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Contemplating Arbitration in Disputed Congressional Elections: A Case Study with the Closest Senate Election in U.S. History

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Ben Sheppard

Contemplating Arbitration in Disputed Congressional Elections: A Case Study with the Closest Senate Election in U.S. History

20 U.N.H. L. REV. 229 (2022)

ABSTRACT. In the US, elections are a hotly contested fare. The stakes are higher when the election's outcome is decided by a razor-thin margin. These close elections often lead to lengthy court battles coupled with bitter and angry candidates and voters. One such example is the 1974 U.S. Senate Election in New Hampshire—a contest decided by only two votes. That election and the events following it are chronicled in this Article. This Article considers that contest to contemplate the use of arbitration in contested Congressional election. Ultimately, the author argues Congress should create a three-person arbitration panel to handle disputed Congressional elections to allow Congress to focus on other pressing issues, ensure transparency, and fairness.

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INTRODUCTION

In 2020, amidst the backdrop of a global pandemic and a tumultuous presidential election, one of the closest Congressional elections in recent memory occurred.¹ That race occurred in Iowa's Second Congressional district.² It pitted Republican state senator Mariannette Miller-Meeks against Democratic state senator Rita Hart.³ On November 30, following a recount, the bipartisan Iowa Board of Canvass voted 5–0 to certify Miller-Meeks as the victor by just six votes (196,964–196,958).⁴

Despite the Iowa Board of Canvass' decision, the race was not over. Hart challenged the results via a petition with the U.S. House Administration Committee under the 1969 Federal Contested Elections Act, which governs contested Congressional election procedures.⁵ Under the U.S. Constitution each chamber of Congress is “the [j]udge of the [e]lections, [r]eturns and [q]ualifications of its own [m]embers.”⁶ Hart's petition challenged the Iowa Board of Canvass' decision to not count twenty-two ballots—a decision that impacted the outcome.⁷

¹ Tom Barton, *Hart Pushes Ahead with Iowa's 2nd Congressional District Challenge as Some Democrats Balk at Overturning Race*, QUAD CITY TIMES (Mar. 23, 2021), https://qctimes.com/news/local/hart-pushes-ahead-with-iowas-2nd-congressional-district-challenge-as-some-democrats-balk-at-overturning/article_a3bddd6-674e-598d-a651-c1b85081632c.html [<https://perma.cc/LR6F-UGYP>]; Ben Kamisar, *Iowa Congressional Race Likely to be One of Closest in Modern History, Meet the Press Blog: Latest news, analysis and data driving the political discussion*, NBC NEWS: MEET THE PRESS BLOG (Dec. 21, 2021, 2:01 PM), <https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-driving-political-discussion-n988541/ncrd1249575#blogHeader> [<https://perma.cc/KF69-V343>] (“When Iowa's State Canvassing Board certified its 2020 election results on Monday, Republican Mariannette Miller-Meeks edged out Democrat Rita Hart in the state's Second Congressional District by just six votes, making it one of the closest U.S. House races in modern history.”).

² Barton, *supra* note 1.

³ See Luke Martz, *Momentum for Miller-Meeks*, IOWA FIELD REPORT (Aug. 5, 2020), <https://www.iowafieldreport.com/campaigns/momentum-for-miller-meeks/> [<https://perma.cc/Q2CB-FEA7>].

⁴ Ryan J. Foley, *Iowa Board Certifies 6-vote Republican Win in US House Race*, AP NEWS (Nov. 30, 2020), <https://apnews.com/article/election-2020-donald-trump-iowa-mariannette-miller-meeks-elections-e3f235f217707a78fcec059f8e0b4ffa> [<https://perma.cc/D36W-4B67>].

⁵ See Paul Brennan, *Rita Hart Will Ask the U.S. House of Representatives to Conduct a Recount of Votes in the 2nd District*, LITTLE VILLAGE (Dec. 2, 2020), <https://littlevillagemag.com/rita-hart-asks-us-house-for-recount/> [<https://perma.cc/YHP9-AZ42>].

⁶ U.S. CONST. art. I, § 5, cl. 1.

⁷ Christopher Branschweig, *HART: 22 Ballots 'Unlawfully Excluded' from State-Certified Results*, NEWTON DAILY NEWS (Dec. 24, 2020), <https://www.newtondailynews.com/news/local/>

In December 2020, Speaker of the House Nancy Pelosi (D-CA) seated Miller-Meeks provisionally pending adjudication of Hart's petition.⁸ It was a real possibility the House would overturn the Iowa Board of Canvass' decision and install Hart as the Representative for Iowa's Second Congressional District.⁹ Such a result was not inconceivable because Democrats had a small majority in the House of Representatives.¹⁰ Naturally, Republicans cried foul at the prospect of Democratic members of Congress overturning a state election board's ruling.¹¹ In addition, Democratic politicians¹² and commentators¹³ expressed concern regarding Hart's challenge.

Ultimately, Hart dropped her challenge regarding Iowa's Second Congressional District results on March 31, 2021.¹⁴ "Despite our best efforts to have every vote counted, the reality is that the toxic campaign of political disinformation to attack

2020/12/24/hart-22-ballots-unlawfully-excluded-from-state-certified-results/
[https://perma.cc/T72F-3FQS].

⁸ Sarah Ferris et al., *Pelosi to Seat Republican in Contested Iowa Race*, POLITICO (Dec. 30, 2020, 12:32 PM), <https://www.politico.com/news/2020/12/30/pelosi-seats-iowa-mariannette-miller-meeks-452332> [https://perma.cc/2RYN-9KPS].

⁹ See Kerry Pickett, *House Democrats trying to 'steal' contested Iowa seat, GOP lawmaker says*, WASHINGTON EXAMINER (Mar. 21, 2021), <https://www.washingtonexaminer.com/news/gop-democrats-steal-iowa-house-seat-by-republicans-process>

¹⁰ See Ally Mutnick et al., *Dems Sound Alarm at Prospect of Overturning Iowa Race*, POLITICO (Mar. 22, 2021, 8:04 PM), <https://www.politico.com/news/2021/03/22/democrats-iowa-race-477497> [https://perma.cc/NNW8-8BLT].

¹¹ E.g., David N. Bossie, *Pelosi and Dems Have a New Target in their Quest for Election Control – Iowa Rep. Miller-Meeks*, FOX NEWS (Mar. 26, 2021), <https://www.foxnews.com/opinion/pelosi-democrats-target-election-control-iowa-miller-meeks-david-bossie> [https://perma.cc/Q494-S249]; Lachlan Markay, *Senate Republicans Warn Corporate America over Iowa House Race*, AXIOS (Mar. 26, 2021), <https://www.axios.com/iowa-house-capitol-riot-donation-d6175f8b-f39e-4b09-b59c-269448ee2ee9.html> [https://perma.cc/FVZ4-CRDY].

¹² E.g., Dean Phillips (@RepDeanPhillips) TWITTER (Mar. 22, 2021, 9:51 AM), <https://twitter.com/RepDeanPhillips/status/1373995713512759297?s=20> [https://perma.cc/28H5-ZFAB] ("Losing a House election by six votes is painful for Democrats. But overturning it in the House would be even more painful for America. Just because a majority can, does not mean a majority should."); see also Kristina Peterson, *Iowa Election Challenge Alarms Some House Democrats*, WALL STREET J. (Mar. 25, 2021, 4:04 PM), <https://www.wsj.com/articles/iowa-election-challengealarms-some-house-democrats-11616677200> [https://perma.cc/CGX3-LHQV].

¹³ E.g., Dylan McCloskey, *Democracy Under Attack: Iowa's 'Bloody Second*, 60 ST. LOUIS UNIV. L. J. ONLINE 1, 1 (2021) (arguing Hart's challenge attacked American democracy).

¹⁴ Sarah Ferris & Ally Mutnick, *Democrat Drops Election Contest in Iowa House Race*, POLITICO (Mar. 31, 2021, 5:37 PM), <https://www.politico.com/news/2021/03/31/democrat-drops-election-contest-in-iowa-house-race-478736> [https://perma.cc/G8LX-GRR8].

this constitutional review of the closest congressional contest in one hundred years has effectively silenced the voices of Iowans,” Hart wrote in a statement regarding her withdrawal.¹⁵ While Hart dropped her challenge under the Federal Contested Elections Act, it is likely that similar challenges will arise in the future. In the 2020 Congressional elections alone, six races were decided by one percent or less.¹⁶

And such a problem is not new to Congress, as many Congressional elections have been remarkably close in American history.¹⁷ In fact, one Congressional election was even closer than the recent Iowa race. That race was the 1974 U.S. Senate election in New Hampshire where Republican Congressman Louis C. Wyman defeated Democratic State Insurance Commissioner John A. Durkin by only two votes.¹⁸ The *Wyman v. Durkin* contest lasted for over ten months and was fraught with court battles and bitter partisanship in the U.S. Senate.¹⁹

This Article proceeds in three parts. Part I gives a brief history of the contested 1974 New Hampshire Senate race. Part II outlines the benefits of arbitration for resolving contested election disputes in comparison to mediation or litigation. Part III offers a proposed statutory modification to the Federal Contested Elections Act to convene an arbitration panel for contested Congressional elections.

¹⁵ *Id.*

¹⁶ *Election Results, 2020: Congressional Elections Decided by 10 Percentage Points or Fewer*, BALLOTPEDIA (Feb. 8, 2021), https://ballotpedia.org/Election_results_2020:_Congressional_elections_decided_by_10_percentage_points_or_fewer [https://perma.cc/RS3K-Q6V5]. Like Iowa, New York witnessed an exceptionally close Congressional contest in 2020. In New York’s 22nd Congressional District, Republican Claudia Tenney defeated Democratic Representative Anthony Brindisi by only 109 votes. *New York’s 22nd Congressional District Election, 2020*, BALLOTPEDIA, https://ballotpedia.org/New_York%27s_22nd_Congressional_District_election_2020 [https://perma.cc/KK5G-C2EE].

¹⁷ Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondents, at 26–27, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (No. 07-21, 07-25), 2007 WL 4340892; Madeline Farber, *5 of the Closest Congressional Races of the Past 50 years*, FOX NEWS (Nov. 6, 2018), <https://www.foxnews.com/politics/5-of-the-closest-house-and-senate-races-of-the-past-50-years> [https://perma.cc/8PA3-XM85]; see also Elliott C. McLaughlin, *11 of the Most Bizarre Elections in American History*, CNN POLITICS (Nov. 16, 2020, 10:09 AM), <https://www.cnn.com/2020/11/16/politics/interesting-us-elections-trump-biden/index.html> [https://perma.cc/HJ3Z-BLDA].

¹⁸ See Farber, *supra* note 17.

¹⁹ See Richard W. Osborne, *My Turn: Reflecting on the Closest Race in U.S. Senate History*, CONCORD MONITOR (Oct. 20, 2020, 7:47 AM), <https://www.concordmonitor.com/My-Turn-Osbourne-36852978> [https://perma.cc/M2S2-DZ4Q].

I. THE CLOSEST SENATE ELECTION IN U.S. HISTORY

This section provides a historic overview of the 1974 New Hampshire Senate election—the closest Senate election in U.S. history. It first considers the campaign itself. Next, the ensuing battle for the seat that featured court battles and a lengthy Senate contest are examined. After much consternation, the candidates finally held a special election, ten months after the original election.²⁰

A. *The Campaign*

In 1974, New Hampshire experienced political change. The incumbent, Republican Senator Norris Cotton, decided to retire.²¹ Cotton's retirement kicked off two primaries.²² The Republicans selected five-term Congressman Louis C. Wyman.²³ By contrast, the Democrats nominated populist former State Insurance Commissioner John A. Durkin, who frequently made headlines for challenging insurance companies on behalf of consumers.²⁴

At the outset of the campaign, Wyman was considered the favorite.²⁵ However, two events altered the course of the race.²⁶ First, the Durkin campaign aired ads that lambasted Wyman for hosting elite Washington cocktail parties to raise campaign funds.²⁷ The spots showcased clinking glasses in the background.²⁸ Second, the resignation of President Richard Nixon amidst the cloud of the Watergate scandal occurred only three months before the election.²⁹ The Watergate

²⁰ Monica Davey & Carl Hulse, *Franken's Win Bolsters Democratic Grip in Senate*, N.Y. TIMES (June 30, 2009), <https://www.nytimes.com/2009/07/01/us/politics/01minnesota.html> [<https://perma.cc/KFX3-8H62>].

²¹ Christopher Lydon, *Republican Strategists See Major 1974 Election Losses for G.O.P.*, N.Y. TIMES (Dec. 17, 1973), <https://www.nytimes.com/1973/12/17/archives/republican-strategists-see-major-1974-election-losses-for-gop-most.html> [<https://perma.cc/URM3-U9T8>].

²² See Osborne, *supra* note 19.

²³ *Id.*

²⁴ See *In Memoriam: Sen. John A. Durkin*, N.H. BAR NEWS, Nov. 16, 2012, at 1, 10 [hereinafter *Durkin Memoriam*].

²⁵ Osborne, *supra* note 19.

²⁶ John Gizzi, *Louis Wyman, R.I.P.*, HUMAN EVENTS, May 27, 2002, at 11.

²⁷ Gizzi, *supra* note 26, at 11; Osborne, *supra* note 19.

²⁸ Gizzi, *supra* note 26, at 11.

²⁹ See *id.*

scandal hindered Republican electoral prospects across the United States.³⁰

Such events conspired to make for a memorable election day in New Hampshire. As ballots trickled in, the race was exceptionally close.³¹ The next day, early counts caused the New Hampshire Secretary of State to declare Wyman “won” the race by 355 votes.³²

B. Recounts, Recounts, and Court Challenges

A razor-thin margin like this naturally sparked a recount. Immediately after the election, a painstaking hand recount commenced until November 27, 1974, and reversed the result.³³ Now Durkin was declared the winner by just ten votes.³⁴

Yet, the dispute continued.³⁵ New Hampshire law permitted additional review by the state’s Ballot Law Commission (“BLC”), a three-member board with plenary authority over issues concerning recounts.³⁶ Given the closeness of the race, Wyman appealed to the BLC on November 29, 1974.³⁷

At the time when Wyman raised his appeal, the BLC had two Republicans and one Democrat as its members.³⁸ The BLC reviewed the evidence concerning the Senate contest and issued a 2–1 ruling favoring Wyman with Crowley, the Democratic member, dissenting.³⁹ The BLC declared Wyman the winner by only two votes.⁴⁰ After this decision, Governor Meldrim Thomson, Jr. awarded Wyman a certificate of election, a credential necessary for a seat in the U.S. Senate.⁴¹

Subsequently, Durkin challenged the constitutionality of the BLC’s decision in

³⁰ See Josh Chafetz, *Congressional Overspeech*, 89 *FORDHAM L. REV.* 529, 568–69 (2020); Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 *CLEV. ST. L. REV.* 349, 364–65 (2010).

³¹ Osborne, *supra* note 19.

³² *Id.*

³³ EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 251 (Oxford University Press, 2016).

³⁴ *Durkin Memoriam*, *supra* note 24.

³⁵ *Id.*

³⁶ See Foley, *supra* note 30, at 251.

³⁷ *Durkin v. Snow*, 403 F. Supp. 18, 18 (D.N.H. 1974).

³⁸ Roger Crowley was the Democrat member. FOLEY, *supra* note 33, at 251. He was considered too closely tied to the Republican Party. *Id.* Additionally, Crowley’s son had briefly worked for Wyman. *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

the courts.⁴² First, Durkin appealed to the U.S. District Court of New Hampshire which held the BLC's proceedings were constitutional because states are granted broad powers to verify the integrity of election results.⁴³ Second, Durkin challenged the results in New Hampshire state courts multiple times without success.⁴⁴ Yet, Durkin remained undeterred and pursued his challenge.

C. *A Petty and Partisan Senate Debate*

After a panoply of unsuccessful court challenges, Durkin appealed to the Senate under the Federal Contested Elections Act.⁴⁵ He alleged that the BLC made errors in reviewing contested votes.⁴⁶ When Wyman presented his certificate of elections credential to the Senate, they declined to accept it—even provincially—in a straight party-line vote.⁴⁷ Such a result left New Hampshire with only one Senator.

After refusing to recognize Wyman's credential, the Senate voted 58–34 to refer the matter to the Rules Committee.⁴⁸ The Rules Committee was chaired by Senator Howard Cannon (D-NV) and comprised of five Democrats and three Republicans.⁴⁹ From the beginning of February until the end of April, the Rules Committee attempted to recount the contested ballots in the New Hampshire contest.⁵⁰ One Senator on the Rules Committee, Senator Claiborne Pell (D-RI), argued that

the actual counting of the N.H. ballots, and as much as possible of the procedural decision-making relative to the N.H. Senate election contest, should not be done by elected individuals, but should have been delegated to a neutral body chosen from a panel recommended by the American Arbitration Association or other impartial source

⁴² See *The Election Case of John A. Durkin v. Louis C. Wyman of New Hampshire* (1975), UNITED STATES SENATE [hereinafter *United States Senate Election Case*], https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/137Durkin_Wyman.htm [<https://perma.cc/7HS4-TAS4>].

⁴³ See *Snow*, 403 F. Supp. at 18–19.

⁴⁴ *Durkin v. Hillsborough Cnty. Super. Ct.*, 330 A.2d 777 (N.H. 1974); *Op. of the Justices*, 330 A.2d 774 (N.H. 1974); *Wyman v. Durkin*, 330 A.2d 772 (N.H. 1974).

⁴⁵ See Luis Kutner, *Due Process in the Contested New Hampshire Senate Election: Fact, Fiction, or Farce*, 11 NEW ENG. L. REV. 25, 28 (1975).

⁴⁶ *Id.*

⁴⁷ FOLEY, *supra* note 33, at 252.

⁴⁸ Kutner, *supra* note 45, at 29.

⁴⁹ FOLEY, *supra* note 33, at 252.

⁵⁰ Kutner, *supra* note 45, at 29.

agreed upon by the contestants.⁵¹

But Pell's wise suggestion was never heeded, and the Rules Committee referred the matter to the whole Senate on May 22, 1975, after being unable to resolve the dispute.⁵²

After this impasse, the Senate began a debate regarding the New Hampshire race on June 11.⁵³ The debate raged on throughout the summer with fifty-seven Democrats ready to support Durkin's installment as Senator, but sixty votes were necessary to break a filibuster, and four Southern Democrats refused to vote with their party's position.⁵⁴ The Senate's stalemate on the issue was condemned in the *Washington Post* declaring the Wyman v. Durkin contest a "disgraceful mess."⁵⁵ Later, the *Washington Post* condemned the Senate as acting "petty" and "partisan."⁵⁶ The newspaper suggested a neutral was needed to resolve the dispute.⁵⁷

As the debate continued in the Senate, Wyman independently contacted Durkin in late July.⁵⁸ Wyman suggested they face off in a new election.⁵⁹ After some initial hesitation, Durkin's daughter changed his mind. Durkin's daughter said "Dad, don't you realize [the Senate] can't make their mind up about anything?"⁶⁰ On July 29, Durkin announced to a New Hampshire television audience that he agreed to a new election.⁶¹ Consequently, the U.S. Senate declared the New Hampshire seat vacant on August 8, 1975; after nearly one hundred hours of debate over eight long

⁵¹ FOLEY, *supra* note 33, at 252. Pell's suggestion was not a historical anomaly, in 1792, jurist James Kent suggested the disputed 1792 New York gubernatorial election be resolved through a tribunal like modern-day arbitration. *Id.* at 59–60, 252.

⁵² *Id.*

⁵³ Kutner, *supra* note 45, at 30.

⁵⁴ FOLEY, *supra* note 33, at 252.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *The Election Case of John A. Durkin v. Louis C. Wyman of New Hampshire (1975)*, UNITED STATES SENATE [hereinafter *United States Senate Election Case*], https://www.senate.gov/about/origins-foundations/electing-appointing-senators/contested-senate-elections/137Durkin_Wyman.htm [<https://perma.cc/7HS4-TAS4>].

⁵⁹ *Id.*

⁶⁰ The Associated Press, *John A. Durkin, Winner of Close Senate Election, Dies at 76*, N.Y. TIMES (Oct. 17, 2012), <https://www.nytimes.com/2012/10/18/us/politics/john-a-durkin-senator-from-new-hampshire-dies-at-76.html> [<https://perma.cc/X9NY-BEYE>].

⁶¹ *United States Senate Election Case*, *supra* note 58.

months.⁶² The Senate would later reimburse Durkin and Wyman a combined total of \$227,000 (approximately \$1,167,020.50 in today's dollars)⁶³ in legal fees for the period from January to August 1975.⁶⁴

After the Senate declared the seat vacant, Governor Thomson appointed former Senator Norris Cotton to serve until the special election determined the victor.⁶⁵ On September 15, 1975, New Hampshire voters went to the polls and elected Durkin by a decisively uncontestable margin of over 27,000 votes.⁶⁶ On September 18, 1975, Durkin was sworn in as Senator approximately ten months after the first election in November 1974.⁶⁷

Durkin later reflected on his contested election experience. Durkin stated he would not wish such an experience on his worst enemy.⁶⁸ "I'd much rather have read about it than have lived it."⁶⁹

The 1974 Senate election in New Hampshire shows a better way forward must exist for both citizens and candidates in contested Congressional elections. We should not tolerate a state's loss of representation in Congress for eight months. That is why the author advocates for arbitration for resolving disputed Congressional elections such as the 1974 New Hampshire Senate election.

II. AN ARGUMENT FOR ARBITRATION IN DISPUTED CONGRESSIONAL ELECTIONS

This section seeks to vindicate Senator Pell's wise suggestion to convene an arbitration panel to assist the Senate in handling the contested 1974 New Hampshire Senate election. Sending contested election disputes into the political den of wolves that is the U.S. Congress proved calamitous in contests such as *Wyman v. Durkin*.⁷⁰ This option resulted in costly attorney fees for the candidates (ultimately paid for by taxpayers) and New Hampshire citizens having only one Senator for a period of

⁶² See Kutner, *supra* note 40, at 45.

⁶³ *Historical Inflation Rates: 1914-2021*, U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/inflation/historical-inflation-rates> [<https://perma.cc/T7PG-73AZ>].

⁶⁴ *United States Senate Election Case*, *supra* note 58.

⁶⁵ See Osborne, *supra* note 19.

⁶⁶ *Id.*

⁶⁷ See *Durkin Memoriam*, *supra* note 24, at 10.

⁶⁸ *Winner of Close Senate Election*, *supra* note 60.

⁶⁹ *Id.* The New Hampshire race was not the only contested 1974 U.S. Senate election. The Senate did not dismiss a challenge to Oklahoma's Senate election until March 4, 1976, sixteen months after the election was held. FOLEY, *supra* note 33, at 250.

⁷⁰ See Rebecca Green, *Arbitrating Ballot Battles*, 104 KY. L. J. 699, 702 (2015) [hereinafter *Green I*].

eight months while the Senate debated the contest.⁷¹ This section begins by describing arbitration and its benefits. It then argues against the use of mediation or litigation to resolve disputed elections.

A. Arbitration for Contested Election Disputes

Alternative Dispute Resolution (“ADR”) processes could help Congress settle contested election disputes. Arbitration is an ADR process where one or more neutrals render a decision for the parties.⁷² The parties relinquish their decision-making right to a neutral who decides for them.⁷³

Postelection disputes like *Wyman v. Durkin* are best-suited for arbitration because such disputes often involve lingering tensions from the hotly competitive campaign and time-sensitive concerns.⁷⁴ Therefore, the neutral’s involvement must be “more direct and decisive,” like in arbitration.⁷⁵ The *Wyman v. Durkin* contest is a case study highlighting such concerns. The candidates engaged in an aggressive campaign and had difficulty meeting with each other.

Arbitration offers several attractive features that are particularly beneficial in contested election disputes.⁷⁶ An attractive feature of arbitration is that disputing parties control who shall arbitrate their dispute.⁷⁷ After all, people like to control things that are important to them.⁷⁸ Giving disputants the ability to select arbitrators offers flexibility and the ability to select experts on election law disputes.⁷⁹ In the U.S, associations of arbitrators have developed such as the American Association of Arbitrators (“AAA”) and Judicial Arbitration and Mediation Service (“JAMS”).⁸⁰ AAA and JAMS refer parties to lists of qualified arbitrators and

⁷¹ See *United States Senate Election Case*, *supra* note 58.

⁷² JOHN W. COOLEY, *MEDIATION ADVOCACY* 2 (2d. ed. 2005).

⁷³ *Id.*

⁷⁴ Erin Butcher-Lyden, *The Need for Mandatory Mediation and Arbitration in Election Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531, 548 (2010).

⁷⁵ *Id.*

⁷⁶ *Green I*, *supra* note 70, at 703.

⁷⁷ See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 122 DICK. L. REV. 349, 371 (2017).

⁷⁸ Brian S. Harvey, *Speech*, 8 J. BUS. & TECH. L. 385, 386 (2013).

⁷⁹ *Green I*, *supra* note 70, at 705.

⁸⁰ *Id.*

their practice area specialties.⁸¹ On December 5, 2021, JAMS listed three neutrals with practice experience in election law arbitration.⁸² Additionally, arbitration organizations like JAMS and AAA have developed stellar reputations because they carefully vet arbitrators and maintain clear sets of procedural rules.⁸³ Consequently, these actions lend credibility and legitimacy to the use of arbitration in resolving election law disputes.⁸⁴

Control and flexibility are not the only justifications for arbitrating ballot battles. Arbitration is a more expeditious process compared to litigation.⁸⁵ First, matters in arbitration are not constrained by an overburdened judicial system creating long delays before disputes heard in court reach a final verdict.⁸⁶ Second, an arbitration panel is not necessarily bound by the rules of discovery and evidence, meaning a final award is arrived at faster compared to traditional litigation.⁸⁷ This means that the uncertainty and drama that result from an election contest will be over quicker and elected officials can focus on governing.⁸⁸ And because arbitration is expeditious, it is usually less expensive than typical litigation.⁸⁹

These benefits have been recognized by many commentators who argue for arbitration in election disputes.⁹⁰ But beyond commentators, these benefits are

⁸¹ See Ronald J. Nessim & Scott Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement*, 22 UCLA ENT. L. REV. 233, 246 (2015).

⁸² Search Neutral Directory, JAMS, <https://www.jamsadr.com/neutrals/search?name=&keyword=election+law&location=&homeOffice=yes&practice=&language=&judicialstate=&judicial=> [https://perma.cc/VXB8-HZN3?type=image].

⁸³ *Green I*, *supra* note 70, at 705.

⁸⁴ See *id.*

⁸⁵ See Harvey, *supra* note 78, at 385; James P. Gray, *That's a Wrap! How to Conclude a Mediation*, 61 ORANGE COUNTY LAW 27, 29 (September 2019). But see Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 392–93 (1986) (questioning claims that ADR reduces court dockets).

⁸⁶ See Robert J. Kerekes, *The Crisis of Congested Courts: One Potential Solution*, 18 SETON HALL LEGIS. J. 489, 492–95 (1994).

⁸⁷ Ilan E. Simon, *Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc.: The Eradication of the Mistake of Law Doctrine in Private Sector Arbitration*, 48 RUTGERS L. REV. 533, 540–41 (1996); see also Jim Carr et al., *Colorado's Revised Uniform Arbitration Act*, 33 COLO. LAW. 11, 15 (September 2004) (discussing the discovering process in Colorado arbitration).

⁸⁸ See generally Harvey, *supra* note 78, at 386.

⁸⁹ Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008).

⁹⁰ *E.g.*, *Green I*, *supra* note 70, at 699 (“[A]rbitration is an under-explored mechanism for resolving post-election disputes.”).

recognized by both states and the federal government in the election context.⁹¹ For example, New York state created the now-defunct Board of Election Arbitration which provided arbitration services for voters in an expeditious manner.⁹² Other states, such as Connecticut and North Carolina, have implemented administrative processes that resolve election disputes before advancing to the courts.⁹³ In addition, the state of Minnesota utilized three-member ADR panels to resolve two contested elections in the state: the 1962 gubernatorial election (decided by 89 votes)⁹⁴ and the 2008 U.S. Senate election in Minnesota (decided by 312 votes).⁹⁵ These states have served as “laboratories of democracy” and show arbitration and other ADR processes can be used effectively across the U.S. to resolve disputed elections.

However, it is not only the states that administer arbitration related dispute resolution for election disputes, but the federal government does so too. The Federal Elections Commission operates an ADR office to promote settlement outside the traditional court adjudication process.⁹⁶ The program was designed to reduce costs, solve complaints faster, and bring cases to a mutually satisfactory resolution.⁹⁷ Yet, the Federal Election Commission’s ADR program only resolves federal campaign disclosure disputes and not all types of election law disputes.⁹⁸ Nonetheless, the federal government like many states employs ADR programs to resolve election-related disputes. It follows that amending the Federal Contested Elections Act to require the parties engage in arbitration would not be an oddity in

⁹¹ See Jessica Becerra, *The Possibility of Using Alternative Dispute Resolution for Election Law Disputes*, 18 PEPP. DISP. RESOL. L.J. 117, 126–28 (2018).

⁹² *Board of Elections Arbitration*, New York State Dispute Resolution Association, Inc. (Jan. 10, 2018) <http://www.nysdra.org/?page=BOE> [<https://perma.cc/48XE-CZ3D?type=image>].

⁹³ Becerra, *supra* note 91, at 128.

⁹⁴ See Brian DeSantis, *Letting the Candidates Own the Recount: The 1962 Minnesota Gubernatorial Recounts and Its Use of Alternative Dispute Resolution*, 27 OHIO ST. J. ON DISP. RESOL. 405, 422, 434–35 (2012) (providing a detailed historical account of a successful arbitration process to resolve a disputed election).

⁹⁵ See Rebecca Green, *Mediation and Post-Election Litigation: A Way Forward*, 27 OHIO ST. J. ON DISP. RESOL. 325, 353, 353 n. 114 (2011) [hereinafter *Green II*]; Ceridwen Cherry, *Increasing Youth Participation: The Case for a National Voter Pre-Registration Law*, 45 U. MICH. J.L. REFORM 481, 481 n.2 (2012).

⁹⁶ *Alternative Dispute Resolution*, FEDERAL ELECTION COMMISSION (2021) [hereinafter *FEC ADR*], <https://www.fec.gov/legal-resources/enforcement/alternative-dispute-resolution/> [<https://perma.cc/VXB8-HZN3?type=image>].

⁹⁷ *Id.*

⁹⁸ Becerra, *supra* note 91, at 126.

dispute resolution regarding contested Congressional elections.

B. *Why Arbitration is Better Fit to Resolve Disputed Elections Compared to Mediation and Litigation*

In this Article I argue arbitration is the best suited dispute resolution process for postelection disputes. Yet, other commentators have argued for either mediation⁹⁹ or litigation¹⁰⁰ as the proper method for resolving postelection disputes. In this section, I argue both alternative options present significant downsides compared to arbitration.

Mediation like arbitration is an ADR process that is less formal compared to court adjudication.¹⁰¹ Specifically, mediation is an ADR process where a disinterested neutral assists disputants in reaching a voluntary settlement by identifying mutual interests.¹⁰² Compared to court adjudication, mediation retains many benefits associated with arbitration like procedural flexibility, cost savings, and expediency.¹⁰³ Unlike arbitration, the neutral does not render an award instead the mediator assists the parties in reaching a mutually beneficial agreement.¹⁰⁴ This “essential distinction,”¹⁰⁵ is precisely what makes mediation inferior compared to arbitration for resolving postelection disputes. Due to the urgency in resolving postelection disputes, it is necessary for the neutral to take an active role in deciding the outcome instead of assisting the parties in reaching a settlement like in

⁹⁹ E.g., Lawrence Susskind, *Could Florida Election Dispute Have Been Mediated?*, DISP. RESOL. MAG., Winter 2002, at 8, 10 (ambitiously arguing that Gore and Bush could have mediated the contested 2000 president election through a settlement that might have (1) agreed to cooperation and feedback on Supreme Court and cabinet appointments, and (2) agreed to bipartisan task forces to develop policy proposals).

¹⁰⁰ Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1243 (2005) (arguing publicity associated with election litigation may reduce election worker confusion by clarifying rules and inform the public about upcoming elections); Gregory J. Wallance, *Republican Election Hypocrisy Knows No Limits*, THE HILL (Apr. 2, 2021, 5:30 PM), <https://thehill.com/opinion/campaign/546225-republican-election-hypocrisy-knows-no-limits> [<https://perma.cc/VM9S-L8AM>] (“Courts should decide election challenges in the first instance because they are neutral forums with the expertise to weigh and decide between conflicting claims based on legal standards and not based on political power.”).

¹⁰¹ COOLEY, *supra* note 72, at 2–3.

¹⁰² *Id.* at 2.

¹⁰³ See Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251, 252 (2007); Butcher-Lyden, *supra* note 74, at 548.

¹⁰⁴ COOLEY, *supra* note 72, at 2.

¹⁰⁵ *Id.*

mediation.¹⁰⁶ When election results are disputed, an expeditious decision is important due to the public's need for elected representation.¹⁰⁷ Therefore, arbitration is better suited for postelection disputes compared to mediation.

While mediation is not appropriate for postelection disputes, it can work for resolving pre-election disputes like campaign financing, ballot access, voter identification, and advertising disputes.¹⁰⁸ It has been suggested that pre-election dispute mediators adopt an evaluative approach.¹⁰⁹ An evaluative mediator “assesses the strengths and weaknesses of the parties’ positions so they can craft a settlement that reflects the likely outcome at trial.”¹¹⁰ By contrast, a facilitative mediator will refrain from weighing in on the substance of the dispute or suggesting options for the parties and instead facilitate a process in which the parties generate their own options.¹¹¹ The evaluative approach is likely superior for election disputes because it helps alleviate potential information asymmetry between the parties and it provides expertise to avoid unfair results.¹¹²

After disqualifying mediation as an alternative for resolving postelection disputes, we now must consider court adjudication for election disputes, which is the traditional path of resolving American postelection disputes.¹¹³ But litigation is unsatisfactory for resolving postelection disputes. In *Wyman vs. Durkin* contest, Durkin lodged multiple unsuccessful administrative and court challenges.¹¹⁴ Yet, court adjudication failed to end Durkin’s challenges, and he took his challenge to the U.S. Senate—where debate on Durkin’s challenge went on for eight long months. Ultimately, the courts were unable to reach a conclusive outcome regarding the *Durkin vs. Wyman* contest.

Additionally, the judiciary has proven historically a poor option for resolving

¹⁰⁶ Becerra, *supra* note 91, at 132.

¹⁰⁷ *Id.* at 132–33.

¹⁰⁸ *See id.* at 131. *But see* Howard S. Bellman, *A Response to “The Promise of ADR”*, 27 OHIO ST. J. ON DISP. RESOL. 321, 322 (2012) (“I would suggest 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.”).

¹⁰⁹ *Green II*, *supra* note 90 at 348.

¹¹⁰ GEOFF DRUCKER, *RESOLVING 21ST CENTURY DISPUTES: BEST PRACTICES FOR A FAST-PACED WORLD* 56 (Easton Studio Press 2012).

¹¹¹ Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 943–45 (1997).

¹¹² *Green II*, *supra* note 95, at 349–50.

¹¹³ *See Green I*, *supra* note 70, at 701.

¹¹⁴ Kutner, *supra* note 45, at 27–28.

election disputes.¹¹⁵ Throughout history, partisan courts have stooped to political interests over legitimate judicial outcomes.¹¹⁶ In the book, *Ballot Battles*, Professor Edward Foley meticulously recounts multiple historical examples of courts elevating partisanship over sound judicial decision making.¹¹⁷ Examples include the one-party controlled Rhode Island Supreme Court disregarding the majority of the voters' will in the 1956 gubernatorial election by invalidating absentee ballots "through a strained and unnecessarily technical interpretation of the state's constitution,"¹¹⁸ and the 1994 Alabama election for Chief Justice in which "renegade jurists even had the chutzpah to proclaim the ballots valid despite the explicit language of state law that provided otherwise."¹¹⁹

Beyond historically justified concerns of partisanship over justice, courts should welcome arbitration because it can alleviate the "taint" partisanship when courts enter the political thicket of disputed elections.¹²⁰ Historically, the U.S. Supreme Court was reluctant to weigh in on ballot counting disputes.¹²¹ As seen in *Taylor v. Beckham*, wherein the Court held federal courts lacked the power to address ballot counting disputes.¹²² This only changed when the Warren Court entered the political thicket.¹²³ Despite success in eliminating voting restrictions,¹²⁴ the Court's jurisprudence regarding disputed elections has embroiled it in major partisan disputes—when the public should strongly believe the judiciary is free of *any* form of partisan influence.¹²⁵ We need not look further than *Bush v. Gore* to see a negative effect on the judiciary when it considers disputed elections.¹²⁶ Justice Sandra Day

¹¹⁵ *Green I*, *supra* note 70, at 702 (citing FOLEY, *supra* note 33 at 97).

¹¹⁶ *Id.* at 700–01.

¹¹⁷ *E.g.*, FOLEY, *supra* note 33, at 228–29.

¹¹⁸ *Id.* at 230–31. *But see* Patrick T. Conley, *Rhode Island Hall of Fame Honorees: Six Legal Luminaries*, 63 RI B. J. 25, 26 (2015) (describing the Rhode Island Supreme Court's decision as "legal and technically sound").

¹¹⁹ FOLEY, *supra* note 33, at 258.

¹²⁰ *Green I*, *supra* note 70, at 700.

¹²¹ *See generally* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1014–15, 1014 n.235 (2002).

¹²² *Taylor v. Beckham*, 178 U.S. 548, 580–81 (1900).

¹²³ *See* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1412–13 (2002).

¹²⁴ *Id.* at 1412–13.

¹²⁵ *Green I*, *supra* note 70, at 700.

¹²⁶ Sherrilyn A. Iffil, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606 (2002); ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH*

O'Connor, the author of *Bush v. Gore*, would later reflect on the case saying, “[*Bush v. Gore*] stirred up the public,” and “[*Bush v. Gore*] gave the Court a less-than-perfect reputation.”¹²⁷ In sum, the judiciary should welcome increased use of arbitration to handle disputed elections to escape a political thicket and preserve the public perception of judicial impartiality.

At bottom, we should consider Senator Pell’s wise suggestion to use arbitration to resolve disputed elections because it offers control,¹²⁸ arbitrator specialization,¹²⁹ expeditious results,¹³⁰ cost-savings,¹³¹ proven effective in past examples,¹³² and renders an award by a third-party neutral.¹³³

III. AMENDING THE FEDERAL CONTESTED ELECTIONS ACT TO MANDATE ARBITRATION

This section proposes that Congress amend the Federal Contested Elections Act to mandate arbitration in contested election challenges.

A. *Proposed Modification of the Federal Contested Elections Act*

Mandatory Arbitration for Disputed Congressional Elections:

(A) “Arbitration” in this section means two parties meeting with an arbitration panel that shall issue a decision regarding the contested election that shall advise the House of Congress reviewing the disputed election.

(1) “Arbitration panel” in this section means a three-person panel of arbitrators.

COURT HIJACKED ELECTION 2000 3 (2001) (“The five Justices who ended election 2000 . . . have damaged the credibility of the U.S. Supreme Court and their lawless decision . . . promises to have a more enduring impact on Americans than the outcome of the election itself.”).

¹²⁷ Dahleen Ganton, *O'Connor questions court's decision to take Bush v. Gore*, CHICAGO TRIBUNE (Apr. 27, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-04-27-ct-met-sandra-day-oconnor-edit-board-20130427-story.html> [<https://perma.cc/H44K-RD2M>].

¹²⁸ *Green I*, *supra* note 70, at 705.

¹²⁹ Rabea Benhalim, *The Case for American Muslim Arbitration*, 2019 WIS. L. REV. 531, 575 (2019) (“The benefits include those that traditional commercial arbitration promotes, such as court specialization . . .”).

¹³⁰ *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (“A prime objective of an agreement to arbitrate is to achieve “streamlined proceedings and expeditious results.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985))); Matthew M. Mitzner, *Snatching Arbitral Freedom from Hall Street’s Clenched Fist*, 29 REV. LITIG. 179, 189 (2009).

¹³¹ Edna Sussman, *Why Arbitrate? The Benefits and Savings*, N.Y. ST. B.J., October 2009, at 20, 21 (“The abbreviated schedule in most arbitrations usually results in significant cost savings.”).

¹³² *E.g.*, DeSantis, *supra* note 94, at 405.

¹³³ See COOLEY, *supra* note 72, at 2.

Each party to the dispute will select one arbitrator of their choice. Each disputant shall select only one arbitrator for a total of two arbitrators. Together, the two disputant-selected arbitrators will pick the third arbitrator on the panel.

(2) “Arbitration decision” in this section means the decision issued by the arbitration panel. The arbitration decision requires a minimum of two arbitrators to sign off on the decision unless none of the panel members can agree to one decision. If two arbitrators cannot reach a decision, the third neutral arbitrator selected by two disputant-appointed arbitrators will issue the final decision for the panel.

(B) When a party files a challenge under the Federal Contested Elections Act, Congress shall automatically send the dispute to mandatory arbitration.

(1) Congress shall send the dispute to arbitration and notify the disputants to select their arbitrator within seventy-two hours of the election-related filing; and

(2) The parties will have seventy-two hours from the date of notice to select their preferred arbitrator. The two disputant-selected arbitrators will then have an additional twenty-four hours to select the third arbitrator.

(3) The parties must meet in a public forum to begin arbitration within seventy-two hours of the selection of the third arbitrator.

(C) The process will not be confidential and any records from the process will be open to the public to promote transparent and free elections.

(D) The procedural process of each arbitration will be selected by each arbitrating panel with consideration of the timeliness of the issue. The arbitrators must select either an arbitration process in which the rules of discovery and the rules of evidence do not apply, or an arbitration process in which the rules of discovery and the rules of evidence do apply.

(E) Awards and remedies are the same as those available in litigation.

B. Statutory Modification Analysis

This statutory modification combines the best aspects of arbitration and lessons from prior disputed elections challenges. This section discusses the purpose and effect of each statutory portion and how the statute improves upon the existing process of handling disputed Congressional elections.

1. Section (A)(1): The Three Person Arbitration Panel

This portion is based on the panels utilized in the 1962 Minnesota gubernatorial election and the 2008 Minnesota Senate election, both disputed elections that used

ADR panels.¹³⁴ This proposed statute offers a hybrid of the two approaches. Like both panels, the statute's panel is composed of three members.¹³⁵ The statute's panel like the 1962 panel allows the parties to select the arbitrators but differs slightly.¹³⁶ The proposed panel lets each disputant select one arbitrator each. This proposed panel still allows for party input and lets them control the process to an extent. But the panel differs slightly and vests the final appointment with the parties' arbitrators. This is like the 2008 panel where the panel was appointed by judges to ensure diversity in arbitrator political affiliation.¹³⁷ The 2008 Minnesota panel was composed of a Republican, Democratic, and a politically unaffiliated arbitrator.¹³⁸ This proposal gives the panel the power to prevent impasse between the disputants by including the third arbitrator. An impasse is more likely to occur in the modern political era because the Congressional polarization and gridlock is much more common today than in 1962.¹³⁹

2. Section (A)(2): Finality

This provision governs how awards are rendered. If two arbitrators on the panel can agree upon an award the arbitration is settled. Yet, this provision ensures that the arbitration panel can render an award in case the three-person arbitration panel cannot reach a consensus. If an impasse occurs the decision of the third arbitrator (the one appointed by the arbitrators) renders the award regarding the disputed election.

3. Section B (1-3): Timeliness

Section B concerns timeliness. Arbitration offers parties a more expeditious resolution.¹⁴⁰ First, it requires Congress to send the dispute to arbitration within twenty-four hours. Second, the statute requires each party select their preferred arbitrator within twenty-four hours. Third, the two disputant-selected arbitrators must select the third arbitrator within twenty-four hours. Finally, the section ensures that the disputants and the three arbitrators meet in a public forum within

¹³⁴ See DeSantis, *supra* note 94, at 423–24; see also FOLEY, *supra* note 33, at 325–26.

¹³⁵ See *supra* text accompanying notes 94–95.

¹³⁶ DeSantis, *supra* note 94, at 424.

¹³⁷ See FOLEY, *supra* note 33, at 326.

¹³⁸ *Id.*

¹³⁹ See Lee Drutman, *American politics has reached peak polarization*, VOX (Mar. 24, 2016), <https://www.vox.com/polyarchy/2016/3/24/11298808/american-politics-peak-polarization> [<https://perma.cc/GGJ8-XTZ2>].

¹⁴⁰ Harvey, *supra* note 78, at 385.

twenty-four hours to resolve the dispute. This process ensures the dispute is heard before a mutually agreed upon arbitration panel only four days after filing the disputed election challenge in Congress. This avoids the problems that plagued *Wyman vs. Durkin* where the U.S. Senate spent eight months debating the dispute only to declare the seat vacant after the two candidates mutually agreed to hold a special election.¹⁴¹ Meanwhile, New Hampshire citizens lacked full representation in the Senate for those eight months.¹⁴² We should utilize arbitration's expeditiousness to minimize disruption in Congressional representation.

4. Section C: Ensuring Transparency

Generally, confidentiality is considered "one of the principal advantages of arbitration."¹⁴³ Nonetheless, even though confidentiality is generally used in arbitration agreements, it does not mean that confidentiality is assured in the absence of a confidentiality agreement.¹⁴⁴

Confidentiality is *not* appropriate for resolving disputed Congressional elections.¹⁴⁵ Any sense that disputed elections are being resolved in secret will drastically reduce the public's willingness to accept the outcome.¹⁴⁶ Consequently, many states allow members of the public to observe the state's review of disputed ballots.¹⁴⁷ The 2008 Minnesota panel live-streamed its review of the disputed ballots.¹⁴⁸ In sum, confidentiality can ensure public acceptance of arbitration for resolving disputed elections.

¹⁴¹ See *supra* Part II, Section C.

¹⁴² *Id.*

¹⁴³ Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 466 (2013).

¹⁴⁴ Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 313 (2013).

¹⁴⁵ *Green I*, *supra* note 70, at 714.

¹⁴⁶ See Oliver Darcy, *Right-Wing Media Portrayed Window Covering at Ballot Center as Nefarious. Here's What Really Happened*, CNN BUSINESS (Nov. 6, 2020) <https://www.cnn.com/2020/11/05/media/detroit-windows-covered-ballots-vote-center/index.html> [<https://perma.cc/M3NX-2V6H>]; e.g., Bradford Betz & Nick Givas, *John James Campaign Alleges Irregularities, Lack of Integrity in Michigan Vote Count*, FOX NEWS (Nov. 4, 2020), <https://www.foxnews.com/politics/john-james-campaign-alleges-lack-of-integrity-in-vote-count> [<https://perma.cc/7WPD-GESH>].

¹⁴⁷ *Green I*, *supra* note 70, at 715; e.g., Brian Barrett, *Philly's Ballot-Counting Livestream Is the Only Thing Worth Watching Today*, WIRED (Nov. 4, 2020), <https://www.wired.com/story/philadelphia-ballot-counting-livestream-election-2020/> [<https://perma.cc/XQP5-RSV7>].

¹⁴⁸ FOLEY, *supra* note 33, at 320.

CONCLUSION

In sum, Congress should amend the Federal Contested Elections Act to include an arbitration panel provision to better resolve contested Congressional elections. This Article considered the “closest election in U.S. history” the 1974 Senate Election in New Hampshire which featured a drawn-out Senate hearing for eight months. Ultimately, the Senate failed to resolve the dispute, and it only ended when the two candidates on their own agreed to hold a new election. If the Senate had an arbitration panel, the two candidates, Durkin and Wyman, may have agreed much earlier to hold a special election to resolve their dispute. This would allow the Senate to focus on other pressing national issues, reduce candidate legal fees, and restore voter confidence during contested elections. Such a panel could assist both Congress and candidates in handling disputed elections and resist partisan temptation.¹⁴⁹

¹⁴⁹ *See id.*