PUBLIC INTEREST
LEGAL FOUNDATION

Testimony of
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I am President and General Counsel for 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 also served as an attorney in the Voting Section at the Department of Justice. I have brought multiple enforcement actions under the Voting Rights Act and have litigated in a number of the areas addressed by H.R.1.

H.R.1 is today before this Committee. This proposal would mark the largest transfer of power over elections from the states to the federal government in the history of the nation. Regarding the proposal, we can certainly all agree on three things.

First, it has never been easier to register to vote and to vote in America than it is in 2019. In fact, it is difficult to *avoid* opportunities to register to vote. Not only is registration offered every single time you go to a motor vehicle office, Americans are offered registration in social service agencies, post offices, county courthouses, outside of grocery stores, county libraries, Marine Corp recruitment stations, in forward operating bases, in jails, online, in high school, in church, in mobile registration vans[1], on your front porch as part of a third party registration drive, at Lollapalooza[2], and pursuant to various settlements the Justice Department entered into in the last few years, even in drug treatment facilities and methadone clinics in Rhode Island[3].

It is *harder to avoid* opportunities to register to vote than it is to register to vote.

Second, we all know that no part of H.R.1 is going to become the law during this Congress. This is merely an exercise in educating the public about a variety of election process changes that one political party would like to implement because they believe they will benefit from them. On the other hand, H.R.1 presents an opportunity to also educate the public about how various provisions in H.R.1 that are already the laws of some states – like California – have injected vulnerabilities into the elections process.

Third, H.R.1 radically transforms the Constitutional relationship between states and the federal government. It strips power from states to run their own elections. Under the Constitution, states are strongly presumed to have the power to establish the rules that H.R.1 seeks

[1] See https://www.abqjournal.com/1225442/county-debuts-mobile-voting-unit-during-voter-registration-drive.html.
[2] See http://chronicleillinois.com/news/cook-county-news/lollapalooza-a-good-place-to-register-voters/.
[3] See consent decree at https://www.scribd.com/document/51103523/US-v-RI-Proposed-Consent-Decree.

to take away. There is a reason states were given power to run their own elections, namely, decentralization promotes freedom. The Constitution decentralized control over elections to the states because when power is centralized, a single malevolent actor can exert improper or dangerous control over the process. This is not wild speculation; this is a simple historical fact. Decentralized elections are more democratic because each state develops systems more suited the wishes of their own citizens.

Article 1, Section 4, of the Constitution gives states power over elections. It says "the Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof." This is the default presumption in the Constitution, and for good reason. Fifty states and thousands of counties are better suited to running elections than federal officials. Elections are less subject to manipulation when they are run closer to the people.

But alas, advocates of H.R.1 go all-in on the last part of Article 1, Section 4, which states, "but the Congress may at any time by Law, make or alter such Regulations."

Using this exception to the Elections Clause to justify H.R.1 fails for two reasons. Firstly, this provision of the Constitution was only added in 1787 when concerns were raised that the states would suffocate the power of the new government by refusing to establish procedures to elect federal officials. In other words, the last part was added because it was feared states would refuse to enact rules for Congressional elections and thus terminate the federal government. In 2019, that is a laugh line. The concern in 1787 that states would suffocate the federal government hasn't materialized in the slightest. This exception to the presumption of state control was put into the Constitution for a circumstance which simply does not exist, and therefore should not justify a federal takeover of election procedures.

Second, just because Congress can do something, doesn't mean it should. Indeed, the authors of the Constitution made it quite clear that power granted Congress to alter the state election rules in Article 1, Section 4 *is to be rarely used*. Alexander Hamilton called federal power in Federalist 59, "a last resort." Congressional power is described in Federalist 59 as "a means of its own preservation." I will leave it to others to opine how it is that H.R.1's mandate that felon voting rights be granted nationwide has anything to do with Congress's "own preservation."

Indeed, were Alexander Hamilton here today, he might testify about what he wrote in Federalist 59 about the very Constitutional clause you rely on to support H.R.1: "suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power and as a premeditated engine for the destruction of the state governments."

Just because Congress can do something doesn't mean it should. Just because I *can* stay up all night playing World of Warcraft does not mean I should. Just because I *can* have just one more Manhattan doesn't mean I should, not if I want to preserve a measure of balance. And the Constitution plainly and explicitly establishes a balance between the states and the federal government, and makes clear who should have the power to set the rules for elections – and the answer is, the states.

H.R.1's Constitutional offense is even worse than this, for it seeks to set the qualification of electors, something that Article 1, Section 2, very explicitly leaves to the state legislatures to set. H.R.1 offends this by dictating who would be qualified to cast a ballot.

Other Committee Jurisdiction

While this Committee only has a portion of H.R.1, and my testimony is mostly confined to provisions within the jurisdiction of this Committee, it bears mention that many of the provisions of H.R.1 not within the jurisdiction are as problematic as the provisions within this Committee's jurisdiction. For example, putting every name on a government list onto the voter rolls will dramatically introduce error into the election process. States must already maintain voter databases that detect and remove or combine error entries. For example, small differences in names will lead to people being registered to vote multiple times under H.R.1's mandates.

Voter Registration Interference

Title I, Subtitle A, Part 7 has a poorly drafted provision regarding interference with voter registration. It states: "It shall be unlawful for any person, whether acting under color of law or otherwise, to corruptly hinder, interfere with, or prevent another person from registering to vote or to corruptly hinder, interfere with, or prevent another person from aiding another person in

registering to vote." For starters, the provision has a split infinitive – "to corruptly hinder." The term is vague. More importantly, this provision could jeopardize very important voter registration safeguards in places like Texas. In Texas, voluntary deputy registrars are private parties who are authorized to engage in voter registration. Texas has implemented protections to ensure that registrations are actually turned in by regulating and certifying the power of the voluntary deputy registrars. There is no doubt that these rules interfere with the registration operation. Whether they corruptly do is perhaps in the eye of the beholder. Nevertheless, this provision jeopardizes voter protections enacted across the United States to ensure registration forms are actually turned in.

Common Sense Voter Roll Maintenance

H.R.1 would undo *Husted v. A. Philip Randolph Institute*, a Supreme Court case that said there is nothing wrong with using voter inactivity to keep the rolls clean of dead and those who no longer reside where they used to. Title I, Subsection C, in H.R.1 refers to this strangely as "voter caging" despite that fact that just about every state uses inactivity and postal mailings to help conduct voter roll maintence. H.R.1 would prohibit what the National Voter Registration Act explicitly suggests as a safe harbor to conduct list maintence – namely using postal mailings to see if registrants still live at the same place.

The voter rolls are currently full of ineligible voters who have died or moved out of the jurisdiction where they are registered. H.R.1 would make the problem worse by stripping the power of states to manage their own voter rolls to keep them clean using well-established best practices such as postal mailings and recurring inactivity of registrants in elections. H.R.1's mandate that states stop using these tools is just bad public policy.

Extinguishing Power of States to Redistrict

Another constitutionally dubious provision of H.R.1 is the provision whereby the Congress extinguishes the power of states to draw their own Congressional districts in Title II, Subtitle E, as they chose to. This proposed federal mandate is grotesquely offensive to the Constitution that vests power in the state legislatures to determine the manner of choosing Representatives.

Lowering Standards of "Voter Intimidation"

Subtitle D in H.R.1 contains a provision regarding "Hindering, Interfering With, or Preventing Voting or Registering to Vote" that states "No person, whether acting under color of law or otherwise, shall intentionally hinder, interfere with, or prevent another person from voting, registering to vote, or aiding another person to vote in an election …" There are other voter intimidation provisions in H.R.1.

I have brought more voter intimidation lawsuits under Section 11(b) than nearly every other lawyer in the United States. That isn't saying much because there have been so few. The danger in lowering the standard of what is prohibited voter intimidation is that these expansions eventually intrude on free speech, the right to petition and free association rights. Section 11(b) of the Voting Rights Act currently contains a very workable standard where someone who deliberately seeks to threaten, intimidate or coerce someone from voting or registering to vote violates the statute. It requires objective real threats, intimidation or coercion, and that is a workable and rather sound statutory *status quo.*

I have experienced the danger of lowering the standard firsthand. My organization, the Public Interest Legal Foundation, published reports accurately linking to government documents which we obtained from state election officials. The government documents plainly stated that thousands of registrations had been cancelled as "declared non-citizen." These documents were

obtained in public records requests pursuant to the Nation Voter Registration Act. We linked to these documents in a report and drew reasonable inferences from these documents – namely that the Motor Voter citizenship verification checkbox was ineffective and that those who registered to vote and voted as noncitizens were committing federal felonies. The former was our opinion, the later a fact. At no time prior to publication of this report was there any indication that the Commonwealth of Virginia had bungled list maintence and removed some valid registrations as badly as they did. A subsequent report contained all statewide data – namely the complete list of cancellations of those "declared noncitizen" and reasonable inferences about the cancellations. State officials confirmed that that list of "declared noncitizen" registration cancellations was accurate and did not include the names of any registrants who subsequently reregistered to vote as citizens. Nevertheless, our report on the statewide lists of cancellation included the view that if the state improperly cancelled citizens, such an act was as "appalling" as allowing noncitizens to register and vote. Again, we published government records and made reasonable inferences about them. Lastly, we also sued the Commonwealth of Virginia for improperly removing citizen registrants from the rolls and publishing error filled voter registration data under the NVRA.

Nevertheless, a group brought a Section 11(b) claim *against our organization and me for publishing these reports*. These groups are attempting to misuse Section 11(b) to impair citizen efforts to obtain and publish government data about voter roll maintence. It is an effort to silence those with whom they disagree. My organization brought an action against the Commonwealth of Virginia for improperly removing voters as noncitizens who were in fact citizens; the plaintiffs did not. The plaintiffs didn't take *any action against election officials who improperly removed voters from the rolls and published false election records. Only we* were targeted, and indeed, *only we* have taken action against election officials for improperly removing voters.

If Section 11(b) reaches the truthful publication of government election records – data which this Congress made public under Section 8 of the National Voter Registration Act – and making statements that draw reasonable inferences about that data, then it would be a dangerous thing to further lower the standards of what constitutes voter intimidation under federal law. Indeed, such a warped view of "voter intimidation" in this lawsuit is a warning to this Congress about lowering the standard of what constitutes "voter intimidation" even further. Intimidation and threats should mean intimidation and threats, real ones. Civil rights statutes should not be used to target those with whom you disagree.

"Hindering" and "interfering" with someone who is trying to vote or register is a terribly low standard, and you cannot predict what behavior currently employed as standard electioneering by all parties may be caught up in it. A variety of perfectly legal and everyday activity could "hinder" someone from voting, such enforcing state requirements for polling place check in. It could put election officials at risk of harassment and threats of prosecution. The use of the term – "under color of law" only amplifies this concern.

Recommended Amendments

1. Explicitly Extend Section 2 of the Voting Rights Act to Territories.

I recently won a voting rights lawsuit against the territory of Guam for violating the 15th Amendment for engaging in voting discrimination with a racially discriminatory intent.[4] The victory was based on a finding under the 15th Amendment. The plaintiff was a retired Air Force officer who was ineligible to register to vote in a status plebiscite because he did not have the preferred bloodline. While the plaintiff alleged a violation of Section 2 of the Voting Rights Act,

[4] See https://www.cir-usa.org/2017/03/federal-judge-strike-down-race-based-guam-plebiscite/.

the court never reached that statutory question. If Congress is seeking to shore up possible gaps – albeit ones which the plaintiff did not believe existed - in the Voting Rights Act, explicitly bringing territories within the scope of Section 2 would be a worthwhile change.

2. Allow states to verify the citizenship of registrants.

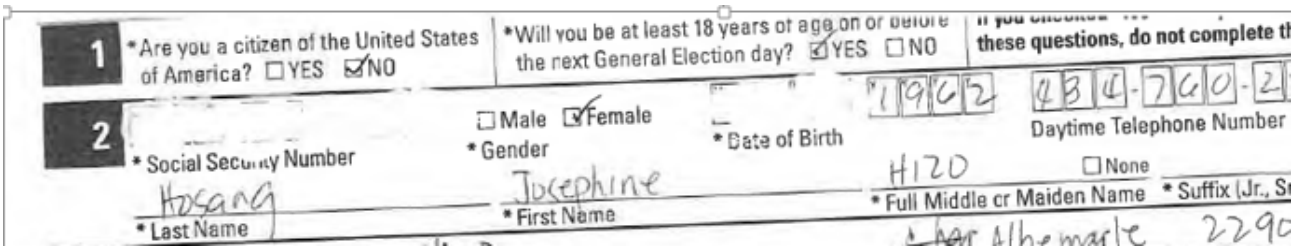
The federal voter registration form enacted pursuant to the National Voter Registration Act of 1993 has been a failure. The form contains a checkbox where applicants need affirm that they are a citizen. States which have sought to verify citizenship have faced attacks in the courtroom.[5] That's too bad, because the noncitizens who are finding their way onto the voter rolls are unwittingly the victims of a broken Motor Voter system. Some have even gone to jail because they registered to vote. Large numbers of noncitizens face threats to their naturalization because they have registered to vote under this broken Motor Voter checkbox.

The solution is for states to be allowed explicitly to validate citizenship at the registration stage before green card holders can jeopardize their status by registering to vote. And if you don't think they are registering to vote, then you aren't paying attention or don't want to know. Glitches in state DMV systems, and failures to conduct citizenship verification, have led to alien voter registrations in places that we have documented such as Pennsylvania, California, New Jersey, Florida, Michigan and Texas, among other states.[6] Some states are registering voters who mark the checkbox "NO" I am not a citizen. Here are some examples we have collected from around the country. These aliens **were registered to vote despite marking the citizen checkbox no**:

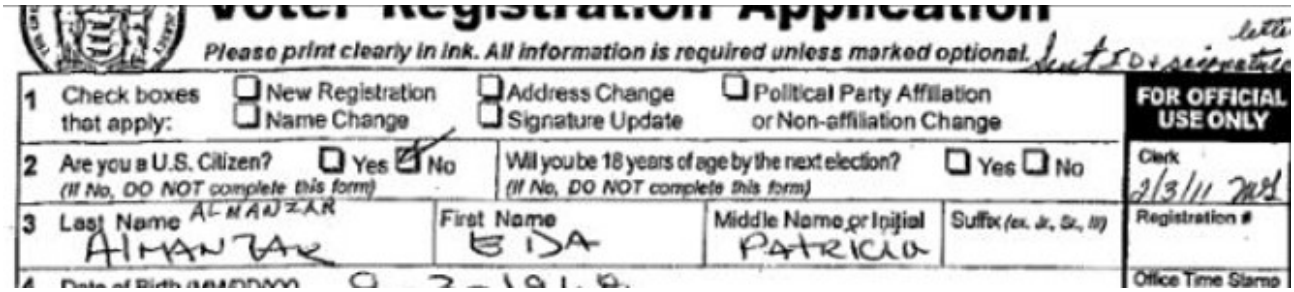
[5] See eg. League of Women Voters, et al. v. Newby, et al., United States District Court for the District of Columbia, Case No. 16-236-RJL.

[6] https://publicinterestlegal.org/blog/steeling-the-vote-allegheny-county-reveals-how-citizenship-verification-protects-citizens-and-immigrants-alike/

From Virginia -


1 *Are you a citizen of the United States of America? ☐YES ☑NO
*Will you be at least 18 years of age on or before the next General Election day? ☑YES ☐NO
these questions, do not complete th
2
* Social Security Number
☐Male ☑Female
* Gender
* Date of Birth
1962
Daytime Telephone Number
Hosang
* Last Name
Josephine
* First Name
H120
☐None
* Full Middle or Maiden Name
* Suffix (Jr., S
Charlottesville 2290

From New Jersey[7] –


Please print clearly in ink. All information is required unless marked optional.
1 Check boxes that apply: ☐New Registration ☐Name Change ☐Address Change ☐Signature Update ☐Political Party Affiliation or Non-affiliation Change
FOR OFFICIAL USE ONLY
2 Are you a U.S. Citizen? ☐Yes ☑No (If No, DO NOT complete this form)
Will you be 18 years of age by the next election? ☐Yes ☐No (If No, DO NOT complete this form)
Clerk
2/3/11
3 Last Name ALMANZAR
ALMANZAR
First Name
EDA
Middle Name or Initial
PATRICIA
Suffix (ex. Jr., Sr., III)
Registration #
Office Time Stamp

Again, **they were registered to vote.** These are but two of hundreds of examples we have found from just a small sample of American jurisdictions.

H.R.1 should include a provision that allows election officials to verify the citizenship of registrants because the citizen checkbox mandated by the NVRA has proven to be a failure in keeping non-citizens off of the voter rolls.

Thank you for the opportunity to testify about this important matter.

Date: January 29, 2019.

Respectfully submitted,
J. Christian Adams

[7] https://publicinterestlegal.org/blog/garden-state-gotcha-how-opponents-of-citizenship-verification-for-voting-are-putting-new-jerseys-noncitizens-at-risk-of-deportation/