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ALTERNATIVE DISPUTE RESOLUTION FOR ELECTION ACCESS ISSUES IN A POST-VOTING
RIGHTS ACT SECTION 5 LANDSCAPE

By
Casey Millburg*

I. INTRODUCTION

Since the United States Supreme Court's 2013 decision in *Shelby County v. Holder*,¹ states with histories of racial discrimination against voters have implemented controversial measures pertaining to voter identification ("voter ID"), polling places, provisional ballots, and early voting.² *Shelby County* eliminated³ the preclearance provision in Section 5 of the Voting Rights Act (VRA) requiring these states to receive Department of Justice approval for proposed changes to their electoral processes, to ensure the changes did not disproportionately impact racial minorities.⁴ The courts have recently mitigated or overturned a spate of restrictive electoral measures passed since the decision.⁵ However, these actions often came after voters have been denied access at the polls, or not far enough in advance of an upcoming election to implement.⁶

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¹ *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

² Leah Aden, et al., *Warning Signs: the Potential Impact of Shelby County v. Holder on the 2016 Election*, THE LEADERSHIP CONFERENCE EDUCATION FUND (June 2016), <http://civilrightsdocs.info/pdf/reports/2016-Voting-Rights-Report-FOR-WEB.pdf>.

³ *Shelby County*, 133 S. Ct at 2631.

⁴ *See About Section 5 of the Voting Rights Act*, UNITED STATES DEPARTMENT OF JUSTICE (Aug. 8, 2015), <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

⁵ *See, e.g.*, *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *Brakebill v. Jaeger*, No. 1:16-CV-008 DLH, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); *Cromwell v. Kobach*, No. 15-9300-JAR-JPO, 2016 WL 4060260 (D. Kan. Jul. 29, 2016); *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 WL 4059222 (W.D. Wis. Jul. 29, 2016).

⁶ The voter ID law at issue in *NAACP v. McCrory* took effect at the start of 2016, *see NAACP v. McCrory*, *supra* note 5, at 216, but the case was filed in April and decided only after North Carolina's presidential, state, and Congressional primaries, *see North Carolina elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_elections,_2016. Additionally, the law at issue in *Veasey v. Abbott* was enforced beginning mid-June 2013, *see Veasey v. Abbott*, *supra* note 5, at 227, and wasn't overturned until the court's decision in 2016 after numerous elections in 2014, 2015, and 2016, *see Texas elections, 2014*, BALLOTPEDIA, https://ballotpedia.org/Texas_elections,_2014; *Texas elections, 2015*, BALLOTPEDIA, https://ballotpedia.org/Texas_elections,_2015; *Texas elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Texas_elections,_2016. The law at issue in *Brakebill v. Jaeger* passed in 2015, *see Brakebill v. Jaeger*, *supra* note 5, at *2, but the court did not issue its ruling until August 2016 after the presidential caucus and state primary had occurred, *see North Dakota elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/North_Dakota_elections,_2016. The law at issue in *Cromwell* took effect in January

Alternative Dispute Resolution⁷ (“ADR”) provisions in the Help America Vote Act⁸ (“HAVA”) present one option for resolving ballot access issues in a timely manner. HAVA, created in response to the contested 2000 presidential election, provides funding to states to help them improve election outcomes and requires that states implement several election programs and procedures.⁹ To be eligible for HAVA funding, Title IV of the Act requires that states use ADR procedures to resolve complaints about violations of Title III of HAVA, in the event a state does not respond to the complaint within ninety days of its filing.¹⁰ Violations of Title III include issues pertaining to voting system standards, provisional voting, voter information requirements, statewide voter registration databases, and accessibility for persons with disabilities.¹¹

Although the expeditious resolution of election access complaints is in the public’s best interest, using ADR to resolve these claims is problematic, as it removes complaints from the courts. Civil rights matters are traditionally decided by courts for several important reasons. First, courts decide such matters to ensure that the issues are considered by a jury of the litigant’s peers, each of whom has a stake in those same rights.¹² Next, courts decide such matters to ensure that the situation is subjected to meaningful scrutiny

2013, *see* *Cromwell v. Kobach*, *supra*, note 5 at *2, but the court did not render its verdict until late July 2016 after numerous elections in 2014, 2015, and 2016; *see Kansas elections, 2013*, BALLOTPEDIA, https://ballotpedia.org/Kansas_elections,_2013; *Kansas election, 2014*, BALLOTPEDIA, https://ballotpedia.org/Kansas_elections,_2014; *Kansas elections, 2015*, BALLOTPEDIA, https://ballotpedia.org/Kansas_elections,_2015; *Kansas elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Kansas_elections,_2016. Finally, the law at issue in *One Wisconsin Inst., Inc. v. Thomsen* took effect in 2011, *see One Wisconsin Inst., Inc. v. Thomsen*, *supra* note 5, at *1, and was decided at the end of July 2016 in addition to impacting a number of elections between 2011 and 2016, *see Wisconsin judicial elections, 2011*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_judicial_elections,_2011, *Wisconsin elections, 2012*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_elections,_2012, *Wisconsin elections, 2013*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_elections,_2013, *Wisconsin elections, 2014*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_elections,_2014, *Wisconsin elections, 2015*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_elections,_2015, *Wisconsin elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_elections,_2016. It also had no effect on the August 2016 election which occurred shortly after the decision, *see One Wisconsin Inst., Inc. v. Thomsen*, *supra* note 5, at *3.

⁷ Arbitration is a type of ADR, but for the purposes of this paper ADR refers to non-arbitration means of dispute resolution.

⁸ Help America Vote Act, 52 U.S.C. §§ 20901-21145 (2002).

⁹ 52 U.S.C. § 20901.

¹⁰ 52 U.S.C. § 21112.

¹¹ 52 U.S.C. §§ 21081-21102.

¹² *EEOC Notice: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 10, 1997), <https://www.eeoc.gov/policy/docs/mandarb.html>.

proportional to its import to society.¹³ Finally, courts decide such matters to ensure that the decision adds to civil rights jurisprudence.¹⁴ Removing civil rights matters from the courts poses significant problems for upholding the rights of all litigants bringing civil rights claims. ADR takes proceedings out of the court and therefore does not utilize a jury of peers, nor do ADR rulings contribute to American legal jurisprudence.¹⁵

Looking specifically at states which fell under the jurisdiction of VRA Section 5, this article will first explore how these states are or are not using HAVA's ADR provisions. Next, it will look at litigation in these states pertaining to election access issues that has occurred since the *Shelby County* decision. Finally, this article will discuss whether ADR or the court system is the most appropriate avenue for resolving election access issues. Ultimately, this article concludes that ADR is an inappropriate avenue for resolving election access issues, and that these decisions are best made by the courts.

II. ADR PROVISIONS IN STATES WHICH WERE FORMERLY UNDER THE JURISDICTION OF VRA SECTION 5

A. Models of State HAVA ADR Procedures

The broad purpose of this article is to assess whether ADR is an appropriate and effective way to resolve state-level voting rights disputes. An important element of this assessment is looking at how states currently utilize ADR to resolve voting rights complaints. A comparative analysis of HAVA ADR provisions in states which formerly came under the jurisdiction of VRA Section 5 follows.

The comparative analysis is grouped in two sections. The first section looks at the states which fell entirely under the jurisdiction of VRA Section 5, which include Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.¹⁶ Second, the analysis focuses on states in which only certain counties fell under the jurisdiction of VRA Section 5: Arizona, Hawaii, Idaho, and North Carolina.¹⁷

State administrative codes and procedures generally provide that individuals raising HAVA complaints may submit complaints through the state Secretary of State or Board of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 964 (2000) (discussing how “ADR also results in the sacrifice of constitutional and other public law rights through ADR processes, such as the rights to an attorney and to due process, the appellate process’s assurance of the accurate application of public laws, and the educational value of public decision making.”)

¹⁶ See UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 4.

¹⁷ While North Carolina has a statute instructing its State Board of Elections to develop HAVA ADR procedures, N.C. Gen. Stat. § 163-91, its State Board of Elections does not make the procedures publicly available, so this paper will not include an overview of North Carolina HAVA ADR procedures.

Elections, identifying which HAVA Title III violations they believe have occurred.¹⁸ Complaints which are not resolved within ninety days from the date they are received by the Secretary of State are resolved through ADR within sixty days.¹⁹ HAVA leaves the choice of which ADR procedures to establish to the state.²⁰

1. HAVA ADR Models in States Which Fell Entirely Under the Jurisdiction of VRA Section 5

Alabama does not specify the method of ADR to be used to resolve complaints.²¹ Complaints that are still not resolved by ADR within 150 days from the date the original complaint was filed with the Secretary of State are treated as resolved against the complainant.²²

In Alaska, the ADR is conducted by a hearing officer appointed by the Director of Elections.²³ The hearing officer reviews the complaint and proposes a determination for the Director's consideration, based on a preponderance of the evidence standard.²⁴ The Director makes a final determination within 150 days after the complaint was filed.²⁵

In Georgia, the Secretary of State maintains a list of qualified mediators to conduct the ADR, from which the Secretary of State and the complainant each select one

¹⁸ ALA. CODE § 17-2-3 (2003); ALASKA ADMIN CODE 6 AAC 25.470 (2003); GA. COMP. R. & REGS. 590-8-2-.01 (2004); IDAHO ADMIN. CODE 34.02.02.017; LA. STAT. ANN. § 18:567.2 (2003); N.Y. Elec. Law § 3-105 (2005); S.D. CODIFIED LAWS § 12-1-22 (2003); 1 TEX. ADMIN. CODE § 81.171 (2003); *Help America Vote Act: State of Arizona State Plan*, ARIZ. SEC'Y OF STATE 33 (May 15, 2003) http://www.azsos.gov/hava/2003/state_plan/HAVA_Arizona_State_Plan.pdf; *Help America Vote Act of 2002 (HAVA) Complaint Form and Procedures*, CAL. SEC'Y OF STATE (June 16, 2013) <http://www.sos.ca.gov/elections/additional-elections-information/help-america-vote-act/complaint-procedure>; *State of Florida HAVA Plan 2006 Update*, FLA. SEC'Y OF STATE, 87-88 (2006), <http://dos.myflorida.com/media/693840/hava-state-plan-2006.pdf>; *Complaint Process*, STATE OF MICH. BUREAU OF ELECTIONS 5, http://www.michigan.gov/documents/HAVAComplaintProc_102255_7.pdf (last visited Oct. 29, 2016); *State Plan for Compliance with HAVA, Rule 2.8: Alternative Dispute Resolution*, MISS. SEC'Y OF STATE, <http://www.sos.ms.gov/ACCcode/00000175c.pdf> (last updated July 2004); *Complaint Procedures*, S.C. ETHICS COMM'N, http://www.state.sc.us/scsec/t3comp_form.htm (last visited Oct. 29, 2016); *Voter Complaints*, VA. DEPT. OF ELECTIONS, <http://www.elections.virginia.gov/voter-complaints/index.html> (last visited Oct. 29, 2016).

¹⁹ 52 U.S.C. § 20901 (2002).

²⁰ *Id.*

²¹ ALA. ADMIN. CODE 820-2-5-.02(3).

²² *Id.*

²³ ALASKA ADMIN. CODE 6 AAC 25.470(a).

²⁴ ALASKA ADMIN. CODE 6 AAC 25.470(b).

²⁵ ALASKA ADMIN. CODE 6 AAC 25.470(c).

mediator.²⁶ In the event that the complainant does not select a mediator, the mediator selected by the Secretary of State will review the complaint and issue a decision.²⁷ If two mediators are designated, they select a third mediator, and the three-member panel reviews the complaint and makes a final recommendation.²⁸ The mediator or panel must make a final recommendation to the Secretary of State within fifty days after the final determination of the Secretary of State is due, and the Secretary of State will issue a final determination that is not subject to appeal.²⁹

In Louisiana, if the State Board of Election Supervisors fails to make a final decision within ninety days of the complaint being filed, the complaint is assigned to an administrative law judge.³⁰ The judge may not receive additional testimony or evidence except in exceptional circumstances, and issues a final resolution within sixty days of the complaint being submitted.³¹ The judge's final resolution may be judicially reviewed within thirty days of its issuance.³²

In Mississippi, the Secretary of State can refer a complaint at any time for ADR, or the right to the ADR process automatically triggers if a filed complaint has not been addressed for ninety days.³³ The Secretary of State maintains a list of approved arbitrators, from which they and the complainant each select one arbitrator, and the two arbitrators then select the third to complete the panel.³⁴ Alternately, if the complainant consents in writing, the Secretary of State may designate a single, professionally qualified individual to serve as the arbitrator.³⁵ The arbitrator or panel may request additional briefs or memoranda, and determines the appropriate resolution within sixty days, which is the final resolution and not subject to court appeal.³⁶

²⁶ *Rule 590-8-2-.01. Administrative Complaint Procedure for Violations of Title III of the Help America Vote Act of 2002*, GA. SEC'Y OF STATE, <http://rules.sos.ga.gov/GAC/590-8-2-.01> (last updated Apr. 21, 2017).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ La. Stat. Ann. § 18:567.3(J)(1).

³¹ La. Stat. Ann. § 18:567.3(J)(4).

³² La. Stat. Ann. § 18:567.6.

³³ *State Plan for Compliance with HAVA, Rule 2.8: Alternative Dispute Resolution*, MISS. SEC'Y OF STATE, 5, <http://www.sos.ms.gov/ACCcode/00000175c.pdf> (last updated Jul. 2004).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

In South Carolina, if the Executive Director of the State Election Commission is unable to resolve the complaint within ninety days, it must be resolved within sixty days by the State Election Commission.³⁷

In Virginia, the Department of Elections selects a volunteer from a panel of state employee volunteers to decide election related complaints.³⁸ The volunteer recommends an outcome within sixty days to the Election Commissioner, who can adopt or revise the recommendation.³⁹ The Commissioner's final determination can be appealed to the full State Board of Elections within fifteen days, and the State Board of Elections must decide all appeals within forty-five days.⁴⁰

2. HAVA ADR Models in States Where Only Certain Counties Came Under the Jurisdiction of VRA Section 5

In Arizona, a complaint is initially filed with the Secretary of State, who then determines whether to refer the complaint to the Arizona Department of Justice or the Arizona Attorney General's office.⁴¹

In Idaho, if a complaint is not resolved within ninety days, the complainant and Secretary of State choose an arbitrator from a list provided by the Secretary of State by striking names until one acceptable to both parties is chosen.⁴² The arbitrator then issues a final, binding written resolution.⁴³

Hawaii and North Carolina do not make public information regarding its ADR provisions for HAVA voting rights complaints.⁴⁴ However, a 2012 report filed by the Hawaii Office of Elections indicates that the Office of Elections finalized contracts to

³⁷ *Complaint Procedures*, S.C. ETHICS COMM'N, http://www.state.sc.us/scsec/t3comp_form.htm (last visited Oct. 29, 2016).

³⁸ *Voter Complaints*, VA. DEP'T OF ELECTIONS, <http://www.elections.virginia.gov/voter-complaints/index.html> (last visited Oct. 29, 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ ARIZ. SEC'Y OF STATE, *supra* note 18.

⁴² IDAHO ADMIN. CODE 34.02.02.017.

⁴³ *Id.*

⁴⁴ The North Carolina Board of Elections, Secretary of State, and Attorney General offices do not provide this information on their websites or in reports they have issued to the state legislature regarding voting processes. The same is true regarding the Hawaii Office of Elections, Attorney General, and Lieutenant Governor (who fulfills duties traditionally associated with a Secretary of State).

ensure compliance with HAVA ADR provisions, indicating that the state has some form of ADR system in place.⁴⁵

3. Trends Within Each Grouping

HAVA ADR procedures in states which formerly fell entirely under VRA Section 5's jurisdiction are more sophisticated and detailed than those in states where only certain counties came under VRA Section 5's jurisdiction. They are more sophisticated in two important ways. First, they generally provide more procedural mechanisms, meaning that they largely provide for panel selection provisions, standards of review, and multiple layers of review.⁴⁶ In contrast, states that only have certain counties under VRA Section 5 tend to have procedures consisting entirely of "punting" the decision to another entity.⁴⁷

Second, states that previously fell entirely under VRA Section 5's jurisdiction largely stipulate that the person making the final determination regarding a potential violation of voting rights must have some expertise with elections and familiarity with the rights associated with elections.⁴⁸ These models provide that final decisions are to be made by directors of election boards or divisions, secretaries of state, state boards of elections, administrative law judges, and arbitrators approved by secretaries of state.⁴⁹ In contrast,

⁴⁵ *Report to the Twenty-Sixth Legislature*, HAWAII OFFICE OF ELECTIONS 4 (July 25, 2012), https://ags.hawaii.gov/wp-content/uploads/2012/09/oe_report_act_164_slh_2011_7-25-2012.pdf.

⁴⁶ *See, e.g.*, Georgia, *supra* note 26, and Mississippi, *supra* note 33, providing for panel selection provisions which include a panel member selected by the plaintiff; Alaska, *supra* note 24, providing for a preponderance of evidence standard of review of complaints; Louisiana, *supra* note 31, providing that no additional testimony or evidence is usually permitted after the complaint is filed; and Virginia, *supra* note 38, detailing a threefold layer of review beginning with a panel of state employee volunteers, proceeding to the Election Commissioner, and finally to the State Board of Elections as necessary.

⁴⁷ "Punting," as used in this paper, means that the government entity with which the complaint is filed hands all responsibility for resolving the complaint to another party, whether another government office, *see, e.g.*, Arizona, *supra* note 41, or an ADR entity whose ruling is final, *see, e.g.*, Idaho, *supra* note 42.

⁴⁸ *See, e.g.*, Alaska, *supra* note 25, providing that the Director of Elections makes the final decision; Georgia, *supra* note 29, providing that the Secretary of State makes final decision; Louisiana, *supra* note 31, providing that an administrative law judge makes the final decision; Mississippi, *supra* note 36, providing that a qualified arbitrator makes the final decision; South Carolina, *supra* note 37, providing that the state's Election Commission makes the final decision; and Virginia, *supra* note 39, providing that the state's Election Commissioner makes the final decision.

⁴⁹ *See* Alaska, *supra* note 25, providing that the Director of Elections makes the final decision; Georgia, *supra* note 29, providing that the Secretary of State makes final decision; Louisiana, *supra* note 31, providing that an administrative law judge makes the final decision; Mississippi, *supra* note 36, providing that a qualified arbitrator makes the final decision; South Carolina, *supra* note 37, providing that the state's Election Commission makes the final decision; and Virginia, *supra* note 39, providing that the state's Election Commissioner makes the final decision.

states with counties which fell under VRA Section 5's jurisdiction tend to not specify who makes the final decision.⁵⁰

Although it did not come under VRA Section 5's jurisdiction, New York's model of using ADR for election disputes deserves mention, as it appears to be the most sophisticated model of ADR for election disputes. In New York, the complaint is referred to one of several independent ADR agencies with which the State Board of Elections may contract if the dispute is not resolved within ninety days of submission.⁵¹ Noteworthy in New York's provisions is the stipulation that ADR procedures should not be "construed to impair or supersede the right of an aggrieved party to seek a judicial remedy including a judicial remedy concerning any final determination made pursuant to subdivision eight of this section."⁵² The complaint arbitrator is selected from a panel of arbitrators trained on HAVA issues and approved by the ADR agency and the State Board of Elections.⁵³ Selection of an arbitrator occurs via a geographic selection method based on the origin of the complaint and on a rotating basis; arbitrators may be removed from serving on a particular case if neutrality is or may become an issue.⁵⁴ The arbitrator issues the final decision to the State Board of Elections, which then makes the final decision regarding the complaint.⁵⁵ This model is more sophisticated given the diversity of dispute resolution entities available to complainants, as well as the explicit preservation of complainants' rights to pursue such a civil rights matter in court. Additionally, New York's model is also more sophisticated as it stipulates that arbitrators must be trained on HAVA and provides complainants with protections against potential arbitrator bias in the selection and removal processes for arbitrators.

B. Lack of Data on State Use of HAVA ADR

In states previously covered under VRA Section 5, there exists little publicly-available data on whether HAVA's ADR provisions are being used to resolve election access disputes. The reason for the lack of data is unclear, as there also exists little data on HAVA Title III complaints received by state secretary of state offices. Three explanations, or some combination thereof, for this lack of information are plausible.

⁵⁰ See, e.g., Arizona, *supra* note 41, which stipulates the entities to which a complaint may be referred, but does not specify who makes the final decision; Hawaii and North Carolina, *supra* note 44, which do not detail any HAVA ADR processes, including who makes the final decision.

⁵¹ *State of New York 2015 Election Law*, N.Y. STATE BD OF ELECTIONS 627 (2015), <http://www.elections.ny.gov/NYSBOE/download/law/2015NYElectionLaw.pdf>.

⁵² *Id.* at 631.

⁵³ *Id.* at 628.

⁵⁴ *Id.* at 629

⁵⁵ *Id.* at 630.

The first possibility is that states are not receiving HAVA Title III complaints. While citizens could be unaware of the option to submit formal complaints under the umbrella of HAVA to their state's secretary of state office, it is doubtful that no citizen or voting rights group in any of these states has learned of HAVA's state administrative complaint provisions during the past fifteen years. Further, given the volume of election access-related legislation passed in these states since HAVA took effect,⁵⁶ and the number of elections which have taken place over the last fifteen years, it would be highly unusual for none of these states to have received any complaints. It is also possible that a majority of complaints are made through state-created informal complaint programs operated independently of HAVA requirements.⁵⁷

The second possibility is that states have been able to resolve HAVA Title III complaints during the ninety day window after filing, and therefore have no need for ADR. While plausible, if true this should not excuse states from providing data on the complaints they resolve independent of ADR, even though HAVA does not require states to make this data public.⁵⁸ At a minimum, states should make available current information on the nature of all complaints; the dates they were received; the dates they were resolved; and how the complaints were resolved to ensure transparency, accountability, and public access to this important information.

The third possibility is that complaints in these states have not been resolved within ninety days and are referred to ADR for resolution, but states simply choose not to make related information public. This is similarly plausible, however, it is also similarly inexcusable. A state's failure to timely resolve election access complaints submitted by its residents should be public record, as should the decision to remove the resolution of that complaint to an extrajudicial entity and that entity's ultimate decision on the matter. A state's citizenry should know how a state handles important claims regarding their right to vote within its borders. Further, both this data and data regarding claims that have been resolved would be a useful tool for assessing whether states are neglecting to address these important claims, and how these claims are being resolved.

III. ELECTION ACCESS LITIGATION AFTER *SHELBY COUNTY* IN VRA SECTION 5 STATES

After *Shelby County*, changes to election facilities and procedures no longer need to be reviewed by the U.S. Department of Justice to ensure they do not disproportionately

⁵⁶ See, e.g., *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *Brakebill v. Jaeger*, No. 1:16-CV-008 DLH, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); *Cromwell v. Kobach*, No. 15-9300-JAR-JPO, 2016 WL 4060260 (D. Kan. Jul. 29, 2016); *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 WL 4059222 (W.D. Wis. Jul. 29, 2016).

⁵⁷ See *Help America Vote Act of 2002: Virginia State Plan 2012*, VA. STATE BD. OF ELECTIONS 17 (Mar. 20, 2012), <https://view.officeapps.live.com/op/view.aspx?src=https://www.eac.gov/assets/1/Documents/VA%20HAVA%20Amended%20State%20Plan%2003-20-2012.docx> (discussing the Virginia State Board of Elections' development of informal election complaint procedures).

⁵⁸ See 52. U.S.C. § 21112, which does not contain language requiring states to make this information public.

impact racial or language minorities, qualified voters who rely heavily on languages other than English.⁵⁹ States formerly under the jurisdiction of VRA Section 5 have implemented significant changes to their voting processes, and the volume of cases indicates that these states remain hotbeds for controversial measures which often give rise to complaints.⁶⁰ Most relevant to this article are the changes these states have made to voter identification (“voter ID”), the number of polling places, and voter registration database procedures. Because HAVA complaints must relate to administration of Title III of HAVA,⁶¹ this section also discusses complaints that could be brought pertinent to each area of focus.

A. Voter Identification

The Constitution does not provide individuals with an absolute right to vote, and states may impose requirements citizens must meet in order to vote, provided there is a compelling state interest.⁶² A large number of states have asserted their interest in preventing voter fraud and increasing public confidence in elections.⁶³

However, voter ID laws have a disproportionately negative impact on minorities’ access to the polls, specifically Black and Latino voters.⁶⁴ Inadequate information about the kind of identification required to vote means that individuals may not be properly matched with their name in the ballot books, and consequently denied a ballot.

Since *Shelby County*, the passage of new or increasingly restrictive voter ID legislation has been commonplace in states which formerly fell under the jurisdiction of

⁵⁹ See *About Section 5 of the Voting Rights Act*, *supra* note 4.

⁶⁰ See, e.g., *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Michigan State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016); *Brakebill v. Jaeger*, No. 1:16-CV-008 DLH, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); *Cromwell v. Kobach*, No. 15-9300-JAR-JPO, 2016 WL 4060260 (D. Kan. Jul. 29, 2016); *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-CV-324-JDP, 2016 WL 4059222 (W.D. Wis. Jul. 29, 2016). See also *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, NAACP (Sept. 2, 2016), http://www.naacpldf.org/files/publications/Democracy%20Diminished-State%20and%20Local%20Voting%20Changes%20Post-Shelby%20v.%20Holder_4.pdf (providing an overview of election-related access litigation and regulations in states that previously fell under VRA Section 5 jurisdiction).

⁶¹ 52 U.S.C. §§ 21081-21102.

⁶² *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352-53 (11th Cir. 2009).

⁶³ See 146 AM. JUR. 2D TRIALS 207 (2016) (*Litigation of Voter Identification Requirements Under § 2 of Voting Rights Act*, 52 U.S.C.A. § 10301).

⁶⁴ See Brentin Mock, *More Research Shows Voter ID Laws Hurt Minorities*, THE ATLANTIC/CITILAB (Feb. 5, 2016), <http://www.citylab.com/politics/2016/02/research-more-conclusive-that-voter-id-laws-hurt-blacks-andlatinos/459819/>; Nate Silver, *Measuring the Effects of Voter Identification Laws*, N.Y. TIMES: FIVETHIRTYEIGHT (July 15, 2012), http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/?_r=1.

VRA Section 5.⁶⁵ Voter ID litigation post-*Shelby County* arose in numerous states previously under the jurisdiction of VRA Section 5, directly because of the new or increasingly restrictive voter ID laws.⁶⁶ HAVA requires that states provide accurate information to voters on voter requirements.⁶⁷ Thus, a registered voter could submit a Title III HAVA claim regarding the state or municipal election office providing inadequate or confusing information on the types of identification required to vote.⁶⁸

B. Polling Place Closures and Reductions

Polling place closures and reductions are another way that voters' access to the polls is often restricted.⁶⁹ In reducing the number of polling places, states and municipalities often cite budget shortfalls or an inability to comply with the Americans with Disabilities Act.⁷⁰ Closures force residents to travel longer distances to vote, which can reduce turnout, as well as have an impact on those with disabilities.⁷¹ Further, closure of a polling place in a minority community can result in depressed minority voter turnout.⁷²

States formerly under VRA Section 5 jurisdiction have actively and significantly reduced the number of available polling places. Following *Shelby County*, "61 percent of Louisiana parishes [] closed a total of 101 polling places," "34 percent of all Mississippi counties surveyed [] closed polling places," and in Alabama "12 counties [reduced

⁶⁵ *Voter Identification Requirements / Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 26, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

⁶⁶ North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016); Michigan State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656 (6th Cir. 2016); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016); Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015); League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224 (4th Cir. 2014); Brakebill v. Jaeger, No. 1:16-CV-008 DLH, 2016 WL 7118548 (D.N.D. Aug. 1, 2016); Greater Birmingham Ministries v. State, 161 F. Supp. 3d 1104 (N.D. Ala. 2016); Lee v. Virginia State Bd. of Elections, 155 F. Supp. 3d 572 (E.D. Va. 2015).

⁶⁷ 52 U.S.C. § 21082(b).

⁶⁸ 52 U.S.C. § 21082.

⁶⁹ Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, THE NATION (Nov. 4, 2016), <https://www.thenation.com/article/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted-the-voting-rights-act/>.

⁷⁰ *Id.*

⁷¹ Martha R. Mahoney, "Democracy Begins at Home"-Notes from the Grassroots on Inequality, Voters, and Lawyers, 63 U. MIAMI L. REV. 1, 2 n.4 (2008).

⁷² Nina Perales, Luis Figueroa, & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 713, 716 (2008).

locations of] 66 polling places.”⁷³ Further, in Arizona, “almost every county reduced [locations of] polling places,” and in Texas, “53 percent of counties . . . reduced voting locations.”⁷⁴ Litigation over closures and restrictions has occurred in several states previously under VRA Section 5 jurisdiction.⁷⁵

HAVA requires that polling places be accessible for persons with disabilities and that the state provide adequate information to voters about voting locations and requirements.⁷⁶ Thus, a disabled voter unable to access a precinct with voting systems equipped for individuals with disabilities due to distance, or a voter who was provided inadequate or inaccurate information by the state about the location or operating hours of his or her polling place, could submit a HAVA Title III claim.

C. Voter Registration Databases

Voters typically can cast a ballot only if their name appears on their election precinct’s voter registration rolls.⁷⁷ States may assert an interest in preventing election fraud when they purge the names of voters who do not vote in a certain number of elections from their rolls of registered voters.⁷⁸ Election fraud occurs when someone submits a vote using the identity of another person, and, in theory, more ineligible names on voter rolls increases the risk that voter fraud could occur.⁷⁹

Frequently, however, voter purges result in qualified voters being denied the right to vote at the polls on election day, simply because they have chosen not to vote in prior elections and their names have consequently been removed from the voter rolls.⁸⁰

⁷³ *The Great Poll Closure*, LEADERSHIP CONFERENCE EDUCATION FUND 8 (Nov. 2016), <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>.

⁷⁴ *Id.*

⁷⁵ *Feldman v. Arizona Sec’y of State’s Office*, No. 16-16865, 2016 WL 6472060 (9th Cir. Nov. 2, 2016); *Anderson v. North Carolina State Bd. of Elections*, No. 14-cvs-012648 (N.C. Super. Ct. Oct. 13, 2014), <http://electionlawblog.org/wp-content/uploads/20141013-NC-early-vote.pdf>; Letter from J. Gerald Herbert, Executive Director & Director of Litigation, and Harry Baumgarten, Attorney for Voting Rights Institute, to T. Christian Herren, Jr. Chief, Voting Section, Civil Rights Division, U.S. Dep’t of Justice (Apr. 13, 2016) (on file with the Campaign Legal Center).

⁷⁶ 52 U.S.C. § 21081.

⁷⁷ *Voter Purges*, BRENNAN CENTER FOR JUSTICE 6 (2008) <https://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.pdf>.

⁷⁸ Jeffrey A. Blomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1106 (1995).

⁷⁹ See Steve Barber et al., *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483, 483 (1988); Arnold I. Menchel, *Election Laws: The Purge for Failure to Vote*, 7 CONN. L. REV. 372, 372 (1975) (describing how voter purge statutes operate).

⁸⁰ Barber, *supra* note 79, at 483.

Litigation regarding voter purging has arisen in at least one state formerly under the jurisdiction of VRA Section 5.⁸¹

HAVA requires that persons who claim to be registered to vote in a jurisdiction but are not on the voter registration list be permitted to cast a provisional ballot, which is verified and counted after the election; individuals who are denied an opportunity to cast a provisional ballot may bring a claim under Title III.⁸² HAVA also requires that voter registration lists be maintained “in a uniform and nondiscriminatory manner.”⁸³ Thus, an individual could bring a HAVA Title III claim if they believe discriminatory purging has resulted in their name being improperly removed from voter rolls, or their being denied a provisional ballot.

IV. ADR IS NOT THE MOST APPROPRIATE AVENUE FOR RESOLVING ELECTION ACCESS ISSUES

A. Legislation and Cases Discussing the Appropriateness of ADR for Civil Rights

Although Congress deliberately included ADR as a provision in HAVA,⁸⁴ it has previously been stated that ADR is inappropriate in matters where “a definitive or authoritative resolution of the matter is required for precedential value, and such proceeding is not likely to be accepted generally as an authoritative precedent.”⁸⁵ This is particularly true in cases regarding discrimination and civil rights, which implicate and impact the rights of all United States citizens, and therefore should be decided in a public forum.

A comparison between anti-trust and voting illustrates the difference between matters which may be decided in ADR and those which are more appropriately decided by the courts. While the Supreme Court has held that arbitration is suitable for anti-trust disputes⁸⁶ which, like voting, affect all U.S. citizens, unlike anti-trust matters voting is a matter of intensely personal civil rights. In the American democratic system, voting

⁸¹ *Common Cause and the Georgia State Conference of the NAACP v. Kemp*, 1:16-cv-452-TCB (N.D. Ga. May 4, 2016), <https://www.justice.gov/crt/case-document/file/926371/download>; *Georgia State Conference of the NAACP v. Hancock County Bd. of Elections*, No. 5:15-cv-414-CAR, *Complaint for Injunctive and Declaratory Relief* (M.D. Ga. Nov. 3, 2015), <https://lawyerscommittee.org/wpcontent/uploads/2016/01/Hancock-Co-Complaint.pdf>.

⁸² 52 U.S.C. § 21082.

⁸³ 52 U.S.C. § 21083.

⁸⁴ 52 U.S.C. § 20901.

⁸⁵ *Alternative Dispute Resolution Act*, 5 U.S.C. § 572(b)(1) (1990).

⁸⁶ *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

represents a citizen's delegation of power over their political autonomy to legislators who will then pass the laws governing a citizen's day-to-day life.

Congress has reaffirmed the importance of the government's involvement in civil rights. With respect to voting rights, Congress has clearly considered the contexts under which enforcement of these rights should be privatized. While Congress explicitly provided for civil enforcement and private rights of action under the National Voter Registration Act (NVRA), in HAVA Congress required states to develop administrative adjudication processes and included no private right of action.⁸⁷ Courts have held that this difference between the two statutes means that Congress intentionally excluded such a private right of action in HAVA.⁸⁸

Congress has asserted the importance of government involvement in other areas of civil rights as well. The Americans with Disabilities Act ("ADA"), which does not provide for arbitration, states that part of its purpose is to invoke the Fourteenth Amendment in the broader public interest of eliminating discriminatory practices.⁸⁹ Even with legislation allowing for the arbitration of constitutional or statutory civil rights claims, such as the Judicial Improvements and Access to Justice Act ("JIAJA"),⁹⁰ Congress has recognized the importance of such decision-making remaining in the courts by stipulating that parties must consent to such arbitration.⁹¹ Requiring consent does not necessarily mean that the subject matter is unsuitable for arbitration or ADR, but it does reflect Congress' judgment that, for constitutional or civil rights matters, there should be barriers involving citizen consent before such matters can be taken out of the courts.

The United States government's support for keeping civil rights in the courts is found elsewhere as well. The United States Secretary of Labor's Task Force on Excellence in State Government Through Labor-Management Cooperation ("the Brock Commission") recommended that "ADR should normally not be used in cases that represent tests of significant legal principles."⁹² Civil rights cases often do represent tests of significant legal principles regarding the extent of individual liberties.⁹³

⁸⁷ Compare Help America Vote Act 52 U.S.C. § 21112 with National Voting Rights Act 52 U.S.C. § 20510 (1993).

⁸⁸ See, e.g., *Am. Civil Rights Union v. Philadelphia City Commissioners*, No. CV 16-1507, 2016 WL 4721118, at *5 (E.D. Pa. Sept. 9, 2016).

⁸⁹ 42 U.S.C. §§ 12101(b)(3)-(4).

⁹⁰ 28 U.S.C. § 652(c)(2).

⁹¹ 28 U.S.C. § 652(b)(1).

⁹² *Working Together for Public Service*, U.S. SEC'Y OF LABOR'S TASK FORCE ON EXCELLENCE IN STATE AND LOCAL GOVERNMENT THROUGH LABOR-MANAGEMENT COOPERATION 82 (May 1996), <https://www.dol.gov/dol/aboutdol/history/reich/reports/worktogether/cover.htm>.

⁹³ See, e.g., *Brown v. Board of Education* 349 U.S. 294, 301 (1955) (prohibiting racial segregation in public schools).

Further, United States courts have previously held that civil rights are not appropriate for resolution by ADR. In *Alexander v. Gardner-Denver Co.*, for example, the Supreme Court held that employees could not be precluded from pursuing discrimination claims in a judicial forum even if they had signed an arbitration agreement.⁹⁴ The Court noted that the Title VII discrimination statute's purpose and procedure strongly suggest that individuals do not forfeit private causes of action if they first pursue their grievances to final arbitration.⁹⁵ The Court held that civil rights are too critical to confine to only one possibility for remedy, and that such "statutory rights are independent of the arbitration process."⁹⁶

Similarly, in *Gilmer v. Interstate/Johnson Lane Corp.*, while the Court precluded an employee from further pursuing his claims in a judicial forum after final arbitration, the Court reasoned that, unlike in *Gardner*, it did "not perceive any inherent inconsistency between these policies . . . and enforcing [arbitration] agreements."⁹⁷ The *Gilmer* court found that legal remedies and institutional practice as to the selection of the arbitrator adequately protected the rights of the employee.⁹⁸

The Supreme Court has held that statutes governing discrimination claims must preserve a complainant's right to pursue the claim in court.⁹⁹ Further, the Court has cautioned, "[C]ourts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."¹⁰⁰ Between Congress' clear mandate and the repeated judicial emphasis on the need to adjudicate civil rights in a judicial forum, there is little legislative or legal support for using ADR to decide civil rights claims without parties' express agreement to resolve such disputes in arbitration.

B. Other Ways ADR is Used to Resolve Rights Issues

There are other statutes which utilize ADR provisions to resolve rights issues. The Alternative Dispute Resolution Act¹⁰¹ provides for the use of ADR by federal

⁹⁴ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974).

⁹⁵ *Id.*

⁹⁶ *Id.* at 54.

⁹⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

⁹⁸ *Id.* at 30-31, 42.

⁹⁹ *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995).

¹⁰⁰ *Alexander*, 415 U.S. at 60 n.21.

¹⁰¹ 5 U.S.C. §§ 571-584.

administrative agencies where the parties agree.¹⁰² Congress has also stated, in the Judicial Improvements and Access to Justice Act (“JIAJA”), that ADR is appropriate where “the case involves complex or novel legal issues.”¹⁰³

Further, the Federal Election Commission (“FEC”) uses an ADR program to expedite resolution of campaign law violations by candidates, campaign workers, or political action committees.¹⁰⁴ The program contains several noteworthy characteristics. Both the FEC and the respondent work towards a mutually agreeable resolution that emphasizes compliance with the Federal Election Campaign Act (“FECA”), and if that is unattainable the case may be referred to mediation.¹⁰⁵ The respondent selects a neutral, experienced professional mediator from a list provided by the FEC’s ADR office; all individuals on the list come from the private sector and have no ties to the FEC.¹⁰⁶

Should a settlement be reached, it is a matter of public record, but it cannot serve as precedent for other cases that come before the FEC as, under the program, settlement is not an admission of liability.¹⁰⁷ Additionally, documents used in negotiations with the ADR office are unavailable to the FEC’s Office of General Counsel in the event that the parties do not reach a settlement in negotiations with the ADR Office.¹⁰⁸

C. Drawbacks to Using ADR to Resolve Rights Issues

There are many drawbacks to using ADR to resolve rights issues, particularly ballot access issues. Both courts and ADR tribunals resolve disputes, but whereas ADR’s focus is on resolving a dispute, courts also consider the public values shaping rights laws by looking to Congressional intent to inform their opinions.¹⁰⁹ Procedurally, this results in different approaches to matters brought to their attention.

Certain remedies are available under civil rights laws that may not be available through ADR due to the private, extrajudicial nature of dispute resolution, such as injunctions ordering states or municipalities to act in a certain manner.¹¹⁰ Individuals may

¹⁰² 5 U.S.C. § 572(a).

¹⁰³ 28 U.S.C. § 652(c)(2).

¹⁰⁴ *Alternative Dispute Resolution Program*, FED. ELECTION COMM’N (Feb. 2010), <http://www.fec.gov/em/adr.shtml>.

¹⁰⁵ *Id.*.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See* Reuben, *supra* note 15.

¹¹⁰ Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 207 (2015) (citing Civil Rights Act of 1957 § 131(c), 52 U.S.C.A. § 10101(c) (authorizing injunctive relief in section 131(b) claims)); *Mizell v. North Broward Hosp. Dist.*, 427 F.2d 468,

be discouraged from bringing their claims to the government if they know they are unable to litigate them in court and pursue these remedies. As Congress and the Supreme Court have stated, an individual should be able to decide whether to forego the courts and resolve a complaint through ADR.¹¹¹

Further, mandatory ADR not only undermines an individual claimant's interest but also the public's interest in maintaining fair elections. Those who would deprive others of ballot access should be prosecuted under the public's civil rights laws in the public forum of the courts.

Though state election commissions or Secretary of State offices may be the entities responsible for enforcing voter discrimination laws, courts serve as the final guard for the enforcement of statutes, examination of claims, and providing of relief. Unlike ADR officials, courts have coercive authority to ensure compliance with their orders. Further, while society upholds certain standards for judges,¹¹² there are no requirements in HAVA about qualifications and characteristics of ADR officials, and state criteria vary for individuals who may serve in that role.¹¹³

Courts also establish precedent, which provides guidance that may help prevent or deter violations of the law. ADR is extrajudicial and does not require that decisions be written or reasoned, and therefore does not develop the law.¹¹⁴ ADR is not suited towards developing guidance regarding rights and responsibilities or enhancing compliance with the laws. Further, unlike ADR, the public nature of court proceedings means they are in a position to provide notice to the community of the "costs of discrimination," and of the "identity of violators of the law and their conduct."¹¹⁵

Finally, the private nature of ADR presents further challenges in civil rights cases, particularly with HAVA Title III complaints. A number of important requirements are absent from HAVA and left to states to determine: whether ADR decisions should be made public without the consent of the parties; whether and how to publicize such decisions; and how the ADR officer is selected.¹¹⁶ The private nature of ADR leaves little room for the public to assess the adequacy of the procedures and standards selected by the state,

473 (5th Cir. 1970) (finding that § 1985(3) permits injunctive relief); *United States by Katzenbach v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 354 (E.D. La. 1965) (granting injunctive relief under section 11(b)); *James v. Humphreys Cnty. Bd. of Election Comm'rs*, 384 F. Supp. 114, 132 (N.D. Miss. 1974) (granting injunctive relief under section 11(b)).

¹¹¹ See *Alexander*, 415 U.S. at 60 n.21.

¹¹² For example, federal judges must abide by the Code of Conduct for United States Judges, a set of ethical principles and guidelines adopted by the Judicial Conference of the United States. See *Code of Conduct for United States Judges*, ADMIN. OFFICE OF U.S. COURTS, <http://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies>.

¹¹³ 52 U.S.C. § 20901.

¹¹⁴ See EEOC, *supra* note 12.

¹¹⁵ See *id.*

¹¹⁶ 52 U.S.C. §§ 20901-21145.

particularly when, as with HAVA complaints, there exists little to no data on whether and how ADR provisions are used.

D. How ADR Could Most Effectively Be Applied to Resolve Election Access Issues

Even the Equal Employment Opportunity Commission has gone “on record in strong support of voluntary ADR programs that resolve [] discrimination disputes in a fair and credible manner.”¹¹⁷ The EEOC notes that the complainant must freely make a decision to enter ADR, however.¹¹⁸ An effective election access ADR program would need to incorporate several additional provisions.

Such a system should first and foremost have some sort of federal judicial presence, given the highly sensitive and important nature of the right to vote. Ideally, a federal judge should supervise the ADR proceeding. Unlike in arbitration, nothing is bartered in a civil rights ADR claim. Civil rights are legal rights which must be protected. Final oversight, at least, should be rest in the courts.

Next, who serves as the ADR officer is a critical matter, in terms of ensuring the outcome is accepted as legitimate. An ombudsman model is one promising option. Georgia currently utilizes an ombudsman program to address concerns of abused and neglected children by providing independent oversight of those providing services to victims of child abuse and neglect. In an election context, states could similarly place former judges, attorney generals, or individuals with significant experience in civil rights matters in charge of HAVA complaint dispute resolution, to ensure there is independent oversight of government agencies providing election access to citizens.¹¹⁹

Neutrality of the ADR officer is also of critical importance. Several state HAVA ADR models, such as those for Alaska, Georgia, South Carolina, and Virginia, provide that the final determination of a complaint rests with a political figure or entity, such as the Secretary of State or the state Board of Elections.¹²⁰ A decision related to voting rights should not be made by an individual who is beholden to interests other than the successful resolution of the matter at hand, such as a political party.

Further, a variety of remedies should be available to complainants. Financial settlements and injunctions should all be valid options. While arbitrators are able to order such a private injunction, in arbitration both parties opt into the proceedings, while only the civil rights complainant opts into HAVA’s ADR, making the system more adversarial.

Finally, current data on the types of complaints submitted and how they are resolved should be made publicly available on a regular basis in an easy-to-access format.

¹¹⁷ See *EEOC Notice*, *supra* note 12.

¹¹⁸ See *id.*

¹¹⁹ Judith Jones & Alvin W. Cohn, *State Ombudsman Program*, U.S. DEPT. OF JUSTICE 10 (Feb. 2005) <https://www.ncjrs.gov/pdffiles1/ojdp/204607.pdf>.

¹²⁰ See, e.g., ALASKA ADMIN. CODE 6 AAC 25.470(c); *Administrative Complaint Procedure*, *supra* note 24; *Complaint Procedures*, *supra* note 18; *Voter Complaints*, *supra* note 18.

Public accountability of the privatization of civil rights adjudication is critical, and this data allows the public to assess how the ADR program is functioning.

V. CONCLUSION

Congress' attempt to prevent a repeat of the problematic 2000 presidential election and strengthen the United States' electoral systems is to be applauded. However, the right to vote is a fundamental part of the American democratic system. A system that resolves citizens' election access claims in an extrajudicial setting should be subjected to stringent, uniform standards to ensure complaints are given proper redress, if not abolished entirely and left to the courts.

Congress should, as a condition of continued HAVA appropriations to states, require them to submit data on the usage and outcomes of their ADR systems. If the evidence shows minimal use and effective resolution within state departments, Congress should consider eliminating the ADR requirement in HAVA entirely. If the evidence shows the ADR provision is being frequently used in states, Congress should require that states' ADR procedures meet strong, uniform standards that facilitate thorough and independent assessment of complaints and afford parties an opportunity for judicial appeal.