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

Hearing on "The Need to Enhance the Voting Rights Act: Practice-Based Coverage"
July 27, 2021

T. Russell Nobile
Senior Counsel
Judicial Watch, Inc.

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 Russell Nobile. I am a Senior Attorney at Judicial Watch Inc. and part of its election integrity group. Judicial Watch is the largest conservative public interest group in the United States. It is 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, 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"), the 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 career 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 of the VRA and Title I of the Civil Rights Act of 1964.[1] The Department's website shows that the Waller County case was one of the last Section 5 cases it brought before the U.S. Supreme Court invalidated further use of the triggering mechanism for Section 5 in *Shelby County*, 570 U.S. 529, 546 (2013).[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, where I continued handling civil rights and voting cases. 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.

---

[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 July 25, 2021).

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

I. Section 5 of the VRA and Shelby County

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 black voters. Because of this discrimination, elections did not accurately reflect popular support in those jurisdictions. The registration data from that time showed just how much the system was failing. Before the enactment of the VRA, only 19.4 percent of black citizens of voting age were registered to vote in Alabama, 31.8 percent in Louisiana, and a remarkably low 6.4 percent in Mississippi. *See Shelby County*, 570 U.S. at 546. These figures reflected a roughly 50 percent or greater disparity between the registration rates of black and white voters. *Id.*

This data led Congress to enact the Voting Rights Act of 1965, which was comprised of permanent statutes banning discrimination as well as 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.* Section 5 basically *presumed* that any voting change by a covered jurisdiction was unlawful (i.e., 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 shockingly low level of black voter registration and turnout in 1965.

While it was originally enacted as a temporary provision set to expire after five years, Congress extended Section 5 for the next 66 years using virtually the same coverage formula Congress adopted in 1965. The Supreme Court's rejection of this formula in *Shelby County* does not mean that intentional or effect-based discrimination in voting is legal. 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 discriminatory election standards, practices, or procedures.

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 drive-by reporting of "rampant voter suppression" occurring nationwide. 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, which were vacated following the *Shelby County* decision.[4] Since the start of the Obama administration in

[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 July 25, 2021). *See also Abbott v. Perez*, 138 S. Ct. 2305 (2018).

2008, the Justice Department has filed only *ten* Section 2 enforcement cases.[5] This is not to suggest that racism no longer exists. Nor is it meant to impugn my former Department colleagues' sincere desire to bring Section 2 cases. Rather, it is simply reliable data that shows the Attorney General is currently capable of enforcing voter protections on a case-by-case basis and that he does not need new authority to combat "rampant voter suppression."

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 likes or talking points, 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 tells the true story of ballot access in America. To objectively evaluate 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 minority

---

[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) available at https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html (last visited May 25, 2021).

participation 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. 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. Any discussion of a revised preclearance formula should at a minimum start with those four states.

Turnout. The 2020 election had a higher turnout across all racial 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 disparities in these former Section 5 states. Again, turnout for black voters in Mississippi exceeded that of whites.

---

[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).

There is a significant disconnect between this ballot access data and the media narrative. Notwithstanding pervasive talking points about "rampant voter suppression," the public data cannot be ignored: registration and turnout for minority voters in 2020 far exceeds that of 1965. When black citizens now register and turnout at higher rates than white citizens in places like Mississippi, it is simply not credible to claim that Jim Crow style voter suppression currently exists.[8]

II. 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 appears part of a grander plan to shift control of American elections away from state legislatures accountable to voters and into the hands of a single federal bureaucratic agency. It accomplishes this by giving the Attorney General a previously unseen level of nationwide authority over elections. Even more troubling than this change to our constitutional tradition of leaving elections to the states, new changes in H.R. 4 will lead to lasting damage to the Department of Justice's credibility.

A. There Is No Data Supporting The New Practice-Based Nationwide Section 5 Coverage

H.R. 4 proposes a nationwide coverage provision that did not exist in the VRA before the *Shelby County* decision that will vastly expand the federal government's control

[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).

over federal, state, and local elections. It creates a "practice-based preclearance" requirement that would apply to every jurisdiction in the country, regardless of its history of discrimination or racial disparities. Whatever the claims in support of this new practice-based coverage, there is no data that supports using Congress' Fourteenth and Fifteenth Amendment powers to take over, for example, all municipal annexations and poll site changes nationwide. If 1965 voting disparities did not prompt Congress to enact nationwide coverage during the height of Jim Crow, current registration and turnout data certainly does not support imposing a new nationwide coverage today. To the extent that H.R. 4 purports to enforce the guarantees of the Fourteenth Amendment, it is constitutionally required that "[t]here must be a 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). The record and data do not support the claim that voting rights are somehow in peril, nor can they justify a nationwide, federal takeover of states' electoral processes.

H.R. 4's new nationwide coverage applies to seven practices: 1) method of elections, 2) annexations, 3) redistricting, 4) voter documentation and qualifications, 5) bilingual materials, 6) poll site changes, and 7) state list maintenance practices. Each one of these new coverages raises more questions than answers, such as what existing conditions support using Congress' Fourteenth and Fifteenth Amendment powers to require federal approval of traditional state activities.

Beyond looking at the data, Congress needs to look at the practical reality related to the Department of Justice's ability to enforce the VRA on a case-by-case basis. In

Katzenbach, the Supreme Court emphasized that Congress reviewed the Department's ability to enforce black voting rights before making a factual determination that "case-by-case litigation [by the Department of Justice is] inadequate to combat widespread and persistent discrimination in voting[.]" While that was true in 1965, it is no longer the case. Looking at the Department's own enforcement data since 2010, it is hard to contend that it cannot enforce the VRA's protections on a case-by-case basis.

For over five decades, the Department has used Section 2 to challenge discriminatory annexations and methods of elections. Because jurisdictions change their method of elections and boundaries infrequently, the universe of colorable VRA claims that may arise from such changes is small. Even accounting for this, the number of recent enforcement actions involving such changes is strikingly small. Since 2010, the Department has brought only *three* Section 2 cases challenging methods of elections and *zero* annexation cases.[9] Of the three cases mentioned, one settled the day the complaint was filed and the other settled within three weeks, which shows these cases required only limited Department resources.[10]

Redistricting certainly occurs more frequently than changes to methods of election and annexations. Yet the Department has brought even fewer redistricting cases since 2010. In fact, during the last redistricting cycle, the Department brought only *two* Section

---

[9] Voting Section Litigation available at https://www.justice.gov/crt/voting-section-litigation (last visited July 25, 2021).

[10] *United States v. Chamberlain School District*, Civ. No. 3:21-cv-00988 (W.D. La. 2021) and *United States v. Chamberlain School District*, Civ. No. 4:20-cv-04084 (D.S.D. 2020).

2 cases, both against Texas in 2013.[11] Thus, over the last 11 years the Department has brought a combined total of *five* cases challenging methods of election, annexations, and redistricting plans. This current caseload volume is dramatically lower than the caseload facing the Department when it began enforcing the VRA in 1965. It shows the Department is fully capable of handling redistricting claims on a case-by-case basis.

H.R. 4's new practice-based coverage also requires federal review of all poll site changes nationwide as well as the text and translation for all bilingual materials distributed by each individual jurisdiction. In practice, bilingual materials often need to be revised every election cycle. Accordingly, this coverage may result in requiring the Department or the U.S. District Court to review hundreds of thousands of pages of translated documents. Again, the Department's website tells the true story regarding the need for nationwide coverage and its ability to protect voting rights related poll sites and language minorities on a case-by-case basis. Since 2010 the Department has brought *zero* lawsuits over poll site changes. Similarly, since 2010 it has brought only *eight* cases under the language minority provisions of the Voting Rights Act, all of which were settled, conserving Departmental resources. Such a caseload hardly supports a federal nationwide takeover as proposed for these covered practices. The language minority enforcement staff in the Department are certainly capable of handling the current rate of cases. If H.R. 4's practice-based coverage is enacted, however, the Department will most assuredly need

---

[11] See note 4, *supra*.

more resources to timely review all poll site changes or bilingual materials from across the nation.

As originally filed, H.R. 4's nationwide coverage targets wildly popular state requirements that voters show some form of identification when voting. Since then new polling shows that 80% of Americans support requiring voters to show photo identification in order to cast a ballot.[12] Only 18% oppose this requirement. Voter ID laws are promulgated at the state level, making it hard to claim that the Department cannot handle such claims on a case-by-case basis. Since 2010, the Department has only brought *one* Section 2 case challenging state voter ID provisions. Again, the record shows the Department is capable of prosecuting voter ID enforcement actions on a case-by-case basis without the nationwide federal takeover proposed in H.R. 4.

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

H.R. 4 grants the Attorney General authority to enjoin "any act prohibited by the 14th or 15th Amendment" of the Constitution.[13] This little-noticed provision will abolish a 153-year-old legal principle that limits the Attorney General's jurisdiction over Fourteenth Amendment disputes between states and private individuals.[14] It opens the door to highly contentious litigation between states and the Attorney General. It is difficult to overstate the risk that this new law poses to the Department. The Congress should end this

[12] See "Public Supports Both Early Voting And Requiring Photo ID to Vote" published on June 21, 2021 https://www.monmouth.edu/pollinginstitute/reports/monmouthpoll_us_06212 1 / (last visited on July 26, 2021).

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

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

unprecedented effort to inject the 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 Department does not. This proposed change is a major shift, allowing the Justice Department to become involved in a whole range of Fourteenth Amendment cases that previously it would have been unable to pursue. What is more alarming is that the new powers included in H.R. 4 are not limited to voting rights. Whether intentionally or unintentionally, as written, the Attorney General will be allowed to bring *any* action under the Fourteenth Amendment, which could include actions to promote (or restrict) gun rights, religious liberties, and abortion rights. The opportunity for any administration, Republican or Democratic, to exploit this new law is significant. 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.

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

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 incentive it creates. H.R. 4 defines "voting rights violations" broadly, capturing minor settlements that never resolved

the merits of any claims. This definition actually 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 both defensive and affirmative civil rights litigation, I can say firsthand that discouraging settlement is counterproductive to civil rights enforcement.

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 (*i.e.*, richest) 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" even trivial claims, before running to the Justice Department to claim their settlement triggered Section 5 coverage. Such incentives 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 such problems by replacing the data-based approach for Section 5 coverage with a new, easily corruptible process that rewards litigious and collusive 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 the Section 5 process discouraged jurisdictions from making good faith improvements to their

voting laws. We may disagree on the degree, but anytime costs and regulations increase, it discourages the targeted behavior – in this case, even non-discriminatory changes to elections practices. 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 a change was made post-*Shelby County* does not mean that it was racially motivated.

III. Civil Rights Division

I would like to touch briefly on my experiences while a trial attorney at the Civil Rights Division. Under H.R. 4, the Department of Justice's Voting Section will have significantly enhanced responsibilities. The Voting Section of the Justice Department has in the past proved to be a hotbed of partisanship. Even within arguably the most political town in the country, the culture of the Voting Section stands out for its partisanship. An Inspector General's report from March 2013 described the harassment of conservative and Republican employees, and race-based enforcement of the Voting Rights Act.

There has been recent debate over the use of Critical Race Theory ("CRT"). From my observations, there are few places in the federal government that are more partisan or dominated by the assumptions that underlie CRT than the Civil Rights Division. The partisanship and hostility towards conservative staff that do not hold the same CRT assumptions is startling. Section staff know how to identify other staffers who do not hold CRT-like views. While some maintained professional decorum, others showed a troubling level of intolerance to those they disagreed with and, in some cases, actively harassed them,

as recounted in the OIG report.[15] I personally witnessed many of the episodes chronicled in the OIG report and several that were not.

IV. Brnovich v. DNC

A. *Vote Denial Under Section 2 Prior to Brnovich*

Prior to *Brnovich*, courts adopted basically two approaches in resolving vote denial claims under Section 2. 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."[16] 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."[17] In other

---

[15] 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

[16] *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).

[17] *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*

words, under this second approach, (1) disparate impact, plus (2) general, Senate Factor evidence establishes a violation of Section 2's "results" standard.

B. The Decision in Brnovich

In *Brnovich*, the Supreme Court resolved this split and outlined for the first time a framework for how challenges to state time, place, and manner regulations ("TMP regulations") are handled under Section 2.[18] The ruling did not depart from the text of Section 2, as some have claimed. In fact, I see the *Brnovich* decision as providing long-needed guidance regarding how Section 2's "totality of circumstances" analysis applies to vote denial challenges to TPM regulations. Indeed, if the Court had issued the ruling in a less contentious political atmosphere, as far back as ten years ago, *Brnovich* would have been unremarkable.

To put the impact of *Brnovich* in context, a brief overview of Section 2 is useful. The text of Section 2 allows two types of claims: intent-based and results-based claims. Section 2 cases can be further categorized as either vote dilution cases, challenging the system of election itself, or vote denial cases, challenging particular administrative requirements. The distinction between dilution and denial cases is often overlooked. One of the most significant aspects of the *Brnovich* ruling is that it firmly established that these categories require different analyses. Since its enactment in 1965, Section 2 enforcement

---

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).

[18] *Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257 and 19-1258, __ S. Ct. __, 2021 U.S. LEXIS 3568 (July 1, 2021).

has largely involved dilution claims.[19] *Brnovich* does not alter Section 2's vote dilution analysis. Aside from redistricting, jurisdictions rarely alter their methods of elections. Thus, vote dilution claims are not a growth area for Section 2 litigation. In fact, many jurisdictions nationwide have already either been investigated for, or subject to, a Section 2 claim while many others proactively modified their method of elections to avoid such suits. As a result, vote dilution claims have been in secular decline. This should be a source of national pride. Many advocacy groups, however, have shifted their focus and resources to vote denial claims targeting race-neutral TPM regulations. 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.[20] Attacks on these longstanding regulations are facilitated by utilizing the assumptions inherent in Critical Race Theory, which postulates that existing institutions and regulations are designed to reinforce current racial, ethnic, and gender hierarchies, in order to establish the necessary "social and historical conditions that have produced discrimination." These new types of denial claims often depend on statistics that artificially amplify alleged burdens caused by targeted regulations.

---

[19] This fact is cemented by Congress' decision in 1982 to add a proviso at the end of Section 2 that expressly refutes any belief that its protections entitled protected classes to proportional representation.

[20] *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.

Brnovich addresses how result-based vote denial cases are handled under Section 2. The Court provided a list of five "relevant circumstances" (*i.e.*, extent of any burden, departure from a historical benchmark, the significance of any disparity, other opportunities to register and vote, and the strength of the state's interest) than can be used by courts to evaluate denial cases. Most of these "relevant circumstances" are common considerations any voting lawyer would review in preparing a Section 2 case. The Court made clear that it was providing a non-exhaustive list of considerations, leaving the door open for future litigants to raise *any* other circumstances they contend are important to their Section 2 claims. The Court then addressed which dilution considerations were useful for analyzing denial claims. In particular, the Court addressed the preconditions and Senate factors set forth in the seminal vote dilution case of *Thornburg v. Gingles* and discussed how, if at all, these applied to denial cases. The tools used to consider whether an at-large election system dilutes minority votes are often of little probative value in determining whether a TPM regulation denies or abridges someone's right to vote. The Court, however, did note that considerations such as past discrimination and lingering effects of past discrimination were relevant to a denial claim. None of *Brnovich* should surprise a practitioner familiar with the traditional Senate Factors. In fact, very little in *Brnovich* is new. Vote denial raises different issues than vote dilution. Dilution-based analysis is often completely irrelevant to denial claims.

Thank you very much for inviting me to testify today. I look forward to answering your questions.