The Voting Rights Advancement Act of 2019, H.R. 4
Exacerbates Rather Then Cures the Constitutional Infirmities
of the Voting Rights Act

Testimony of

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By John C. Eastman

Good afternoon, Chairman Cohen, Ranking Member Johnson, and the other members of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Thank you for inviting me to aid in your deliberations on how to strengthen and preserve the Voting Rights Act. That Act, as originally adopted in 1965, was one of the signature accomplishments of the civil rights era of the late 1950s and 1960s. It has rightly been credited with greatly reducing and in many cases outright eliminating rank discrimination in voting rights that had persisted in parts of our country for a century after the conclusion of the Civil War.

One provision of the Act, Section 5, was an extraordinary and drastic departure from the normal rule that law must have general applicability even to warrant the name "law"—an idea that has been a mainstay of legal systems since at least Roman times, and certainly here in the United States since the very founding of our Republic. That Section's targeting of only certain jurisdictions was upheld by the Supreme Court at the time *only* because Congress had determined, and the Court agreed, that such "strong medicine … was needed to address entrenched racial discrimination in voting."[2] As the Court put it in *South Carolina v. Katzenbach*: "exceptional conditions can justify legislative measures *not otherwise appropriate*."[3]

[2] *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 535 (2013) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).
[3] 383 U.S. at 334 (emphasis added).

That last phrase, "not otherwise appropriate," was a strong signal from the Court that, at some point, the "extraordinary remedy" of targeting only certain states with the drastic remedy of requiring permission from either the Attorney General or a federal court for every change in its voting laws, practices, and procedures must come to an end. The States are, after all, separation sovereigns in our federal system, and they are not to be treated as children under the constant "mother may I" advance preclearance supervision of the federal government.

That is why from the very beginning members of the Court have expressed concerns about the constitutionality of Section 5. *See, e.g., Katzenbach*, 383 U.S., at 358-62 (Black, J., concurring and dissenting); *Allen v. State Board of Elections*, 393 U.S. 544, 586, n. 4 (1969) (Harlan, J., concurring in part and dissenting in part); *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); *City of Rome v. United States*, 446 U.S. 156, 209-21 (1980) (Rehnquist, J., dissenting); *id*., at 200-06 (Powell, J., dissenting); *Lopez v. Monterey County*, 525 U.S. 266, 293-98 (1999) (Thomas, J., dissenting); *id.*, at 288 (Kennedy, J., concurring in judgment).

That is also why, on several occasions over the past two decades, the Supreme Court itself has warned Congress that provisions of the Voting Rights Act have become constitutionally problematic. In *Reno v. Bossier Parish School Board*, for example, the Court warned that a broadening interpretation of Section 5 coverage to reach laws that merely prevented the favoring of racial minority groups would "exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality."[4] Despite that warning, Congress codified that very requirement just six years later in the 2006 amendment of the Act.

[4] 528 U.S. 320, 336 (2000).

In the 2003 case of *Georgia v. Ashcroft*, Justice Kennedy identified a key anomaly in the law, namely, that conduct which would be unconstitutional under the Fourteenth Amendment was being required in order to obtain preclearance under Section 5 of the Voting Rights Act. He added that this "fundamental flaw" "should be confronted" in a case in which the issue was squarely presented, but, quite frankly, that advice is equally applicable to Congress. Similarly, in *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193 (2009), the Supreme Court noted that the plaintiff had raised a "big question" about the constitutionality of Section 5, but did not need to reach the question because a preliminary issue of statutory construction allowed it to avoid reaching the constitutional question *at that time*. The decision itself was nevertheless a broadside criticism of both Section 5 and the trigging formula found in Section 4, criticisms that would come to the forefront just four years later in *Shelby County v. Holder*, 570 U.S. 529 (2013). And although in *Shelby County* the Court invalidated only Section 4's triggering formula, it continued to identify significant constitutional problems with Section 5—problems that, as Justice Thomas noted in his concurrent, lead to the "inevitable conclusion" that Section 5 is, under current circumstances, unconstitutional.

Yet instead of addressing those increasingly manifest constitutional problems, the Voting Rights Advancement Act of 2019, H.R. 4, doubles down on them. Granted, it proposes a new triggering formula that is not based on 50-year-old data, the principal problem with the old formula identified in *Shelby County*. But that was not the only problem identified in *Shelby County*. The very notion that preclearance requirements apply only to some jurisdictions and not others is a significant departure from the long-standing norm that law must be generally applicable, not imposing duties only on some. The general rule, in other words, is that federal laws must, absent extraordinary circumstances, treat all states as the equal sovereigns that our

Constitution recognizes. Section 5 continues to violate that general rule, and the proposed new triggering formula contained in H.R. 4 is a far cry from the pervasive violations that warranted Congress's resort to that extraordinary remedy back in 1965, and that led the Court to uphold what was initially a temporary measure in 1966.

But the constitutional problems with the Voting Rights Act, as it has been amended over the years, run even deeper than that. I was a law clerk at the Supreme Court during the October 1996 term, when *City of Boerne v. Flores* was decided. That case reminded us of the importance of critical text in Section 5 of the Fourteenth Amendment, that Congress's power is "to enforce" the requirements of the Fourteenth Amendment against the States, not to add to them. The identical language is found in Section 2 of the Fifteenth Amendment (which prohibits denial and abridgement of voting rights on the basis of race), the Nineteenth Amendment (which prohibits denial and abridgement of voting rights on the basis of sex), Section 2 of the Twenty-Fourth Amendment (which prohibits denial and abridgement of voting rights by reason of failure to pay a poll tax), and Section 2 of the Twenty-Sixth Amendment (which prohibits denial and abridgement of voting rights on the basis of age for anyone eighteen years or older).

The Supreme Court has held in numerous cases that both the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment are violated only by a discriminatory purpose or intent, not merely a disparate effect.[5] Laws that do more than "enforce" the

[5] *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); *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"); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) ("[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").

prohibition on purposeful discrimination are permissible remedial legislation only if they are "congruent and proportional" to the constitutional violation, as the Court held in *City of Boerne*. Two amendments to the original Voting Rights Act that were added over the years run afoul of that proposition, and this Committee should be considering ways to rectify those constitutional violations rather than expanding them.

One such constitutionally problematic amendment occurred in 1982, following the Supreme Court's decision in *Mobile v. Bolden*. In that case, the Court held that the original language of Section 2, like the Fourteenth and Fifteenth Amendments themselves, reached only intentional discrimination. Without benefit of the Court's subsequent analysis in *City of Boerne* confirming that Congress's Section 5 enforcement power did not allow Congress to impose additional *substantive* requirements on the states, Congress added language to Section 2 that reached disparate impact rather than merely intentional discrimination. Section 2 of the Act as originally adopted provided that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote on account of race or color." Pub. L. 89-110, 79 Stat. 437 (Aug. 6, 1965) (emphasis added). The amended Section provides that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b)." Pub. L. 97-205, 96 Stat. 131 (June 29, 1982), now codified at 52 U.S.C. § 10301(a) (emphasis added). That alteration in the language to "in a manner which results in" changed the statute from one prohibiting purposeful discrimination to one prohibiting laws that have merely a

disparate impact, which is to say, changed the statute from one "enforcing" the provisions of the Fifteenth Amendment to one adding to the substantive requirements of the Fifteenth Amendment. Constitutionally problematic at the time, the constitutional infirmity is even more clear after *City of Boerne*.

Another amendment to the Act, adopted in 1975, suffers from a similar infirmity. Purportedly relying on its Fourteenth Amendment Section 5 authority, Congress prohibited states and local governments from conducting elections only in English. Pub. L. 94-73 (H.R. 6219), 89 Stat 400 (Aug. 6, 1975), now codified at 52 U.S.C. § 10303(f)(1). Specifically, Section 203 of the 1975 Amendments, now codified at 52 U.S.C. § 10303(f)(2), provides that: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." But "language minority" is not a suspect classification,[6] so under the Fourteenth's Equal Protection analysis, classifications based on language are subject only to highly deferential rational basis review. That means that nearly all state laws that implicate "language minorities" would be upheld against an Equal Protection challenge, as long as it might have been viewed as furthering a conceivable legitimate government purpose. The additional cost of printing ballots and other election materials in multiple languages is alone sufficient to pass rational basis review. As a result, the 1975 Amendment was not designed to "enforce" the provisions of the Fourteenth Amendment against States that were violating it, but rather to impose additional burdens on the States.

[6] "National origin" is a suspect classification, of course, but almost by definition, the expansion of the Voting Rights Act to "language minorities" reaches a different class of people than those who have migrated to the United States from different nations and become naturalized citizens. A precondition of naturalization in most cases is proficiency in English. 8 U.S.C. § 1423.

The Supreme Court's holding in *Nevada v. Hibbs*, 538 U.S. 721 (2003), is instructive here. In that case, the Court upheld the abrogation of state sovereign immunity in a remedial statute addressing discrimination on the basis of sex (a suspect class), but distinguished two cases[7] in which the Court had struck down an abrogation provision in remedial statutes addressing discrimination on the basis of age or disability (non-suspect classes). The difference between the scrutiny applied to suspect classifications and non-suspect qualifications was outcome determinative on the issue whether Congress was enforcing the Fourteenth Amendment, or adding to it.

Instead of addressing and curing these existing constitutional infirmities, H.R. 4 actually exacerbates them. The proposed amendment to Section 3(c) of the Voting Rights Act adds in enforcement of federal statutes, not just the Fourteenth Amendment, in a context where Congress's authority is based solely on its Fourteenth Amendment Section 5 enforcement authority. Second, the proposed amendment to Section 203(f) expands the existing language dealing with purposeful discrimination against language minorities, already constitutionally suspect under *City of Boerne* and *Hibbs*, to disparate impact discrimination, making it even more constitutionally suspect.

Finally, the proposed change to Section 4—the preclearance trigger formula—fails the "congruence and proportionality" test the Supreme Court set out in *City of Boerne*. Instead of targeting the extraordinary preclearance remedy afforded by Section 5 to those jurisdictions currently engaged in pervasive and entrenched discrimination in voting, as was the case with the original triggering formula upheld in 1966, the new formula would extend the extraordinary preclearance remedy to any state in which as few as 10 voting rights violations had occurred in

[7] *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000).

the prior quarter century—an extremely low threshold that is far from the massive, pervasive history of voting rights violations that led to the adoption of Section 5 of the original Voting Rights Act by Congress and upholding of that provision by the Supreme Court in *Katzenbach*.