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Hearing on "Oversight of the Voting Rights Act: A Continuing Record of Discrimination" May 27, 2021

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Background

Good Morning Mr. Chairman, Ranking Members, and Members of the Subcommittee. Thank you for the invitation to speak with you today.

My name is Russ Nobile. I am a Senior Attorney at Judicial Watch Inc. and part of its election integrity group. Judicial Watch is a public interest nonprofit dedicated to promoting transparency and restoring trust and accountability in government, politics, and the law. For almost a decade, Judicial Watch has been involved in ensuring the honesty and integrity of our electoral processes.

I have been practicing as a litigator for 16 years. I have specialized knowledge and expertise in voting law. I served as a Trial Attorney for the Civil Rights Division of the U.S. Department of Justice for seven years. During this time, I led numerous voting rights investigations, litigation, consent decrees, and settlements in dozens of jurisdictions. I received several awards during my time at the Department, including a Commendation in 2006 and a Service Award in 2010.

From 2006 to 2012, I worked in the Civil Rights Division's Voting Section, which is responsible for enforcing all provisions of the Voting Rights Act of 1965 ("VRA"), National Voter Registration Act of 1993 ("NVRA"), and the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). At different times during my tenure, I was the primary attorney assigned to monitor and receive reports out of certain Section 5 covered jurisdictions, such as South Carolina, Georgia, Mississippi, and Texas. I am particularly familiar with the VRA, which is the subject of my testimony today.

Some of my voting work at the Department of Justice included the 2008 case against Waller County, Texas over how its Registrar handled voter registration applications from students at Prairie View A & M University, an historically black university. That case ultimately led to a consent decree resolving violations of Section 5 and Title I of the Civil Rights Act of 1964.[1] The Justice Department's website shows that the Waller County case was one of the last Section 5 cases it brought before the *Shelby County* decision.[2] In 2011, I was part of the trial team that represented the United States against Texas in the massive Section 5 case Texas filed over its 2010 redistricting.[3]

In 2012, I went into private practice in Mississippi, where I continued handling civil rights and voting cases, including litigating cases involving NVRA and Section 2 of the VRA. My clients included Section 5 covered jurisdictions.

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[1] *U.S. v. Waller County, et al.*, 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008).

[2] *See* Dept. of Justice, Civil Rights Division, "List of Cases Raising Claims Under Section 5 of the Voting Rights Act" available at https://www.justice.gov/crt/voting-section-litigation (last visited May 25, 2021).

[3] *Texas v. United States,* 887 F. Supp. 2d 133 (D.D.C. 2012) *vacated,* 570 U.S. 928 (2013) (citing *Shelby County v. Holder*, 570 U.S. 529 (2013).

I joined Judicial Watch in 2019. Since joining Judicial Watch, I have litigated voting cases in several states and have filed numerous friend-of-the-court briefs before the U.S. Supreme Court and courts of appeal.

The VRA and Shelby County

As the committee knows, Section 5 of the VRA was a temporary, extraordinary remedy to address an extraordinary problem. Before its passage, the democratic process in much of the South was failing because of intentional state-sponsored and/or state-supported efforts to disenfranchise Blacks. Because of this discrimination, elections did not accurately reflect popular support in those jurisdictions. The registration data showed just how much the system was failing in 1965. Before the enactment of the VRA, only 19.4 percent of Blacks of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *See Shelby County*, 570 U.S. at 529. These figures reflected a roughly 50 percent or more racial disparity between the registration rates between Blacks and Whites. *Id.*

This data led Congress to enact the Voting Rights Act of 1965, which was comprised of permanent statutes banning discrimination as well as a unique, temporary statute, Section 5. Congress developed Section 5 after it "found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Through Section 5, Congress created an unusual remedy to limit discrimination without the need for prior adjudication, and to do so by subjecting only a

specific set of jurisdictions to these extraordinary provisions. *Id.* As structured, Section 5 *presumed* that any voting change by a covered jurisdiction was implemented out of discriminatory intent or effect, until the jurisdiction proved otherwise. The Supreme Court ruled this presumption of guilt without a trial was justified in the context of the terrible racial discrimination occurring in 1965.

While Section 5 was originally a temporary provision set to expire after five years, Congress extended it for 66 years before the Supreme Court intervened in 2013 with its *Shelby County* decision. However, that does not mean that intentional or effect-based discrimination in voting are legal following the *Shelby County* decision. Permanent provisions of the VRA, such as Section 2, still prohibit such discrimination and provide the tools needed for the Justice Department or private litigants to challenge election standards, practices, or procedures that are enacted with discriminatory intent or that result in minorities having less opportunity than others to participate in the electoral process.

After *Shelby County*, it was reasonable to expect that the Justice Department would have shifted strategies focusing its resources on Section 2 enforcement. It would not have been surprising to see a large increase in the number of Section 2 cases brought by the Department since 2013, especially given the media's reporting of "rampant voter suppression." Yet, there has been no noticeable uptick in the number of Section 2 cases brought during this time. In fact, the Justice Department has only brought five Section 2 cases since the *Shelby County* decision, two of which were a replacement for the Section 5

redistricting cases against Texas that was vacated following the *Shelby County* decision.[4] In fact, looking all the way back to the start of the Obama administration in 2008, the Justice Department has filed a total of ten Section 2 enforcement cases.[5] This not to suggest that racism no longer exists. Nor is it an attack on my former DOJ colleagues' sincere desire to bring Section 2 cases. Rather, this is simply objective data that speaks to the issue of whether the Attorney General needs new authority to combat "rampant" voter suppression such that a case-by-case approach would be ineffective.

At bottom, the central question is whether current circumstances still necessitate Section 5's extraordinary remedies to combat "widespread and persistent discrimination in voting." *See Katzenbach*, 383 U.S at 328. Actual data, not social media postings, directly answers this question. It is hard to maintain "that case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting" in 2021, given the small number of Section 2 cases initiated by the Justice Department over the 8 years since the *Shelby County* decision.

Registration and Turnout Data[6]

Data, not pop culture nor hyperbole from those that oppose race-neutral election integrity laws, tells the true story of ballot access in America. To objectively evaluate

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[4] *United States v. State of Texas* (W.D. Tex. 2013) and *United States v. State of Texas* (S.D. Tex. 2013). See Dept. of Justice, Civil Rights Division, "List of Cases Raising Claims Under Section 2 of the Voting Rights Act" available at https://www.justice.gov/crt/voting-section-litigation (last visited May 25, 2021).

[5] *Id.*

[6] All registration and turnout data regarding the 2020 election is from an April 2021 report from the Census Bureau. *See* Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020)(Table 4b) https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html (last visited May 25, 2021).

whether racial minorities have an equal opportunity to participate in the electoral process, you must look at racial registration and turnout data. Looking at the most recent data, the opportunity to participate is exponentially better now than it was in 1965. Based on this data, it is hard to contend that Section 5 needs to be expanded as proposed in H.R. 4.

Registration. Current data shows that Black registration has completely rebounded and, in some instances, exceeds White registration rates. In fact, the data shows that eight years after *Shelby County*, registration disparities in Texas, Florida, North Carolina, Louisiana, and Mississippi – all previously covered (in whole or part) by Section 5 – are all below the national average. In fact, Black registration in Mississippi is 4.3% *higher* than White registration. Registration disparities in these former Section 5 states are lower than the disparities in California, New York, Connecticut, D.C., Delaware, and Virginia. In fact, the four biggest registration disparities, i.e. where White registration most exceeds Black registration, are found in Massachusetts, Wisconsin, Oregon, and Colorado, all of which President Biden won in 2020.

Turnout. The 2020 election had a higher turnout across all race groups.[7] Voter turnout disparities in Mississippi, North Carolina, Georgia, Florida, and Texas were all smaller than the national average. In fact, the disparities in turnout in Massachusetts, Wisconsin, Oregon, Colorado, New Jersey, and New York were higher than turnout

[7] "Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record," Dept. of Commerce, Census Bureau**,** Apr. 29, 2021, available at https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html (last visited on May 25, 2021).

disparities in these former Section 5 states. Again, turnout for Blacks in Mississippi outperformed that of Whites.

There is a significant disconnect between the data and the media narrative. However one views any talking points about "rampant voter suppression," the data cannot be ignored: registration rates and turnout data in 2020 far exceeds that in 1965. When Blacks now register and turnout at higher rates in places like Mississippi, it is simply not credible to claim that Jim Crow style voter suppression currently exists.[8]

Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019)

Though it purports to remedy the problems highlighted by the Supreme Court in *Shelby County*, the truth is that H.R. 4 goes far beyond any civil rights law enacted during the height of the civil rights era. Rather, it is part of a grander plan to shift control of American elections away from individual state legislatures and into the hands of a single federal bureaucratic department. It accomplishes this by giving the Attorney General a previously unseen level of authority over elections. Even more troubling than this change to our constitutional tradition of leaving elections to the states, H.R. 4 will ultimately lead to lasting damage to the Department of Justice's credibility.

H.R. 4 Gives the Attorney General Powers That Go Far Beyond Voting

H.R. 4 proves that Congress indeed hides elephants in mouseholes.[9] Buried deep in its final pages, H.R. 4 grants the Attorney General authority to enjoin "any act prohibited

[8] Editorial, *'Jim Eagle' and Georgia's Voting Law: Biden Compares State Voting Bills to Jim Crow, Never Mind the Facts*, WALL STREET JOURNAL, March 26, 2021, available online at https://www.wsj.com/articles/jim-eagle-and-georgias-voting-law-11616799451 (last visited May 26, 2021).

[9] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

by the 14th or 15th Amendment" of the Constitution.[10] This little-noticed provision will abolish a longstanding legal principle, leading to highly contentious litigation between states and the Attorney General. It is difficult to overstate the risk that this new law creates to the Department of Justice and the states. Congress should end this unprecedented effort to further inject the Justice Department into partisan election disputes before it goes any further.

Under current law, the Attorney General is only authorized to bring civil rights claims under specific statutes, typically those statutes prohibiting discrimination, and has no authority to sue directly for certain violations of the Constitution. Private plaintiffs can, and do, allege violations of the Constitution, but the Justice Department does not. This proposed change is a major power shift, allowing the Justice Department to become involved in a whole range of 14th Amendment cases that previously it would have been unable to pursue. The opportunity for any administration, Republican or Democratic, to exploit this new law is significant.

In the election context, we need only look to the 2020 presidential election to see the impact this provision would have had. Virtually every dispute during the 2020 election involved a 14th Amendment claim. While many praised Attorney General Barr's restraint in not involving the Department of Justice in that litigation, he undoubtedly declined to act because, as the Attorney General, he lacked standing over 14th Amendment disputes. If H.R. 4 had been implemented in 2019, the Justice Department would have been under

[10] Sec. 7(a) of H.R. 4.

enormous pressure to intervene or bring its own 14th Amendment case, such as suing to stop last last-minute changes to election laws rushed through Pennsylvania, Arizona, Wisconsin, North Carolina, Georgia, and Michigan. The exact same can be said about the highly partisan dispute in *Bush v. Gore*.

Of course, it is not just presidential elections in which the Attorney General could use these new powers. He or she will have the opportunity going forward to bring constitutional claims to "help" resolve election disputes involving preferred congressional candidates too. It is impossible to quantify the long-term effects on our electoral process if the Justice Department begins resolving highly-partisan electoral disputes.

What is more alarming is that the new 14th Amendment powers in H.R. 4 are not limited to voting rights.[11] As written, the Attorney General will be allowed to bring *any*

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[11] As amended by H.R. 4, 52 USC §10308(d) will provide as follows:

> d) Civil action by Attorney General for preventive relief; injunctive and other relief
> 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 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 aggrieved person or (in the name of the United States) the Attorney General may institute 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 chapters 103 to 107 of this title to vote and (2) to count such votes.

Currently, section (d) of 52 U.S.C. §10308 provides:

> (d) Civil action by Attorney General for preventive relief; injunctive and other relief
> 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 10301, 10302, 10303, 10304, 10306, or 10307 of this title, section 1973e of title 42,1 or subsection (b) of this section, 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 chapters 103 to 107 of this title to vote and (2) to count such votes.

action under the 14th Amendment, which could include actions to promote (or restrict) gun rights, religious liberties, and abortion rights. How the Attorney General exercises these new powers will, of course, depend on whichever direction the political winds are blowing at that time. Members of Congress who support H.R. 4 may feel radically different when another administration takes control.

Ultimately, this new authority raises more questions than can possibly be addressed today. For now, though, there are real questions about what this new power means for private constitutional and § 1983 litigation.

H.R. 4's Coverage Formula For Traditional Section 5

H.R. 4's new coverage formula for traditional Section 5 creates incentives that pervert civil rights enforcement. Under H.R. 4, jurisdictions that have had a number of "voting rights violations" over a period of time will be subject to Section 5 coverage. The most obvious problem with this new coverage formula is the incentives it creates. H.R. 4 defines "voting rights violations" broadly, capturing minor settlements that never resolved the merits of any claims. This definition actually retroactively penalizes jurisdictions that previously entered into good faith settlements motivated by their desire to amicably resolve disputes and limit public costs without regard to the legitimacy of the claims. Having handled affirmative civil rights litigation, I can say firsthand that discouraging settlement is counterproductive to the enforcement of civil rights laws.

Moreover, it is not just the Justice Department who brings voting lawsuits. H.R. 4 creates something akin to the "heckler's veto" for the loudest private interest groups, encouraging them to drive up "voting rights violations" (i.e., minor settlements) against

targeted jurisdictions. Under this coverage formula, advocacy groups and other litigants will be incentivized to "sue and settle" cases, before running to the Justice Department to claim they triggered Section 5 coverage. Such incentives could further encourage collusive settlements – where local officials enter into meritless settlements with groups to which they are aligned – artificially driving up "voting rights violations." Ultimately, H.R. 4's coverage formula does not correct the problems raised in *Shelby County*. In fact, it aggravates the problems by replacing the data-based approach for Section 5 coverage with a new easily corruptible process that rewards litigious parties. This will further encourage the type of close coordination between the Justice Department and advocacy groups criticized in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *affirmed*, 515 U.S. 900 (1995). This is not how Section 5 coverage should be determined.

Regardless of coverage, it goes without saying that the bureaucratic nature of Section 5 discouraged jurisdictions from making good faith improvements to their voting laws. We may disagree on the degree, but anytime you drive up costs and increase regulation, it discourages the targeted behavior (i.e., non-discriminatory changes to elections practices from 1966 – 2013). Much has been made of new voting changes implemented by covered jurisdictions since 2013, but such changes are to be expected. For 48 years, there were substantial costs and risks (both legal and political) associated with making even minor changes to how elections were conducted in Section 5 jurisdictions. The fact that changes have been made post-*Shelby County* does not mean that all of those changes were racially motivated.

There Is No Data Supporting Nationwide Section 5 Coverage

Inexplicably, H.R. 4 imposes a new nationwide preclearance coverage called "Practice-Based Preclearance Coverage." Whatever the lingering effects are from the civil rights era, there is no data that supports expanding Section 5 nationwide. Because this new preclearance targets certain standards, practices, and procedures such as voter identification and list maintenance, it is reasonable to conclude that nationwide preclearance is designed to target popular voter integrity provisions. Clearly, it is not because the Congress determined that "case-by-case litigation [by the Department of Justice is] inadequate to combat widespread and persistent discrimination in voting." If nationwide registration disparities did not justify nationwide Section 5 coverage during the Jim Crow era, it is hard to see what data from 2020 supports imposing a nationwide preclearance requirement today.

H.R. 4's Transparency Provisions

Section 5 of H.R. 4 also imposes a new transparency regime. Specifically, it requires that all state or political subdivisions to provide formal notice of changes to any voting standard, practice, or procedure with respect federal elections occurring 180 days or less before the election. Whatever the motivation for this provision, had it been in effect during the 2020 election, it would have led to even more litigation, likely limiting many of the new election laws put into effect during the 2020 federal election. Because of H.R. 4's permissive private right of action, there would have been no way to limit the number of private transparency suits challenging COVID-related election changes.