PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 18 | Issue 1 Article 5

1-1-2018

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I. Introduction

During the 2016 election cycle, many American voters were preoccupied with the extreme personalities involved in the presidential campaign. However, looming in the background were a variety of election law issues involving voter eligibility and the process of casting a valid ballot. Leading up to the 2016 Election, while many voters were making their decision for the next President of the United States, many other voters were fighting for their right to vote.

Election law determines how candidates get their names on election ballots, how electoral districts are drawn, and voting requirements.[1] While disputes over the proper adoption, interpretation, and implementation of local, state, and federal election laws are nothing new, the number of such disputes has risen substantially since the year 2000.[2] Before the 2016 Election, across the nation there were election law matters being litigated in courts regarding voter registration, early voting, absentee voting, and voter identification requirements.[3] These election policies are the subject of much debate, and the complexities surrounding election law, coupled with partisan politics, have turned election reform into a hotly contested policy issue.[4]

Election law litigation tires courts and election officials during the months and weeks leading up to elections.[5] Prior to the 2016 Election, there were

[1] *Election Policy Disputes in the 2016 Elections*, BALLOTPEDIA, https://ballotpedia.org/Election_policy_disputes_in_the_2016_elections (last updated Nov. 31, 2016).

[2] Richard L. Hasen, *Introduction* to BENJAMIN E. GRIFFITH, AMERICA VOTES! GUIDE TO MODERN ELECTION LAW & VOTING, (Benjamin E. Griffith ed., 4th ed. 2012). Election law has greatly increased since the disputed 2000 Presidential Election, which resulted in Bush v. Gore. Since then, the amount of election law litigation in the courts has more than doubled and now the press pays attention to the tension between political parties prior to an election. Additionally, many states have passed controversial election laws, such as laws requiring voters to show identification before voting and many other jurisdictions have implemented new voting technologies. *Id.*

[3] *Election Policy Disputes in the 2016 Elections*, *supra* note 1.

[4] *Id.*

[5] Erin Butcher-Lyden, *The Need for Mandatory Mediation and Arbitration in Election Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531, 532–33 (2010).

eighteen states where election laws and procedures were being challenged, whether by litigation or other legal measure.[6] These cases are often time-sensitive and trouble courts and voters alike, even after Election Day and especially in jurisdictions with close races.[7] Due to the nature of these disputes, Alternative Dispute Resolution ("ADR") is an approach that will allow for faster decision-making in election law disputes and will help to improve the civil discourse of elections as well as our political culture.[8]

This article looks at the positive effects that ADR can have in resolving election law disputes before, during, and after elections. First, this article will focus on the significance of implementing ADR processes in resolving election law disputes. Next, this article will explain the background and impact that election law disputes have on voters, candidates, and the election process as a whole. This article will then explore why ADR processes should be implemented as opposed to using litigation to resolve election law disputes. After, this article will explain a proposed solution to resolving election law disputes through mediation or arbitration depending on when the dispute arises. Lastly, this article will address potential objections to implementing ADR processes to resolve election law disputes.

II. Significance of the Topic

Using ADR to resolve election law disputes will benefit the election process in many ways. This article does not contend that election law disputes cannot be resolved through litigation, rather it suggests that ADR can be a more productive and effective way of resolving these disputes. When election litigation arises close to, on, or after election day, the American public's confidence in the election process weakens.[9] However, using ADR to resolve

[6] Sarah Smith, *2016 Election Lawsuit Tracker: The New Election Laws and the Suits Challenging Them,* MOYERS & COMPANY (Aug. 15, 2016), http://billmoyers.com/story/2016-election-lawsuit-tracker-new-election-laws-suits-challenging/ (last updated Oct. 19, 2016).

[7] Butcher-Lyden, *supra* note 5, at 532-33.

[8] Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO ST. J. ON DISP. RESOL. 291, 292–93 (2012). ADR refers to a variety of processes that help parties resolve disputes without a trial. ADR processes include mediation, arbitration, neutral evaluation, and collaborative law. These processes are generally confidential, less formal, and less stressful than traditional court proceedings. New York State Unified Court System, *Alternative Dispute Resolution*, NEWYORKCOURTS.GOV, https://www.nycourts.gov/ip/adr/What_Is_ADR.shtml#WhatisADR (last updated Aug. 14, 2013).

[9] Butcher-Lyden, *supra* note 5, at 535.

election law disputes will help to restore the public's trust in the election process and in disputed election outcomes.

The problem with litigation in many election law disputes is that its concentration and timing often leads to negative outcomes that can be detrimental to the election process.[10] For example, at the conclusion of the 2016 Election, the 27,000-vote difference in Wisconsin's election results were concerning given the turmoil surrounding the state's new voter-identification law.[11] It is estimated that on Election Day as many as 300,000 Wisconsin voters did not have the required photo identification to vote.[12] District Judge James Peterson said that the state needed to conduct a better public-information campaign emphasizing how voters without birth certificates could still get an ID.[13] As late as October 11, 2016, the Wisconsin voter-identification law was still being litigated in district court.[14]

> [W]hen problems with an election, [such as the one mentioned above,] arise on election eve, election day, or post-election, voters may lose faith in the electoral system.[15] Voters may question whether

[10] *Id.* at 533. ADR is able to facilitate a faster resolution of disputes since parties begin the process of communicating with the desire and goal of reaching a settlement. *Alternative Dispute Resolution Program*, FEDERAL ELECTION COMMITTEE (Feb. 2017), http://classic.fec.gov/em/adr.shtml.

[11] Christina A. Cassidy, *Effect of Voting Laws Seen, but not Enough to Sway Outcome*, THE SEATTLE TIMES (Nov. 10, 2016), http://www.seattletimes.com/nation-world/nation-politics/effect-of-voting-laws-seen-but-not-enough-to-sway-outcome/. Green Party presidential candidate Jill Stein requested a recount in Wisconsin, where Republican Donald Trump won narrowly over Democrat Hillary Clinton. The recount resulted in a net gain of 131 votes for President Donald Trump. Trump added 844 votes to his total for the November 8 election, while Clinton added 713. The recount resulted in a net increase of 837 ballots. Matthew DeFour, *Completed Wisconsin Recount Widens Donald Trump's Lead by 131 Votes*, WIS. ST. J. (Jan. 11, 2017), http://host.madison.com/wsj/news/local/govt-and-politics/completed-wisconsin-recount-widens-donald-trump-s-lead-by-votes/article_3f61c6ac-5b18-5c27-bf38-e537146bbcdd.html.

[12] Cassidy, *supra* note 11.

[13] Mark Sommerhauser, *Federal Judge to State: 'Disturbing Pattern' of DMV Flubbing Voter ID Rollout*, WISCONSIN STATE JOURNAL (Oct. 13, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/federal-judge-to-state-disturbing-pattern-of-dmv-flubbing-voter/article_eebac52d-1168-55ed-b973-2df0cfaaaba6.html.

[14] Ari Berman, *Scott Walker Says Wisconsin's Voter-ID Law is Working 'Just Fine'—It's not*, THE NATION (Oct. 11, 2016), https://www.thenation.com/article/scott-walker-says-wisconsins-voter-id-law-is-working-just-fine-its-not/.

[15] Butcher-Lyden, *supra* note 5, at 535.A survey that was taken from October 6 through October 8, 2016, "of more than 3,000 registered voters, fully [forty] percent of whom sa[id]: 'I have lost faith in American democracy.' Six percent indicate[d] that they've never had faith in the system. Overall, barely more than half – just [fifty-two] percent – sa[id], 'I have faith in American democracy.'" Nathaniel Persily & Jon Cohen, *Americans are Losing Faith in Democracy — and in Each Other*,

> their votes actually counted, reflected their intended vote, or may suspect that one political party is tampering with the election.[16] This loss in voter efficacy can seriously undermine democracy, sometimes discouraging potential voters from casting ballots because they do not believe their vote matters or will actually count.[17]

Additionally, when judges are given the power to decide a case that determines an election, there is a loss in voter confidence.[18] To the voter, the election no longer seems like a democratic political process, rather another way the judicial system can determine politics.[19]

Furthermore, litigating election law disputes costs taxpayers a great deal of money.[20] For example, over $1 million dollars of Ohio taypayer money was spent on lititgating ten lawsuits realted to the 2004 Presidential Election.[21] When taxpayers see candidates and political parties challenging issues in

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WASH. POST (JAN. 12, 2017), https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy--and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.fd9b46913b1d.

[16] Butcher-Lyden, *supra* note 5, at 535.

[17] *Id.* at 536. A mid-August 2016 poll conducted by Gallup found that only six in ten Americans are "very" or "somewhat" confident that their votes would be accurately cast and counted. Justin McCarthy, *About Six in 10 Confident in Accuracy of U.S. Vote Count*, GALLUP (Jan. 11, 2017), http://www.gallup.com/poll/195371/six-confident-accuracy-vote-count.aspx?g_source=Politics&g_medium=newsfeed&g_campaign=tiles.

[18] Butcher-Lyden, *supra* note 5, at 536. The United States Supreme Court issued unexpected, contrary decisions in election law cases right before the 2014 Election. The decisions appeared contradictory, for example, in Texas strict voter identification requirement were to be used on Election Day, but not in Wisconsin. However, the Court was applying the Purcell Principle, "the idea that courts should not issue orders which change election rules in the period just before the election." This idea, which appeared in Purcell v. Gonzalez, where the Court vacated a Ninth Circuit injunction that temporarily blocked the use of Arizona's strict new voter identification law. However, the Purcell Principle should not be used so freely by the Supreme Court because last minute changes in election laws raise the potential for voter confusion and electoral chaos, and increases the chance that last minute decisions will disenfranchise voters or impose significant burdens on election administrators arbitrarily. Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427, 427-29 (2016). *See also* Rick L. Hasen, *Did the Supreme Court Kill the "Purcell Principle" for Election Litigation? Maybe, Maybe Not,* Election Law Blog (Jan 11. 2017), https://electionlawblog.org/?p=80165.

[19] Butcher-Lyden, *supra* note 5, at 536. Bush v. Gore, is responsible for much of today's judicial polarization around election disputes and election-related litigation. In the case, the Supreme Court effectively decided the 2000 Presidential Election and signaled that courts were able and ready to decide election-related claims. Candidates took notice, and since then, there has been a dramatic increase in election litigation. Joshua A. Douglas, *Discouraging Election Contests*, 47 U. RICH. L. REV. 1015, 1015-16 (2013).

[20] Butcher-Lyden, *supra* note 5, at 537.

[21] *Id.*

court, there is a "risk that taxpayers will consider [the] challenges to be a frivolous waste of taxpayers' money."[22]

"The big questions regarding the use of [ADR] in election-related disputes are: what would these processes look like[,] and when and how should they be implemented?"[23] This article will explore these questions and provide a potential solution to implementing ADR processes to resolve election law disputes as an alternative to litigation. The proposed solution will eliminate judicial decision-making in election outcomes and will help to restore the public's trust in election outcomes.

III. Background

Before and during the 2016 election cycle, voting laws were the subject of much debate and the focus of many election law reform efforts.[24] "As of November 2016, [thirty-one] states have enforced voter identification requirements. . . . [Sixteen] states have required voters to present photo identification [to vote], [and] [fifteen]" states have agreed to "accept[] other forms of identification [to vote]."[25] Further, "[thirty-four] states and the District of Columbia [have] permitted no-excuse early voting," and three states have implemented "all-mail voting systems,[26] eliminating the need for early voting."[27] "[Thirteen] states and the District of Columbia ha[ve] implemented same-day registration provisions, enabling voters to register and vote at the same time," while three other states have "approved same-day registration provisions but [have] not yet implemented them."[28]

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[22] *Id.*

[23] *Id.* at 539.

[24] *Voting Policies in the United States*, BALLOTPEDIA, https://ballotpedia.org/Voting_policies_in_the_United_States (last updated Jan. 31, 2016).

[25] *Election Policy Disputes in the 2016 Elections*, *supra* note 1.

[26] "Three states—Oregon, Washington, and Colorado—conduct all elections by mail." In these states, "a ballot is automatically mailed to every registered voter in advance of Election Day, and traditional in-person voting precincts are not available." *Absentee and Early Voting,* NATIONAL CONFERENCE OF STATE LEGISLATURES (Aug. 17, 2017), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[27] *Election Policy Disputes in the 2016 Elections*, *supra* note 1.

[28] *Id.* Fourteen states: California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Maine, Minnesota, Montana, New Hampshire, Vermont, Wisconsin, Wyoming, and the District of Columbia, currently offer or have enacted laws that provide for same day voter registration. *Automatic Voter Registration and Modernization in the States*, BRENNAN CENTER FOR JUSTICE (Feb. 3, 2017), http://www.brennancenter.org/analysis/voter-registration-modernization-states.

Prior to the 2016 Election, voters expressed frustration that new voting restrictions implemented by their states made it more difficult for them to participate.[29] Florida, Ohio, North Carolina, and Wisconsin, all of which are considered battleground states, were among the states that enacted new voting restrictions prior to the election.[30] In some of the states, the margins between Donald Trump and Hillary Clinton were simply too great for voting restrictions to have been a deciding factor.[31] Although there has been no evidence these changes materially influenced the election, "[t]here were clearly many people who bore the brunt of new voting restrictions or who were otherwise unable to participate, and that is not acceptable in a democracy."[32]

Election law disputes often gain media attention, and although it can help turnout, it can lead to confusion of the issues in an election and lead to more litigation.[33] During the 2016 Election, President Donald Trump made numerous claims that the election would be rigged.[34] President Trump used

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[29] Cassidy, *supra* note 11. Before the 2016 election, Republicans passed new voting restrictions in several key swing states including North Carolina and Wisconsin. Courts and studies found that these restrictions would have a disproportionate impact on minority Americans who tend to vote Democrat. However, when the actual election results are looked at by the courts, the studies are wrong. "Clinton lost in must-win states that had no new voting restrictions," and, in the states that did have new voting restrictions, she lost by such big margins that it is unlikely that the new laws explain the results. German Lopez, *Voter Suppression Didn't Cost Hillary Clinton the Election*, VOX (Nov. 11, 2016), http://www.vox.com/policy-and-politics/2016/11/11/13597452/voter-suppression-clinton-trump-2016.

[30] Cassidy, *supra* note 11.

[31] *Id.*

[32] *Id.* Voting restrictions, even when they do not cause a candidate to lose an election are not right. Voting should not be a task that is difficult for anyone since they are simply exercising their basic democratic right. Additionally, "no one should be burdened by extra hurdles at the ballot box based on their race or political affiliation, one case of voter suppression is far too many." Lopez*, supra* note 29.

[33] Carl Bialik, *No, Voter Turnout Wasn't Way Down From 2012*, FIVETHIRTYEIGHT (Nov. 15, 2016), http://fivethirtyeight.com/features/no-voter-turnout-wasnt-way-down-from-2012/. Approximately 58.1 percent of eligible voters cast ballots in the 2016 presidential election. *Id.*

[34] Greg Sargent, *Trump's real endgame: A white nationalist media empire?,* WASH. POST: THE PLUM LINE (Aug. 22, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/08/22/trumps-real-endgame-a-white-nationalist-media-empire/?utm_term=.5e751ff5c821. *See also* Stephen Collinson, *Why Trump's talk of a rigged vote is so dangerous*, CNN (Oct. 19, 2016) http://www.cnn.com/2016/10/18/politics/donald-trump-rigged-election/index.html; "The election is absolutely being rigged by the dishonest and distorted media pushing Crooked Hillary — but also at many polling places — SAD" Donald Trump (realDonaldTrump) TWITTER (Oct. 16, 2016, 10:01 AM), https://twitter.com/realDonaldTrump/status/787699930718695425. Election integrity is an essential part of free and fair elections. A citizen eligible to vote guarantees you not only the right to

this message to persuade voters that the outcome of the election would be illegitimate, thus this message was used by states and political parties to rationalize voter identification laws and other restrictive election laws.[35] Despite President Trump's allegations, along with special precautions taken by both the Democratic and Republican parties, there were no recorded instances of voting fraud and the "nation's vote-casting-and-counting process delivered a decisive result fairly promptly."[36] These allegations did lead to recounts requested in many states after Donald Trump was announced as the winner of the 2016 Election.[37] Many voting experts do believe that voter identification laws may have had some effect on turnout this year, but it was difficult to measure because of other factors such as a lack of enthusiasm for either Donald Trump or Hillary Clinton and the decision of many people simply not to vote.[38]

Despite the good intentions of voting laws, they are still highly contested, especially close to an election. States can choose to implement one of two different sets of voting requirements. The first are voter accessibility policies, such as early voting and same-day voter registration, which are implemented to make citizen voting easier by improving ballot access.[39] The second are

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vote but also that your vote will not be stolen or diluted. "Every vote that is fraudulently manufactured disenfranchises the legitimate voter and makes a mockery of our political process." *Does Your Vote Count? Ensuring Election Integrity and Making Sure Every Vote Counts*, THE HERITAGE FOUNDATION 1, 2 (Nov. 16, 2016), http://thf_media.s3.amazonaws.com/2014/pdf/Doesyourvotecount.pdf.

[35] Sargent, *supra* note 34.

[36] Edward B. Foley, *The Vote-Counting Wasn't Rigged, But Is The System Still Flawed?,* THE OHIO STATE UNIVERSITY | MICHAEL E. MORITZ COLLEGE OF LAW (Nov. 9, 2016), http://moritzlaw.osu.edu/election-law/article/?article=13361. In November 2016, an election poll asked voters if they would accept the results of the election if the candidate of their choice lost, just thirty-one percent said they definitely would see the outcome as legitimate. Twenty-eight percent said that it is either "unlikely" that they would accept the results or that they definitely would not. However, Trump supporters were more likely to question the legitimacy of a Clinton victory than vice versa, but a large amount of Americans on both sides indicated that they would not accept the legitimacy of the next President of the United States. Persily & Cohen, *supra* note 15.

[37] "Presidential candidate Jill Stein's fight to force presidential recounts in three states" involved seeking an emergency federal court order for statewide recounts in Michigan, Wisconsin, and Pennsylvania. Stein said her intent in asking for a recount is to verify the accuracy of the votes cast. She has suggested, with no evidence, that votes cast were susceptible to computer hacking. The Associated Press*, Here's the Latest in the Presidential Vote Recounts in 4 States*, FORTUNE (Dec. 5, 2016), http://fortune.com/2016/12/05/presidential-vote-recount-WISCONSIN-michigan-pennsylvania-nevada/.

[38] Cassidy, *supra* note 11.

[39] *Voting policies in the United States, supra* note 24.

election integrity policies, such as voter identification laws, which are implemented to reduce fraud and ensure the integrity of the voting process.[40]

Restrictive voting policies, such as voter identification requirements, effectively disenfranchise some Americans, especially racial minorities, the elderly, and the disabled.[41] Proponents of voter identification requirements argue that these laws are necessary in order to prevent voter fraud.[42] According to the American Civil Liberties Union ("ACLU"), "since 2008, states across the country have passed measures to make it harder for Americans . . . to exercise their fundamental right to cast a ballot. These measures include voter identification laws, cuts to early voting, and purges of voter rolls."[43] Meanwhile, opponents of voter identification requirements argue that voter fraud is very rare and that identification requirements "unduly restrict[] the right to vote."[44] According to the Heritage Foundation, "[e]lection integrity is an essential part of free and fair elections. As an eligible citizen, you must be guaranteed the right to vote—and it must be guaranteed that your vote is not stolen or diluted by thieves and fraudsters."[45]

IV. Why ADR and Not Litigation?

Both election law and ADR scholars agree that ADR can help to achieve various goals for deciding election law disputes.[46] The use of ADR to resolve

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[40] *Id.*

[41] *Id. See also Fighting Voter Suppression*, ACLU (Nov. 16, 2016), https://www.aclu.org/issues/voting-rights/fighting-voter-suppression.

[42] Wendy Underhill, *Voter Identification Requirements | Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 5, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

[43] *Fighting Voter Suppression*, supra note 41. Stricter voting requirements particularly affect black people, the elderly, students, and people with disabilities. The U.S. Supreme Court, in June 2013, struck down the Voting Rights Act, since then the ACLU has been fighting this limitation of voting rights through advocacy and litigation and is working to expand the right to vote by challenging criminal disenfranchisement laws and expanding same-day and online voter registration. *Id.*

[44] Underhill, *supra* note 42.

[45] *Does Your Vote Count?*, *supra* note 34, at 2. Those who oppose the restrictive voting requirements intended to prevent election fraud believe that there is not enough fraud to justify these new limitations. The National Commission on Federal Election Reform argues that the problem is not the magnitude of voter fraud, but in close or disputed elections where there could be a small amount of fraud, which could ultimately make a difference. COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 1, 18 (2005), http://www.eac.gov/assets/1/6/Exhibit%20M.PDF.

[46] Douglas, *supra* note 8, at 292. ADR often saves money and speeds up reaching a settlement, since parties play an important role in resolving their own disputes, especially in mediation. Parties'

election law disputes can help to improve the civil discourse of our elections and our political culture by limiting the judicial influence on election law decisions and the media's reporting of election law disputes.[47]

ADR starts with a fundamentally different premise than litigation: "cooperation and collaboration are possible while resolving a dispute."[48] "The principles behind . . . [ADR], such as value creating as opposed to value claiming, are illustrative of a humanistic approach to legal problems."[49] Additionally, ADR is mutually beneficial to all parties involved since it is "more accessible and understandable to the layperson, less adversarial, expensive, and time-consuming, and more likely to produce an outcome that matches the interests of the disputants."[50] ADR incorporates concepts of "common sense and flexibility . . . involves the use of a wider array of approaches to resolve disputes than the traditional and often more costly methods of adversarial litigation and administrative adjudication."[51] Specifically, the use of arbitration and mediation to resolve election law disputes would benefit the American election process.[52]

Election Law and ADR scholars both agree that there is a natural link between ADR and election law disputes since elections are truly a unique form of dispute resolution.[53] Many critics argue that election law disputes do not fit well with many forms of ADR since elections are a zero-sum game, meaning there is no way to "create value" since in an election there must be a winner and a loser.[54] However, many disputes that arise from the election process are not binary and allow ADR to resolve the problem. Election law disputes will often include "multiple parties of interest, strong fervor, high

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involvement in settlement often results in "creative solutions, longer-lasting outcomes, greater satisfaction, and improved relationships." New York State Unified Court System, *supra* note 8.

[47] Douglas, *supra* note 8, at 292.

[48] *Id.* at 303.

[49] *Id.*

[50] Deborah R. Henslera, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1594 (1995).

[51] CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS 33 (1996).

[52] Arbitration is a process where "a neutral [third party] called an 'arbitrator' hears arguments and evidence from each side and then decides the outcome." Mediation is a process where "a neutral person called a 'mediator' helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves." New York State Unified Court System, *supra* note 8.

[53] Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO ST. J. ON DISP. RESOL. 325, 325 (2012).

[54] Green, *supra* note 53.

emotion, a focus on positions rather than interests, and a need to define a process that will produce a result that all sides will abide."[55] However, there is room for value creation in election law disputes and the use of arbitration or mediation will lead to more efficient and effective resolution of election law disputes, which will help restore voter's faith in the democratic process.

Finding alternatives to resolve election law disputes is not a new idea. The Federal Elections Commission ("FEC"), Congress, and even some states have implemented new ways to resolve election law disputes that do not involve litigation.[56] The purpose behind these reforms was to increase the American public's confidence in the election process, which is a major concern for lawmakers.

In 2000, the FEC established the ADR office to promote compliance with Federal Election Law by encouraging settlements outside of the traditional enforcement or litigation processes.[57] The program was created specifically to reduce costs, resolve administrative complaints and referrals faster, and bring cases to a mutually satisfactory resolution.[58] However, the FEC created this program to resolve federal campaign finance disclosure disputes and not all election law disputes.[59]

In an attempt to reduce election-related litigation, Congress created and passed the Help America Vote Act of 2002 ("HAVA").[60] HAVA was in direct response to litigation that followed the 2000 Election, which was a major concern for lawmakers and resulted in a critical look at the United States' election systems.[61] For example, the ACLU brought lawsuits in Florida, Georgia, Illinois, California, and Ohio, all states that used punch-card machines for voting.[62] "All of these cases alleged that the use of punch-card

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[55] *Id.* at 325-26.

[56] *Alternative Dispute Resolution Program, supra* note 10.

[57] *Id.* When applied to violations of the Federal Election Campaign Act ADR is able to facilitate a faster resolution of disputes, because the parties begin communicating early in the process with a sincere commitment to reaching a settlement. *Id*.

[58] *Id.* However, before the 2012 election cycle, the FEC's ADR Program has never formally mediated a case. *Id.*

[59] *Id.*

[60] Help America Vote Act, 42 U.S.C. §§ 20901–21082 (2017).

[61] Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1210 (2005).

[62] *Id. See* Black v. McGuffage, 209 F. Supp. 2d 889, 892 (N.D. Ill. 2002); Common Cause v. Jones, 213 F. Supp. 2d 1106, 1107-08 (C.D. Cal. 2001); Second Amended Complaint at 14-21, Stewart v. Blackwell, 356 F. Supp. 2d 791 (N.D. Ohio 2004) (No. 5:02-CV-2028), 2004 U.S. Dist. LEXIS 26897;

machines violated equal protection because voters using punch-cards were more likely to have their votes discarded than voters using more reliable types of voting equipment."[63] Of these cases, the ones brought in California and Illinois "resulted in published opinions that found the complaints sufficient to state claims under [] the Fourteenth Amendment and the Voting Rights Act."[64]

HAVA calls for states to make provisional ballots available, allows states to purchase new machines in order to move away from outdated punch-card systems, and to properly train poll workers.[65] Further, HAVA provides a centralized database for each state to hold the names and addresses of all registered voters, which each jurisdiction can use to compare.[66] However, the implementation of HAVA only succeeded in increasing controversy and litigation in voting equipment, voter registration, provisional voting, identification requirements, challenges to voter eligibility, and long lines at polling places.[67] Congress passed HAVA too rapidly, which led to it having many holes in the legislation and unanswered implications for the jurisdictions that apply its terms.[68] As a result of HAVA, and the vague guidelines it provides to states, litigation now overwhelms courts and election officials during the months and weeks leading up to an election.[69]

After HAVA, many states saw a need to create statutes to reduce future election problems that have led to greater litigation. Some states have even implemented ADR processes to resolve election law disputes. For example, New York has created the Board of Election Arbitration within the New York State Dispute Resolution Association.[70] The New York State Dispute Resolution Association works with the New York State Board of Elections to provide advisory arbitration services when a panel has exceeded the ninety-day calendar period allotted to conduct a hearing based on a written complaint

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Complaint at 10-14, NAACP v. Harris, No. 01-CIV-120 (S.D. Fla. 2001); Complaint at 3-6, Andrews v. Cox, No. 01-CV-0318 (Ga. Sup. Ct. 2001).

[63] Tokaji, *supra* note 61, at 1210.

[64] *Id.*

[65] Help America Vote Act, 42 U.S.C. §§ 20901–21082 (2017).

[66] *Id.*

[67] Tokaji, *supra* note 61, at 1208.

[68] Butcher-Lyden, *supra* note 5, at 532. *See* Tokaji, *supra* note 61, at 1208–09 (arguing that the changes in federal law made things "worse instead of better" in the early transition to reform, in part because "HAVA provided money and imposed very general standards, while leaving most of the details of election administration to the states and counties.").

[69] Butcher-Lyden, *supra* note 5, at 532.

[70] *Board of Elections Arbitration*, NEW YORK STATE DISPUTE RESOLUTION ASSOCIATION, INC. (Oct.18, 2016) http://www.nysdra.org/?page=BOE.

by a voter who believes that there has been a violation of any provision of Title Three of HAVA.[71]

Some other states have implemented administrative processes to resolve election law disputes.[72] Connecticut uses an administrative commission for election law disputes as opposed to immediate litigation in court.[73] The Connecticut statute requires that the State Elections Enforcement Commission, "attempt to secure voluntary compliance, by informal methods of conference, conciliation, and persuasion . . . ."[74] Similarly, a North Carolina election statute requires voters who wish to file an "election protest" to file with the county board of elections for preliminary consideration and allows for an appeal to the state board of elections.[75] Many other states also require an administrative process before a party may litigate a post-election dispute.[76]

The FEC, Congress, and a few states have already implemented ADR processes to resolve election law disputes, but there is still the possibility that ADR can be successful in resolving most election law disputes. The use of ADR processes, specifically mediation and arbitration, in election law disputes provides an alternative approach to settling election law disputes that include the positive aspects of litigation and mitigation of its negative effects.[77]

V. Proposed Solution

Currently, election law disputes are litigated in a manner that is inefficient and often harmful to the democratic process. Election law reform must accomplish two objectives. First, states should implement methods for resolving election law disputes that ensure minimal ideological decision-making, timely resolution, and clarity in the resolution process.[78] Second, states should ensure that a neutral, unbiased decision maker is resolving all election law disputes.[79]

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[71] *Id.* *See* Help America Vote Act, 42 U.S.C. §§ 15301-15482 (2006).
[72] Green, *supra* note 53, at 328.
[73] CONN. GEN. STAT.§ 9-7a(g) (2011).
[74] *Id.*
[75] N.C. GEN. STAT. §163-182.9-11 (2011).
[76] Green, *supra* note 53, at 328–29.
[77] Butcher-Lyden, *supra* note 5, at 539.
[78] Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 4 (2013).
[79] Douglas, *supra* note 78, at 4.

Since there are so many negative aspects surrounding the litigation of election law disputes,[80] ADR is a positive alternative to resolve these issues.[81] Using ADR to resolve election law disputes can help to improve the civil discourse of our elections and our political culture by "reducing caustic language in election law judicial decisions, in the media's reporting of election law disputes, and among the public overall."[82] The negative aspects of election law disputes have the potential to make voters question the election process and question the role of the judiciary in elections.[83] When parties choose to litigate an election dispute, the democratic process is threatened.[84]

In creating a solution to the negative impact that election litigation has on voters, it is important to ensure that any ADR process that is used is transparent to voters and that it allows for a resolution of "important issues on the election process and outcome."[85] This alternative needs to be more time-

[80] After the 2000 presidential election and the litigation that ensued in Bush v. Gore, candidates who lose by a small margin are more willing to ask courts to resolve disputes on ballot counting issues or even declare who won. Each election cycle candidates see various errors in the election system, some of which they hope can change the outcome in a close race. As a result, preparing for post-election litigation is now a routine part of campaign strategy. Douglas, *supra* note 19, at 1015.

[81] ADR has had a dramatic impact upon litigation practice in the United States. In the past decade, there has been an increase in the number of ADR programs, and lawyers, judges, and litigants increasingly seek to use ADR to resolve disputes outside of litigation. "In 1980, there were approximately one hundred institutionalized ADR programs at state and local levels in the United States. By 1993, there were more than four hundred such programs in all fifty states, the District of Columbia, and Puerto Rico." ADR is now mandatory in some jurisdiction, while in other jurisdictions, judges have discretion in referring cases to ADR. Whereas, court-ordered mediation or arbitration upon motion of a party is used in other jurisdictions. ADR has the capacity to resolve cases prior to trial, therefore eliminating many of the negatives associated with litigation such as the costs and delays. Gail M. Valentine-Rutledge,

Mediation as a Trial Alternative: Effective Use of the ADR Rules, 57 AM. JUR. TRIALS 555 (2016).

[82] Douglas, *supra* note 8, at 292–93.

[83] When courts decide election law cases, they determine the rules of the election or the winner of the election. When courts make election decisions, if they have a negative tone, it adds to the negative public perception of elections. Often then, the media repeats these negative thoughts when reporting the decisions. Additionally, the media will often mention the political identification of the judge who decided the case, creating even more perceived partisanship in the eyes of the public. Douglas, *supra* note 8, at 299.

[84] Butcher-Lyden, *supra* note 5, at 535. Election law litigation is not a positive development for elections, which are now infused with exaggerations and increase partisanship. Campaigns are now more partisan and candidates continue to go to courts to decide election disputes. When an election is close, partisanship becomes even more apparent. When the winner of an election is unclear and candidates go to the court there is a great risk that there will be the appearance ideological decision making. Douglas, *supra* note 19, at 1015.

[85] Butcher-Lyden, *supra* note 5, at 539. ADR processes need to be procedurally reliable, transparent, "have the capacity to balance interests, needs, and expectations that may exist in tension with each

efficient, to not overload the court system, and it must "remove judges from the position of determining the outcome of elections."[86]

In order to reform the election law dispute resolution process, Congress should enact a federal statute providing for a mandatory mediation process for all pre-election disputes that arise more than one month before a scheduled election.[87] For disputes that arise one month prior to election day, on election day, or after the election, a stronger role by a third party would likely be necessary; therefore, mandatory arbitration should be used.[88] This proposition is in line with previously proposed solutions, and would provide a more efficient way to settle disputes that arise prior to, on, or after election day.

For disputes that arise more than one month before an election, mandatory mediation would help to dispel the many negative effects that pre-election litigation causes in voter confidence. Mediation is a viable option for these disputes because there is more time to come to a resolution, as opposed to disputes that arise closer to an election when a decision must be made faster.[89] Moreover, because mediation does not always work, if parties are not able to

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other," and "need to balance the desirability of external or public scrutiny." National Alternative Dispute Resolution Advisory Council, *Maintaining And Enhancing The Integrity Of ADR Processes*, 1, 17 (2011), https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Maintaining%20and%20enhancing%20the%20integrity%20of%20ADR%20processes%20%20From%20principles%20to%20practice%20through%20people.PDF. Any ADR statute created for election disputes "must be responsive to the varying circumstances in which ADR takes place," and give weight to the many interests and expectations that each individual may have. *Id.*

[86] Butcher-Lyden, *supra* note 5, at 539.

[87] Parties involved in a dispute are often encouraged to try mediation because it is self-determining, which allows outcomes that are responsive to both parties' interests. When a dispute is litigated, there is no way to know how a judge will rule, but mediation allows the parties the opportunity to control the outcome of their dispute, a quality that is very attractive to parties, particularly in cases where it is difficult to predict the litigated outcome. Green, *supra* note 53, at 332.

[88] Mediation is not a good fit for post-election dispute resolution because the scope of parties' authority to settle an election dispute is at issue. For example, "[s]uppose in a recount contest the two parties agree in mediation that a new election should be administered. Do the parties have the power to mandate this remedy through a mediated agreement? In certain instances when courts have ordered new elections, they have undertaken to impose this remedy under dubious statutory authority. What exactly is the scope of parties' authority to settle post-election disputes? Mediated agreements have the force of a contract, but can a court enforce such an agreement?" Green, *supra* note 53, at 333 (footnotes omitted).

[89] Butcher-Lyden, *supra* note 5, at 547.

reach an agreement, they may still have the opportunity to litigate the dispute.[90]

There are many benefits of using mediation for pre-election disputes. First, mediation costs less than litigation and the process can be completed in a shorter amount of time.[91] Additionally, mediation is often less adversarial than litigation, which can be important for parties wishing to preserve their relationship after the dispute, for example, the relationship between the state and voters.[92] Mediation provides parties with more control over the outcome of their dispute and allows parties to design their own solutions, which are often more creative than the outcome that would be reached through litigation.[93] Additionally, through mediation, parties have the opportunity to "evaluate the strengths and weaknesses of their cases," accumulate information about the other parties' argument, and gain insight into the possibility of resolving the dispute in their favor.[94] Lastly, even if mediation fails, the parties involved will still benefit from the process because they will have a better understanding of the other side's arguments if the dispute does proceed to litigation.[95]

Not all types of pre-election disputes will work with mediation, but disputes that revolve around ballot access, voter access, machine use, disputed absentee and provisional ballot guidelines, voter identification, HAVA compliance, campaign financing and advertising disputes, and ballot counting disputes would benefit from the use of mediation to settle the dispute.[96] With these types of disputes, the most appropriate form of mediation would involve a court-appointed mediator who mediates for the court regularly in order to ensure neutrality and defeat any questions of bias during the process.[97] Additionally, the mediation record should not be confidential, but instead public record, to promote transparency.[98]

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[90] *Id.*
[91] *Id.* at 540.
[92] *Id.* at 541.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 543; *see also Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections* 1, 233-35 (Chad Vickery ed., 2011), http://www.ifes.org/sites/default/files/guarde_final_publication_0.pdf (listing questions to consider in determining ADR feasibility for a particular issue).
[97] Butcher-Lyden, *supra* note 5, at 544. The lack of transparency in regard to election-related disputes can be detrimental to public confidence. Tokaji, *supra* note 61, at 1247.
[98] Butcher-Lyden, *supra* note 5, at 544.

Disputes that arise close to, on, or after election day will require a stronger role by a third party; therefore, mandatory arbitration should be used to resolve these disputes.[99] Arbitration, unlike mediation, requires that a neutral third party make a definitive judgment in the dispute that is binding on the parties.[100] Because of the tensions and time sensitivity of disputes that arise shortly before and after election day, more involvement by a third party is required in order for a decision to be made.[101] Due to the urgency of resolving these types of election law disputes, it is important for the neutral third party to take an active role in deciding the outcome instead of facilitating the parties in reaching their own decision, as would be permitted in disputes where mediation is a viable option.[102]

Additionally, arbitration "allow[s] parties to seek an injunction or another remedy before an arbitrator and have the court either approve or deny the arbitrator's ruling."[103] Ultimately, using arbitration for disputes that arise close to an election or after an election would alleviate some of the pressure on courts to hear all election law disputes, allowing an arbitrator to resolve the cases instead.[104] Additionally, arbitration will allow for concrete decisions that are necessary for disputes that arise close to, on, or after an election, where there is not time for a full trail on the merits to occur. For example, in disputes that affect the way the election will be conducted, a decision prior to the election is essential to give poll workers a clear understanding on how to conduct the election and to ensure voters that their vote will count.[105] Likewise, when there are disputed election results, a timely

[99] *Id.* at 547. Post-election disputes usually involve disputed election results and are therefore different from normal legal disputes. In these cases, the decision maker determines the winner of an election; in other words, a court or other tribunal will decide who will represent the voters. Therefore, post-election disputes play a fundamental role in shaping our democracy. Douglas, *supra* note 78, at 3.

[100] Butcher-Lyden, *supra* note 5, at 547.

[101] *Id.* There are some types of election disputes where ADR may not be appropriate, such as disputes relating to fundamental rights, cases in which binding precedent is desirable, and cases in which the court system can provide a timely, credible decision. *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections*, *supra* note 96, at 233–35.

[102] Butcher-Lyden, *supra* note 5, at 548. Post-election litigation is a way to ensure that elections are fair. Voters, candidates, and parties have traditionally asked courts to resolve post-election disputes, asked courts to order a new election, disqualify a candidate, declare a winner, or resolve the question of who should take office when the winning candidate has died. In recent years, there has been a dramatic increase in the number of parties that use courts to resolve election disputes. Green, *supra* note 53, at 336-37.

[103] Butcher-Lyden, *supra* note 5, at 549.

[104] *Id.*

[105] *Id.*

decision is important because of the public's need for prompt results and the guarantee of an elected representative or leader.[106]

Mandatory arbitration for disputes occurring close to, on, or after election day serves as an incentive for parties to raise issues early because once a dispute enters arbitration, the parties involved no longer have the advantage of controlling the outcome of the dispute.[107] While most parties involved in arbitration have the choice to decide the arbitration procedural guidelines, parties involved in election law disputes should not have this option; the guidelines should be uniform and clear.[108] Confidentiality of an arbitration proceeding and award is usually determined by the parties involved as well. However, when election law disputes are arbitrated, the process needs to be public record, as it is with litigation, in order to promote transparency.[109] The guidelines also need to clearly define how the parties decide on an arbitrator, define a strict duration for the process, and set out the process for court certified awards and decisions.[110]

In order for ADR to be effective in resolving election law disputes, mediation and arbitration need to be mandatory. This means that the legislature must enact a federal statute mandating this proposed process and ensure that there is uniformity in all jurisdictions.[111] Mandatory ADR for election law disputes could be included in an amendment of HAVA or Congress could create a completely different statute.[112] The statute needs to clearly set out the period in which mediation is allowed and when arbitration becomes necessary, as well as the process that the parties should follow to

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[106] *Id.*

[107] *Id.* Why mediation over arbitration? Mediation is designed to be beneficial to both parties involved; meaning the result often includes the interest of both parties whereas arbitration is oftentimes adversarial, meaning typically someone wins and someone loses. Cavignac & Assocs., *Why You Should Choose Mediation*, PROFESSIONAL LIABILITY AGENTS NETWORK 1, 1 (July 2012), http://www.cavignac.com/wp-content/uploads/0712AEE.pdf.

[108] Butcher-Lyden, *supra* note 5, at 550.

[109] Butcher-Lyden, *supra* note 5, at 550. There is no law in the United States protecting the confidentiality of arbitration. However, many institutional arbitration rules require the arbitrator to maintain the confidential throughout the proceeding. Parties can agree to keep their arbitration and the arbitration award private with a confidentiality agreement. Even if the parties decide to enter into a confidentiality agreement, one of the parties or even both could decide it is in its best interest to make public the arbitration proceedings or even award. Donald L. Carper & John B. LaRocco, *What Parties Might Be Giving Up and Gaining When Deciding Not to Litigate: A Comparison of Litigation, Arbitration and Mediation*, DISP. RESOL. J. 48, 54 (May-July 2008).

[110] Butcher-Lyden, *supra* note 5, at 550.

[111] *Id.* at 552-53.

[112] *Id.* at 553.

complete mediation or arbitration.[113] The statute also needs to account for emergency filings and set out guidelines for issuing an injunction pending mediation or arbitration.[114]

VI. Potential Objections

Many scholars oppose using ADR to resolve election law disputes.[115] These scholars believe that, because ADR has some downfalls, it can be coercive, lead to less just results, be ineffective as a case management tool, minimize the importance of vindicating legal rights, and reinforce preexisting imbalances between parties.[116] These are valid concerns, and although ADR may not be able to resolve every election law dispute, it has the potential to help collaboratively resolve many disputes.

Some potential objections to mandatory mediation for disputes that arise prior to one month before an election would likely come because election law disputes generally consist of multiple political parties, rather than just two individual parties, each with varying strategies, agendas, and financial resources.[117] Another objection will be that after *Bush v. Gore* in 2000,[118] litigating election law disputes have become the norm and now political parties like the publicity that comes with election litigation. However, political parties will still be able to notify "voters that they are fighting policies and legislation that they perceive to favor another party."[119] This will ensure that elections are fair for voters and that there is not a decrease in voter efficacy with disputes being resolved through mediation.

Howard S. Bellman, a mediator and arbitrator in a broad variety of disputes for nearly fifty years, believes that mediation is not a reliable form of dispute resolution for election law disputes.[120] He believes that parties who enter the process may be overcome by the power they have in the mediation.[121] He says, "mediation's potential for salutary after-effects, like most of [the]

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[113] *Id.*
[114] *Id.*
[115] *See* Douglas, *supra* note 8 at 307; Butcher-Lyden, *supra* note 5, at 539.
[116] Douglas, *supra* note 8, at 307-08.
[117] Butcher-Lyden, *supra* note 5, at 542.
[118] Bush v. Gore, 531 U.S. 98 (2000).
[119] Butcher-Lyden, *supra* note 5, at 542.
[120] Howard S. Bellman, *A Response to "The Promise of Ad",* 27 OHIO ST. J. ON DISP. RESOL. 321, 322 (2012).
[121] *Id.*

mediation's potential, correlates with the parties' desire to realize such benefits."[122] He suggests "that election-related litigation, linked as it is to winning or losing entirely, may be particularly resistant to the reorienting of the parties by mediation."[123]

Additionally, many argue that election litigation before elections benefits the process because litigation is effective and leads to higher voter participation and knowledge during an election cycle.[124] These critics also argue that media coverage of election law disputes allows election officials to become aware of problems that they might not have otherwise become aware and that media coverage can help educate the electorate on problems with the election process.[125] However, while the use of litigation to resolve election law disputes can be effective, the concentration and timing of the litigation often leads to negative outcomes that can be detrimental to the election process.[126] Even if election litigation increases efficiency, education, voter efficacy, and transparency during the election process, it is still unknown whether these aspects outweigh the negative effects of election litigation.[127]

Critics also argue that using arbitration for disputes that arise one month prior, on election day, or after an election will still have the same legitimacy issues that are included in election litigation. This is because, even with a neutral arbitrator, there is still the concern that the courts will be too involved with arbitration in election law disputes, and judges will still seem politically motivated when certifying arbitration awards.[128] However, while courts are given the opportunity to determine whether to certify arbitration awards, the standard of review they are held to gives great regard to the decision of the arbitrator.[129] Although courts will still be involved in the arbitration process,

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[122] *Id.*

[123] *Id.*

[124] Butcher-Lyden, *supra* note 5, at 534. When election disputes are litigated with sufficient time before an election, meaning there is sufficient time for the presentation of evidence and time for appeal, it allows election administrators to clarify election administration rules. Even when the litigation is not ultimately successful, it can serve as an important public education function. Tokaji, *supra* note 61, at 1244.

[125] Butcher-Lyden, *supra* note 5, at 534.

[126] *Id.* at 535.

[127] *Id.* "[L]itigation breeds distrust. Scholars have demonstrated that the Supreme Court has evinced "hostility" toward litigation in the language of its opinions, ultimately contributing to negative legal discourse." Douglas, *supra* note 8, at 301.

[128] Butcher-Lyden, *supra* note 5, at 552.

[129] *Id.* *See* Federal Arbitration Act, 9 U.S.C. § 10 (2002).

there will be a level of separation between judges and direct decision-making that will allow for more voter confidence.[130]

Lastly, critics may argue that removing disputes from litigation will result in a decrease in voter awareness, creating ignorance of election policies.[131] However, political parties often use litigation to focus negative attention on another party, not as a way to bring issues in the election to the attention of voters.[132] Election law disputes resolved using mediation or arbitration do not have to leave the public unaware of election law issues. Parties involved in election law dispute should be able to discuss the mediation or arbitration details with the public and media, ensuring that political parties are still able to inform voters on the issues, therefore maintaining the same public awareness that would be obtained through litigation.[133]

VII. Conclusion

Many election law and ADR scholars agree that ADR can help to achieve various goals for deciding election law cases.[134] Although there are still many critics who believe that election law disputes should be litigated and that ADR will not be successful in resolving election law disputes. However, mandatory mediation and arbitration in election law disputes will preserve many of the benefits of pre-election litigation, avoid the negative toll on courts and election fairness, and avoid post-election law disputes that leave the outcome of an election up to the judiciary.

Mediation will allow parties to have the opportunity to control the outcome of the settlement and remove the judicial system from decision-making, and by making the record public, there will be no loss of information to the public. Arbitration will remove the courts from deciding elections and will reduce the use of post-election litigation as an election strategy.

Despite the criticisms, it seems that mediation for disputes brought one month before an election and arbitration for disputes brought closer to or after an election will still allow voters to be aware of contested election policy issues and problems with the election, while removing voter's loss of faith in the democratic process and judicial decision making in elections. For these

[130] Butcher-Lyden, *supra* note 5, at 552.
[131] *Id.* at 546.
[132] *Id.* at 547.
[133] *Id.*
[134] Douglas, *supra* note 8, at 292.

reasons, I believe that Congress should enact a federal statute mandating ADR for election law disputes.