
CONGRESSIONAL TESTIMONY

“The Right Side of History: Protecting Voting Rights in America”

**Testimony before the
Committee on the Judiciary**

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Introduction

My name is Hans A. von Spakovsky.¹ I appreciate the invitation to be here today. I am a Senior Legal Fellow and Manager of the Election Law Reform Initiative in the Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the U.S. Federal Election Commission for two years. Before that I spent four years at the U.S. Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I began my tenure at the Justice Department as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights (2002-2005), where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act, the National Voter Registration Act, the Help America Vote Act, and the Uniformed and Overseas Citizens Absentee Voting Act.²

There Is No Need for Legislative Reforms

The John R. Lewis Voting Rights Advancement Act, S. 4, is an unjustified and unneeded amendment whose broad expansion of the Voting Rights Act of 1965 (“VRA”), including the reimposition of the preclearance requirements of Section 5 of the VRA, would call into question the constitutionality of the law. The VRA is one of the most important – and most successful – statutes ever passed by Congress to guarantee the right to vote free of discrimination. After the U.S. Supreme Court’s correct decision in *Shelby County v. Holder* in 2013,³ the VRA through its various provisions, including Section 2, remains a powerful statute whose remedies are more than sufficient to protect all Americans.

With the guidance provided by the U.S. Supreme Court on the proper application of Section 2 to discriminatory practices in *Brnovich v. DNC*,⁴ both the U.S. Justice Department and private

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² I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

³ *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁴ *Brnovich v. Democratic National Committee*, 594 U.S. ____ (2021).

parties have the legal means at their disposal to stop those increasingly rare instances of voting discrimination when they occur.

There Is No Wave of “Voter Suppression” Occurring

The claim that there is a wave of voter suppression going on across the country that requires expansion of the VRA is simply false. Efforts to enhance the integrity of the election process through reforms such as voter identification requirements and improvements in the accuracy of statewide voter registration lists are not voter suppression.

On voter ID, for example, the data is clear that such a requirement does not prevent any eligible individuals from voting and yet the proposed legislative reforms treat it as a suspect, discriminatory practice. A 2019 survey by the National Bureau of Economic Research of ten years of turnout data from all fifty states found that state voter ID laws “have no negative effect on registration or turnout, overall or for any group defined by race, gender, age, or party affiliation.”⁵ Voter ID laws are in place in numerous states like Indiana, Georgia, Alabama, Tennessee, South Carolina, Wisconsin, Kansas, Arkansas, Mississippi, and Texas because courts ruled they are not discriminatory and do not represent a tangible burden on voters.

We have also seen evidence of this in the steady increases in registration and turnout in states that have implemented much-needed election reforms intended to improve access, integrity, and security, as well as in the steady *decrease* in the number of enforcement cases being brought by the Justice Department due to a decreasing number of violations of federal law, even after the 2013 *Shelby County* decision.

I explained this in greater detail in a 2019 law review article, “The Myth of Voter Suppression and the Enforcement Record of the Obama Administration.”⁶ For example, during the entire eight years of the Obama administration, the Civil Rights Division of the Justice Department filed only four cases to enforce Section 2 of the VRA. The Trump Administration filed two Section 2 enforcement actions.

In short, there was no upsurge in Section 2 cases after the *Shelby County* decision; in fact, the Obama Administration filed far *fewer* Section 2 enforcement actions than the Bush Administration, which filed 16 such cases. The record over the past two decades, and particularly in the last ten years, provides no evidence to support the claim, which has been asserted many times, that there are widespread, systematic, unlawful voter suppression actions being taken against minority voters by state and local jurisdictions.

As the Supreme Court outlined in 2013 in *Shelby County*, the original conditions that

⁵ Enrico Cantoni and Vincent Ponsi, “Strict Voter ID Laws Don’t Stop Voters: Evidence From a U.S. Nationwide Panel, 2008-2018, National Bureau of Economic Research, Working Paper No. 25522 (Feb. 2019, Revised May 2021).

⁶ Hans A. von Spakovsky, “The Myth of Voter Suppression and the Enforcement Record of the Obama Administration,” 49 U. Mem. L. Rev. 1447 (2018-2019).

justified the preclearance requirement no longer existed; in fact, the turnout of minority voters in the covered jurisdictions was higher than white turnout in “five of the six States originally covered by Section 5, with a gap in the sixth State of less than one half of one percent.”⁷ No one disputes that Section 5 was needed in 1965. But in the same way that the Supreme Court did, we must all recognize that time has not stood still, and “[n]early 50 years later, things have changed dramatically.”⁸

This can also be seen in Census Bureau reports on registration and turnout in the subsequent federal elections after the 2013 decision in *Shelby County*. The Bureau’s report on the 2012 election showed that black Americans voted at a higher rate than whites nationally (66.2% vs. 64.1%).⁹ Other examples abound. According to the Census Bureau’s reports (found in Tables 4a) for the 2016, 2018, and 2020 elections, Mississippi, a formerly covered state, had a higher overall turnout of citizen voters than Connecticut, New York, and Delaware. The turnout, respectively, for Mississippi was 67.7%, 54.2%, and 70.3% in each election. The citizen turnout in the other three states according to the Census Bureau was less for each election year:

Connecticut – 63.9% (2016); 54% (2018); and 66.6% (2020)

New York – 57.2% (2016); 49.5% (2018); and 64.7% (2020)

Delaware – 62.3% (2016); 51.8% (2018); and 67.7% (2020)

Moreover, the turnout of black citizens (“alone” per the Census category as outlined in Table 4b) exceeded that of whites “alone” in Mississippi in each of those elections. The same cannot be said for Connecticut, New York, and Delaware, in which the percentage of white voter exceeded that of blacks in some elections, while the reverse was true in others. Georgia, a formerly covered state, also had a higher overall percentage of turnout of its citizens according to the Census reports than New York in the 2016, 2018, and 2020 elections, and the turnout percentage of black citizens was also higher in Georgia in the 2018 (59.6%) and 2020 (64%) elections than in New York in both elections (51.3% and 62.7%).

A survey in Georgia after the 2022 election shows that the critics of the state’s 2021 election reforms that were intended to protect the security and integrity of the election process for Georgia voters were wrong when they claimed it would “suppress” votes, particularly of minority voters.¹⁰ The survey by the Survey Research Center of the School of Public & International Affairs at the University of Georgia found that precisely 0% of black voters said that they had a poor experience voting in 2022. In fact, 96.2% of black voters said their voting experience was “excellent” or “good,” compared to 96% of whites, a statistically insignificant difference.

⁷ *Shelby County*, 570 U.S. at 535.

⁸ *Shelby County*, 570 U.S. at 547.

⁹ Thom File, U.S. Census Bureau, “The Diversifying Electorate – Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections) 3 (2013).

¹⁰ “2022 Georgia Post-Election Survey,” Survey Research Center, School of Public & International Affairs, University of Georgia (Jan. 17, 2023).

Moreover, when asked to compare their voting experience in 2022 in comparison to 2020, over 19% of black voters said their voting experience was “easier” and 72.5% said there was “no difference,” for a total of 91.6%. That compares to 13.3% of white voters who said they had an “easier” experience in 2022 and 80.1% said they saw “no difference,” for a total of 93.4%. Once again, we have a statistically insignificant difference between the stated experiences of black and white voters – except that a larger percentage of black voters than white voters reported that their voting experience actually was easier after the state implemented the new procedures. According to the Pew Research Center, Georgians cast “more votes” in 2022 than in “any other midterm” election in its history, with black voters making up 48% of the increase since 2000.¹¹

The Census Bureau’s recent release of its 2020 election survey of voter turnout also clearly demonstrates that there has been no wave of “voter suppression” keeping American voters from registering and voting or that requires amending the VRA and expanding the power of the Justice Department.¹²

Instead, the Census Bureau reports that the turnout in the 2020 election was 66.8 percent – just short of the record turnout of 67.7 percent of voting-age citizens for the 1992 election. This was higher than the turnout in President Barack Obama’s first election, which was reported as 63.6 percent by the Census Bureau.

The Census survey shows that there was higher turnout among all races in 2020 when compared to the 2016 election. Black Americans turned out at 63 percent, compared to only 60 percent in 2016. Fifty-nine percent of Asian Americans voted in 2020, a 10-percentage point increase from 2016 when 49 percent turned out to vote.

The Census Bureau reports that voter registration in 2020 reached 72.7 percent, which is higher than the 70.3 percent who registered in 2016 after eight years of the Obama-Biden administration. Not only that, but voter registration in 2020 was higher than in the 2000, 2004, 2008 and 2012 elections.

Hispanics made up 11 percent of the total turnout in the 2020 election, up from only nine percent in 2016. The Hispanic share of the vote was just behind that of Black Americans, who had 12 percent of the total vote in 2020 – the same percentage of the total vote by Black Americans in the 2016 election at the end of the Obama-Biden administration.

As outlined in a recent Heritage Legal Memorandum, “Tenth Anniversary of Shelby County: Cause for Celebration,” the registration and turnout rates in the states formerly under the

¹¹ Abby Budiman and Luis Noe-Bustamante, “Black eligible voters have accounted for nearly half of Georgia electorate’s growth since 2000,” Pew Research Center (Dec. 15, 2020).

¹² “2020 Presidential Election Voting and Registration Tables Now Available,” U.S. Census Bureau, Press Release (April 29, 2021).

preclearance requirements of Section 5 of the VRA have continued to have registration and turnout rates far above the low rates the Congress determined were a symptom of discrimination when it passed the VRA in 1965.¹³

The bottom line of the Census Bureau's surveys are that Americans are easily registering – when they want to – and they are turning out to vote when they are interested in the candidates who are running for office. In fact, in an election year in which we were dealing with an unprecedented shutdown of the country due to a pandemic, we had, according to the Census Bureau, "the highest voter turnout of the 21st century."

Proposed Amendments in H.R. 4

Not only are minority voters registering and turning out to vote in record numbers, but the other factors that showed the need for preclearance have also long disappeared. As the Supreme Court pointed out in the *Northwest Austin* case: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."¹⁴ Yet the amendment being proposed in S. 4, "The John Lewis Voting Rights Act Advancement Act," would not only bring back the preclearance requirement of Section 5, but actually *expand* preclearance to reach every state in the country with a new and unprecedented "practice based" preclearance requirement even though there is far less voting discrimination than at any point in our history as a democratic republic.

The new coverage formula in S. 4 is unfair and will not satisfy constitutional concerns. First of all, a state government and all of its subdivisions will be placed under preclearance coverage for ten years if there are 15 "voting rights violations" by local jurisdictions during the "previous 25 calendar years." Thus, a state government can have preclearance imposed on it, even though it has no voice in who is elected to positions in local government and no supervisory authority over, and no ability to direct, what those local elected officials do in passing local ordinances and engaging in redistricting.

Similarly, local governments that have never engaged in any discriminatory actions of any kind, and that obviously have no control over what the state legislature or other local governments do, will still have preclearance imposed on them for ten years if there are ten voting rights violations committed by other actors, one of which was the state. Both of these coverage formulas violate basic and fundamental principles of due process and fairness, among other problems.

Second, "voting rights violations" include not just final court judgments that a jurisdiction has violated the VRA or the Fourteenth and Fifteenth Amendments, but also settlement agreements, consent decrees, and any preclearance objections made by the Attorney General.

¹³ Hans von Spakovsky, "Tenth Anniversary of Shelby County: Cause for Celebration," Heritage Foundation Legal Memorandum No. 345 (Nov. 17, 2023).

¹⁴ *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (citation omitted).

Such objections by the Attorney General under Section 5 do not require any finding of intentional discrimination and can be based on statistical disparities that are not discriminatory, a dubious and highly questionable legal standard that S. 4 would incorporate into Section 2.

Including settlement agreements and consent decrees will not only deter defendants from settling cases, but it will also lead to collusive litigation. Even settlements of meritless litigation that a state or local jurisdiction enters into to avoid the cost of litigation would count as a “voting rights violation” for purposes of triggering preclearance coverage. Moreover, there will be a strong incentive for plaintiffs who are allied politically with the elected leadership of local jurisdictions to file collusive litigation in which the defendants quickly agree to settle what may be a frivolous lawsuit in order for it to count as a voting rights violation so preclearance will be imposed on the entire state. This could enable partisan advocacy groups and others to bring states within preclearance coverage through a series of such lawsuits against their political partners.

However, S. 4 contains a new, unprecedented preclearance provision that would expand the reach of Section 5 far beyond what existed in 1965. The additional “practice based” preclearance being proposed would apply to every single political jurisdiction in the United States, whether they meet the new coverage formula or not, even if there has been absolutely no evidence of discriminatory conduct whatsoever by those jurisdictions. It would apply to changes covering election rules – “practices” – such as the “documentation or proof of identity” needed to register or vote, or the methods used by states to maintain the accuracy of their voter lists.

The “practices” that would have to be approved by the Justice Department or the U.S. District Court for the District of Columbia before they can take effect are so broad and cover such a wide spectrum of election administration procedures and rules that election changes made by state legislatures and local governments in virtually every state would be under federal control, creating an unprecedented violation of the constitutional right of states to administer their elections and to determine the eligibility of voters for federal elections.

There is no justification for requiring cities, counties, and states to get the approval of the Attorney General of the United State for changes, including referenda approved by voters, which have been implemented through the democratic process.

There is also no need for new legislation reimposing and actually expanding the onerous preclearance requirements of Section 5 of the VRA, and no evidence that the permanent provisions of the VRA such as Section 2 are not adequate to protect voters’ rights. The proposed amendments are also almost certainly unconstitutional because they do not satisfy what is required by the Supreme Court’s *Shelby County* decision to justify continuing, much less expanding, the preclearance requirement.

As the Court made clear in that decision, the 1965 standards were obsolete, and any requirement that states obtain federal pre-approval of any proposed election changes before they

can be implemented could be imposed only if Congress found “blatantly discriminatory evasions of federal decrees;” lack of minority office holding; voting tests and devices; “voting discrimination ‘on a pervasive scale;’” or “flagrant” or “rampant” voting discrimination. These conditions are nowhere to be found in any state in 2024.

Additionally, Section 3 of the VRA already allows a federal court to impose a preclearance requirement in a particular jurisdiction for as long as necessary where the court determines that there is intentional misconduct and preclearance is required to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments.¹⁵ With the availability of the customized preclearance requirement of Section 3 that can be imposed on a recalcitrant jurisdiction based on the specific evidence of wrongdoing uncovered in a specific enforcement action, there is no need for a broad, general, and expanded preclearance requirement as proposed in S. 4.

If S. 4 is enacted, the lawyers inside the Voting Section of the Civil Rights Division would be given veto authority over state election laws and regulations. When it comes to exercising that powerful discretion and initiating unbiased enforcement actions, the attorneys in that section have a very checkered record. This was perhaps best captured in 1994 in *Johnson v. Miller*, where a federal court issued a scathing opinion in a preclearance case charging that “the considerable influence of ACLU advocacy on the voting rights decisions of the United States attorney general is an embarrassment” and that the “dynamics” between the DOJ and American Civil Liberties Union lawyers “were that of peers working together, not of an advocate submitting proposals to higher authorities.” The judge was “surprised” that DOJ “was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.”¹⁶ The judge also found the “professed amnesia” of the DOJ lawyers about their relationship with ACLU attorneys “less than credible.”

In another case involving preclearance, a federal court ruled against DOJ, holding that it “had arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies.”¹⁷ In fact, using its power under the VRA, DOJ “impermissibly encouraged – nay, mandated – racial gerrymandering.”¹⁸ The public was forced to pay the state of Louisiana over \$1.1 million in attorneys’ fees and costs due to DOJ’s wrongdoing in that case.

As the Senate Judiciary Committee should be aware from a letter sent to the House Judiciary Committee in 2006 by the Justice Department, these were just two of 11 cases involving the Civil Rights Division from 1993 to 2000 in which courts admonished the Division for its misbehavior and awarded over \$4.1 million in attorneys’ fees and costs to defendants abusively targeted by the Division.¹⁹

¹⁶ *Johnson v. Miller*, 864 F.Supp. 1354 (S.D. Ga. 1994).

¹⁷ *Hays v. State of Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993).

¹⁸ 936 F.Supp. 360 (W.D. La. 1996).

¹⁹ Letter of April 12, 2006, from William E. Moschella, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Hon. F. James Sensenbrenner, Chairman, Committee on the Judiciary, U.S. House of Representatives.

In 2013, the Inspector General of the Justice Department issued a critical report on the operations of the Voting Section of the Civil Rights Division that cited numerous examples of inappropriate and biased behavior by its staff.²⁰ No one who reads that report could possibly think that giving the partisans who work in the Voting Section the legal power to decide what the election rules are for each state could possibly be a good idea.

The VRA is race-neutral – it protects *all* voters from discrimination. But that is decidedly not the view of the Voting Section staff. The Inspector General found “relevant evidence” demonstrating the staff “disfavored” cases where victims of discrimination were white.²¹ This resulted in their ignoring discrimination against white voters even in the most egregious of circumstances.

For example, the Voting Section failed to take action against a Guam law that used a blood ancestry test – the same kind used in the South during the Jim Crow era to exclude blacks – to prevent white and Asian residents of Guam from being able to register and take part in a plebiscite. It took an expensive private lawsuit to end Guam’s bigoted treatment of its residents, which the Ninth Circuit U.S. Court of Appeals found violated the Fifteenth Amendment in *Davis v. Guam* in 2019.²²

In 2006, according to the Inspector General, staff members assigned to file a lawsuit under the VRA against black officials in Noxubee County, Mississippi, for discriminating against white voters were subjected to written and verbal abuse from peers. The team leader was called a “Klansman” in official email correspondence. A black intern who requested to join the team was repeatedly taunted as a “token” and when the intern’s mother paid a visit to the office, career employees complained that her son was acting as a racial “turncoat.”²³

A federal court in 2007 found that the defendants in Noxubee County had engaged in “blatant” racial discrimination in a case that the majority of career staff not only did not want to bring, but in which they attempted to intimidate and harass those involved in working on the case.²⁴

The Inspector General also found that career employees, identifying themselves as DOJ employees, published “highly offensive and potentially threatening statements” about colleagues on prominent liberal-leaning news websites, including posting comments about one person’s “Yellow Fever” – a demeaning reference to that person’s presumed sexual attraction to a person who “look[s] Asian.”²⁵

²⁰ “A Review of the Operations of the Voting Section of the Civil Right Division,” Office of the Inspector General, U.S. Department of Justice (March 2013) (hereinafter “OIG Report”).

²¹ OIG Report, p. 179.

²² *Davis v. Guam*, 932 F.3d 822 (9th Cir. 2019).

²³ OIG Report, p. 121-123.

²⁴ *U.S. v. Brown*, 494 F.Supp.2d 440 (S.D. Miss. 2007), affirmed 561 F.3d 420 (5th Cir. 2009).

²⁵ OIR Report, p. 127.

Another staff employee confessed to being the organizer of a three-person “cyber-gang” that published comments falsely asserting that a supervisor was a racist after hanging a noose in the supervisor’s office (p. 128-129). This employee, who adopted an online avatar of a black literary character who becomes a killer, made further online comments, including stating his desire to “choke” colleagues with whom he disagreed (p. 130).

The Inspector General found other conduct by staff in the Voting Section to be “disturbing,” including posting messages on liberal news sites disparaging administration officials and Section managers, and using extremely bigoted, racial language towards anyone they believed did not share their liberal views. When confronted with the Internet postings about conservative co-workers, one member of the “cyber bullying” group initially lied under oath to the Inspector General’s staff about her participation.²⁶

Lying to an Inspector General employee conducting an investigation is a federal crime, just as it is to lie to an FBI agent. Yet no adverse actions of any kind were taken against this Section staffer. In fact, a source inside the Voting Section told me she was treated as a “hero” by other employees.

Relevant to the finding by a federal court in the *Miller* case, the Inspector General also criticized Voting Section management for specifically reaching out only to progressive organizations, such as the ACLU, the Mexican American Legal Defense and Education Fund, the NAACP Legal Defense and Education Fund, and the Lawyers’ Committee for Civil Rights under Law, to fill job openings, while ignoring the resumes of other qualified professionals.²⁷ As a result, only applicants whose views were slanted dramatically to the left on the ideological spectrum, many of whom endorsed questionable views of the law, were given serious consideration.²⁸

One can already see this bias and abuse of authority in some of the more recent actions taken by the Civil Rights Division. DOJ threatened Arizona over the forensic post-election audit it conducted in a May 5, 2021, letter and issued “guidance” on July 28, 2021, purporting to outline “Federal Law Constraints on Post-Election Audits.”²⁹

This “guidance” wrongly exaggerates the reach of 52 U.S.C. §§ 20701-20706. The purpose of these federal statutes, which require the preservation of federal election records, is investigatory in nature. They exist to help the Attorney General in determining the advisability of commencing possible investigations of federal election offenses. But if there is no underlying potential voting rights violation, any exercise of this power is not authorized and is a brazen abuse of power.

Contrary to the assertions made by DOJ, conducting an audit of a past election does not violate the VRA or any other federal election law. In fact, the Justice Department has never – in the entire history of the existence of the Civil Rights Division – interfered with or investigated an

²⁶ OIG Report, p. 127-129.

²⁷ OIG Report, p. 198.

²⁸ OIG Report, p. 219-222.

²⁹ “Federal Law Constraints on Post-Election ‘Audits,’” U.S. Department of Justice (July 28, 2021).

election audit, because its past leadership has understood it has no legal authority to do so. There is also no basis for DOJ to assert, as it does in the guidance, a possible violation of Section 11b of the VRA, which prohibits the direct intimidation, threat or coercion of individuals “for the purpose of interfering” with the ability to vote given that Arizona voters *have already voted!* The Justice Department’s assertion that an audit could violate Section 11b is a highly implausible, if not outright absurd, interpretation of the law.

The same is true of the Justice Department’s July 28, 2021, “Guidance Concerning Federal Statutes Affecting Methods of Voting.”³⁰ In this “guidance,” DOJ says that it does not “consider a jurisdiction’s re-adoption of prior voting laws or procedures to be presumptively lawful,” and instead will review the changes “for compliance with” federal law. In other words, DOJ will use the emergency procedures adopted to deal with the COVID-19 emergency as the new baseline for reviewing a state’s election laws under the VRA.

Not only is such a standard not contemplated by the text and legislative history of Section 2 of the VRA, which defines the Department’s authority to assert violations of the law, it certainly is not in accord with the clear guidance provided by the U.S. Supreme Court on the application of Section 2 in the *Brnovich v. Democratic National Committee* decision. It is another example of the Division’s abuse of its authority. Instead, the Department was trying to intimidate states to prevent them from returning to their election rules that were in place prior to the health emergency caused by the COVID-19 pandemic.

The provisions of S. 4 that attempt to overturn the Supreme Court’s clear, common-sense guidance in the *Brnovich* decision on the application of Section 2 of the VRA are also ill-advised and interfere with states’ constitutional authority over the administration of elections. S. 4 attempts to eliminate rational and fundamental factors that are essential to evaluating the “totality of the circumstances” in any Section 2 lawsuit and whether a particular election practice is racially discriminatory.

It seems obvious that whether a similar practice – such as requiring voters to vote in their assigned precincts – has a “long pedigree or was in widespread use” or is “identical or similar” to the practices of other states is highly relevant to whether the practice is discriminatory. So is looking at the “availability of other forms of voting unimpacted by the challenged qualification.” And yet S. 4 would eliminate these important considerations as a defense to any claimed Section 2 violation.

S. 4 eliminates other highly relevant factors for evaluating the “totality of the circumstances” such as the “total number or share of members of a protected class on whom” the challenged practice will “not impose a material burden.” This is patently absurd. Under this

³⁰ “Guidance Concerning Federal Statutes Affecting Methods of Voting,” U.S. Department of Justice (July 28, 2021).

formulation of Section 2, if a state is able to show that 99.99% of Hispanic or black voters are unaffected by an election change, the state could still be found in violation of Section 2.

The proposed amendments would interfere with the ability of state legislators to protect their voters and the integrity of the election process by eliminating their ability to act to prevent election fraud or maintain public confidence in our elections. Those are two of the most fundamental duties of state and local officials when it comes to elections and the protection of democracy. Yet S. 4 would throw out all of these relevant factors as a viable defense to a Section 2 claim.

If enacted, this would be a dangerous and reckless policy that would risk the integrity of our elections and the confidence of voters in the fairness and security of elections. Maintaining public confidence is essential to turnout and keeping voters motivated to cast their ballots and participate in choosing their representatives at all levels of government. As former President Jimmy Carter (D) and former Secretary of State James Baker (R) said in their bipartisan 2005 report on our elections, “[b]uilding confidence in U.S. elections is central to our nation’s democracy.”³¹

S. 4 also specifically amends the VRA by inserting language stating that a “class of citizens protected” by Section 2 “may include a cohesive coalition of members of different racial or language minority groups.” Thus, if 25% of the voters in a particular congressional or state legislative district are Hispanic or African American and form a political coalition with 35% of the white voters in that district, all of whom consistently vote for the candidates of one political party, it would become a protected district under the VRA.

This unwise and unfair amendment would change the VRA from a statute intended to prevent racial discrimination in voting into a partisan political tool to protect political alliances and coalitions. As the Supreme Court said in *Bartlett v. Strickland* in 2009, this would raise “serious constitutional questions” about the validity of Section 2 of the VRA.³²

The VRA was passed by Congress under the authority of the Fifteenth Amendment, which bans denial or abridgment of the right vote on account of race. Changing Section 2 to protect political alliances as opposed to enforcing the straightforward language of the amendment to prevent racial discrimination would be far outside the enforcement authority granted by the amendment.

This change would also raise “serious constitutional concerns under the Equal Protection Clause” of the Fourteenth Amendment. Section 2 was not intended to “guarantee minority voters an electoral advantage,” and the protection of such combined districts would give minority voter

³¹ “Building Confidence in U.S. Elections,” Report of the Commission on Federal Election Reform (Sept. 2005), p. iv.

³² *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009).

an electoral advantage not provided to other groups such as, for example, white voters who constitute a majority in a district.³³

There are numerous other problems with changes proposed in S. 4, many of which would raise substantial questions about the constitutionality of the VRA if they were adopted. This includes the creation of a novel legal standard for injunctive relief unknown in modern jurisprudence that reverses the principle that the burden of proof is on a plaintiff, not the defendant. It mandates that federal courts issue an injunction if a plaintiff simply raises “a serious question” about a voting change and the “hardship” imposed on the state by enjoining the change is less than the “hardship” that would be experienced by the plaintiff if an injunction is not issued.

The inability of a state to enforce its own voting laws and regulations does not “constitute irreparable harm to the public interest,” thus overriding the fundamental democratic principle that the public interest is best served by courts enforcing the laws under which citizens choose to govern themselves through the representational process.³⁴

This change alone is perhaps one of the most anti-democratic provisions ever proposed by members of Congress.

Conclusion

Existing federal voting laws, including the VRA and other statutes such as the National Voter Registration Act and the Help America Vote Act, are more than sufficient to protect voters and ensure that they can easily and securely practice their franchise without discrimination, fear, or intimidation. Americans today have an easier time registering and voting securely than at any time in our nation’s history, and election officials and voters are already protected from intimidation and coercion by comprehensive federal and state laws. Voter registration and turnout data, as well as the enforcement record of the U.S. Justice Department, show that there is no widespread, systematic discrimination by state or local election officials to prevent citizens from registering and voting.

The permanent, nationwide provisions of the VRA such as Section 2 and Section 3 as currently written that apply across the country – not just to formerly covered jurisdiction under Section 5 – are powerful tools that still exist and are more than adequate to protect voting rights in those increasingly rare instances where discrimination does occur.

There is simply no need to resuscitate the outdated and obsolete preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5, which in addition to bringing back preclearance for covered jurisdictions, would add a “practice-based”

³³ Bartlett at 21.

³⁴ For more details about other unfair and unconstitutional sections of S. 4, see Hans von Spakovsky, “Destroying Election Integrity: The Unnecessary and Unconstitutional John R. Lewis Voting Rights Advancement Act (S. 4/H.R. 4),” Heritage Foundation Legal Memorandum No. 292 (Oct. 29, 2021).

preclearance requirement that would apply to every city, county, and state in the country. And the changes proposed to Section 2 would change it from a provision intended to prevent racial discrimination in voting to a tool for political manipulation of redistricting and the voting process intended to guarantee the success of one specific political party.

It is not 1965 and there is no longer any justification for giving the federal government the ability to veto the election laws and regulations that citizens and their elected representatives choose to implement in their respective states. There is also no justification for eliminating the ability of states to defend themselves from meritless lawsuits filed under the Voting Rights Act for nondiscriminatory, widespread, traditional election practices that have been developed to ensure both access for voters and the safe, fair, effective, and secure administration of our elections.