

**TESTIMONY OF PROFESSOR MICHAEL T. MORLEY
BEFORE THE U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS & CIVIL LIBERTIES**

**Hearing on Congressional Authority to Protect
Voting Rights After *Shelby County v. Holder*
September 24, 2019**

INTRODUCTION

Chairman Cohen, Ranking Member Johnson, and members of the Committee, thank you very much for inviting me here to testify. This Committee has held numerous hearings across the nation, receiving testimony from dozens of witnesses and compiling a voluminous record in support of a critical goal of national importance: amending the Voting Rights Act,¹ a statute that lies at the heart of our nation’s democratic infrastructure. Given the manner in which the current conservative majority of the U.S. Supreme Court construes the relevant provisions of the Constitution, it is very likely that several key sections of the proposed Voting Rights Advancement Act (“VRAA”) of 2019,² as presently drafted, would be held unconstitutional and enjoined. Modifying some of the VRAA’s provisions would substantially increase the likelihood of the current Court upholding the Act.

I. CONSTITUTIONAL BACKGROUND

A. *The Constitutional Right to Vote*

The Constitution of 1789, as originally enacted, treated voting as an almost exclusively political matter primarily within the control of the states and Congress.³ The Fourteenth

¹ Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965).

² H.R. 4, 116th Cong., 1st Sess. (introduced Feb. 26, 2019).

³ See U.S. CONST. art. I, § 2, cl. 1 (providing that the Electors for the U.S. House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature”); *id.* art. I, § 4, cl. 1 (granting state legislatures and Congress power to regulate federal elections); *id.* art. I, § 5, cl. 1 (empowering each

Amendment established new protections for voting rights,⁴ and subsequent amendments went on to prohibit the Government and states from denying citizens the right to vote on certain specified grounds, such as race,⁵ gender,⁶ failure to pay a poll tax (for federal elections),⁷ or age (for citizens who are at least 18 years old).⁸

The Supreme Court has repeatedly held that the Equal Protection Clause⁹ and Fifteenth Amendment¹⁰ prohibit only intentional racial discrimination, including laws that either contain

chamber of Congress to determine the elections, qualifications, and returns of its members); *see also* Michael T. Morley, *The New Elections Clause*, 91 NOTRE DAME L. REV. 79, 90-92 (2016).

⁴ Originally, voting rights were protected only by § 2 of the Fourteenth Amendment, which was enforceable through political channels—specifically, Congress’ authority to reduce the number of Representatives allocated to states that violated the right to vote. *See* U.S. CONST. amend. XIV, § 2; Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. L. FORUM 279, 318-19, 323-24 (discussing the original understanding and intent underlying § 2 of the Fourteenth Amendment). The Supreme Court later reinterpreted the Equal Protection Clause, U.S. CONST., amend. XIV, § 1, as prohibiting not only racial discrimination concerning voting rights but, more broadly, arbitrary or otherwise unwarranted treatment of certain groups of voters, as well. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). *See generally* Michael T. Morley, *Prophylactic Redistricting? Congress’s Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2088-2112 (2018).

⁵ *Id.* amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State **on account of race**, color, or previous condition of servitude.” (emphasis added)).

⁶ *Id.* amend. XIX, § 1.

⁷ *Id.* amend. XXIV, § 1. The Supreme Court later held that the Equal Protection Clause likewise prohibits states from requiring people to pay a poll tax in order to participate in state or local elections. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

⁸ *Id.* amend. XXVI, § 1. The Seventeenth Amendment also expanded voting rights by establishing direct elections for U.S. Senators, *id.* amend. XVII, § 1, while the Twenty-Third Amendment allowed citizens of the District of Columbia to participate in Presidential elections, *id.* amend. XXIII, § 1.

⁹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Washington v. Davis*, 426 U.S. 229 (1976); *see also Wisconsin v. City of New York*, 517 U.S. 1, 19 n.8 (1996) (“Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.”).

¹⁰ *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.) (“[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. . . . [R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.”); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (holding that a plaintiff bringing a vote dilution claim under either the Fourteenth or Fifteenth Amendments must “establish that the state or political subdivision acted with a discriminatory purpose.”); *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (holding that when a legislature “singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment”); *see also N.W. Austin Mun.*

express racial classifications¹¹ or were enacted for racially discriminatory purposes.¹² The Supreme Court explained, “Discriminatory purpose . . . implies more than . . . awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part ‘because of,’ and not merely ‘in spite of,’ its adverse effects upon a particular group.”¹³ A court will “not assume unconstitutional legislative intent even when statutes produce harmful results.”¹⁴ Accordingly, the Fourteenth and Fifteenth Amendments do not prevent states from adopting facially neutral laws (*i.e.*, laws without race-based categories) for race-neutral purposes, even if they disparately impact members of racial minority communities.¹⁵ Although some scholars, Members of Congress, and even Justices reject this interpretation of the amendments, this is the standard that the current conservative majority on the Supreme Court would apply in reviewing the VRAA’s constitutionality.

Util. Dist. No. 1 (“NAMUNDO”) v. Holder, 557 U.S. 193, 223 (2009) (Thomas, J., concurring in part and dissenting in part) (discussing “the explicit prohibition on intentional discrimination found in the text of the Fifteenth Amendment”); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (holding that no violation of the Fifteenth Amendment or other voting-rights amendments occurred because the plaintiffs “failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines”); *see, e.g., Rice v. Cayetano*, 528 U.S. 495, 512, 514-15, 517 (2000) (holding that the Fifteenth Amendment prohibits express racial classifications, including those framed in terms of ancestry); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (holding that a political party violated the Fifteenth Amendment by prohibiting minorities from participating in its primary); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (invalidating literacy test with grandfather clause pegged to a time prior to the Fifteenth Amendment’s ratification, because its only purpose was to circumvent the Fifteenth Amendment’s prohibition against racial discrimination).

¹¹ *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (holding, in a redistricting case, that the Equal Protection Clause prohibits “[l]aws that explicitly distinguish between individuals on racial grounds”).

¹² *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (holding, in a voter identification case, that “without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional”).

¹³ *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (quoting *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

¹⁴ *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

¹⁵ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (“[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.”); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”).

B. Congress' Power to Enforce the Constitutional Right to Vote

1. Historical approach—The constitutional source and scope of Congress' authority to regulate elections varies based on the type of election at issue.¹⁶ The Constitution expressly grants Congress virtually plenary power over the conduct of congressional elections.¹⁷ The Court has also construed the Constitution as authorizing Congress to exercise similarly broad power over Presidential elections,¹⁸ except states have some degree of autonomy in determining the manner

¹⁶ See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 NW. U. L. REV. ONLINE 103, 105-10 (2017).

¹⁷ U.S. CONST. art. I, § 4, cl. 1 (granting Congress power to “make or alter” the “Regulations” governing the “Times, Places and Manner of holding Elections for Senators and Representatives”). The Court has held that the “comprehensive words” of the Elections Clause confer “authority to provide a complete code for congressional elections,” including rules concerning “notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.” *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *accord Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). The clause grants Congress authority “to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.” *Smiley*, 285 U.S. at 366.

Congress may exercise its power under the Elections Clause regardless of whether a state has enacted its own laws regulating a particular aspect of the electoral process. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (“This grant of congressional power was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”); *Ex Parte Siebold*, 100 U.S. 371, 384 (1880) (holding that Congress’ authority under the Elections Clause may be exercised “at any time”). In the event of a conflict between federal and state law, Congress’ enactment prevails. *Siebold*, 100 U.S. at 384 (“The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”); *see, e.g., Inter Tribal Council*, 570 U.S. at 15 (holding that the Elections Clause requires a state law conflicting with the National Voter Registration Act to “give way”); *Foster v. Love*, 522 U.S. 67, 74 (1997) (“When Louisiana’s statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void.”).

Congress’ power under the Elections Clause is subject to several limits. First, most obviously, Congress may not use this authority to violate constitutional rights. Second, the Elections Clause does not permit Congress to regulate candidate qualifications, *see* U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3, or voter qualifications, *id.* art. I, § 2, cl. 1; *id.* amend. XVII, § 1, since other constitutional provisions expressly establish them. *See Inter Tribal Council*, 570 U.S. at 16 (holding the Elections Clause does not grant Congress power to regulate voter qualifications); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832, 835-36 (1995) (same for candidate qualifications). Finally, the Supreme Court has held that the Elections Clause does not confer power to “dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *Thornton*, 514 U.S. at 833-84; *accord Cook v. Gralike*, 531 U.S. 510, 523 (2001) (invalidating a law requiring a purportedly derogatory label to be included on the ballot near the names of candidates who refused to pledge to support term limits).

¹⁸ *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (*per curiam*); *Oregon v. Mitchell*, 400 U.S. 112, 124 & n.7 (1970) (“It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.”) (opinion of Black, J.); *Burroughs v. United States*, 290 U.S. 534, 545, 547-48 (1934); *Ex Parte Yarbrough*, 110 U.S. 651, 662, 666 (1884); *see also* U.S. CONST. art. II, § 1, cl. 5 (“The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”).

in which they will choose their presidential electors.¹⁹ Congress’ only compulsory authority over state and local elections, in contrast, stems from its power to enforce constitutional amendments guaranteeing the right to vote.²⁰ Most prominently, § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment—the “Enforcement Clauses”—grant Congress power to “enforce” those amendments “by appropriate legislation.”²¹

During the Civil Rights Era, in *Katzenbach v. Morgan*²² (Fourteenth Amendment) and *South Carolina v. Katzenbach*²³ (Fifteenth Amendment), the Supreme Court held that the Enforcement Clauses granted Congress sweeping, plenary authority to enact election-related legislation. Congress’ authority under the Enforcement Clauses was as broad as its power under the Necessary and Proper Clause²⁴ as construed in *McCulloch v. Maryland*.²⁵ “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which

¹⁹ U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors”); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“[T]he State legislature’s power to select the manner for appointing electors is plenary”).

²⁰ Congress may also attempt to regulate state and local elections under the Spending Clause, U.S. CONST., art. I, § 8, cl. 1, by offering election-related funding to states or municipalities that agree to abide by Congress’ restrictions on the use of those funds.

²¹ U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

²² *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (upholding § 4(e) of the Voting Rights Act as a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment because § 4(e) “may be regarded as an enactment to enforce the Equal Protection Clause” and was “plainly adapted to that end” (quotation marks omitted)).

²³ *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (upholding several other provisions of the Voting Rights Act under § 2 of the Fifteenth Amendment because “Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting” (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824))).

²⁴ U.S. CONST. art. I, § 8, cl. 18.

²⁵ *Morgan*, 384 U.S. at 650 (“By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause.” (citation omitted)); *South Carolina*, 383 U.S. at 326 (“The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.”).

are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²⁶

Under this approach, Congress could “exercise its discretion in determining whether and what legislation is needed” to enforce the constitutional right to vote.²⁷ The Enforcement Clauses authorized Congress to prohibit not only actual violations of Fourteenth and Fifteenth Amendment rights, but other constitutionally valid state laws and conduct that, in Congress’ judgment, impaired those rights.²⁸ The Court would uphold federal voting rights laws so long as it could “perceive a basis” upon which Congress might have believed they promoted the Fourteenth and Fifteenth Amendments’ goals.²⁹ The Supreme Court has never expressly or specifically overturned these cases; to the contrary, it continues to cite them approvingly.

2. The *Boerne* Standard—In 1996, however, in *City of Boerne v. Flores*, the Supreme Court substantially narrowed the scope of Congress’ power under § 5 of the Fourteenth Amendment.³⁰ It has not yet similarly revisited the scope of Congress’ authority under § 2 of the Fifteenth Amendment. Since the Enforcement Clauses are phrased and structured identically, and

²⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

²⁷ *Morgan*, 384 U.S. at 651; *see also South Carolina*, 383 U.S. at 324 (“Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

²⁸ *Morgan*, 384 U.S. at 648 (rejecting the argument that a federal statute prohibiting certain state practices “can not be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides” that the prohibited state practices are “forbidden by the Equal Protection Clause itself”); *South Carolina*, 383 U.S. at 327 (rejecting the argument that, under § 2 of the Fifteenth Amendment, “Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms”).

²⁹ *Morgan*, 384 U.S. at 656.

³⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

have traditionally been read *in pari materia* with each other,³¹ it is extremely likely the Court would apply this new interpretation to § 2 of the Fifteenth Amendment, as well.

In *Boerne*, the Court emphasized that Congress' power under § 5 of the Fourteenth Amendment does not include "the power to determine what constitutes a constitutional violation."³² It explained, "Congress does not enforce a right by changing what the right is."³³ Accordingly, the Court drew a "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."³⁴ *Boerne* concluded that, for a law to fall within Congress' power under § 5, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³⁵

Boerne carefully constrains Congress' power under § 5 of the Fourteenth Amendment to preserve the Supreme Court's role in construing the scope and meaning of constitutional guarantees such as the Equal Protection Clause and Fifteenth Amendment.³⁶ Such constraints are also important because § 5 allows Congress to "assert an authority over the States which would

³¹ Compare *Morgan*, 384 U.S. at 650 (construing § 5 of the Fourteenth Amendment as equivalent to the Necessary and Proper Clause), with *South Carolina*, 383 U.S. at 326 (same for § 2 of the Fifteenth Amendment).

³² *Boerne*, 521 U.S. at 519.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 520.

³⁶ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("[I]t falls to this Court, not Congress, to define the substantive of constitutional guarantees."); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress to define the substance of constitutional guarantees."); *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution."); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.").

otherwise be unauthorized by the Constitution, including abrogation of their sovereign immunity³⁷ and intrusion “into sensitive areas of state and local policymaking.”³⁸ Finally, enforcing limits on the scope of the federal government’s power preserves individual liberty by preventing the concentration and centralization of authority.³⁹

3. Invalidated Statutes—Applying *Boerne*, the U.S. Supreme Court has struck down several provisions of federal law:

- Family and Medical Leave Act of 1993’s self-care provisions, requiring states to provide unpaid sick leave to their employees;⁴⁰
- Title I of the Americans with Disabilities Act (“ADA”), prohibiting states from discriminating against disabled employees;⁴¹
- Violence Against Women Act (“VAWA”), prohibiting, and creating a private right of action for, gender-based violence;⁴²

³⁷ *Alden v. Maine*, 527 U.S. 706, 756 (1999); *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” (internal citation omitted)).

³⁸ *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

³⁹ *Morrison*, 529 U.S. at 620 (“These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.”).

⁴⁰ Pub. L. No. 103-3, §§ 102(a)(1)(D), 107(a)(2), 107 Stat. 6, 9, 16 (Feb. 5, 1993), *codified at* 29 U.S.C. §§ 2612(a)(1)(D), 2617(a)(2); *see Coleman v. Court of Appeals*, 566 U.S. 30, 39 (2012) (plurality op.) (holding that, although the FMLA’s self-care provision “offers some women a benefit by allowing them to take leave for pregnancy-related illnesses,” the law “is not congruent and proportional to any identified constitutional violations”).

⁴¹ Pub. L. No. 101-336, § 502, 104 Stat. 337, 370 (July 26, 1990), *codified at* 42 U.S.C. § 12202; *see Bd. of Trs. v. Garrett*, 531 U.S. 356, 368 (2001) (“The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational discrimination in employment against the disabled.”).

⁴² Pub. L. No. 103-322, § 40302, 108 Stat. 1796, 1941 (Sept. 13, 1994), *codified at* 42 U.S.C. § 13981; *see United States v. Morrison*, 529 U.S. 598, 627 (2000) (“Congress’ power under § 5 does not extend to the enactment of [VAWA].”).

- Age Discrimination in Employment Act (“ADEA”), as amended by the Fair Labor Standards Amendments Act of 1974, allowing states to be sued for discriminating against older employees;⁴³
- Trademark Remedy Clarification Act (“TRCA”), allowing states to be sued for false advertising;⁴⁴ and
- Patent and Plant Variety Protection Remedy Clarification Act, allowing states to be sued for patent infringement.⁴⁵

4. Applying the *Boerne* Standard—In applying *Boerne*’s “congruence and proportionality” standard, the Court has identified the following factors that weigh against a federal statute’s constitutionality under § 5:

- Prohibiting a substantial amount of state action that does not violate the Constitution—The federal statute is not primarily tailored to prevent constitutional violations, but instead goes far beyond by prohibiting state laws, policies, and conduct that are not actually unconstitutional;⁴⁶

⁴³ Pub. L. No. 93-259, §§ 6(d)(1), 28(a)(2), 88 Stat. 55, 61, 74 (Apr. 8, 1974), *codified at* 29 U.S.C. §§ 216(b), 630(b); *see Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (“In light of the indiscriminate scope of the [ADEA]’s substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment.”).

⁴⁴ Pub. L. No. 102-542, § 3(a)-(d), 106 Stat. 3567, 3567-68 (Oct. 27, 1992), *codified at* 15 U.S.C. §§ 1114(1), 1121, 1125(a), 1127; *see College Sav. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (holding that the Trademark Remedy Clarification Act was not a valid exercise of Congress’ § 5 power because “there is no deprivation of property here,” and so no constitutional rights for Congress to enforce).

⁴⁵ Pub. L. No. 102-560, § 2(a), 106 Stat. 4230, 4230 (Oct. 28, 1992), *codified at* 35 U.S.C. §§ 271(h), 296(a); *see Fla. Prepaid Postsec. Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 630 (1999) (holding that, under *Boerne*, the Patent and Plant Variety Protection Remedy Clarification Act “cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment’s Due Process Clause”).

⁴⁶ *See, e.g., Bd. of Trs. v. Garrett*, 531 U.S. 356, 372 (2001) (holding that the Americans with Disabilities Act, as applied to state governments, was not within Congress’ power under § 5 of the Fourteenth Amendment, in part because it imposed duties on states to accommodate disabled employees that “far exceed[ed] what is constitutionally required”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (holding that the Age Discrimination in Employment Act, as applied to state governments, exceeded Congress’ power under § 5 of the Fourteenth Amendment because “through its broad restriction on the use of age as a discriminating factor, [the ADEA] prohibit[ed] substantially more

- Targeting state action on the grounds it has a disparate impact on members of certain demographic groups—The federal statute is not aimed at unconstitutional intentional discrimination, but rather facially neutral state laws or policies adopted for non-discriminatory reasons;⁴⁷
- Sweeping scope—The statute prohibits broad swaths of state conduct, rather than discrete, easily identifiable acts.⁴⁸

state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard”); *Fla. Prepaid Postsec. Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 643 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress’ power under § 5 of the Fourteenth Amendment, primarily because “Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations”); *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (“Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”); *see also United States v. Morrison*, 529 U.S. 598, 620-21 (2000) (invalidating VAWA’s civil remedy because private conduct does not violate the Fourteenth Amendment); *cf. United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[I]nsofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” (emphasis in original)).

⁴⁷ *See, e.g., Coleman v. Court of Appeals*, 566 U.S. 30, 42-43 (2012) (plurality op.) (holding that the FMLA’s self-care provision exceeded Congress’ power under § 5 of the Fourteenth Amendment primarily because, “[t]o the extent . . . [it] addresses neutral leave policies with a disparate impact on women, it is not directed at a pattern of constitutional violations”); *Garrett*, 531 U.S. at 372-73 (holding that the ADA, as applied to states, exceeded Congress’ power under § 5 of the Fourteenth Amendment, in substantial part because “[t]he ADA forbids utilizing standards, criteria, or methods of administration that disparately impact the disabled, without regard to whether such conduct has a rational basis,” but such disparate impact “alone is insufficient [to establish a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny” (quotation marks omitted)); *see also Boerne*, 521 U.S. at 535 (holding that the RFRA exceeded Congress’ § 5 power in large part because, “[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry”). *But see Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (“When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation prohibiting practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.”).

⁴⁸ *See, e.g., Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress’ power under § 5, in large part because, under that Act, “[a]n unlimited range of state conduct would expose a State to claims of direct, induced, or contributory patent infringement,” and Congress made no “attempt to confine the reach of the Act by limiting the remedy to certain types of infringement”); *Boerne*, 521 U.S. at 532 (holding that the RFRA exceeded Congress’ power under § 5 of the Fourteenth Amendment, primarily because its “[s]weeping coverage ensures [the act’s] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter”); *see also Kimel*, 528 U.S. at 86, 91 (holding that the ADEA exceeded Congress’ § 5 power because of its “broad restriction on the use of age as a discriminating factor” and “the indiscriminate scope of the Act’s substantive requirements”); *cf. Lane*, 541 U.S. at 530-31 (upholding § 2 of the ADA by considering only its application to courthouses to enforce the constitutional right of access to courts, and noting that remedy was “limited”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738-39 (2003) (upholding the FMLA’s family leave provision under § 5 in “significant” part because the law was “narrowly targeted,” “affects only one aspect of the employment relationship,” and contained “many . . . limitations” on its scope, since it required only unpaid leave, applied only to certain

- Prohibiting state action that does not intentionally violate constitutional rights—

The federal statute subjects a state to suit for unintentional or negligent conduct, rather than primarily intentional constitutional violations;⁴⁹

- Shifting the burden of proof—The federal statute requires the state to prove its conduct is permissible, rather than requiring potential challengers to demonstrate that the state’s actions are invalid;⁵⁰

- Ignoring state-level remedies—The federal statute prohibits a state from engaging in conduct that is already illegal under state law, or for which state-level remedies are available;⁵¹

- National applicability—The federal statute applies across the entire nation, rather than only to states found to have violated the Constitution;⁵² and

employees, allowed recovery only of actual damages, excluded policymaking officials and their staffs, and guaranteed only 12 weeks of leave).

⁴⁹ See, e.g., *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress’ power under § 5 of the Fourteenth Amendment, in part because “Congress did not focus on instances of intentional or reckless infringement on the part of the States. . . . [N]egligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment.”); cf. *Hibbs*, 538 U.S. at 727-28 (upholding the FMLA’s family leave provision under § 5, in part because Congress had evidence that state family leave policies were “applied in discriminatory ways”).

⁵⁰ *Garrett*, 531 U.S. at 372 (holding that the ADA exceeded Congress’ § 5 powers, in part because the Act required a state employer to demonstrate that accommodating a disabled employee would impose an undue burden, “instead of requiring (as the Constitution does) that the complaining party” demonstrate the employer’s decision violated her rights).

⁵¹ *Coleman*, 566 U.S. at 39 (holding that a federal cause of action against state governments is not a congruent and proportional remedy for violations of the U.S. Constitution because existing state-level remedies “would have sufficed”); *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety Protection Remedy Clarification Act exceeded Congress’ power under § 5 of the Fourteenth Amendment, in part because Congress “barely considered the availability of state remedies . . . and hence whether the States’ conduct might have amounted to a constitutional violation under the Fourteenth Amendment”); see also *Kimel*, 528 U.S. at 91 (holding that the expansion of the ADEA to state governments exceeded Congress’ power under § 5 of the Fourteenth Amendment, noting that “[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”).

⁵² *Garrett*, 531 U.S. at 374 (holding that the ADA exceeded Congress’ power under § 5 of the Fourteenth Amendment, in part because it imposed a ‘comprehensive national mandate’” (quoting 42 U.S.C. § 120101(b)(1)); *Morrison*, 529 U.S. at 626-27 (holding that VAWA exceeded Congress’ power under § 5 of the Fourteenth Amendment, in part because “it applies uniformly throughout the nation,” despite the fact that “Congress’ findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States”); *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding that the Patent and Plant Variety

- Indefinite duration—The federal statute does not have a sunset provision.⁵³

Thus, the heart of Congress’ authority under the Enforcement Clauses is preventing constitutional violations.⁵⁴ The Court has emphasized that the term “enforce” in these provisions “is to be taken seriously—that the object of valid § 5 legislation must be the carefully delimited remediation or prevention of constitutional violations.”⁵⁵ The Enforcement Clauses also confer a limited prophylactic power to go beyond prohibiting solely constitutional violations, allowing Congress to bar some limited range of other state conduct that is closely associated with such violations.⁵⁶ The Supreme Court, however, has rejected overbroad “prophylaxis-upon-

Protection Remedy Clarification Act exceeded Congress’ power under § 5 of the Fourteenth Amendment, in part because “Congress made all States immediately amenable to suit in federal court for all kinds of possible patent infringement,” rather than “providing for suits only against States with questionable remedies or a high incidence of infringement”); *see also Kimel*, 528 U.S. at 90 (holding that evidence of unconstitutional age discrimination within one state’s agencies “would have been insufficient to support Congress’ 1974 extension of the ADEA to every State of the Union”); *cf. Garrett*, 531 U.S. 373 (noting that *Katzenbach* upheld the Voting Rights Act, in part because it was a “limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States’ systematic denial of those rights was identified”); *Boerne*, 521 U.S. at 532 (noting that *Katzenbach* upheld the Voting Rights Act, in part because “the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant”).

⁵³ *Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. at 643 (holding Congress exceeded its § 5 remedial power in part because the statute applied “for an indefinite duration”); *Boerne*, 521 U.S. at 532 (holding that the RFRA exceeded Congress’ power under § 5 of the Fourteenth Amendment, in part because it “has no termination date or termination mechanism”).

⁵⁴ *Coleman*, 566 U.S. at 36 (holding that laws enacted under § 5 must be “targeted at ‘conduct transgressing the Fourteenth Amendment’s substantive provisions’” (quoting *Fla. Prepaid Postsec. Educ. Expense Bd.*, 566 U.S. at 36)); *United States v. Georgia*, 546 U.S. 151, 158 (2006) (“[N]o one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for actual violations of those provisions.”); *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) (“Section 5 authorizes Congress to enforce commands contained in and incorporated into the Fourteenth Amendment.”); *Garrett*, 531 U.S. at 368 (“Congress’ § 5 authority is appropriately exercised only in response to state transgressions [of § 1 of the Fourteenth Amendment].”).

⁵⁵ *College Sav. Bank*, 527 U.S. at 672.

⁵⁶ *Hibbs*, 538 U.S. at 727-28 (“Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. . . . Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”); *Garrett*, 531 U.S. at 365 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence.”); *Kimel*, 528 U.S. at 81, 88 (“Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text. . . . [W]e have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.”); *Boerne*, 521 U.S. at 518 (“Legislation which deters or remedies constitutional violations can fall within

prophylaxis” measures⁵⁷ that stray too far from the promotion of Congress’ constitutionally permissible objectives.⁵⁸ The only post-*Boerne* cases in which the Court has upheld federal laws as valid exercises of Congress’ power under § 5 involved statutes that the Court construed to prohibit actual constitutional violations,⁵⁹ or that were “narrowly targeted,” featuring numerous “limitations” on both the requirements they imposed on states and the remedies they authorized.⁶⁰

C. *The Supreme Court and § 5 of the Voting Rights Act*

The Supreme Court originally upheld the constitutionality of § 5 of the Voting Rights Act in *South Carolina v. Katzenbach*.⁶¹ It began by holding that Congress’ power under § 2 of the Fifteenth Amendment was as broad as its authority under the Necessary and Proper Clause.⁶² The Court then concluded that § 5 was valid because the “exceptional conditions” and “unique circumstances” in covered jurisdictions justified measures that would not otherwise be appropriate.⁶³ African-American voter registration rates in covered jurisdictions were at least 50

the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . .”).

⁵⁷ *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014); *accord FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.).

⁵⁸ *Coleman*, 566 U.S. at 41 (holding that Congress had failed to justify a statute subjecting states to suit “for violations of a provision (the self-care provision) that is a supposedly preventive step in aid of already preventive provisions (the family-care provisions)”).

⁵⁹ *Georgia*, 546 U.S. at 158 (“[I]nsofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” (emphasis in original)).

⁶⁰ *Hibbs*, 538 U.S. at 738 (upholding FMLA’s family leave provision under § 5 of the Fourteenth Amendment); *see Tennessee v. Lane*, 541 U.S. 509, 531, 533 (2004) (upholding Title II of the Americans with Disabilities Act as a “limited,” “reasonably targeted” prophylactic measure).

⁶¹ 383 U.S. 301 (1966).

⁶² *Id.* at 326.

⁶³ *Id.* at 334.

percentage points less than for whites.⁶⁴ The Court emphasized that the Voting Rights Act’s preclearance requirements applied only to areas where “there was evidence of actual voter discrimination.”⁶⁵

Over the decades that followed, the Court repeatedly cited the Voting Rights Act as an example of a valid exercise of Congress’ authority under the Enforcement Clauses.⁶⁶ A half-century later, in *Northwestern Austin Municipal Utility District No. 1 (“NAMUNDO”) v. Holder*,⁶⁷ however, the Court raised constitutional concerns with § 5 of the Act. It explained that, by “authoriz[ing] federal intrusion into sensitive areas of state and local policymaking,” § 5 imposes “substantial federalism costs.”⁶⁸ The Court further noted that § 5’s preclearance requirements “go[] beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared.”⁶⁹ It further cautioned, “[T]he Act imposes current burdens and must be justified by current needs.”⁷⁰ Yet the Act’s coverage formula was based on data that was over 35 years old and did not “account for current political conditions.”⁷¹ Additionally, the Act requires states and localities to engage in explicitly

⁶⁴ *Id.* at 313.

⁶⁵ *Id.* at 330.

⁶⁶ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736-38 (2003); *Bd. of Tr. v. Garrett*, 531 U.S. 536, 373 (2001); *United States v. Morrison*, 529 U.S. 598, 626 (2000); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 283 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518, 525-26 (1997).

⁶⁷ 557 U.S. 193 (2009).

⁶⁸ *Id.* at 201 (quoting *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999)).

⁶⁹ *Id.* at 202.

⁷⁰ *Id.* at 203.

⁷¹ *Id.*

race-conscious decisionmaking regarding the electoral process that can raise serious constitutional concerns.⁷²

A few years later, in *Shelby County v. Holder*,⁷³ the Court resolved many of the constitutional issues raised in *NAMUNDO*. It reaffirmed that the Voting Rights Act’s preclearance requirements were “extraordinary measures to address an extraordinary problem.”⁷⁴ Requiring states to “obtain federal permission before enacting any law relating to voting” was “a drastic departure from basic principles of federalism.”⁷⁵ Similarly, the Act’s applicability to only certain states violated the structural constitutional principle of “equal sovereignty.”⁷⁶

To impose such unusual measures, Congress “must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.”⁷⁷ Yet § 4(b) of the Voting Rights Act relied on forty-year-old data to determine the jurisdictions that would be subject to § 5’s preclearance requirements. The Court concluded that “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”⁷⁸ It concluded by inviting Congress to adopt a new coverage formula for determining which states and localities would be subject to § 5’s preclearance requirements. Federal courts retain power under § 3(c) of

⁷² *Id.*

⁷³ 570 U.S. 529 (2013).

⁷⁴ *Id.* at 534.

⁷⁵ *Id.* at 535, 544.

⁷⁶ *Id.* at 535, 544.

⁷⁷ *Id.* at 553.

⁷⁸ *Id.* at 535.

the Act, however, to subject individual jurisdictions that engage in intentional discrimination concerning voting rights to preclearance requirements.⁷⁹

II. CONSTITUTIONAL CONCERNS WITH THE VOTING RIGHTS ADVANCEMENT ACT OF 2019

To maximize the likelihood that the current conservative majority on the U.S. Supreme Court will uphold the constitutionality of H.R. 4, the Voting Rights Advancement Act of 2019, the Committee should consider the following concerns and potential amendments:

A. Sections 2 and 3(a)(1) – Defining “Voting Rights Violations” to Include Violations of § 2 of the Voting Rights Act Under a Disparate Impact Theory

H.R. 4, as presently drafted, subjects states and political subdivisions to preclearance requirements if they engage in “voting rights violations.” The bill defines “voting rights violation” in part as including any violations of the Voting Rights Act. H.R. 4, § 3(a)(1) (*Proposed § 4(b)(3)(B)*). The bill also allows federal courts to “bail in” jurisdictions under § 3(c) of the Voting Rights Act, subjecting them to preclearance requirements on a case-by-case basis, if they violate § 2 of the Act. H.R. 4, § 2(a)-(b). These provisions would allow states and political divisions to be subject to preclearance requirements for violations of § 2 of the Voting Rights Act arising from election-related laws, procedures, or policies with a racially disparate impact that do not violate the Fourteenth or Fifteenth Amendments to the Constitution.⁸⁰ It is very likely that the current conservative majority on the U.S. Supreme Court would conclude that it is unconstitutional to impose preclearance requirements on states or political subdivisions for adopting constitutionally valid election laws that have racially disparate impacts.

⁷⁹ 52 U.S.C. § 10302(c).

⁸⁰ *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986).

Preclearance requirements are a prophylactic protection against potentially discriminatory voting laws. The Court has held that they impose substantial federalism costs on states, however.⁸¹ Section 2’s prohibition on racially disparate impacts is another prophylactic protection against the type of intentional racial discrimination that the Court has held violates the Fourteenth and Fifteenth Amendments.⁸² It applies to a wide range of state policies that do not amount to constitutional violations. Allowing preclearance requirements to be triggered by violations of § 2 arising from a disparate impact theory of liability impermissibly stacks prophylaxis upon prophylaxis. Accordingly, the current conservative majority on the Court is likely to conclude that § 2 of H.R. 4, as well as *Proposed § 4(b)(3)(B)*, stray too far from the prevention of actual constitutional violations to fall within Congress’ authority under the Enforcement Clauses.

B. Section 3(a)(1) – Definition of “Voting Rights” Violations

As noted above, H.R. 4 subjects states and political subdivisions that commit “voting rights violations” to preclearance requirements. The bill defines “voting rights violation” as including:

- (A) constitutional violation: a final judgment in federal court that the jurisdiction denied or abridged the right to vote on account of race, color, or membership in a language minority group in violation of the 14th or 15th amendments;
- (B) VRA violation: a final judgment in federal court that the jurisdiction violated §§ 2 or 203 of the Voting Rights Act;
- (C) failure to obtain preclearance in court: a federal court’s denial of the jurisdiction’s request for a declaratory judgment approving a change to a voting qualification, prerequisite, standard, practice, or procedure under §§ 3(c) or 5 of the Voting Rights Act;
- (D) failure to obtain preclearance from the Attorney General: the Attorney General objects to a jurisdiction’s application to change a voting qualification, prerequisite,

⁸¹ See *supra* note 68 and accompanying text.

⁸² See *supra* notes 9-12 and accompanying text.

standard, practice, or procedure under §§ 3(c) or 5 of the Voting Rights Act, and the objection is not overturned in court; or

- (E) settlement in voting rights case: the jurisdiction enters into a “consent decree, settlement, or other agreement” to amend or repeal a voting practice “that was challenged on the ground that [it] denied or abridged the right . . . to vote on account of race, color, or membership in a language minority group” in violation of the Fourteenth Amendment, Fifteenth Amendment, or §§ 2 or 203 of the Voting Rights Act.

See Proposed § 4(b)(3)(A)-(E).

In addition to the concerns set forth above, *see supra* Section II.A, this definition raises two additional concerns. **First**, *Proposed § 4(b)(3)(C)-(D)* allows a state, as well as every political subdivision within the state, to be subject to preclearance based exclusively on unsuccessful applications for preclearance to the Attorney General or a federal court. The State of Florida, for example, has 67 counties and 412 municipalities. A single unsuccessful application from only 3% of these jurisdictions over a quarter of a century would trigger preclearance requirements throughout the entire state. The Committee should either eliminate *Proposed § 4(b)(3)(C)-(D)*, or include qualifications so that a rejected preclearance application would qualify as a “voting rights violation” only if the Attorney General or court determines the jurisdiction did not present any reasonable arguments in support of its request, or the request facially and indisputably violated §§ 3(c) or 5 of the Voting Rights Act.

Second, *Proposed § 4(b)(3)(E)* treats a “consent decree, settlement, or other agreement” as a “voting rights violation” if the original complaint alleged that the jurisdiction racially discriminated in violation of the Fourteenth Amendment, Fifteenth Amendment, or §§ 2 or 203 of the Voting Rights Act. In effect, this provision treats the mere filing of a voting rights lawsuit—including by politically motivated candidates or political parties—as a voting rights violation unless the defendant jurisdiction prevails. Political subdivisions, however, face tremendous

pressure to settle voting rights suits, regardless of whether they actually violated the Constitution or federal law. Beyond political concerns, defendants run the risk of being held liable to plaintiffs for millions of dollars in attorneys' fees⁸³—a risk many municipalities cannot assume.

Proposed § 4(b)(3)(E) creates substantial incentives for private groups to file dubious lawsuits, and for defendant jurisdictions to continue litigating more substantial matters they otherwise would be willing to settle. Moreover, when each locality bears its own litigation costs, it has no incentive to consider the externalities of settlement: potentially subjecting the state and all of its municipalities to preclearance. A complaint is a pleading, not evidence. A defendant's decision to settle a case may be driven by numerous factors other than the merits of a complaint's allegations. The current conservative majority on the Court is likely to conclude that *Proposed § 4(b)(3)(E)* is too far attenuated as evidence of an actual constitutional violation to support imposition of preclearance requirements. This Committee should either delete *Proposed § 4(b)(3)(E)*, or add the following clause to it:

A consent decree, settlement, or other agreement was entered into, which resulted in the alteration or abandonment of a voting practice anywhere in the territory of such State that was challenged on the ground that the practice denied or abridged the right of any citizen of the United States to vote on account of race, color, or membership in a language minority group in violation of subsection (e) or (f), or section 2 or 203 of this Act, or the 14th or 15th Amendment, if the defendant state or political subdivision admitted liability.

Proposed § 4(b)(3)(E).

C. Section 3(a)(1) – Treatment of Political Subdivisions

Section 3(a)(1) of H.R. 4, as presently drafted, subjects states and political subdivisions to preclearance requirements based on voting rights violations in which they were completely uninvolved, and which they lacked power to prevent. The proposed statutory language provides

⁸³ 42 U.S.C. § 1988(b).

that preclearance requirements apply to “a State and all political subdivisions within the State” if either:

- “15 or more voting rights violations occurred in the State during the previous 25 calendar years,” or
- “10 or more voting rights violations occurred in the State during the previous 25 calendar years at least one of which was committed by the State itself”

Proposed § 4(b)(1)(A)(i)-(ii). A political subdivision also becomes subject to preclearance if it commits three or more voting rights violations within a 25-year period. *Proposed § 4(b)(1)(B)*.

Under *Proposed § 4(b)(1)(A)*, a political subdivision can become subject to preclearance if other, completely unrelated political subdivisions—potentially on the other side of the state, controlled by officials of a different political party—commit voting rights violations. Such collective responsibility is especially problematic given *Proposed § 4(b)(3)(C)-(D)*’s sweeping definition of “voting rights violation” as including unsuccessful requests for preclearance to the Attorney General or a federal court. This Committee should not subject all towns and counties throughout a state to preclearance requirements potentially based on a handful of jurisdictions’ unsuccessful attempts to win preclearance for amendments to their election laws that never take effect.

More broadly, a political subdivision committed to fair elections and racial equality should not be subject to preclearance based on the acts of other political subdivisions it may staunchly oppose. Similarly, a state government should not be subject to preclearance based on the acts of county or municipal governments, especially when those entities have home rule or their election officials are independently elected. *Proposed § 4(b)(1)(B)*, which holds each political subdivision accountable for its own voting rights violations, exemplifies a much fairer and constitutionally defensible approach.

D. Section 4 – Practice-Based Pre-Clearance

H.R. 4, as presently drafted, further requires all states, indefinitely, to obtain pre-clearance from either a three-judge district court panel or the Attorney General before implementing a wide range of “covered practices.” *Proposed § 4A(a)(1)(B), 4A(c)*. The list of “covered practices” includes:

- adding at-large seats in racially diverse jurisdictions, *Proposed § 4A(b)(1)(A)*;⁸⁴
- converting one or more seats from a single-member district to one or more at-large seats in racially diverse jurisdictions, *Proposed § 4A(b)(1)(B)*;
- the boundaries of a racially diverse jurisdiction change so that the percentage of the jurisdiction’s voting-age population comprised of any racial or language minority group is reduced by at least 3%, *Proposed § 4A(b)(2)*;
- the boundaries of any election district changes in any state where the population of any racial or language minority group has increased by at least 10,000 people or 20% of the voting-age population over the preceding decade, *Proposed § 4A(b)(3)*;
- any change to voter identification requirements more stringent than those set forth in 52 U.S.C. § 21083(b), *Proposed § 4A(b)(4)*;
- any enhancement to the documentation or identification requirements for registering to vote, *Proposed § 4A(b)(4)*;
- any reduction in multilingual voting materials or change in the manner in which they are provided or distributed that does not also apply to English-language materials, *Proposed § 4A(b)(5)*; and
- any reduction, relocation, or consolidation of any early, absentee, or election-day voting location impacting racially diverse areas, *Proposed § 4A(b)(6)*.

Proposed § 4A(b).

⁸⁴ For purposes of brevity, “racially diverse” is a shorthand used to refer to H.R. 4’s standard that either: (i) two or more racial groups or language minority groups each comprise at least 20% of the relevant jurisdiction’s voting-age population, or (ii) a single language minority group represents at least 20% of the voting-age population on Indian lands in the relevant jurisdiction.

A federal court must enjoin a state or political subdivision from applying any covered practice unless it first obtained preclearance. *Proposed § 4A(d)(2)*. To win preclearance, a state or political subdivision must demonstrate that its covered practice “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.” *Proposed § 4A(c)(1)*. To do so, the state must show the covered practice was not adopted for the purpose, and will not have the effect, of diminishing citizens’ “ability . . . to elect their preferred candidate of choice” on “account of race, color, or membership in a language minority group.” *Proposed § 4A(c)(2)*.

The current conservative majority on the Supreme Court would likely hold that *Proposed § 4A*’s preclearance requirements for covered practices are unconstitutional. *Proposed § 4A* imposes strong federalism costs on states by subjecting a wide list of election-related measures to preclearance. These requirements apply, indefinitely, to any state or political subdivision that adopts any of the covered practices, regardless of its lack of past discriminatory conduct or the extent of minority voter participation or political success there. The covered practices themselves are measures that have been held constitutionally valid, so long as they are not adopted with a racially discriminatory purpose.⁸⁵ Indeed, some of the covered practices, such as the relocation of polling places or changes in voting districts in response to population growth, are completely ordinary and unremarkable features of the election administration process.

⁸⁵ See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (“Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.”); *Crawford v. Marion Cnty. Sch. Bd.*, 553 U.S. 181, 202-03 (2008) (rejecting challenge to voter identification requirements imposing more stringent standards than HAVA); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971) (“[W]hen the validity of the multi-member district, as such, was squarely presented, we held that such a district is not per se illegal under the Equal Protection Clause.”).

To obtain preclearance, a state or political subdivision must demonstrate, among other things, that the measures do not give rise to a racially disparate impact. *Proposed § 4A* thus imposes a prophylaxis-upon-prophylaxis remedy that raises serious questions under *Boerne*. It creates a strong prophylactic requirement (preclearance) to ensure that states and political subdivisions comply with another prophylactic requirement (satisfying a disparate impact standard), regardless of those jurisdictions' history of racial fairness or the extent of minorities' political participation and success there. The current conservative majority on the Court is likely to hold this measure is too far removed from the protection of Fourteenth and Fifteenth Amendment rights as defined by the Court to fall within Congress' authority under the Enforcement Clauses.

E. Section 5(a)(1) – Prohibition on Enforcing Changes in Election Laws

H.R. 4, as presently drafted, contains three provisions mandating that states and most political subdivisions publicly disclose information concerning changes in their election laws.

First, a jurisdiction must provide “reasonable public notice,” within 48 hours, of changes to any “prerequisite to voting” or “standard, practice, or procedure with respect to voting” in federal elections that is adopted within 180 days of a federal election. *Proposed § 6(a)(1)-(a)(2)*. The notice must explain how the new provision differs from previous law. *Proposed § 6(a)(1)*. The statute does not further specify what information is sufficient to satisfy these requirements.

Second, a jurisdiction must provide information concerning changes to any precinct or polling place within 48 hours of adopting it,⁸⁶ *Proposed § 6(b)(1), (3)*, including:

⁸⁶ The bill is ambiguous as to whether this 48-hour requirement applies only once information concerning the precincts and polling places for an election has been initially disclosed to the public pursuant to Proposed § 6(b)(1), or instead applies continuously (including more than 30 days before federal elections).

- its name or number;
- the voting-age population and number of registered voters in the area it serves, broken down by demographic group if that information is reasonably available;
- the number of voting machines, official poll workers, and volunteers assigned there; and,
- for a polling place, its address, as well as its dates and hours of operation, and whether it is “accessible to persons with disabilities.”

Proposed § 6(b)(2).

Third, a jurisdiction must provide information concerning changes to the “constituency that will participate in an election” or “the boundaries of a voting unit or electoral district” for any federal, state, or local election within 10 days of adopting it. *Proposed § 6(c)(1)*. This information includes:

- the voting-age population, broken down by demographic group, of the affected areas;
- an estimate of the population of the affected areas “which consists of citizens of the United States who are 18 years of age or older,”⁸⁷ broken down by demographic group, if that information is “reasonably available”;
- the number of registered voters affected by the change, if that information is reasonably available; and
- for changes that apply to the entire state or a single political subdivision, the actual or estimated number of votes received by each candidate in every statewide or subdivision-wide election for the past five years.

Proposed § 6(c)(3).

The bill contains a sweeping enforcement mechanism, declaring:

The right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision if the State or political subdivision involved did not meet the applicable requirements of this section with respect to the change.

⁸⁷ The Committee should consider clarifying how this differs from “voting-age population.”

Proposed § 6(e).

As a constitutional matter, the Government likely can apply this requirement to federal elections, since it has virtually plenary authority to regulate them. It seems unlikely, however, that the Government may constitutionally enforce *Proposed § 6(e)* for violations of *Proposed § 6(c)(1)* as it applies to state and local elections. *Proposed § 6(c)(1)* applies indefinitely to all states throughout the nation; extends to any changes in jurisdictional boundaries, regardless of whether there is reason to believe a constitutional problem exists; mandates the disclosure of information that states are not constitutionally obligated to gather or release; and completely prohibits enforcement of any such changes, no matter how innocuous, if states fail to comply. The Court is likely to conclude that *Proposed § 6(e)*, as applied to state and local elections under *Proposed § 6(c)(1)*, is unconstitutional.

Putting aside constitutional objections, *Proposed § 6(e)* raises several other troubling policy concerns that this Committee should address before applying it to elections at any level of government. Most significantly, if a state or political subdivision does not disclose statutorily required information within the 48-hour or 10-day timeframes, is it completely prohibited from implementing and applying the changes at issue, or can the entity “cure” the defect by providing the information after the statutory timeframe has expired? The same issue arises if a court determines that a state did not provide sufficient information under *Proposed § 6(a)(1)* about a change to its election laws, or that its disclosures were not “reasonably convenient and accessible to voters with disabilities.” *Proposed § 6(a)(1), (b)(1)*. It is also unclear whether *Proposed § 6(e)* allows voters or candidates to challenge the results of elections by seeking a court order that certain provisional ballots be counted contrary to state law or that a new election be held, based on a state’s failure to provide the statutorily required disclosures. This Committee should amend *Proposed*

§ 6(e) to expressly address these issues now, rather than leaving the issue for courts to resolve in the context of actual elections.

To address these problems, the Committee should amend *Proposed § 6(e)* by adding the underlined sentence below, so that the Subsection reads:

The right to vote of any person shall not be denied or abridged because the person failed to comply with any change made by a State or political subdivision if the State or political subdivision involved did not meet the applicable requirements of this section with respect to the change. The foregoing sentence shall not apply if a State or political subdivision: posts, publishes, or otherwise makes available disclosures containing immaterial errors; posts, publishes, or otherwise makes available information reflecting scrivener’s, typographical, or computational errors; substantially complies with the applicable requirements of this section; or, after failing to meet this section’s requirements, cures the violations by belatedly providing the required disclosures in the required formats.

F. Section 7(a)(1) – Creation of Private Rights of Action

H.R. 4, as presently drafted, would amend 52 U.S.C. § 10308(d) to read:

Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by ~~section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section~~ *the 14th or 15th Amendment, this Act, or any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group*, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.⁸⁸

The Committee should strengthen this provision and eliminate unnecessary litigation over whether a law falls within its scope by deleting the qualifying phrase, underlined above, “that prohibits discrimination on the basis of race, color, or membership in a language minority group.” Eliminating that qualification would create a private right of action to allow voters and candidates

⁸⁸ Language in strikethrough currently exists in federal law and is deleted by the bill. Language in italics is added by the bill.

with Article III standing to sue to enforce any federal voting rights law. Federal laws comprise a critical part of the backdrop against which elections are held, and voters and candidates should be able to enforce those mandates as necessary to ensure the process occurs in a fair and legal manner.⁸⁹

CONCLUSION

The Voting Rights Enforcement Act of 2019 contains many substantial changes to federal election law. As currently drafted, however, there is a substantial risk the current conservative majority on the U.S. Supreme Court would invalidate several of its major provisions, including:

- the treatment of violations of § 2 of the Voting Rights Act under a disparate impact theory as “voting rights violations” under H.R. 4, § 3(a)(1) (*Proposed § 4(b)(3)(B)*) and grounds for “bail in” under H.R. 4, § 2;
- other components of the definition of “voting rights violations” under H.R. 4, § 3(a)(1) (*Proposed § 4(b)(3)(B)-(E)*);
- the treatment of political subdivisions under H.R. 4, § 3(a)(1) (*Proposed § 4(b)(1)(A)*); and
- the requirement for practice-based preclearance under H.R. 4, § 4 (*Proposed § 4A*).

Other minor changes would eliminate unnecessary ambiguities and strengthen the law’s protections:

- In § 5(a)(1) of H.R. 4, within the *Proposed § 6(c)(1)*, delete the phrase “, State or local”.
- In § 5(a)(1) of H.R. 4, add the following language to the end of *Proposed § 6(e)*: “The foregoing sentence shall not apply if a State or political subdivision: posts, publishes, or otherwise makes available disclosures containing immaterial errors; posts, publishes, or otherwise makes available information reflecting scrivener’s, typographical, or computational errors; substantially complies with the applicable requirements of this section; or, after failing to meet this section’s requirements,

⁸⁹ See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L.J. 113, 157 (2010) (“Allowing a private right of action thus provides a check on potential partisanship by DOJ, as well as state and local election officials.”).

cures the violations by belatedly providing the required disclosures in the required formats.

- In § 7(a)(1) of H.R. 4, delete the phrase “that prohibits discrimination on the basis of race, color, or membership in a language minority group”.