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Destroying Election Integrity: The Unnecessary and Unconstitutional John R. Lewis Voting Rights Advancement Act (S. 4/H.R. 4)

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KEY TAKEAWAYS

It is easier today than ever before in our nation's history for eligible Americans to participate in the electoral process.

The permanent, nationwide provisions of the Voting Rights Act are more than adequate to protect voting rights in the rare instances where discrimination occurs.

S. 4/H.R. 4 is a politically motivated federal power grab designed to thwart necessary election reform and manipulate redistricting decisions made by the states.

S. 4/H.R. 4, the John R. Lewis Voting Rights Advancement Act, would give liberal bureaucrats in the U.S. Department of Justice (DOJ) the power to veto changes of polling place locations, voter ID and registration requirements, and the boundary lines in redistricting in *every single state*. It would also amend the Voting Rights Act (VRA) to change legal standards to make it extremely difficult for states to defend themselves against meritless litigation filed by advocacy organizations to void state laws that protect election integrity.[1]

Three Supreme Court Rulings Targeted by S. 4 and H.R. 4

S. 4/H.R. 4 is intended to overturn three decisions by the Supreme Court of the United States over the application and constitutionality of various provisions

of the VRA: *Shelby County v. Holder* (2013);[2] *Brnovich v. Democratic National Committee* (2021);[3] and *Bartlett v. Strickland* (2009).[4]

Shelby County v. Holder. In *Shelby County v. Holder*, the Supreme Court struck down the coverage formula for Section 5 of the VRA. Section 5 was intended to be a temporary provision that required covered jurisdictions to get approval (preclearance) from the DOJ or a federal court in Washington, DC, before making any changes in their voting laws.

The 1965 coverage formula was based on low voter registration and turnout in presidential elections, which the Court found to be unconstitutional because the 2006 renewal of Section 5, which would have extended that provision for another 25 years, was based on 40-year-old data that did not reflect contemporary conditions. Census Bureau data show that black voter turnout today is on par with or exceeds that of white voters in many of the formerly covered states and that there are no disparities traceable to discriminatory behavior by states.

This decision did not affect other provisions of the VRA that protect voters, such as Section 2. There is no need for new legislation reimposing (and expanding) the onerous preclearance requirement and no evidence that the permanent provisions of the VRA are not adequate to protect voter rights. This is particularly true given that Section 3 of the VRA, which was unaffected by the *Shelby County* decision and in contrast to the blanket, widespread coverage of former Section 5, allows a court to impose a preclearance requirement on a particular jurisdiction for as long as necessary where the court determines that there has been intentional misconduct in that specific jurisdiction that justifies imposing preclearance to ensure compliance with the voting guarantees of the Fourteenth and Fifteenth Amendments.[5]

The proposed legislation is almost certainly unconstitutional because it does not satisfy what the Supreme Court said was required for preclearance coverage: The 1965 standards were obsolete, and any requirement that states obtain federal approval of election changes 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. Those conditions are nowhere to be found in 2021.

In the entire eight years of the Obama Administration, the Justice Department filed only four enforcement cases under Section 2 of the VRA, and there was no rise in enforcement actions by the department after the *Shelby County* decision.[6] According to a recent study, the decision "did not

widen the Black–White turnout gap in states subject to the ruling."[7] In fact, the U.S. Census Bureau survey of the 2020 election reports "the highest voter turnout of the 21st century."[8]

Brnovich v. Democratic National Committee. In *Brnovich v. Democratic National Committee*, the Supreme Court provided guidance on the proper application of Section 2 of the VRA. Section 2 is a permanent, nationwide ban on any voting practices that "result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group.[9] To determine whether Section 2 has been violated requires a court to consider the "totality of the circumstances" in each case. As the Supreme Court has explained and as Section 2 outlines, this "demands proof 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 '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[10]

In *Thornburg v. Gingles* (1986), the Supreme Court set out certain factors to be considered in the "totality of circumstances" analysis that the court adopted from a Senate Judiciary Committee report on 1982 amendments to the VRA.[11] Those factors, which are referred to as the "Senate Factors" by the courts and litigators, include, among other things, the extent of any history of official discrimination in the ability of minorities to register and vote, as well as their ability to participate as candidates in the election process, and the extent to which minorities have been elected to public office.

The totality of circumstances analysis had been applied in numerous redistricting cases involving claims of vote dilution under Section 2, but the *Brnovich* decision was the first case in which the Supreme Court applied Section 2 and the totality of the circumstances analysis "to regulations that govern how ballots are collected and counted."[12] While Arizona law "generally makes it very easy to vote," according to the Court, it applied two restrictions.

First, ballots cast by a voter outside of the voter's assigned precinct will not be counted.

Second, "mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter's family members, household members, or caregiver."[13] In other words, Arizona bans vote trafficking—the collection of ballots by third-party strangers such as candidates, campaign staffers, party activists, and political operatives who have a stake in the outcome of the election.[14]

In holding that neither of these election practices, which are followed by numerous other states, are discriminatory under Section 2, the Court provided "certain guideposts" on the application of Section 2 that led to its decision.[15] In determining whether a state's election law or practice is discriminatory, for example, a court "must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." This means that "where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without taking into account the other available means."[16]

S. 4/H.R. 4 would add a factor that would void voter ID laws and citizenship verification as well as eliminate all of the "guideposts" the Court provided in *Brnovich.* The effect would be to make it virtually impossible for states to defend themselves against meritless Section 2 claims challenging traditional, common-sense election practices followed by numerous states that impose minimal or nonexistent burdens on voters and protect the integrity of the election process.

Bartlett v. Strickland. Finally, S. 4/H.R. 4 would also overturn *Bartlett v. Strickland*. One of the threshold requirements established by the Supreme Court in *Thornburg* when a plaintiff is making a vote dilution claim under Section 2 in the redistricting context is that the racial minority group asserting a claim must be "sufficiently large and geographically compact to constitute a majority in a single-member district."[17] In other words, the minority group challenging the boundary lines of a political district has to be large enough that if the boundary lines were redrawn, the group would constitute a majority of the voters in the new district and thus would have the ability to elect its candidates of choice.

In *Bartlett*, the plaintiffs argued that Section 2 protected a North Carolina state House district with an African-American population of only 39 percent because those voters "could elect [their] candidate of choice with support from crossover majority [white] voters."[18] The Supreme Court specifically rejected this claim, saying it was "contrary to the mandate of §2." Section 2 requires showing that minority voters "have less opportunity than other member of the electorate to...elect their candidates of choice." But where those minority voters constitute a minority of the voters only in a particular district, they have "no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength."[19]

Applying Section 2 protection to so-called crossover districts "would grant minority voters a right to preserve their strength for the purposes of

forging an advantageous political alliance." As the Court concluded, Section 2 was intended to stop racial discrimination, not grant "special protection to a minority group's right to form political coalitions." Section 2 was not meant to grant minority voters immunity "from the obligation to pull, haul, and trade to find common political ground."[20]

What the Proposed Act Would Do

S. 4/H.R. 4's stated purpose is to prevent racial discrimination, but it would force racial gerrymandering, make race the predominant factor in the election process, advance the partisan interests of one political party, and prevent common-sense election reforms like voter ID.

It would change Section 3 from requiring a showing of intentional discrimination to allowing other violations of the VRA—most of which require only a showing of "disparate impact" (i.e., a statistical disparity)—to count toward triggering preclearance coverage.

New Coverage Formula for Section 4 of the VRA. Under a new coverage formula, a state government and all of its political subdivisions would be placed under Section 5 preclearance for 10 years if the DOJ determines that 15 "voting rights violations" by local jurisdictions have occurred during the "previous 25 calendar years," even though there were no violations by the state or by the majority of local governments.

Alternatively, entire states would be placed under Section 5 preclearance for 10 years if the DOJ determines that 10 "voting rights violations" have occurred during the "previous 25 calendar years" if one of those violations was by the state government.

A political subdivision within a state would be placed under preclearance coverage if it has had just three "voting rights violations" during the "previous 25 calendar years." That trigger is so low that it could end up covering almost any city, county, or town in the country.

"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. Such objections do not require *any* finding of intentional discrimination; a discriminatory effect based on statistical disparity is sufficient. Such "disparate impact" liability has been misused in many different areas besides voting.

This is especially troubling given the DOJ's history of filing unwarranted objections under Section 5 based on its bias in favor of liberal advocacy groups. For example:

- In 2012, a federal court overturned the DOJ's objection to South Carolina's voter ID law—but it cost the state millions of dollars to win.[21]

- In 1994, in a Georgia redistricting case, a federal court ruled against the DOJ and wrote a scathing opinion charging that "the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment" and expressing the court's "surprise[]" that the DOJ was "so blind to this impropriety."[22]

This bias has not changed. A 2013 report from the DOJ Inspector General criticized the Voting Section of the Civil Rights Division for hiring a majority of its lawyers from only five advocacy organizations: the American Civil Liberties Union (ACLU); National Council of La Raza; NAACP; Lawyers' Committee for Civil Rights Under Law (LCCR); and Mexican American Legal Defense and Educational Fund (MALDEF).[23]

In testimony before the Senate Judiciary Committee on September 22, 2021, Maureen Riordan, a 20-year veteran of the Voting Section who was directly involved in Section 5 preclearance, detailed the bias, partisanship, and "twisted racialism" she witnessed in the mishandling of cases. As just one example, during the Florida recount that occurred in the 2000 election, she observed "Voting Section staff discussing strategies to aid the DNC in Florida and receiving and sending faxes to [the] Democratic National Committee and campaign operatives."[24]

Most jurisdictions do not have the resources to fight the DOJ even when its objections are meritless.

Because tallying up court rulings against a jurisdiction, including settlement agreements and consent decrees, will trigger coverage, the DOJ and outside groups will have an incentive to file as many objections as possible and to manufacture litigation. Even settlements of meritless litigation that a state enters into to avoid the cost of litigation would count as "voting rights violations" for purposes of triggering preclearance coverage.

Practice-Based Preclearance Coverage. S. 4/H.R. 4 also has a new, unprecedented provision that did not exist in the VRA before the *Shelby County* decision and would vastly expand the DOJ's power and reach. It creates a "practice-based preclearance" requirement that would apply to *every single political jurisdiction in the country*, regardless of whether that jurisdiction is covered under the new 10-year coverage formula or ever had a history of discrimination.

Specifically, *all* state legislatures and local governments would have to get preclearance from the DOJ for any new "law, regulation, or policy" that:

- Adds "elected at-large" seats where two or more racial/language minority groups represent 20 percent of the voting age population (VAP);
- Adds "elected at-large" seats where a single language minority group represents 20 percent of the VAP on Indian lands within the political subdivision;
- Changes political boundaries that reduce by three percentage points the VAP of a single racial/language minority group where two or more racial/language groups represent 20 percent of the VAP or where a single language minority groups represents 20 percent of the VAP on Indian lands;
- Changes the political boundaries of a district where a racial/language minority group has experienced an increase in its population over the past decade of at least 10,000 or 20 percent of the VAP in the district;
- Changes the "documentation or proof of identity" needed to register or vote that is stricter than Section 303(b) of the Help America Vote Act[25] or stricter than what existed in state law on the day S. 4/H.R. 4 is enacted;
- Reduces or alters the distribution of "multilingual voting materials";
- "Reduces, consolidates, or relocates voting locations," including for early and absentee voting, or reduces the "days or hours of in person voting on any Sunday" in any census tract where two or more racial/language minority groups represent 20 percent of the VAP or on Indian lands represent 20 percent of a language minority group; and
- Changes state voter registration procedures for removing ineligible registered voters if two or more racial/language minority groups represent 20 percent of the VAP.

These "practices" are so broad and cover such a wide spectrum of election administration and procedures that election changes made by state

legislatures and local governments in virtually every state would now be within federal control. This is a startling invasion of state sovereignty that would likely be held unconstitutional by the U.S. Supreme Court, particularly since it allows the DOJ to object based purely on statistical disparities without any showing of any discriminatory purpose or intent.

Eliminating Defenses to Meritless Section 2 Claims by Changing the Senate Factors and Overturning Brnovich

S. 4/H.R. 4 adds a factor to the "totality of the circumstances" used to determine whether Section 2 has been violated that is obviously aimed at eliminating voter ID requirements and attempts by states to verify the citizenship of registered voters despite the fact that citizenship is a legal requirement to vote in federal and state elections.[26] It would amend the Senate Factors to include the following as evidence that a state or local government has engaged in voting discrimination:

> The extent to which the State or political subdivision has used unduly burdensome photographic identification requirements, documentary proof of citizenship requirements, or other voting standards, practices, or procedures beyond those required by Federal law that may impair the ability of members of the protected class to participate fully in the political process.

This essentially sets up federal law as the *de facto* law that states must apply. They could not impose any standards stricter than those imposed by federal law without being found to violate the VRA—an untenable and potentially unconstitutional limitation on state authority in elections to determine the qualifications of voters.

The only voter ID requirement in federal law is contained in the Help America Vote Act of 2002 (HAVA). Section 303(b) requires any individual who registers by mail—but only the first time he or she votes—to provide a copy of a photo ID or a "copy of a utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" or just the last four digits of the person's Social Security number that is matched to an existing state record.[27] Thus, states that require a photo ID to vote in every election and require IDs from all voters, including those who vote in-person at state agencies, would be subject to a lawsuit under Section 2 of the VRA claiming that they are discriminating.

Similarly, since the same section of HAVA added a citizenship question to the federal voter registration form, any attempt by a state to verify

citizenship that goes beyond simply accepting that form could violate this new factor. That would be the case even if election officials received credible evidence that a registered voter was not a U.S. citizen since they could be found to be violating Section 2 for asking voters to provide any documentation proving they are U.S. citizens.

Both the identity and citizenship of an individual determine whether that individual is actually eligible and qualified to vote in an election. Article I, Section 2 and the Seventeenth Amendment of the Constitution specifically provide the states with the power to determine who is eligible and qualified to vote in federal congressional elections. Thus, limiting the ability of states to verify the identity and citizenship of voters in federal elections is potentially unconstitutional when the state is applying those requirements in a racially neutral manner that does not violate the Fifteenth Amendment. While the new preclearance requirement is intended to prevent states from putting in new voter ID and other security requirements, this change is intended to foment successful attacks on existing voter ID and other laws that liberals have tried unsuccessfully to stop in court.

S. 4/H.R. 4 changes the language of one of the other Senate Factors in a way that makes no logical sense. One of the relevant considerations in a court's analysis is the extent to which minorities have been elected to office since that is a way of judging whether discrimination is present that prevents minority-preferred candidates from being elected. But that language is amended to say that the "fact that the protected class is too small to elect candidates of its choice" cannot be used to defend a Section 2 claim. If a challenger is arguing that the fact that minority-preferred candidates have not been elected to office is evidence of discrimination, how can it not be relevant that the minority population bringing the challenge is so small that even in a perfect system with absolutely no discriminatory barriers of any kind, it still could not elect its candidate of choice?

The John R. Lewis bill totally eliminates the guidelines the Supreme Court laid out in *Brnovich* for determining whether the election requirements of a state are, under the totality of the circumstances analysis, racially discriminatory under Section 2. If S. 4/H.R. 4 becomes the law, states will be prohibited from raising common-sense defenses to any such claim such as:

- The total number or share of members of a protected class on whom a challenged law "does not impose a material burden."

- The degree to which the challenged law "has a long pedigree or was in widespread use at some earlier date."

- The fact that the challenged law is used "in other States or political subdivisions."

- The "availability of other forms of voting unimpacted by the challenged" law.

- A "prophylactic impact on potential criminal activity" if such crimes have "not occurred in the State or political subdivision in substantial numbers."

- The legislature's intent was to prevent fraud and support and maintain "voter confidence" in the election process.

The elimination of these legitimate, rational, and entirely justifiable reasons for imposing election rules and regulations could result in completely absurd results. For example, no matter how minimal the number of voters affected by a requirement might be, that evidence could not be used to defend the law. Thus, if 99.9 percent of voters were completely unaffected by a voter ID requirement, the fact that the law imposed some burden on 0.1 percent of voters would still be sufficient to find the law discriminatory. As the Supreme Court said, "The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified."[28]

The fact that a challenged law—such as a requirement that an individual vote in his or her assigned precinct—has been in place for decades and is also the same rule followed by a majority of states could not be used to counter claims that the law is discriminatory. Those are obviously key facts in trying to determine whether a state has put in place some type of new, unusual, or extraordinary rule for the purposes of discriminating against particular voters.

The fact that the challenged rule was in place at an earlier date, such as in 1982 when Section 2 was amended to its current text, would also not be relevant under S. 4/H.R. 4. As the Supreme Court said in *Brnovich*, "the burdens associated with the rules in widespread use when § 2 was adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally 'open' or furnishing an equal 'opportunity' to vote in the sense meant by § 2." "We doubt," said the Court, "that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States." The language in S. 4/H.R. 4 is intended to do just that: uproot

long-standing election rules used by many states to protect the access of voters and the security and integrity of the election process that liberals have decided they do not like and that interfere with their partisan political goals.[29]

S. 4/H.R. 4 would bar courts from examining the entire election process in a state and all of the different opportunities that an individual has to vote since it would not be a viable defense to present evidence on the "availability of other forms of voting unimpacted by the challenged" law. Again, this makes no sense. The Supreme Court said that "courts must consider the opportunities provided by a State's entire system of voting" when examining a challenged law because if a State "provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means."[30]

If you are claiming that a state law limiting the ability of third-party strangers to pick up and deliver a voter's absentee ballot is discriminatory because it imposes an unacceptable burden on the voter, how can it not be relevant that the voter has an entire month to engage in early voting in person, not just on Election Day, but can also mail back his absentee ballot, deliver it himself to election officials, or allow a member of his immediate family or a caregiver to deliver the ballot? It seems obvious that such information is relevant to assessing the extent of the burden this one limitation imposes on a voter.

S. 4/H.R. 4 would eliminate as a defense what the Supreme Court called the "strong and entirely legitimate state interest [in] the prevention of fraud." "Fraud," said the Court, "can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."[31] Yet S. 4/H.R. 4 says that a legislature's concern in preventing fraud and ensuring public confidence in the election process is not legitimate and not a valid defense to a Section 2 discrimination claim.

The truth of what the Court said is underscored by The Heritage Foundation's Election Fraud database, which documents proven cases of fraud throughout the country, including fraud that overturned elections such as the 9th Congressional District race in North Carolina in 2018.[32] As the Supreme Court said in 2008:

> It remains true, however, that flagrant examples of such fraud…have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years…[and] that not only is the risk of voter fraud real but it could affect the outcome of a close election.[33]

Similarly, S. 4/H.R. 4 eliminates as a defense any "prophylactic impact" a law or rule may have on "potential criminal activity" unless such crimes have occurred in "substantial numbers." How much fraud does a state have to tolerate before it is free to act? Is one stolen election sufficiently "substantial?" How many voters have to be disenfranchised and their votes stolen or diluted before a state could act? And how is a state even going to know whether fraud has occurred if it does not have the tools in place to detect it?

The Seventh Circuit pointed this out when it upheld Indiana's voter ID law in discussing the type of fraud "in which a person shows up at the polls claiming to be someone else—someone who has left the district, or died, too recently to have been removed from the list of registered voters, or someone who has not voted yet on election day. Without requiring a photo ID, there is little, if any, chance of preventing" or even detecting this type of fraud.[34] Furthermore, there is "endemic underenforcement" of election fraud cases for a number of reasons, including the fact that election crimes are treated as "minor criminal" acts by all too many prosecutors.[35]

Distorting Section 2 by Protecting Political Alliances

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

By overruling *Bartlett* and extending Section 2 protection to such cross-over districts, Congress would transform Section 2 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 that case, this would raise "serious constitutional questions" about the validity of Section 2.[36]

The Voting Rights Act was passed by Congress under the authority of the Fifteenth Amendment, which bans denial or abridgement of the right to vote "on account of race, color, or previous condition of servitude." Changing the VRA to protect political alliances as opposed to enforcing the straightforward language of the amendment to prevent racial discrimination in the voting context would be far outside the enforcement authority granted by the amendment.

Such a 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 crossover districts would in fact give minority voters an electoral advantage not provided to other groups such as, for example, white voters who constitute a majority in a district.[37]

In addition to the constitutional issues, this change in Section 2 would raise serious practical problems. Such crossover districts "would require courts to make predictive political judgments not only about familiar, two-party contests in large districts but also about regional and local jurisdictions that often feature more than two parties or candidates." Courts "would face the difficult task of discerning crossover patterns in nonpartisan contests for a city commission, a school board, or a local water authority. The political data necessary to make such determinations are nonexistent for elections in most of those jurisdictions." Moreover, "predictions would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role" in the choices they make.[38]

New Disclosure Requirements

S. 4/H.R. 4 imposes burdensome and impractical public information disclosure requirements on local officials, such as providing detailed demographic analysis of every single precinct, as well as on state officials with respect to redistricting and other election changes. These changes must be posted within 48 hours despite the fact that much of the information that must be disclosed, such as the number of registered voters in each precinct, is constantly changing up until Election Day.

Changing Legal Standards and Procedures. While Section 5 of the VRA could be enforced only by the Attorney General, which means that only the DOJ could file an enforcement action against any covered jurisdiction that failed to comply with the preclearance requirement, S. 4/H.R. 4 would expand enforcement to allow "any aggrieved citizen" to file an enforcement action. This would open the floodgates to litigation by advocacy groups, particularly because the act would allow them to file a federal lawsuit if they disagreed with the DOJ's preclearance of a voting change.

S. 4/H.R. 4 creates a novel legal standard for injunctive relief that is both unknown in modern jurisprudence and far less stringent than the legal standard used for all other cases in the federal courts. The usual standard for whether a preliminary injunction is appropriate requires a court

to determine whether the plaintiff has shown a substantial likelihood of succeeding on the merits, the plaintiff is likely to suffer irreparable harm without the injunction, the balance of equities and hardships is in the plaintiff's favor, and an injunction is in the public interest.[39]

However, under S. 4/H.R. 4, if a plaintiff such as the ACLU simply "raise[s] 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 court must grant an injunction. This weaker standard favors plaintiffs' lawyers; reverses the principle that the burden of proof is on a plaintiff, not a defendant; and dramatically increases the odds that an injunction will be granted against state and local governments.

In another unprecedented move, S. 4/H.R. 4 also severely restricts the ability of courts of appeal, including the U.S. Supreme Court, to issue stays of such injunctions. In a section entitled "Grounds for Stay or Interlocutory Appeal," the act states that the inability of a state to enforce its own voting laws and regulations shall not "constitute irreparable harm to the public interest," thereby 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.

Finally, the Act would *dramatically* expand the Attorney General's power to challenge "any act prohibited by the 14th or 15th Amendment" of the U.S. Constitution. Under current law, the Attorney General can bring civil rights claims only under specific federal statutes such as the VRA that authorize the Justice Department to enforce the law. Only private plaintiffs can file lawsuits alleging violations of the Fourteenth or Fifteenth Amendment. This change would allow the Attorney General to become involved in a whole range of constitutional cases that are unrelated to race discrimination, such as highly partisan, politically charged election disputes like the *Bush v. Gore* decision of 2000.

Conclusion

Americans today have an easier time registering and voting than at any other time in our nation's history. Moreover, both the enforcement record of the U.S. Department of Justice and voter registration and turnout data show that there is no widespread, systematic discrimination by state legislators and election officials to prevent citizens from registering and voting. The permanent, nationwide provisions of the Voting Rights Act, such as

Section 2 and Section 3, are powerful provisions and more than adequate to protect voting rights in those increasingly rare instances where discrimination does occur.

There is simply no need to bring back the preclearance provisions of Section 5 of the VRA and certainly no need to implement a new, vastly expanded Section 5. There is also no justification for amending Section 2 to allow it to be used to attack nondiscriminatory, race-neutral state election laws that critics do not favor for policy reasons. Extending the protections of the VRA to coalition districts would change the statute from a law protecting voters from racial discrimination to a law used to protect political alliances that favor particular political parties.

This 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. S. 4/H.R. 4 is nothing less than a federal power grab designed to thwart election reform and manipulate redistricting decisions made by the states.

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Endnotes

1. The House of Representatives passed H.R. 4 by a vote of 219 to 212 on August 24, 2021.
2. Shelby County v. Holder, 570 U.S. 529 (2013).
3. Brnovich v. Democratic National Committee, 141 S.Ct. 2321 (2021).
4. Bartlett v. Strickland, 556 U.S. 1 (2009).
5. 52 U.S.C. § 10302.
6. Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 Univ. of Memphis L. Rev. 1147 (2019), https://www.memphis.edu/law/documents/07_von_spakovsky.pdf.
7. Kyle Raze, "Voting Rights and the Resilience of Black Turnout," February 7, 2021, p. 1, https://kyleraze.com/files/shelby_county_voting.pdf.
8. Press Release, U.S. Department of Commerce, U.S. Census Bureau, 2020 Presidential Election Voting and Registration Tables Now Available (April 29, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-presidential-election-voting-and-registration-tables-now-available.html.
9. 52 U.S.C. § 10301.
10. *Brnovich*, 141 S.Ct. at 2332 (citing 52 U.S.C. §10301(b)) (emphasis in original).
11. Thornburg v. Gingles, 478 U.S. 30 (1986). *See also* Roger Clegg and Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, Heritage Found. Legal Memorandum No. 119 (Mar. 17, 2014).
12. Brnovich, 141 S.Ct. at 2330.
13. Id.
14. *See* Hans von Spakovsky, *Vote Harvesting: A Recipe for Intimidation, Coercion, and Election Fraud*, Heritage Found. Legal Memorandum No. 253 (Oct. 8, 2019).
15. *Brnovich*, 141 S.Ct. at 2336.
16. *Id.* at 2339.
17. *Thornburg*, 478 U.S. at 51.
18. *Bartlett*, 556 U.S. at 6.
19. *Id.* at 14.
20. *Id.* at 14–15 (citations omitted).
21. South Carolina v. Holder, 898 F.Supp.2d 30 (D. D.C. 2012).
22. Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), *affirmed*, 515 U.S. 900 (1995).
23. 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, p. 209, https://oig.justice.gov/reports/2013/s1303.pdf.
24. *Restoring the Voting Right Act: Combatting Discriminatory Abuses: Hearing before the S. Jud. Comm., Subcomm. on the Constitution*, Statement of Maureen S. Riordan (Sept. 22, 2021).
25. 52 U.S.C. § 21083(b).
26. A small number of jurisdictions such as San Francisco allow aliens to vote in local elections.
27. 52 U.S.C. § 21083(b).
28. *Brnovich*, 141 S.Ct. at 2339.
29. *Id*. at 2338–2339.
30. *Id*. at 2339.
31. *Id*. at 2340.
32. *See* Hans von Spakovsky, *Four Stolen Elections: The Vulnerabilities of Absentee and Mail-In Ballots*, Heritage Found. Legal Memorandum No. 268 (July 16, 2020); *see generally* https://www.heritage.org/voterfraud.
33. Crawford v. Marion County Election Board, 128 S.Ct. 1610, 1619 (2008).
34. Crawford v. Marion County Election Board, 472 F.3d 949, 953 (7th Cir. 2007).
35. *Id*.
36. *Bartlett*, 556 U.S. at 18.

37. *Id*. at 21.
38. *Id*. at 18.
39. *See* Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008).