18 **(c) If notwithstanding its authority under subsection (b), the State Supreme Court**
19 **determines at or before 11:59 p.m. on the date of the Safe Harbor Deadline that the state is**
20 **unable to declare a final certification of the presidential election pursuant to these**
21 **Procedures, then the State Supreme Court immediately shall issue a public declaration that**
22 **the state is exercising its option to waive the Safe Harbor status available under 3 U.S.C. § 5.**

23 **(d) Whenever the State Supreme Court pursuant to subsection (c) has issued a public**
24 **declaration that the state cannot meet the deadline necessary for Safe Harbor status, the**
25 **State Supreme Court shall have the authority to issue emergency orders as necessary to**
26 **enable final certification of the presidential election on or before the date specified in 3 U.S.C.**
27 **§ 7 for the state's presidential electors to cast their Electoral College votes.**

28 **Comment:**

29 *a. Weaving three threads together.* This Section is the wrap-up provision of these
30 Procedures and, accordingly, has a claim for being the most important. This Section enables the

1 state’s Chief Elections Officer—and, if necessary, the State Supreme Court—to weave together
2 into a single final result three distinct threads, each of which potentially may reach its own
3 culmination on the day before the Safe Harbor Deadline.

4 **Illustration:**

5 1. Imagine this scenario: the 2020 presidential election has been the subject of
6 multiple disputes in a single pivotal state. First, during the recount, a question arose
7 concerning whether to count ballots that are doubly marked for the same candidate, with
8 the oval filled in next to the candidate’s name and the same name added on the line for a
9 write-in candidate. The machines recorded these ballots as containing an uncountable
10 “overvote” in the presidential election, and during the manual recount the Presidential
11 Election Court, along with many Local Election Authorities, have interpreted the relevant
12 provision of state law as requiring the ballots to be interpreted to contain an uncountable
13 overvote in the presidential election. The State Supreme Court, however, has reversed that
14 legal ruling and ordered a remand, requiring the counting of ballots in this category. The
15 Local Election Authorities have completed their necessary review of the ballots on remand,
16 the Presidential Election Court has affirmed this review, and on the Monday before the
17 Safe Harbor Deadline, the State Supreme Court has dismissed any further appeals related
18 to the recount. The vote totals as certified at the end of the canvass now stand ready to be
19 adjusted in light of these additionally counted votes as part of the remanded component of
20 the recount.

21 Second, during the canvass, a question arose whether late-arriving domestic
22 absentee ballots lacking a postmark could be counted if it could be shown that post-office
23 error caused the absence of the postmark. The Presidential Election Court, along with many
24 Local Election Authorities, answered this question in the negative, holding that domestic
25 absentee ballots arriving after Election Day cannot count without a postmark showing them
26 cast on or before Election Day regardless of the reason for the missing postmark. The State
27 Supreme Court, however, reversed this holding and, on remand, the Local Election
28 Authorities have counted all such absentee ballots where evidence established that the
29 missing postmark was caused by post-office error. The Presidential Election Court has
30 affirmed these post-remand determinations, and the State Supreme Court has dismissed all

1 further appeals relating to the canvass. The previously certified vote totals now stand ready
2 to be adjusted to include these additionally counted absentee ballots.

3 Third, a contest to the vote totals certified at the end of the canvass was filed on the
4 ground that the candidate ahead in the certified totals benefited from improper assistance
5 provided to voters residing in nursing homes. After holding a trial to consider the evidence
6 of the alleged improper assistance, the Presidential Election Court ruled that, although the
7 conduct was inappropriate, it did not subvert the voluntary choices of the nursing-home
8 voters and therefore no adjustment in the certified count was required. On appeal, however,
9 the State Supreme Court has reversed this ruling, holding instead that the conduct of the
10 candidate's campaign workers at the nursing home, as demonstrated by the evidence in the
11 record, went far beyond permissible assistance and negated the view that these ballots
12 represented an exercise of the voters' autonomous choice. The State Supreme Court
13 determined that the record showed that 138 ballots were tainted by this kind of impropriety,
14 and thus the State Supreme Court ordered that 138 votes be deducted from the leading
15 candidate's initially certified vote total.

16 Thus, as of the day before the Safe Harbor Deadline, in this situation there are three
17 separate adjustments that must be made to the vote totals as certified at the end of the
18 canvass: first, the adjustment made as a result of the remanded component of the recount,
19 concerning the doubly marked ballots; second, the adjustment made on remand in the
20 judicial review of the canvass, concerning the absentee ballots lacking a postmark; and
21 third, the adjustment required as a result of the contest, concerning the nursing-home
22 ballots tainted by improper assistance. This Section empowers the Chief Elections Officer
23 to make all three adjustments simultaneously (along with any other similarly necessary
24 adjustments as a result of any of the proceedings undertaken pursuant to these Procedures),
25 and to unify all these adjustments into a single, final certification of the presidential
26 election—and to announce this final certification in time to satisfy the Safe Harbor
27 Deadline.

28 *b. Final certification of the election.* Although it may seem obvious, it is worth
29 underscoring the distinction between the certification of the canvass under § 311, which is
30 preliminary, and certification of the election under this Section, which is final. What gets certified
31 under § 311, moreover, is not the election, but rather simply the vote totals as reflected in the

1 canvass. Those vote totals may change in any of three ways, as described above. Thus, it would be
2 wrong to say that the certification under § 311 identifies a winner of the election as determined in
3 the canvass; rather, the § 311 certification identifies a candidate who is officially ahead in the count
4 upon completion of the canvass. That distinction is an important one. For nonpresidential elections,
5 it often may be appropriate to say that the certification of the canvass identifies an official *winner*;
6 but not so in a presidential election governed by these Procedures. Even though the certification
7 of the canvass is an important moment in the overall process structured by these Procedures, and
8 even though one of its important features is that it imposes a significant burden of proof on any
9 candidate petitioning to contest the certification under § 315 (as described above), it goes too far
10 to claim that certification of the canvass under § 311 identifies (even if only preliminarily) the
11 *winner* of the presidential election in the state. The candidate ahead in the vote totals as certified
12 under § 311 is emphatically not officially the *winner*, even in a preliminary sense. Instead, the
13 official winner is identified solely by the final certification that occurs under this Section.

14 To be sure, if after certification of the canvass under § 311, no candidate files a petition for
15 judicial review of the canvass under § 312 and no candidate files a petition to contest the
16 certification under § 315—and if there are no further recount proceedings under
17 § 309—then certification of the canvass under § 311 can become converted, without any changes
18 to the vote totals, into a certification of the election under this Section. But in order for that
19 conversion to occur prior to the relevant deadlines in §§ 311, 312, and 315, the candidates would
20 need to enter the stipulation specified in § 319. In this sense, the conversion does not occur
21 automatically. Once these expedited Procedures have been invoked in a presidential election under
22 § 303, then for the election to become final—and thus for there to be an official winner of the
23 election—the Chief Elections Officer must make the public declaration of the certification required
24 by this Section. That public declaration constitutes notice that the state’s proceedings are complete,
25 including for the purpose of satisfying the Safe Harbor Deadline.

26 *c. Between noon and midnight on the date of the Safe Harbor Deadline.* If the Chief
27 Elections Officer has not issued the certification called for in subsection (a), then the state’s
28 supreme court has until midnight to remedy this omission before the state loses its opportunity to
29 achieve Safe Harbor compliance. The time specified in subsection (c) is 11:59 p.m., one minute
30 before midnight, because that time is immediately before the expiration of the Safe Harbor
31 Deadline. The goal is to permit a state’s supreme court to be able to make the certification

1 necessary to obtain Safe Harbor status up until the very last minute, if using every last bit of
2 available time makes doing so possible. But if and when the state's supreme court realizes that it
3 will be incapable of meeting the Safe Harbor Deadline, then it must issue a public declaration to
4 this effect immediately upon that realization.

[No Reporters' Note]

5 **§ 319. Cessation of Expedited Procedures If No Longer Necessary**

6 **(a) At any time after the Chief Elections Officer has issued a declaration under § 303**
7 **on the necessity of an Expedited Presidential Recount, and prior to final certification of the**
8 **election under § 318, these Procedures will no longer be applicable if and only if:**

9 **(1) all candidates entitled to participate in a recount under**
10 **§ 307(c) jointly sign and submit to the Presidential Election Court a statement**
11 **stipulating that:**

12 **(A) there is no further need to complete any recount or other**
13 **proceedings, including the canvass, on an expedited basis pursuant to these**
14 **proceedings;**

15 **(B) all the candidates signing the statement waive all rights that they**
16 **otherwise would have under these Procedures; and**

17 **(C) the Chief Elections Officer may proceed forthwith to the final**
18 **certification of the election under § 318;**

19 **(2) the Chief Elections Officer signs and submits a separate statement to the**
20 **Presidential Election Court confirming all the stipulations set forth in the joint**
21 **statement of the candidates under paragraph (1); and**

22 **(3) the Presidential Election Court upon receipt of the statements required in**
23 **paragraphs (1) and (2), issues a pronouncement confirming that the Chief Elections**
24 **Officer may proceed forthwith to the final certification of the election under § 318.**

25 **(b) Immediately upon issuance of a pronouncement of the Presidential Election Court**
26 **under subsection (a)(3), the Chief Elections Officer shall proceed forthwith to issue the final**
27 **certification of the election under § 318.**

28 **(c) Whether or not a stipulation has been reached pursuant to subsection (a), any**
29 **candidate who files a judicial petition or appeal under any provision of these Procedures may**
30 **voluntarily dismiss the petition or appeal at a subsequent time by applying to the court in**

1 **which the petition or appeal is under consideration and, upon approval of the court to which**
2 **this application for voluntary dismissal is made, the petition or appeal shall be dismissed by**
3 **court order.**

4 **Comment:**

5 *a. Termination of expedited Procedures if no longer necessary.* This Section permits the
6 expedited Procedures to terminate, even after they have been triggered under § 303 but before they
7 otherwise would be complete, if the circumstances develop such that the presidential-election
8 outcome in the particular state is no longer unsettled. There is obviously no point in undertaking
9 the arduous effort required by these expedited Procedures if, as a practical matter, they have
10 become moot. Still, this Section requires all relevant participants to make a formal declaration that
11 the expedited Procedures, having once been invoked, are no longer necessary. These formal
12 declarations are essential so that there is no doubt about the official status of the presidential
13 election in the state.

14 The candidates may invoke this Section on a state-by-state basis. In other words, even if
15 the winner of the presidency remains undetermined because other states remain in dispute, the
16 candidates can choose to agree that the outcome of a particular state is no longer disputed. The
17 Chief Elections Officer, however, must agree that an expedited recount and canvass no longer are
18 necessary in the state. An expedited recount and canvass are triggered under § 303 by order of the
19 Chief Elections Officer, not by the request of a candidate, and the Chief Elections Officer must be
20 satisfied that the conditions no longer warrant these expedited proceedings. By contrast, the three
21 different types of judicial-review proceedings available under these Procedures, as well as appeals
22 of these judicial-review proceedings, are instigated at the behest of a particular candidate, and thus
23 each of these judicial forms of relief may be withdrawn voluntarily by the candidate who initially
24 sought the particular form of judicial relief.

25 *[No Reporters' Note]*