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BEFORE
THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS & CIVIL LIBERTIES, U.S. HOUSE JUDICIARY COMMITTEE

REGARDING HR4,
AMENDING THE COVERAGE FORMULA
OF SECTION 4 OF THE VOTING RIGHTS ACT OF 1965

SEPTEMBER 5, 2019

I. INTRODUCTION

I am honored to be able to speak to you today on such an important issue, one which has occupied the attention of those concerned about voting rights since the Supreme Court's Shelby County v. Holder decision.[1] After briefly reviewing my qualifications and some relevant Voting Rights Act history, I will explain why a reauthorized Section 5 is needed; why Section 2 alone will not suffice; why Congress likely has proper authority in this area; and why the current proposal for reauthorization set out in the HR4 is for the most part appropriate. I will also make one suggestion for amending the bill.

I am the Bredesen Professor of Law at the University of Memphis, where I have taught for 19 years. Among the courses I teach are Constitutional Law, a Federal Discrimination Seminar, and Voting Rights & Election Law. My first job after law school and a two-year federal district court clerkship was in the Voting Section of the U.S. Justice Department, where I enforced the Voting Rights Act, including Section 5 preclearance review, Section 2 litigation, and constitutional challenges to minority electoral districts. As shown in the attached resume, I have published a number of scholarly articles on various aspects of the Voting Rights Act, and just recently published a book on election reform which includes substantive discussion of the Voting Rights Act and constitutional jurisprudence on voting rights claims. For a time here in Memphis, I served as an elected county commissioner. In that capacity, I was personally involved in a redistricting process, efforts to ensure election integrity, and efforts to change local methods of election.

After the Voting Rights Act's 1965 passage, voting rights advocates focused on barriers to voting registration and casting a ballot. This so-called "first generation" of Voting Rights Act enforcement, *enfranchisement*, dealt with the use of literacy tests and other devices, as well as discriminatory application by local officials, to prevent racial and ethnic minorities from registering and voting. This first wave of enforcement was extraordinarily successful. Along with the use of federal registrars authorized under the Act, the registration and turnout rates of African-American voters in the South skyrocketed within a few years. *See* Chandler Davidson & Bernard Grofman, eds., QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (1994) (QUIET REVOLUTION).

By the 1970s, attention turned to the "second generation" of Voting Rights Act cases, those dealing with *minority vote dilution*. These cases concerned the use of particular methods of election and districting plans which diluted the voting strength of minority voters such that, even though they could register and cast a ballot, they would not have a realistic or equal chance to elect candidates of choice. *See., e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986). This second wave of enforcement was also successful, resulting in a dramatic increase in the percentage of elected officials at the federal, state, and local level who were candidates of choice of minority voters. *See* QUIET REVOLUTION, *supra*.

While the second generation did improve the situation for minority voters, such minority vote dilution continued, including up to the present day. For example, in every redistricting cycle

[1] Shelby County v. Holder, 570 U.S. 529 (2013).

since 1970, Texas has been found by courts to have violated the Voting Rights Act with racially gerrymandered districts.[2] That includes the most recent 2010 round of redistricting, where a federal district court found that Texas did so with racially discriminatory intent.. Perez v. Abbott (II), 253 F.Supp.3d 864 (W.D. Tex., 2017) (intentional dilution of black and Latino vote in congressional districting plan). Texas is by no means the only jurisdiction which has in recent years engaged in minority vote dilution in violation of the Act. *See, e.g.,* Michigan APRI v. Johnson, 833 F.3d 656 (6th Cir. 2016) (elimination of straight-ticket voting in Michigan found to dilute black voting rights); Luna v. Kern County, 291 F.Supp. 3d 1088 (E.D. Cal. 2018) (Latino voter dilution in California county redistricting plan).

In recent years, a "third generation" of Voting Rights Act enforcement has arisen in response to various barriers to voting—e.g., voter ID laws, restrictions on early voting, bans on same-day registration—which tend to disproportionately burden minorities. These new "vote denial" cases[3] mark a return to the first generation's focus on the bare ability to cast a ballot. *See, e.g.*, North Carolina State Conference of NAACP v. McCrory, 831 F.3d 204, 242 (4th Cir. 2016) (striking down omnibus legislation re: voter ID, early voting, and same-day registration as being imposed with racially discriminatory purpose); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) (strict Texas voter ID law violates Act), *and* Veasey v. Abbott, 249 F.Supp.3d 868 (S.D. Tex. 2017) (finding discriminatory purpose in passage of Texas voter ID law).

Along with the continuing instances of minority vote dilution, this new generation of vote denial cases underscores the continuing need for robust Voting Rights Act protection. Because the Shelby County decision has eliminated Section 5 preclearance review, the only legal vehicle still available is an affirmative minority vote dilution lawsuit under the Act's Section 2. For the reasons discussed below, merely relying on Section 2 is not adequate for the problem.

II. INSUFFICIENCY OF SECTION 2 ALONE AS A REMEDY

In a nutshell, Section 2 is expensive, time-consuming, and ultimately less effective than Section 5.

A. Expense

Litigation under Section 2 is a daunting enterprise. For one thing, it is expensive. This is true even in those cases where plaintiffs are lucky enough to have attorneys work *pro bono,* or with no up-front fees in hope of receiving court-ordered attorneys' fees if they end up prevailing.

This is certainly true for vote dilution cases. To make out a *prima facie* case alone, plaintiffs must employ highly credentialed expert witnesses using sophisticated statistical

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[2] *See* LULAC v. Perry, 548 U.S. 399 (2006); Bush v. Vera, 517 U.S. 952, (1996); Upham v. Seamon, 456 U.S. 37 (1982); White v. Weiser, 412 U.S. 783 (1973); White v. Regester, 412 U.S. 755, (1973) (collected in Veasey v. Perry, 71 F.Supp.3d 627, 636 n.23 (S.D. Tex. 2014), *rev'd in part on other grounds*, Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc)).

[3] *See, e.g.,* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 SOUTH CAROLINA L. REV. 689 (2006).

techniques to establish racially polarized voting. Similar expert witness testimony is normally required for going beyond the *prima facie* case to establish a full record on historical discrimination & socioeconomic disparities affecting voting, the record of minority electoral success, and other inquiries under the "Senate factors" to be considered under the Act's "totality of the circumstances" approach. *See* Gingles, 478 U.S. at 41; *see also* Voting Rights Act of 1965. These expert witnesses normally do not work *pro bono,* so plaintiffs must be able to pay them for their work up front, which can be very expensive. Plaintiffs must be prepared to provide to the court extensive evidence of a "searching inquiry" into the "totality of the circumstances." *See id.;* United States v. Euclid City School Bd., 632 F. Supp. 2d 740, 770–71 (N.D. Ohio 2009); *see also* Johnson v. Hamrick, 196 F.3d 1216, 1223 (11th Cir. 1999) ("the resolution of a voting dilution claim requires close analysis of unusually complex fact patterns"). This takes a lot of time in research and preparation of documentary and witness evidence.

Vote denial cases are similarly complex and expensive. While federal courts analyzing such claims have not always required extensive evidence of racially polarized voting, they have required extensive evidence regarding the history of discrimination, socioeconomic disparities, and other intensive inquiries. *See* Dale Ho, *Voting Rights Litigation After* Shelby County: *Mechanics And Standards In Section 2 Vote Denial Claims*, 17 LEGISLATION AND PUBLIC POLICY 675, 699 (2014) (listing Senate factors discussed by courts in vote denial cases).

All of the above adds up. It is not unusual for voting rights plaintiffs and their lawyers to have to risk spending hundreds of thousands of dollars in Section 2 cases. *See* Brief of Joaquin Avila, *et al* as *Amici Curiae* in Support of Respondents a 16, *Shelby County v. Holder*, No. 12-96 (U.S. Feb. 1, 2013) (Avila Brief). Most of these expenditures will not be reimbursed regardless of the case's outcome. Some portion of the attorney fees may ultimately be reimbursed, but only if plaintiffs ultimately prevail in court. Even then, the court may not award the full amount incurred by plaintiffs' counsel, based on disagreements about the proper number of hours, billable rate, etc.

Because of this expense, civil rights organizations---one of the few types of entities with the resources to bring any Section 2 litigation—will use their limited resources to focus on the cases with the biggest impact, usually statewide challenges. But there are many voting rights problems at the local level as well, problems which will go unaddressed if Section 2 is the only relevant operative part of the Voting Rights Act. Indeed, the vast majority of Section 5 objections in the pre-Shelby County v. Holder period involved violations by local governments. *See, e.g.,* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 Nebraska L. Rev. 605, 612 (2005) (noting that 92.5% of Section 5 objections from 200 to 2005 were to voting changes at the local level).

Section 2 litigation is also expensive for the defendants. State and local governments routinely spend millions of dollars on such cases. Contrast the former Section 5 review. Almost all such review involved a streamlined administrative process which involved submitting paperwork to the Department of Justice. It thus cost jurisdictions an average of $500 to obtain preclearance review. Avila Brief, *supra*, at 20-21.

B. Time

Section 2 cases are also time-expensive. On average, such cases can last between 2 to 5 years. *Id*. at 21. It is not unusual for a redistricting case to last well toward the end of the decade.

The protracted nature of these cases is problematic in several ways. For one thing, it can be such a time commitment that it discourages plaintiffs, organizations, and lawyers from taking it on. For another, it usually means that voting rights violations continue for years without being addressed. This is because courts are generally reluctant to enter preliminary injunctions against voting practices before final adjudication after trial. Preliminary injunctions are considered extraordinary relief in even garden variety cases. Given the states' rights (or local government rights) interests involved in federal supervision of state and local voting and election rules, federal courts can be especially reluctant to do so. *See* Dale Ho, *supra*, 675 LEGIS. AND PUBLIC POLICY at 675–76. For example, of the approximately 21 successful Section 2 cases since Shelby County, preliminary injunctions, including even partial preliminary injunctions, were granted in only 1/3 of those cases. *See* U.S. Civil Rights Commission, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*, at 224-230, available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf#page=164&zoom=100,0,96. (listing successful Section 2 cases between the 2006 reauthorization and 2018); This means that several election cycles can go by with the voting rights violation going uncorrected. Once the election occurs, there are no do-overs.

Contrast review under Section 5. Almost all such review occurred administratively. *See* Dale Ho, *supra*, at 683 n.26 (over 99% of annual submissions reviewed administratively). Reviews occur within 60 to 120 days. Even in the rare case where Section 5 review went to a special three-judge court for a declaratory judgment action, those actions completed within months rather than years. *Id*. at 683-685.

C. Effectiveness

Section 2 is also less effective at preventing voting discrimination than Section 5. While Section 2 covers the entire country, that coverage matters only to the extent that plaintiffs have the time, expertise, and resources to prosecute Section 2 claims. This leads to patchwork, pick-of-the-draw enforcement. Because the burden of proof is on plaintiffs, and that burden is fairly hard to meet as a practical matter, plaintiffs may not prevail even in otherwise meritorious cases. Because the legal standard is comparatively less clear, it is harder to predict outcomes, leading to uncertainty and inconsistent enforcement.

Section 5 is comparatively more effective. While its geographic coverage area is limited, it focuses on those jurisdictions where voting rights violations are most likely. Within those jurisdictions, its coverage is comprehensive. All significant voting changes which might abridge the right to vote are screened for discriminatory purpose or effect. The legal standard—either discriminatory purpose or "retrogression"—is clear and straightforward. Advocates, courts, and jurisdictions all have a relatively clear understanding of what is permitted and forbidden.

III. POWER TO REAUTHORIZE PRECLEARANCE REVIEW

A. Generally

There is broad congressional power to remedy discrimination in voting. Section 5 of the 14th Amendment, requiring equal protection of the laws, and Section 2 of the 15th Amendment, barring racial discrimination in voting, expressly grant Congress the power to enforce the amendments "by appropriate legislation." The Supreme Court has held that under these provisions, Congress is not confined to simply proscribing acts which are themselves violations of the 14th or 15th Amendment. Instead, where "appropriate" to further the goals of the amendments, it may prohibit conduct which is not itself unconstitutional, even where such regulation "intrudes into 'legislative spheres of autonomy previously reserved to the States.'" City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)); *see also*. Katzenbach v. Morgan, 384 U.S. 641, 648 (1966) (Section 5 of 14th Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (Section 2 of 15th Amendment).[4] While Congress cannot change the substance of the restrictions of the amendments, it has "wide latitude" to draft reasonable regulations designed to remedy or prevent violations of the rights granted therein. Boerne, 521 U.S. at 519-520.

To be sure, any such exercise of congressional enforcement power must now be "congruent and proportional" to the scope of the societal problem Congress intends to address, as documented by evidence in the legislative record and soundly grounded congressional findings. Boerne, 521 U.S. at 520. But that does not undercut the broad remedial authority discussed above; it merely requires evidence in the record of a continuing and substantial problem to which the specific means—in this case, preclearance review—can be said to be "appropriate" as a remedy. *See* id. at 523-524. Indeed, in Boerne, the Court specifically cited the Voting Rights Act as a law properly supported by congressional evidence and findings to meet the "congruent and proportional" standard. Id. at 525-526 (citing South Carolina v. Katzenbach, 383 U.S. at 308; Katzenbach v. Morgan, , 384 U.S. at 656; Oregon v. Mitchell, 400 U.S. 100, 132 (1970); City of Rome v. U.S., 446 U.S. 156, 182 (1980)).

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[4] Historical evidence suggests that Section 5 of the 14th Amendment was intended to expand the power of Congress rather than the courts. *See generally* Laurent . Limiting congressional power to just proscribing those things already constitutionally proscribed would make the legislature's role redundant, or at most "insignificant." Katzenbach v. Morgan, 384 U.S. at 648. Instead, the 14th Amendment's Section 5 granted Congress the same broad, common-sense reach of authority granted by the Necessary and Proper Clause of Article I, Section 8, cl. 18, id. at 650, which Justice Marshall famously construed broadly to reach "all means plainly adapted" to an otherwise legitimate end. McCulloch v. Maryland, 17 U.S. 316, 41 (1819). In Ex parte Commonwealth of Virginia, 100 U.S. 339, 345-346 (1880), decided a mere 12 years after the amendment's ratification, the Supreme Court adopted an almost identical McCulloch-style deferential test for the broad reach of Congress' 14th Amendment Section 5 authority. The Court has construed Section 2 of the 15th Amendment in an identically broad way. South Carolina v. Katzenbach, 383 U.S. at 326.

The Shelby County decision made clear that even with the Voting Rights Act, the kind of record evidence of "widespread and persisting deprivation" of rights due to racial discrimination, Boerne, 521 U.S. at 267, would need to be substantial and up to date. *See* Shelby County, 570 U.S. at 554. To the extent the law imposed burdens on only some parts of the country, the record evidence would have to support a compelling case for why the law should treat some parts of the country differently from others regarding preclearance. *See* id. at 544-547.

But there is ample evidence available today of continuing voting discrimination against minorities, evidence which would both form a reasoned basis for treating some jurisdictions differently, and demonstrate that such properly targeted preclearance requirements were "congruent and proportional" to the scope of the problem. *See, e.g.,* U.S. Civil Rights Commission, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report*, at 224-230(2018 Civil Rights Comm'n Assessment), available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf#page=164&zoom=100,0,96. (listing successful Section 2 cases between the 2006 reauthorization and 2018); Justin Levitt, QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY, SENATE JUDICARY COMMITTEE (July 17, 2013) (Levitt QFR), at 8-27 (listing post-2006 Section 5 objections, Section 5 enforcement actions, Section 2 cases, and constitutional claims, all indicating racial discrimination in voting).

Among the data amassed in these and similar reports are that between the 2006 VRA reauthorization and the 2013 Holder decision, there were 27 Department of Justice Section 5 objections that were not later withdrawn, sounding in such areas as Redistricting (10), Method of Election (9), Polling Place Siting (2), Language Assistance (2), and Voter ID (2). Levitt QFR. During that same period, there were 25 voting changes withdrawn after the DOJ asked for more information on a submission, with a similar variety and ratio of types of voting changes involved. Id. Notably, there were 23 successful Section 2 lawsuits (from 16 different states) in the 5 years after the 2013 Holder decision, compared to only 5 such lawsuits in the 5 years prior to Holder. 2018 Civil Rights Comm'n Assessment.

B. Tennessee

Other scholars have supplemented the sources cited immediately above to document voting discrimination problems across the country in recent years. I will not repeat that here, but instead focus on issues closer to home, in Tennessee.

Federal courts have found Tennessee to have violated the Voting Rights Act with respect to its statewide state legislative redistricting plan in the 1990s redistricting cycle. *See* Rural West Tennessee African-American Affairs Council v. Sundquist, 209 F.3d 835 (6th Cir. 2000) (affirming district court finding that state House redistricting plan violated the Act). On a separate but related note, federal courts have also recently found that the state violated the Equal Protection Clause in its treatment of minority political parties regarding access to the ballot. Green Party of Tennessee v. Hargett, 791 F.3d 684 (6th Cir. 2015) (affirming lower court findings that restrictive ballot access rules violated Equal Protection rights of minor political parties).

Federal court findings are not the only source of concern. In some instances, the state's laws and practices reinforce the concern. Tennessee's unduly strict voter ID law has features which serve to disproportionately impact minority voters. For example, pursuant to the law, voters are instructed that a state handgun carry permit photo ID suffices for voter identification, but a college student ID issued by a state college does not. *See* Tennessee Secretary of State, *What ID is required when voting*, available at https://sos.tn.gov/products/elections/what-id-required-when-voting . A comprehensive 2014 U.S. Government Accountability Office (GAO) study showed that, after controlling for other potentially confounding factors, Tennessee's voter ID law caused a decline in voter turnout of between 2.2 and 3.2 percentage points. U.S. GOV'T ACCOUNTABILITY OFFICE, GA)-14-634, ELECTIONS: ISSUES RELATED TO STATED VOTER IDENTIFICATION LAWS 48, 51 (2014), https://www.gao.gov/assets/670/665966.pdf. Significantly, the GAO found that this decline was more pronounced for African-Americans than for any other racial or ethnic demographic in the state. Id. While some may say that 3 percentage points does not seem like much, it is more than enough to change the outcome in a close election., especially where skewed against black voters.

Tennessee's felon disenfranchisement law also has distinctive features raising justified alarm about discriminatory impact. It disenfranchises all those convicted of a felony; a voter has the burden of applying for reenfranchisement after having completed his sentence, but can do so only if all restitution and court costs are paid as well. *See* T.C.A. §40-29-202(b). This provision, added in 2010,[5] makes Tennessee one of only 12 states which disenfranchises those convicted of felonies not only while in prison, but also while on parole, probation, and even after having completed their sentence. Christopher Uggen, Ryan Larson, and Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016) (Sentencing Project 2016), available at https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/. Tennessee has the unique provision, passed in 2006,[6] that bars reenfranchisement of those who have served their sentence, paid all fines and fees, but still owe child support. T.C.A. §40-29-202(c). The predictably racially disproportionate result of such strict provisions: Tennessee is thus one of only 4 states where more than 20% of the adult black population is disenfranchised. Sentencing Project 2016.

Sometimes the racially disparate effect comes from local decisions, including right here in Shelby County. For example, as recently as last year the local Election Commission originally planned to open only one poll site for the first week of early voting: namely, the Agricenter, a location east of the densest urban concentrations of Memphis in a predominately white area, inconvenient by public transport for most of the black population of the city. It took loud protestsfrom numerous fronts for it to scrap that plan. Ryan Poe, *Shelby County Democrats, Memphis NAACP sue over early voting sites*, MEMPHIS COMMERCIAL APPEAL, July 6, 2018, available at https://www.commercialappeal.com/story/news/politics/elections/2018/07/06/shelby-county-democrats-sue-over-early-voting-sites/758597002/; Jackson Baker, *Democrats, NAACP Prevail in Voting-Sites Matter*, MEMPHIS FLYER, July 9, 2018, available at

[5] *See* 2010 TENN. LAWS PUB. CH. 1115 (S.B. 440).
[6] *See* 2006 TENN. LAWS PUB. CH. 860 (S.B. 1678).

https://www.memphisflyer.com/JacksonBaker/archives/2018/07/09/democrats-naacp-prevail-in-voting-sites-matter.

And voting controversies of course continue. Just this past spring, Tennessee passed the Third-Party Voter Registration Law. *See* T.C.A. § 2-2-142. This law applies to all paid persons or organizations who attempt to register more than 100 persons. Id. They must pre-register, take a government-mandated training course, and file a sworn statement promising to obey state law. Id. Knowing violations are a Class A misdemeanor, punishable up to just under 1 year in jail and and/or a $2500 fine, with each violation a separately chargeable offense. Id. The law also imposes a civil penalty of up to $2000 for any organization filing up to 500 "incomplete" voter registration applications in a given year; over 500 such applications yields a maximum civil penalty of $10,000. T.C.A. §2-2-143.

This law has a significant potential chilling effect on paid voter registration drives. It was passed in response to supposed abuses by civil rights groups operating in traditionally underserved areas--groups which had achieved dramatic registration gains in 2018, particularly among minority voters. P.R. Lockhart, *Tennessee passed a law that could make it harder to register voters*, VOX, May 3, 2019, available at https://www.vox.com/policy-and-politics/2019/4/25/18516777/tennessee-senate-voter-registration-drives-legislation-fines-lawsuit. It is currently the subject of litigation brought by civil rights organizations which engage in such registration activities. *See* Complaint, Tennessee State Conference Of The NAACP et al. v. Hargett et al., C.A. No. _____ (M.D. Tenn. May 2, 2019).

Perhaps most troubling is the provision that outlaws any arrangement where workers are paid per number of completed applications, or are subject to any minimum quotas. *See* T.C.A. §2-2142(2)(c). In registration drives such as this, as in petition signature drives, it is sometimes necessary to incentivize productivity by paying for results as opposed to paying by the hour. This is a common practice used in other areas of business life, one no doubt the supporters of this law would defend in another private business context. Taken together, these provisions create the potential for suppressing voter registration drives in the minority community.

Sadly, Tennessee has its own examples to contribute to the growing body of evidence that voting practices and procedures with racially discriminatory effects are not just a thing of the past.

What remains, then, is the question of whether the current bill sets appropriate coverage standards and definitions of violations in light of the above.

IV. HR 4

The proposed bill is actually modest compared to the predecessor Section 5. Rather than applying to any jurisdiction with historic voter registration disparities, it only applies to those with recent formal findings of voting discrimination. Rather than applying broadly to all changes affecting voting, it applies only to certain classes of voting changes, which experience has shown have the greatest potential for minority vote dilution or denial.

These classes of changes include: (1) changing the method of election regarding the use of at-large seats or multimember districts; (2) changes in jurisdiction boundaries which significantly lower minority population percentages; (3) the use of multilingual materials; (4) redistricting; (5) registration; (6) voter ID; and (7) polling place locations. And even findings of violations of methods of election, redistricting, boundary changes, and polling place changes county only where there is a significant minority population.

As a voting rights scholar, I am aware that there are many cases and Section 5 objections involving these classes of voting changes. As a Voting Section attorney, I personally handled (1) through (4). As a voting rights advocate and activist in Memphis, I was personally involved in (4) through (7).

Under HR4, preclearance coverage applies to a State if there have been 15 or more voting rights violations within the State during the last quarter-century, or 10 or more such violations, if at least one was committed by the State itself. Any subdivision of a State gets coverage if it has 3 or more such violations within the last quarter-century. A "voting rights violation" can be a court judgment, settlement, or consent decree of a violation of the 14th or 15th Amendments or of the Voting Rights Act itself; or a Section 5 objection, by either a declaratory judgment court or the DOJ.

This rule sensibly ties preclearance coverage to actual findings of voting rights violations rather than using voter registration disparities as a proxy for such violations. The definition of a "voting rights violation" plausibly relies on a judicial determination, or a formal administrative determination that is subject to judicial review.

A pattern of such determinations can be suggestive of intentional discrimination here. That is obviously true where the finding relates to a violation of the 14th or 15th Amendments, which require intentional discrimination, or where it relates to an intent finding through preclearance or Section 2 litigation. But even where a preclearance objection or Section 2 liability finding is premised on discriminatory effects alone, a nexus to intent may be present. A pattern of such violations in the same jurisdiction over a relatively close span of years, one after another, places a jurisdiction on notice as to the voting rights problems it is creating. Continuing to violate those rights, especially where voting rights advocates or minority members of the community seek in vain to forestall or amend the challenged voting practice, indicates an indifference to the voting rights of minorities which legitimately causes concern. Even in the rare case where the pattern of voting rights violations is truly the result of one good faith mistake after another, it suggests a carelessness with minority voting rights which should put us on alert to scrutinize future voting changes, lest the violations continue.

Reasonable minds can of course differ as to how long the "lookback" period should be, or how many violations should be enough within the lookback period to trigger coverage. But these standards are by no means the kind of overkill which would render them inappropriate under federalism principles.

I would recommend one change to the bill. Section 4a(b) identifies as a "covered practice" requiring preclearance the conversion of a single-member district to a multi-member or

at-large election, where there is a significant minority population. I recommend that an exception be added for when such conversion involves the use of proportional or semi-proportional election systems like limited voting, cumulative voting, or the single transferable vote, such that the relevant minority group would be expected under the threshold of exclusion formula[7] to elect candidates of choice at roughly the same or greater rate. Unlike with more traditional "winner-take-all" systems, which have long been recognized to dilute minority voting strength, the use of multimember district or at-large races under these alternative systems does *not* present minority vote dilution concerns. A conversion to such a system should not be discouraged by triggering coverage. Indeed, given the many advantages of such systems (see below), the bill should contain express language indicating such systems as acceptable choices for state and local governments.

I have written much on the virtues of such systems, including as remedies for minority vote dilution under the Voting Rights Act.[8] They have a track record of success based on use for decades throughout numerous jurisdictions throughout the United States.[9] Courts have approved their use as Voting Rights Act remedies.[10] When used properly, they have proven to adequately provide equal opportunities for minority voters to elect candidates of choice.

Indeed, in many cases, they can do so better than the canonical single-member district (SMD) remedy for minority vote dilution. Unlike SMDs, they do not rely on residential segregation to be effective, and can assist minority groups who are politically cohesive but geographically dispersed.[11] They do not rely on "virtual representation," where minority voters outside the one or two majority-minority districts must rely on minority voters within such

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[7] *See* Steven J. Mulroy, RETHINKING US ELECTION LAW 139-142 (2018) (explaining the threshold of exclusion formula).

[8] *See* Steven J. Mulroy, RETHINKING US ELECTION LAW: UNSKEWING THE SYSTEM (Edward Elgar Press 2018); .Steven J. Mulroy, *Coloring Outside the Lines: Erasing "One Person, One Vote" and Voting Rights Act Dilemmas by Erasing District Lines,* 85 MISSISSIPPI. LAW JOURNAL. 1271 (2017); Steven J. Mulroy, *Nondistrict Vote Dilution Remedies under the Voting Rights Act*, *in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 199 (Ben Griffith ed., 2d ed. 2011); Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for Using Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867 (1999); Steven J. Mulroy, *The Way Out: Toward A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333 (1998); Steven J. Mulroy, *Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 NAT'L CIVIC REV. 66 (1995).

[9] *See* Rethinking US Election Law, *supra*, at 133-139.

[10] *See* Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459, 1461-1462 (M.D. Ala. 1988) (describing a number of Alabama federal consent decrees involving the use of limited and cumulative voting to resolve VRA minority vote dilution claims); U.S. v. Euclid City School Board, 632 F.Supp.2d 740, 753-755, 770-771 (N.D. Ohio 2009) (ordering limited voting remedy); United States v. Village of Port Chester, 704 F.Supp.2d 411 (S.D.N.Y. 2010) (ordering cumulative voting remedy); *see also* Minnesota Voters Alliance v. City of Minneapolis, 766 N.W.2d 683 (Minn. 2009) (ranked choice voting system did not violate one person, one vote); Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011) (same).

[11] *See* Rethinking US Election Law, *supra*, 147-148.

districts to virtually represent them.[12] They pose no tension between "descriptive representation" (having representatives who are members of the minority group) and "substantive representation" (having the legislative delegation vote consistent with minority voters' policy preferences), a tension sometimes present with SMDs.[13]

Further, these systems are immune (when used in an at-large framework) or relatively immune (when used in multimember districts) from "reverse discrimination" legal challenges[14] and gerrymandering manipulations,[15] including the new threat of redistricting based on Citizen Voting Age Population, which threatens to underrepresent the Latino community.[16] Particularly when combined with Ranked Choice Voting, as in the proportional representation system Single Transferable Vote used in Minneapolis and Cambridge, Massachusetts, they are more amenable to cooperation among various minority groups.[17]

Aside from the above advantages specific to Voting Rights Act concerns of minority vote dilution, they have the general "good government" advantages of leading to a more accurate reflection of the popular will, representing diversity over more dimensions than simply racial and ethnic diversity (e.g., diversity as to gender and LGBT status), and enhance competition and thus voter turnout.[18]

V. CONCLUSION

The right to vote has famously and properly been called "the right preservative of other …rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964). Because it is so fundamental, robust federal measures are appropriate to protect it, even as it plays out in state and local elections. Where it is denied, victims of the denial necessarily lack the means to use the state or local political process to repeal or correct the infirm improper statute, regulation, ordinance, or administrative practice. It is thus appropriate for external actors—Congress and the federal courts—to step in.

Preclearance, specifically, was designed to "shift the advantage of time and inertia from the perpetrators" of voting discrimination to its victims. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). Because vote dilution and vote denial mechanisms are still common today, and because affirmative litigation under Section 2 places the burden of time and inertia on the victims of those mechanisms, a revived preclearance process is appropriate.

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12 *Id*. at 149-150.

13 *Id*. at 150-152.

14 *See* Miller v. Johnson, 515 U.S. 900 (1995) (invalidating under Equal Protection a minority-majority district where racial considerations were the "predominant motive" in drawing district lines).

15 *Id*. at 145.

16 *Id*. at 152. *See also* Steven J. Mulroy, *Coloring Outside the Lines*, *supra,* 85 MISSISSIPPI LAW JOURNAL 1271 (2017).

17 *Id*. at 158.

18 *Id*. at 156-168.