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

Hearing on

Oversight of the Voting Rights Act: Potential Reforms

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Good morning Mr. Chairman, Ranking Members, and Members of the Subcommittee. Thank you for your invitation to speak with you again today. I am an attorney with the Public Interest Legal Foundation, a non-partisan charity devoted to promoting election integrity and preserving the constitutional decentralization of power so that states may administer their own elections. I have been an attorney for approximately 35 years. For over twenty years, I served in the Civil Rights Division of the Department of Justice. Eighteen of those years were spent both as a Voting Section attorney as well as Senior Counsel to the Attorney General for Civil Rights.

From August 2000 until the Supreme Court's decision in *Shelby v Holder*, my sole responsibility was to review changes in voting submitted for preclearance under Section 5. I also participated frequently in the Section's monitoring of elections throughout the country and was very often the lead attorney coordinating the monitoring exercise. During my tenure at the Department, I have been the recipient of numerous awards. I retired from the Department in January 2021.

If passed H.R. 4 will give tremendous power over the election procedures of every state and local election to extreme partisan bureaucrats within the Voting Section.

In my June 2021 testimony I shared with you my firsthand observations of the unethical conduct that occurred on a daily basis within the Voting Section. This outrageous conduct included instances of twisted racialism, blatant political violations

of the Hatch Act; destroying the reputations of colleagues hired under any Republican administration through on line blogs, the leaking of protected work product to media sources, the targeting of African American colleagues not deemed to have acted "black enough", disdain for the equal protection of civil rights laws for all Americans, the targeting of jurisdictions that staff disagree with ideologically and the impermissible collaboration with many of the advocacy groups scheduled to testify today. But don't just take my word, read the DOJ Inspector General's Report on this point, and read what the Justice Department itself has admitted in a letter to Representative Sensenbrenner. The fact is that the Voting Section attorneys have been sanctioned millions of dollars for bad behavior in Section 5 reviews and other court cases. I have attached the letter to my testimony. I would urge every member here to read the DOJ Inspector General Report entitled "A Review of the Operation of the Voting Section of the Civil Rights Division."[1] It provides instance after instance of bad behavior – often racially motivated – among section staff. When you finish reading the report, you will rightfully wonder if it is such a good idea to give this office so much power over every election.

[1] U.S. Department of Justice, Office of the Inspector General, Oversight and Review Division, A Review of the Operations of the Voting Section of the Civil Rights Division, March 2013, https://oig.justice.gov/reports/2013/s1303.pdf (accessed August 15, 2021).

Preclearance is not necessary in 2021

Sections 4 and 5 of the Voting Rights Act were intended to be temporary; they were set to expire after five years. In *South Carolina* v. *Katzenbach,* the Supreme Court upheld the 1965 Act against constitutional challenge, explaining that it was justified to address "voting discrimination where it persists on a pervasive scale" and indicated that the Act was "uncommon" and "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions. 383 U.S., at 334, 335 (1966). Multiple decisions since have reaffirmed the Act's "extraordinary" nature. See, *e.g.*, *Northwest Austin v. Holder*, 129 S. Ct. 2504, (2009).

Section 5 was a temporary provision for a reason that no longer exists. The nexus of preclearance and low minority political participation and success no longer exists. The Supreme Court made clear in *Shelby* that only certain conditions would justify any formula for Section 5 coverage today. Among the touchstones listed by the Court are "blatantly discriminatory evasions of federal decrees," lack of minority office holding, tests and devices, "voting discrimination 'on a pervasive scale," "flagrant" voting discrimination, or "rampant" voting discrimination. Such discrimination does not exist today. Indeed, this Committee could look long and hard and not find a single evasion of a federal decree – the central assumption of why preclearance was needed in 1965. Federal intrusion into the powers reserved by the Constitution to the States must relate

to these empirical circumstances. Triggers that are built around political or partisan goals will not withstand Constitutional scrutiny.

According to information received from the DOJ through a FOIA request, from 2000 through 2013, (when Shelby was decided) the Voting Section received and reviewed 222,132 submissions and issued 81 objections. An objection by the Attorney General does NOT require a finding of discrimination, and in my experience, the clear majority are not based upon purposeful discrimination. The lack of objections since 2000 is very enlightening, since in 1982 Congress expanded §5 to prohibit any voting law "that has the purpose of or will have the effect of *diminishing* the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." This diminished evidentiary standard made it quite easy for the Attorney General to issue an objection. Yet, between the year 2000 and 2013, the Attorney General issued objections in less than .30 of one percent of all submissions reviewed by the Department for preclearance. Do you think that number represents massive discrimination?

Furthermore, in *Shelby*, the Court rejected the dissent's notion that the preclearance requirement of the VRA would be constitutional into the future until there is no evidence of unconstitutional action by States. Yet, that is exactly what Congress is attempting to do through H.R. 4.

Proposed Coverage Formula is Unconstitutional under Shelby

H.R. 4 would subject a jurisdiction to the rigors of Section 5 for violations of H.R. 4, previous violations of Section 5, previous Section 2 violations, and Consent decrees. Previous Section 2 findings that used a "disparate impact" theory, would fail today based upon the recent decision in the *Brnovich* case. Yet, under the proposed formula such faulty findings would be used to justify subjecting a jurisdiction to preclearance. Furthermore, the proposed formula's use of previous Section 5 objections to trigger coverage would single out, only those states previously subjected to Section 5 preclearance. Clearly, this results in the same unequal treatment of these States which was condemned by the Court in *Shelby*. As the Supreme Court cautioned in *Shelby,* the Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and it gives Congress the power to enforce that command, **but** the Amendment is not designed to punish for the past; its purpose is to ensure a better future. To serve that purpose, Congress--if it is to divide the States--must identify those jurisdictions to be singled out on a basis that makes sense <u>in light of current conditions.</u> It cannot rely simply on the past. Yet the proposed formula does just that by reaching back years ago to bring a jurisdiction within the coverage formula. Furthermore, the use of previous Section 5 objections to trigger coverage unconstitutionally targets the same States that were subject to preclearance under the last Section 4 formula. States not previously subject to Section 5 will have no history to

trigger coverage. Such disparate treatment will again render the proposed formula unconstitutional.

Any formula must be forward looking to be consistent with *Shelby.* Any strict "geographic formula" could never pass constitutional muster, regardless of a practiced based coverage formula that could accompany it. Quite simply, the proposed formula will never pass constitutional muster.

No need for a Statutory Standard for Vote Denial Claims under Section 2

Claims that the *Brnovich* decision "gutted Section 2" are absolute nonsense. In *Brnovich,* the Supreme Court set forth a list of considerations by which vote denial claims should be evaluated. The list is not exclusive and does not prevent courts from considering additional factors when evaluating a vote denial claim

Section 2 of the Voting Rights Act forbids intentional discrimination. It also proscribes processes that "result" in a discriminatory electoral outcome. The Act provides in relevant part that a state or jurisdiction's civil liability for a "denial or abridgement of the right to vote is established, if based upon the totality of the 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 class of citizens…in that it's members have less opportunity than other members of the electorate to participate in the right to vote. In its infancy, Section 2

"results" cases typically involved a claim of "vote dilution" and targeted at-large or multi-member electoral systems that deprived a racial minority of effective representation. Seminal cases in vote dilution under Section 2 include *Thornburg v Gingles*, 478 U.S. 30, (1986) and *White v. Register*, 412 U.S. 755, (1973), and provided the appropriate analysis to evaluate a "results" claim based upon vote dilution. However, prior to the recent *Brnovich* case, the Supreme Court had not resolved the legal basis by which courts should evaluate a "results" claim based upon vote denial. That is because vote denial claims were rarely made prior to 2013.[2] If the date seems familiar it is because the Shelby case was decided in 2013.

After Shelby plaintiffs began filing Section 2 "vote denial" claims against electoral procedures such as voter identification requirements, trying to persuade courts to lower the Section 2 evidentiary standard to a "disparate impact" standard, almost identical to the retrogression standard of Section 5.[3] This standard would make it almost impossible for a state to ever make changes to its election laws, and has been recognized for what it is… an attempt to use vote denial cases to challenge voter integrity reforms

[2] 997 F. Supp. 2d 322, 346 (M.D.N.C. 2014)

[3] *See* Adams, J. Christian (2015) "Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not," *Touro Law Review*: Vol. 31 : No. 2 , Article 8.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol31/iss2/8

using Section 2 as a substitute for Section 5.[4] The use of this theory of liability created a conflict among the circuit courts. *Brnovich* presented the Supreme Court with an opportunity to enunciate a constitutional standard for courts to evaluate a vote denial claim moving forward. Claims that the *Brnovich* decision "gutted Section 2" are absolute nonsense. In *Brnovich*, the Supreme Court set forth a list of considerations by which vote denial claims should be evaluated. The list is not exclusive and does not prevent courts from considering additional factors when evaluating a vote denial claim.

While the Department and many of my colleagues here may not like the result in *Brnovich*, it was their improper use of Section 2 as a replacement for Section 5 that necessitated the *Brnovich* decision.[5]

Practice Based Preclearance:

H.R 4's practice-based preclearance triggers will require most electoral changes to be submitted for preclearance, no matter how inconsequential the change may be. For example, a polling place change does not just include a change in physical address. It

[4] Memorandum #119 (2014), http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act. *But see* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143 (2015).

[5] Noel H. Johnson, Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?, 12 *Duke Journal of Constitutional Law & Public Policy* 1-21 (2017)
Available at: https://scholarship.law.duke.edu/djclpp/vol12/iss3/1

includes ANY change to the polling place. If a polling place moved from the school gym to the school cafeteria, the lawyers in the Voting Section would have to review and approve or reject the change. Voter registration changes include office hour openings from 8:30 to 8:25 would have to be approved. Any change in polling place signage font would have to be approved. Any change in location of the office of the Registrar from the old city hall to the new city hall literally across the street, changes in the numbering of precinct numbers that do not affect location, all of these would have to be approved. Additionally, every local town annexation must be submitted and approved. These types of changes represent the majority of those reviewed. The Attorney General does not have the burden of establishing a discriminatory purpose or effect to issue an objection under Section 5. The burden is on the jurisdiction submitting the change to prove that the proposed change does not have a discriminatory purpose or discriminatory effect. In essence, the submitting jurisdiction must prove a negative.

Present Tools Exist to Stop Discrimination

Permanent provisions of the Voting Rights Act such as Section 2 still prohibit discrimination and provide the Justice Department with the ability to challenge election procedures. In June of this year DOJ announced was suing the State of Georgia. Yet the Department has only brought 5 Section 2 cases since the *Shelby* decision in 2013. If rampant discrimination in voting actually exists why hasn't the DOJ brought hundreds of cases challenging these ills?

Language minority provisions such as Section 203 and Section 4(3) were not affected by the Shelby decision. Section 3(c) the "bail in provision", allows a judge to order a state or subdivision to submit to the preclearance provisions, if it finds that the jurisdiction intentionally discriminated against minority voters. It is also consistent with the *Shelby* mandate that federal oversight of state or local elections be closely matched by need. However, as proposed, H.R. 4 would also allow a jurisdiction to be subjected to the rigors of Section 3 (c) for violations of H.R. 4, violations of Section 5, or when a jurisdiction has agreed to settle a case through a consent decree. None of the new allowable triggers require a showing of intentional discrimination and are inconsistent with permissible federal oversight as outlined in the *Shelby* decision. Lastly, but of great importance is Section 11(b), which prohibits intimidation, threats, or coercion directed towards voters or those aiding voters. This section is also available post Shelby, yet there has not been a case brought by the Department through 11(b) since the case against the New Black Panther Party in 2009.

Twisted Injunction Standards

The new "evidentiary standard" for obtaining a preliminary injunction proposed in H.R. 4 sets federal law on its head. This is an intrusion into the exclusive province of the courts. The Supreme Court has held that a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in

his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 20, (2008). The Court further noted that because a preliminary injunction is such an extraordinary remedy, it is NEVER awarded as a right., and that courts should pay particular regard for the public interest. *Winter* at 24. The new standard contained in H.R. 4 not only disregards the public interest held by the State, H.R. 4 actually prohibits the court from considering the interest of the State in any application for the preliminary injunction.

Thank you for your time and attention.