

Testimony Before the United States House of Representatives' Committee on the Judiciary's Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

The Implications of *Brnovich v. Democratic National Committee* and Potential Legislative Responses.

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Good afternoon Chairman Cohen, Ranking Member Johnson, and Members of the Subcommittee. Thank you for the invitation to speak with you today. My name is Robert D. Popper. I am a Senior Attorney and Director of voting integrity efforts at Judicial Watch, Inc. Judicial Watch is a Washington, D.C.-based public interest nonprofit dedicated to promoting transparency, accountability, and integrity in government, politics, and the law.

I was admitted to the Bar in New York in 1990, and I have been practicing as a litigator for 31 years. I have special knowledge and expertise in the area of voting law. In 1995, as a solo practitioner, I represented plaintiffs in a successful constitutional challenge to the design of New York's 12th Congressional District.¹

In 2005, I joined the Voting Section of the Civil Rights Division of the U.S. Department of Justice, where I worked for eight years. In 2008, I received a Special Commendation Award for my efforts in enforcing Section 7 of the National Voter Registration Act of 1993 ("NVRA"), which requires state offices providing public assistance to offer those receiving it the opportunity to register to vote. That same year, I was promoted to Deputy Chief of the Voting Section. In my time at the DOJ, I managed voting rights investigations, litigations, consent decrees, and

¹ *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (three-judge court), *aff'd mem.*, 521 U.S. 801 (1997).

settlements in dozens of states. I helped to enforce all the statutes the Department is charged with enforcing, including the NVRA, the Help America Vote Act of 2002, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, and the Military and Overseas Voter Empowerment Act of 2009. Of particular relevance, I managed lawsuits enforcing the Voting Rights Act of 1965, as amended, including the minority language provisions of Section 203; the preclearance provisions of Section 5; the anti-intimidation provisions of Section 11; and Section 2, the subject of the *Brnovich* decision.²

In 2013, I joined Judicial Watch. In my time here, I have litigated voting rights cases in several states and have filed numerous friend-of-the-court briefs before the U.S. Supreme Court—including in *Brnovich*³—and in various other courts. I have testified before state legislatures on voting reform measures. In the course of my career, I have published popular pieces and scholarly articles on the subject of voting law.⁴

I. The Law Prior to *Brnovich*.

Section 2 of the Voting Rights Act provides in relevant part that a state or jurisdiction’s civil liability for a “denial or abridgment” of the right to vote

is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected]

² *Brnovich v. Democratic Nat’l Comm.*, Nos. 19-1257 and 19-1258, ___ S. Ct. ___, 2021 U.S. LEXIS 3568 (July 1, 2021).

³ Amici Curiae Brief of Judicial Watch, Inc. and Allied Educational Foundation in Support of Petitioners, *Brnovich v. Democratic Nat’l Comm.*, Nos. 19-1257, Dec. 7, 2020.

⁴ See, e.g., *How H.R.1 Intends to Overturn Supreme Court Rulings on Elections*, THE HILL, March 21, 2021; *The Voter Suppression Myth Takes Another Hit*, WALL ST. J., December 28, 2014; *Florida Gets Another Chance to Appeal for the Right to Clean Voter Rolls, They Should Take It*, THE DAILY CALLER, December 11, 2014; *Political Fraud About Voter Fraud*, WALL ST. J., April 27, 2014; *Little-Noticed Provision Would Dramatically Expand DOJ’s Authority at the Polls*, THE DAILY CALLER, March 28, 2014; and, with Professor Daniel D. Polsby, *Guinier’s Theory of Political Market Failure*, 77 SOC. SCI. Q. 14 (1996); *Racial Lines*, NAT. REV. 53, February 20, 1995; *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301 (1991); *Gerrymandering: Harms and a New Solution*, Heartland Institute Monograph (1990).

class of citizens ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52. U.S.C. § 10301(b). Although Section 2 clearly forbids intentional discrimination, the cited text also proscribes political processes that *result* in a discriminatory electoral outcome, whether or not intent is claimed or proved. A Section 2 claim that alleges a discriminatory effect, but not discriminatory intent, is often referred to as a “results” claim.

In the seminal case of case of *Thornburg v. Gingles*, 478 U.S. 30, 46 *et seq.* (1986), the Supreme Court explained what must be shown to prevail on a claim of “vote dilution,” which alleges that an electoral system has the result, whether intended or not, of “submerging” minority voters in a racial majority. This particular kind of “results” claim is typically made where an at-large or a multi-member district system (at issue in *Gingles*) deprives a substantial racial minority of any effective representation. The analysis in *Gingles*—indeed, the language of Section 2 itself, which was amended in 1982—were based in turn on the analysis supplied by an earlier Supreme Court decision, *White v. Regester*, 412 U.S. 755, 765-66 (1973).

What was not resolved by the Supreme Court in *Gingles* or *Regester* was how a plaintiff could plead and prove a “results” claim that is *not* based on vote dilution. In other words, how should a court assess a claim that a time, place, or manner regulation concerning, for example, the documents needed to register or vote, the hours or locations of poll sites, or the requirements for voting by mail, violated Section 2 of the Voting Rights Act?

Prior to *Brnovich*, courts adopted basically two approaches in resolving such claims. The difference between these approaches ultimately led to a significant split between circuits, and even between different panels of the same circuit. A clear majority of courts and circuits required “proof that the challenged standard or practice causally contributes to the alleged

discriminatory impact by affording protected group members less opportunity to participate.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637-38 (6th Cir. 2016); *see Frank v. Walker*, 768 F.3d 744, 752-53 (7th Cir. 2014); *Luft v. Evers*, 963 F.3d 665, 668-69, 672-73 (7th Cir. 2020); *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc), *aff’d on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998); *Greater Birmingham Ministries v. Sec’y of State for Ala.*, 966 F.3d 1202, 1233, 1238 (11th Cir. 2020); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 598, 600 (4th Cir. 2016); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989).

A second approach, however, did not require plaintiffs to establish that a challenged procedure itself particularly caused the loss of opportunity proscribed by Section 2, but only that a challenged procedure “affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both.” *Veasey v. Abbott*, 830 F.3d 216, 245 (5th Cir. 2016) (en banc); *see League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *see also Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated*, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014). Evidence of “social and historical conditions” is what is known as “Senate Factor” evidence, a reference to the Senate report discussing Section 2. *Id.*; *see S. Rep. No. 97-417*, at 28-29 (1982). In other words, under this second approach, (1) disparate impact, plus (2) general, Senate Factor evidence establishes a violation of Section 2’s “results” standard.

II. The Second Approach in Practice.

It was inevitable that this second approach would lead to legal challenges against even

the most ordinary seeming electoral rules. This is because plaintiffs will almost always be able to establish the two prongs of this approach. Every law has a “disparate impact,” whether intentional or accidental, regarding any group or subgroup that can be defined. And every region in the country, and, for that matter, in the world, has seen its share of racial and ethnic discrimination. Establishing the necessary “social and historical conditions that have produced discrimination,” moreover, is facilitated by utilizing the assumptions inherent in Critical Race Theory, which postulates that existing institutions are designed to reinforce current racial, ethnic, and gender hierarchies.

Accordingly, a great many Section 2 lawsuits were commenced in recent years challenging ordinary seeming regulations—and *changes* to such regulations—governing, for example, the use of absentee ballots, in-precinct voting, early voting, voter ID laws, election observers, same-day registration, durational residency requirements, and straight-ticket voting.⁵ These lawsuits were filed notwithstanding that many, or a majority, or even a vast majority of states had an identical statutory framework to that that was being challenged.⁶ Indeed, in a less contentious political atmosphere, the bipartisan Carter-Baker Commission in 2005 expressly noted the need for such regulations, including those regarding absentee ballots (“the largest source of potential voter fraud”), out-of-precinct voting, early voting, in-person ID requirements, and election observers.⁷

No regulation or burden seemed too trivial to give rise to a Section 2 lawsuit. A good

⁵ See Brief of Senator Ted Cruz and Ten Other Members of the United States Senate as Amici Curiae in Support of Petitioners, Dec. 7, 2020, at 22-24, cited in *Brnovich.*, 2021 U.S. LEXIS 3568 at *21 & n.6.

⁶ *Id.* at 22 (noting that 27 states limit out-of-precinct voting); at 24 (noting that only six states offer straight-ticket voting).

⁷ *Id.* at 20, 22, 23, 24; see Carter–Baker Comm’n on Fed. Elections Reform, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005).

sense of how extreme the new crop of lawsuits could be is afforded by the Sixth Circuit's decision in *Husted*. The district court in that case had declared that an Ohio law that decreased the early voting period from 35 days to 29 days violated Section 2 of the Voting Rights Act. *Husted*, 834 F.3d at 623. The district court reached this conclusion, notwithstanding that it found any resulting disparate burden to be “‘modest’ (*i.e.*, ‘more than minimal but less than significant’),” on the theory that the change “interacts with the historical and social conditions facing” minority voters to “reduce their opportunity to participate in Ohio’s political process relative to other groups.” *Id.* at 625, 626.

In reversing, the Sixth Circuit noted the obvious fact that the loss of one week of early voting was, “[a]t worst,” a “contraction of just one of many conveniences that have generously facilitated voting participation in Ohio.” 834 F.3d at 628. It noted as well that thirteen states did not “permit any early in-person voting days,” and that “[i]ronically,” Ohio “would have avoided this challenge altogether” by never adopting an early voting period in the first place. *Id.* at 628-29. Maintaining that state laws had “established a federal floor that Ohio may add to but never subtract from,” creating in effect a “one way ratchet,” was an “astonishing proposition.” *Id.* at 623. The court observed:

Under this conception of the federal courts’ role, little stretch of imagination is needed to fast-forward and envision a regime of judicially-mandated voting by text message or Tweet (assuming of course, that cell phones and Twitter handles are not disparately possessed by identifiable segments of the voting population).

Id. at 629.

The facts of *Husted* and these other cases should be kept in mind when assessing the outrageous hyperbole used to describe the kinds of regulations that have been challenged, and the Supreme Court’s decision in *Brnovich*. One hears—and large news outlets dutifully report—that there is a “tsunami” of legislation “restricting the right to vote,” that states reforming their

mail-in voting laws as COVID retreats are engaged in “voter suppression,” and even that these actions represent “the new Jim Crow.” These claims are preposterous. At best, they reveal a startling historical ignorance. The grandfather laws, absurd literacy tests, poll taxes, intimidation and terroristic violence of the Jim Crow era have nothing whatever to do with, say, Ohio’s restriction of early voting from 35 to 29 days, or with limiting same-day registration. Nor do they have anything to do with regulating absentee ballots, out-of-precinct voting, or voter ID requirements, all reasonable electoral integrity measures approved by the Carter-Baker Commission.

At worst, these statements reveal a startling cynicism, driven by a desire to inflame passions—and to raise funds. Those who talk this way are being irresponsible.

III. The decision in *Brnovich*.

Ultimately, the Supreme Court in *Brnovich* did no more than resolve the issue left open in *Gingles* and *Regester*, namely, what are the standards that govern a Section 2 “results” claim challenging regulations regarding the time, place, and manner of voting? The answers the Court gave to this question mirrored the approach of a majority of courts to have considered the issue.

The Arizona statutes challenged in *Brnovich* were as neutral as the Ohio statutes at issue in *Husted*:

First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots will not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter’s family member, household member, or caregiver.

Brnovich., 2021 U.S. LEXIS 3568, at *13. In determining how to assess a challenge to such regulations, the Court started with the plain language of Section 2. “The key requirement is that ... the process of voting [] must be ‘equally open’ to minority and non-minority groups alike.”

Id. at *30-31. “Open” means “without restrictions as to who may participate,” and “requiring no special status, identification, or permit for entry or participation.” *Id.* at *31 (citations omitted). “[E]qually open” is further explained by this language: ‘in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’” *Id.* As the statute requires, this assessment depends on a “totality of the circumstances.”

The Court then propounded a *non-exhaustive* list of factors relevant to such a determination. These include “the size of the burden imposed by a challenged voting rule,” as measured against the “usual burdens of voting.” 2021 U.S. LEXIS 3568, at *32-33 (citation omitted). “[T]he degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.” *Id.* at *35. “The size of any disparities in a rule’s impact on members of different racial or ethnic groups is also an important factor to consider.” *Id.* Courts must also “consider the opportunities provided by a State’s entire system of voting.” *Id.* at *35-36. And courts must weigh “the strength of the state interests served by a challenged voting rule.” *Id.* at *36.

Each of these matters easily fits within a “totality of the circumstances” analysis. None of them should surprise a Section 2 practitioner familiar with the traditional Senate Factors. The fact that these commonsense considerations will make it more difficult to bring the outlandish Section 2 challenges to ordinary rules seen in recent years is a point in their favor, not against them.

The Supreme Court applied these factors to conclude that Arizona’s statutes did not violate Section 2. Among other things, the Supreme Court rightly corrected the Ninth Circuit’s “highly misleading” presentation of evidence regarding the burdens involved in voting in

precinct. 2021 U.S. LEXIS 3568, at *47. While 99% of minority voters voted in the correct precinct, and 99.5% of non-minority voters did so, it was “statistical manipulation” to say, as the Ninth Circuit majority did, that minority voters voted out-of-precinct “at twice the rate” of white voters. *Id.* at *47-48. “Properly understood, the statistics show only a small disparity that provides little support for concluding that Arizona’s political processes are not equally open.” *Id.* at *48. Further, the State had a legitimate interest in “[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives,” which “deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker.” *Id.* at 52.

IV. Proposed Legislative Responses.

Brnovich resolved an unsettled question of law regarding the application of Section 2 of the Voting Rights Act to time, place, and manner restrictions. The decision embodied an unremarkable interpretation of the plain text of Section 2 that is wholly consistent with longstanding principles used in applying it. Accordingly, a legislative fix is not necessary—it is a classic “solution in search of a problem.”

In particular, the John R. Lewis Voting Rights Advancement Act that was introduced in 2019 (H.R.4) is a bad idea. To begin with, it provides the Attorney General with a new, unchecked power to sue directly for violations of the Constitution. I wrote about the problems with this proposal in response to earlier versions of such legislation.⁸ The Voting Section of the Justice Department has in the past proved to be a hotbed of partisanship. An Inspector General’s report from March 2013 described the harassment of Republican employees, and race-based

⁸ Robert Popper, *Little-Noticed Provision Would Dramatically Expand DOJ’s Authority at the Polls*, THE DAILY CALLER, March 28, 2014.

enforcement of the Voting Rights Act.⁹ I was Deputy Chief of the Voting Section at the time and personally witnessed many of the incidents recounted in that report. But partisans of every stripe should object to providing such a power to an Attorney General. Choose whomever *you* would describe as the most partisan Attorney General of the past 50 years. Would you want that person intervening in election disputes on behalf of the United States?

H.R. 4 provides enormous power to the Justice Department in other ways. Under a new, two-level preclearance regime, *all* changes concerning certain election-related measures—including redistricting that affects minority groups, and voter ID laws—wherever and whenever adopted, and regardless of justification, would be subject to a preclearance review by the Department. Further, particular states would be “bailed in” to an even more stringent preclearance regime for ten years if, in the most recent 25 years, 15 “voting rights violations occurred” in any state subdivisions, or 10 violations if the state committed one of them. A violation basically means any final judgment, settlement, or consent decree concerning voting rights. It also includes any DOJ objection to a covered voting change that is not overturned. Again, this transfers a great deal of new power to the Attorney General to make, or to refrain from, objections. It also gives power to partisan interest groups who sue under the Voting Rights Act, because their preferred targets will tend to become federally regulated. In addition, partisan administrations in closely contested states may choose to “sue and settle,” to run up the number of violations and bring on federal regulation.

The bill is certain to encounter strong constitutional objections. First, to the extent that H.R. 4 purports to enforce the guarantees of the Fourteenth Amendment, “[t]here must be a

⁹ A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION, U.S. Department of Justice, Office of the Inspector General, March 2013, available at <https://oig.justice.gov/reports/2013/s1303.pdf>.

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). As discussed, the record does not support the claim that voting rights are somehow in peril, nor can it justify a complete federal takeover of states’ electoral processes.

Second, to the extent that the application of H.R. 4 would lead to a differing level of oversight of states’ electoral regimes, as it inevitably would over time as states’ “scores” rise and fall and they are bailed in or out of coverage, it would run afoul of “the fundamental principle of equal sovereignty” between states, which “remains highly pertinent in assessing [their] subsequent disparate treatment.” *Shelby County v. Holder*, 570 U.S. 529, 544 (2013), citing *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

Third, insofar as any of H.R. 4’s requirements provide protections based on the disparate treatment of racial and language minority groups—as is explicit, for example, in the bill’s redistricting requirements—it risks violating the Equal Protection Clause of the Fourteenth Amendment. As Justice Scalia noted in the context of Title VII, “disparate-impact provisions place a racial thumb on the scales, often requiring” parties “to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.” *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). He added that, while the “Court’s resolution of these cases makes it unnecessary to resolve these matters today,” the “war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.” *Id.* at 595-96. H.R. 4 is likely to bring this “war” to a head.

Robert D. Popper