1. This calendar is designed to enable a state to complete all procedures related to resolving a disputed election, including a recount and judicial litigation, by December 31 of the same year in which the November election took place. Doing so would enable the winner of the election to take office, with all issues of state law resolved, as soon as January 1.

2. This calendar, therefore, could be used for any gubernatorial election or other election to an office under state law. It could also be used for congressional (U.S. Senate and U.S. House) elections—at least insofar as delivering to the winning candidate a final certificate of election under state law, to be presented in Congress and subject to further congressional proceedings. Likewise, it could also be used for a presidential election, if Congress were to move the meeting of the Electoral College to early January (and either move or eliminate the so-called Safe Harbor Deadline under 3 U.S.C. § 5). Appropriately adjusted, a similar 8/9-week calendar could be developed for primary elections, as well as referenda or initiative elections regardless of when they are held during the year.

3. The basic structure of this calendar is to allot the first two weeks after Election Day to the canvass, then five weeks after completion of the canvass to various potential legal proceedings including a recount, and finally the remainder of the time up to December 31 for an appeal to the state’s supreme court of all issues resolved during the prior weeks.

4. In some years, this calendar would afford two weeks to the appellate proceedings in the state supreme court. In other years, the time available for these appellate proceedings would be as short as just one week. Moreover, the deadlines for filing appellate briefs (and the date for holding an oral argument in the state’s supreme court) would need to take account of upon which date Christmas Day fell in any given year. Also, to resolve all legal issues by December 31, it would be necessary to leave open the possibility of additional proceedings in the trial-level Election Court, or before the State Recount Board, upon remand from a decision by the state’s supreme court.

5. Clearly, then, under this calendar, there is little time for the appeal and potential post-appellate proceedings, and in some years they would be especially rushed. This time pressure could be alleviated by pushing into January the date by which all of the state’s
legal proceedings regarding a disputed election must be conclusively be resolved. Making the deadline January 7, for example, would add an extra week. While that might be desirable in some circumstances, in other situations the date on which the winning candidate is supposed to take office might already have passed. For example, members of Congress take office on January 3, and some states use that date for the inauguration of their governors.

6. This calendar contemplates three distinct types of legal issues that might be litigated in a state court concerning the counting of ballots: (a) claims about the eligibility of ballots that local officials during the canvass determined were not entitled to be counted; (b) claims about the eligibility of ballots already counted—and commingled with other counted ballots—or other claims attacking the validity of the result as determined by the count as certified after the canvass; (c) claims about determinations of voter intent made during a recount of the originally counted ballots.

7. These three distinct types of issues call for somewhat different judicial procedures, with different standards of proof. For example, for category (a), there should be a ballot-specific burden of proof regardless of which candidate has more votes after certification of the canvass: any candidate who wishes the judiciary to count a ballot that local officials determined is not entitled to be counted should bear the burden of showing that the local determination was, more likely than not, erroneous. By contrast, for category (b), a candidate who seeks to overturn the certification of the canvass on the ground that ballots already counted and commingled were not eligible to be counted, or on the ground that the certification rests on a systemic defect of the electoral process that prevents the certified count from being an accurate determination of the electorate’s will, should bear a more difficult burden of showing by clear and convincing evidence the fundamental flaws that undermine the validity of the count. Furthermore, for category (c), judicial review of the recount should be confined to legal issues concerning the rules and procedures governing the recount and should not involve any ballot-specific factual issues of whether the recount accurately determined a voter’s intent on a particular ballot.

8. The calendar attempts to sequence these three separate categories of issues efficiently, so that they all can be resolved in the state’s trial-level court by the end of the seventh week, in time for a single consolidated appellate proceeding in the state's supreme court.

9. Under this calendar, there is no separate judicial “contest” of the election after final administrative certification of the result. Instead, using the three distinct judicial procedures, a candidate can challenge different aspects of the counting process, and when all of those procedures are complete, there is a final certification that is not subject to any further challenge.

10. An advantage of this approach is that the judiciary need not wait for the completion of the recount to begin litigation of issues in category (a) & (b). By frontloading any
judicial trial of these issues, the calendar makes it possible to complete all necessary proceedings by the end of December.

11. To make this approach work, it is imperative that no court extend the deadline for completion of the canvass. Instead, the litigation of any issue concerning the conduct of the canvass, particularly those concerning the eligibility of ballots reviewed during the canvass, should be postponed until after the completion of the canvass according to this schedule.

12. To make acceptable the postponing of litigation concerning the conduct of the canvass until after its completion, it is necessary that ballots not originally counted during the canvass remain separated from previously counted and commingled ballots until after all judicial proceedings regarding their eligibility are finally and conclusively resolved. In other words, even after the trial-level court determines that some more ballots are eligible to be counted, or if local officials change their minds about a particular ballot’s eligibility during the canvass, these ballots should remain in a separate “to be counted” category until after the state’s supreme court has had the opportunity to rule on their eligibility.

13. The same principle should be able to all ballots not counted on Election Day itself. Any counting of these ballots will occur after an initial report of vote totals for each candidate will have been released. Thus, in a close election, the debate over which of these uncounted ballots are entitled to be counted will be conducted with an eye to “moving the needle” in one direction or another. Thus, after Election Day, no such determination with respect to the counting of a ballot should be made in a way that is irreversible until after all potential legal proceedings concerning the counting of these ballots have been completed.

14. For this reason, the certification of the canvass is not the certification of an electoral victory, which does not occur until after completion of all the different types of potential judicial proceedings.

15. With respect to the deadline for allegations of fraud that would undermine the validity of the certified canvass, the calendar attempts to balance two conflicting goals: first, the desire for a result that is honest and accurate; and second, the need for a final result before the day on which the winning candidate is supposed to take office. The calendar strikes this balance by requiring claims of fraud to be raised within three weeks after Election Day, with another eight days available for claims of fraud that reasonably could not have been discovered during those first three weeks. But once 30 days after Election Day have passed, any claim of newly discovered election fraud would need to be raised in a separate procedure to remove the winning candidate from office, like impeachment for a President, rather than in a procedure attempting to change the count of the ballots as determined by the certification of the canvass.
16. The selection of the members who will serve on the trial-level Election Court is an issue of particular importance.

   a. Experience shows that it is preferable to have a three-judge panel for this court, rather than a single judge; the reason is that the final outcome of the election should not appear to be the decision of a single individual. Although a 2-1 split that appears partisan would not be desirable, at least exposing a 2-1 split is preferable to not knowing whether the decision of a single judge would command the assent of other judges who presided over the same proceedings.

   b. The method for selecting the three members to this panel should be designed to maximize the likelihood that the public will perceive the panel to be fair, impartial, and evenhandedly balanced towards the competing claims of the two disputing candidates.

   c. One possible method for assuring this maximal perception of legitimacy is to have all members of the state's supreme court unanimously chose the panel's three members, assuming that the state's supreme court is not perceived to be dominated by a particular political party. Otherwise, it may be necessary to set up a more complicated selection mechanism.

17. The same need for maximal perception of legitimacy applies to members of the State Recount Board.

   a. If the Election Court is well chosen according to this criterion, it may be possible to permit the Election Court itself to select the members of the State Recount Board.

   b. A Secretary of State who is elected to office as a partisan candidate should not be a voting member of a State Recount Board unless the Secretary of State’s presence as a voting member is visibly balanced by a high-ranking public official from a competing political party, so that the public perceives the overall composition of the State Recount Board as fair and evenhanded.