AN UNPRECEDENTED AND UNCONSTITUTIONAL POWER GRAB

How Democrats are Abusing the Constitution to Nationalize Elections

Republican Staff Report

Committee on House Administration
Committee on the Judiciary

U.S. House of Representatives

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EXECUTIVE SUMMARY

Voting in free and fair elections is a foundation of American democracy. Every eligible voter must be able to cast a ballot, all lawful votes must be counted according to state law, and all Americans should have confidence in the outcome of elections. Radical Democrat legislation introduced in the House of Representatives would upend these principles, preventing common-sense measures to reduce voter fraud and putting partisan Washington, D.C. bureaucrats in charge of local elections. This legislation amounts to a partisan power grab designed to keep elected Democrats in power.

Under the Constitution, states maintain primary authority over election administration, with the federal government playing only a supporting role. Democrats ignore this Constitutional division of power to target and attack the election processes in Republican-led states. In a seemingly coordinated effort across government, Democrats have falsely and without evidence claimed that Republican-led states have instituted laws that are akin to "Jim Crow 2.0"[1] and passed to intentionally suppress minority votes. President Biden's Justice Department has even filed a meritless voting rights lawsuit against a Republican-led state—a state that actually allows greater election access than President Biden's home state of Delaware—and baselessly threatened that state efforts to return to pre-pandemic voting practices could be voting rights violations.

The centerpiece of the Democrats' legislative effort is H.R. 4, a radical far-left bill to weaponize the Voting Rights Act (VRA) to nationalize elections and prohibit popular voter integrity measures. At the time of its passage in 1965, the VRA was an exceptional and necessary departure from the principles of federalism to fight Democrat-led segregation and discrimination in voting in several states.[2] The VRA sought to overcome the exceptional conditions of pervasive state resistance and barriers that prevented minority voters from exercising their right to vote guaranteed under the 15th Amendment.[3]

Democrats refuse to accept that the United States today is different than the United States as it existed in the 1960s. Democrats refuse to accept the fact that the VRA has worked—that voter registration and minority turnout have hit record levels and continue to grow.[4] As the Supreme Court recognized in *Shelby County v. Holder*, a recent case in which the Court evaluated a portion of the VRA, "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[5]

The Committee on House Administration and the Committee on the Judiciary have received ample evidence documenting how more minority Americans are participating in elections

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[1] *See, e.g.*, Andrew E. Busch, *'Jim Crow 2.0' Is Imaginary – and Divisive*, Commentary, Real Clear Politics (Aug. 20, 2021), https://www.realclearpolitics.com/articles/2021/08/20/jim_crow_20_is_imaginary__and_divisive_146276.html.
[2] History, Voting Rights Act of 1965, https://www.history.com/topics/black-history/voting-rights-act (last visited Apr. 14, 2021).
[3] *Id.*
[4] *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. Hans von Spakovsky, Senior Legal Fellow, Center for Legal Studies, The Heritage Foundation, at 3 and 4).
[5] *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

than ever before. An election law expert testified that "minority participation is exponentially better now than it was in 1965."[6] He elaborated that registration disparities between certain minority and non-minority populations in states previously covered under the VRA are below the national average and are lower than the registration disparities in Democrat-led states such as "California, New York, Connecticut, D.C., Delaware, and Virginia."[7] In addition, according to data from the 2020 election, voter turnout was higher across all racial groups.[8] More Americans voted in the last two elections than ever before in our nation's history.[9]

Republicans embrace the great strides our country has made in electoral participation. Democrats seem unwilling to accept these facts. Instead, Democrats have created a false "crisis" in voting rights to justify their unprecedented and unconstitutional power grab. H.R. 4 would give the Department of Justice (DOJ) and federal courts the power to exert considerable control over state and local elections. H.R. 4 would effectively prohibit states from implementing popular voter integrity measures—like voter ID—by requiring these laws to be approved by partisan bureaucrats in Washington.

Democrats' push to nationalize elections in H.R. 4 can only be properly evaluated in conjunction with H.R. 1, their grab-bag bill to empower Democrat special interests and mandate far-left California-style elections. Taken together, these two bills are a massive federal power grab that would mandate some of the worst "pandemic-style" election administration changes of 2020 permanently across the nation. These bills do little to actually improve voting rights where there is intentional discrimination, and they do absolutely nothing to promote election integrity.

This Republicans staff report of the Committee on House Administration and the Committee on the Judiciary presents the evidence available to the Committees in relation to H.R.

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[6] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 6 (2021) (prepared statement of Mr. T. Russell Nobile, Senior Counsel, Judicial Watch, Inc.).

[7] *Id.*

[8] *Id.*

[9] U.S. CENSUS BUREAU, Table A-9, Reported Voting Rates in Presidential Election Years, by Selected Characteristics: November 1964 to 2016, *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/voting-historical-time-series.html; U.S. CENSUS BUREAU, Voting and Registration in the Election of November 2020, *available at* https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html. *See also* Jacob Fabina, *Record High Turnout in the 2020 General Election: Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record*, U.S. CENSUS BUREAU, https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html ("Despite unique challenges to voter registration and voting created by COVID-19 and heightened concerns about turnout as a result, the 2020 election had the highest voter turnout of the 21st century."); *Election Administration And Voting Survey 2020 Comprehensive Report: A Report From The U.S. Election Assistance Commission To The 117th Congress* ii, U.S. ELECTION ASSISTANCE COMM'N (2020), https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf

> (The 2020 EAVS confirms that the 2020 general election saw the highest turnout of any federal general election recorded by the EAVS to date, with 67.7% of the citizen voting age population (CVAP) casting ballots that were counted, an increase of 6.7 percentage points from 2016 levels. Nearly every state saw an increase in turnout compared to the 2016 EAVS. Furthermore, more than 209 million people were active registered voters for the 2020 general election, which represents an all-time high, and more than 161 million voters cast ballots that were counted for this election.).

4. It details how the radical provisions in H.R. 4 are not supported by data or experience. It explains how H.R. 4 is an unnecessary and unconstitutional power grab in support of Democrats' progressive goals. The report exposes how Democrats are politicizing voting rights, placing their partisan objective ahead of American constitutional rights.

At a time when our country faces real crises at home and abroad, Democrats in Washington have chosen to devote their limited time to addressing a manufactured one. It is easier today than ever before to vote in the United States, as the data reflects. But rather than celebrate this progress, Democrats continue their baseless attacks on Republican-led voter integrity measures and selectively target election laws in Republican-led states. H.R. 4 is merely a continuation of President Biden's and Washington Democrats' aggressive efforts to radically restructure every facet of American society in their progressive image.

I. H.R. 4's Radical Overhaul of Voting Rights and Elections Is Not Supported by Facts or Data

Despite what Democrats allege, the information available to the Committees does not support such a radical overhaul of the Voting Rights Act as proposed in H.R. 4. Voter registration overall and voter turn-out among minority populations have reached record levels.[10] Some states previously covered by the VRA actually outperform states that were not subject to the provisions of the VRA. As the Supreme Court has noted, the circumstances have changes since 1965 requiring a fresh examination of voting rights.

A. The United States Has Made Great Strides in Ballot Access for Minority Americans

Voting is a fundamental and constitutionally protected right in the United States. All eligible voters must have access to the ballot, and all lawful votes must be counted. Although the United States has struggled in the past with ensuring voting rights in some Democrat-led southern states, the country has made tremendous progress since then. It is easier today for eligible Americans to vote than ever before in our nation's history. More Americans voted in the last two elections than ever before in our nation's history.[11]

Voter registration overall and minority turn-out in the United States have hit record levels and continue to grow.[12] According to Census Bureau reports, turnout for the 2020 election broke the modern record, set in 1992.[13] Turnout among all races has also increased in recent presidential elections.[14] Racial minorities have also grown as a share of the overall electorate.[15]

Judicial Watch senior attorney Russell Nobile, an expert in election law, detailed these improvements in testimony before the Subcommittee on the Constitution of the House Judiciary Committee. Nobile told the Subcommittee that "minority participation is exponentially better now than it was in 1965."[16] He explained that "registration disparities in Texas, Florida, North Carolina, Louisiana, and Mississippi—all previously covered (in whole or part) the VRA—are all below the national average" and are lower than the registration disparities in "California, New York, Connecticut, D.C., Delaware, and Virginia."[17] As for turnout, Nobile testified that the "2020

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[10] *Id*. *See also Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. Hans von Spakovsky, Senior Legal Fellow, Center for Legal Studies, The Heritage Foundation, at 3 and 4).

[11] *Id. See also* Grace Segers, *Record voter turnout in 2018 midterm elections*, CBS News (Nov. 7, 2018), https://www.cbsnews.com/news/record-voter-turnout-in-2018-midterm-elections/.

[12] *Id*.

[13] United States 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.

[14] *See id*.

[15] *Id*.

[16] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 6 (2021) (prepared statement of Mr. T. Russell Nobile, Senior Counsel, Judicial Watch, Inc.).

[17] *Id.*

election had a higher turnout across all racial groups" and in Mississippi, a previously covered jurisdiction, "turnout for black voters . . . exceeded that of whites."[18] Given the recent Census data, Nobile concluded that "it is simply not credible to claim that Jim Crow style voter suppression currently exists."[19]

B. Democrats Selectively Target Republican States While Ignoring Democrat States

The Constitution sets forth a decentralized election administration system in which states maintain primary authority.[20] This decentralized system provides additional levels of security while affording states the ability to innovate to best serve the needs of their voters.[21] Democrats seek to undermine this decentralized process to consolidate power in the federal government and stop state-based voter integrity measures. As noted by Weber County, Utah, Clerk/Auditor Ricky Hatch in a February 2021 Committee on House Administration Hearing:

> Understanding that America's constitutionally decentralized election infrastructure recognizes that policies that may be best suited for one state may not be best suited for others. We respectfully encourage the federal government to engage in a robust federalism process with both state and local stakeholders regarding any legislative or regulatory changes relating to elections.[22]

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[18] *Id.*

[19] *Id*. at 7.

[20] U.S. Const. art. I § 4, cl. 1. *See also* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

[21] "The decentralization of the American election system means hackers would have to gain access to thousands of county and municipal systems, and to hundreds of thousands of machines, to make a dent in the electoral outcome." Reid Wilson, *Hacking the election is nearly impossible. But that's not Russia's goal*, THE HILL (Sept. 10, 2016), https://thehill.com/policy/cybersecurity/295170-hacking-the-election-is-nearly-impossible-but-thats-not-russias-goal.

> One reason [the election cannot be hacked] is that our election system is highly decentralized. There are more than 9,000 polling places from sea to shining sea, each of which is overseen by its own staff and equipped with its machines—either paper ballots or one of several brands of electronic voting machine. Each precinct reports its results independently. There is no centralized, federal election board. There is no national voter database. There is no U.S. election infrastructure that can be infiltrated or hacked.

Haley Sweetland Edwards and Chris Wilson, *It's Almost Impossible for the Russians to Hack the U.S. Election. Here's Why*. TIME (Sept. 21, 2016), https://time.com/4500216/election-voting-machines-hackers-security/. *See also Elections: System Security*, Washington Secretary of State, https://www.sos.wa.gov/elections/system-security.aspx ("State and local autonomy over election administration is a critical source of resilience for the US election process. Further, the decentralized structure allows state and local officials to innovate by creating and implementing solutions, which effectively manage the risk to their unique systems.").

[22] *Strengthening American Democracy,* Hearing before H. Comm. on Admin. (Feb. 25, 2021) (written testimony of Ricky Hatch, Clerk/Auditor, Weber County, Utah, at 3, https://docs.house.gov/meetings/HA/HA00/20210225/111246/HHRG-117-HA00-Wstate-HatchCPAR-20210225.pdf).

Democrats attack election integrity efforts in states like Georgia, Texas, and Florida as an excuse to nationalize elections. In doing so, Democrats completely disregard existing laws in Democrat strongholds like President Biden's home state of Delaware that are more restrictive. For example, Georgia's new election integrity law provides 17 days of early voting (compared to 10 days of early voting in 2018),[23] while Delaware will only have 10 days beginning in 2022.[24] New York provides only ten days of early voting.[25] Even the *Washington Post* gave President Biden a rating of "Four Pinocchios"—its worst rating—on his claim that the new Georgia voting law "ends voting hours early."[26] In addition, the pending Texas election reform legislation would prohibit drive-through and 24-hour voting, which local jurisdictions implemented temporarily due to the pandemic.[27] Neither Delaware nor New York currently allow drive-through or 24-hour voting.[28]

C. Democrats Ignored Perspectives of Local Election Officials

Democrats are not seriously interested in letting states decide what works best for their residents, or at the very least learning from local election administrators on the best ways to increase access to the ballot box and efficiently administer elections. In fact, the Democrats on the Committee on House Administration are so uninterested that they did not call a single witness that had administered an election until the last full committee hearing. This means that during the previous 18 hearings on elections and the one legislative hearing on H.R. 1 hosted by the Committee on House Administration,[29] in which the Democrats called over 100 witnesses, only their last two witnesses had ever administered an election on the state or county level. Democrats attempted to call certain Secretaries of States, and officials with the title of "Election Administrator," but these individuals also never administered elections. At the Subcommittee on Elections hearing on June 11, 2021, Rep. Bryan Steil exemplified this fact during the following exchange with Isabel Longoria, the Election Administrator from Harris County in Texas:

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[23] Ga. Code Ann. § 21-2-385(d) (Amended by *Election Integrity Act of 2021*); Ga. Code Ann. § 21-2-385(d)(1)(A). *See also* Nat'l Conference of State Legislatures, State Laws Governing Early Voting, https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last visited Jul. 29, 2021).

[24] Isabel Hughes and Sarah Gamard, *Georgia Republican lawmaker wants to emulate Delaware's 'draconian' voting laws*, DEL. NEWS J., https://www.delawareonline.com/story/news/politics/2021/04/13/georgia-republican-lawmaker-wants-emulate-what-he-calls-delawares-draconian-voting-laws/7186971002/. *See also* Nat'l Conference of State Legislatures, State Laws Governing Early Voting, https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last visited Jul. 29, 2021).

[25] *See also* Nat'l Conference of State Legislatures, State Laws Governing Early Voting, https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx (last visited Jul. 29, 2021).

[26] Glenn Kessler, *Biden falsely claims the new Georgia law 'ends voting hours early'*, Analysis, WASH. POST (Mar. 30, 2021), https://www.washingtonpost.com/politics/2021/03/30/biden-falsely-claims-new-georgia-law-ends-voting-hours-early/.

[27] *'No constitutional right to have 24-hour voting,' Gov. Abbott speaks to KHOU II about voting rights, results of 2020 election*, KHOU-11 (Jul. 14, 2021).

[28] Karl Rove, *Texas Democrats Suppress the Vote*, WALL ST. J. (Jul. 14, 2021).

[29] The Committee on House Administration and its Subcommittee on Elections held hearings over the 116th and 117th Congresses to inform the drafting of H.R. 4. *See Hearings*, U.S. H. of Reps. Comm. on H. Admin., 117th Cong., https://cha.house.gov/committee-activity/hearings.

Rep. Steil: Have you ever administered an election?

Ms. Longoria: No. Everyone's got to start somewhere, so I started six months ago as the elections administrator.[30]

A similar exchange occurred between Rep. Steil and Shenna Bellows, the Maine Secretary of State, at a hearing on February 25, 2021. In response to Rep. Steil's question on whether she had ever administered an election, Ms. Bellows stated, "I am in the process of administering my first election at the district level. . . . This is my first term as Secretary of State."[31]

Democrats knew that engaging directly with experienced state and local election administrators would hurt their efforts to overhaul the nation's election laws, so they conveniently did not request their participation in the hearings. Fortunately, Republican-invited witnesses included several experienced election administrators, such as Weber County, Utah Clerk/Auditor Ricky Hatch, Washington Secretary of State Kim Wyman, Kentucky Secretary of State Michael G. Adams, Louisiana Secretary of State R. Kyle Ardoin, Alabama Secretary of State John H. Merrill, and U.S. Election Assistance Commission (EAC) Chair Donald Palmer. Every experienced election administrator with whom Republicans engaged expressed serious concerns about H.R. 1. They repeatedly stressed that the numerous mandates throughout H.R. 1 would not work in their jurisdictions, would cost an incredible amount of money to implement, and could even make elections less secure.[32]

A common theme that the Committees have heard repeatedly from election officials serving on both state and local levels is to preserve state flexibility in elections. Given the unique needs and diverse demographics of the country's voting population, what may work in one state may not be feasible in other states or jurisdictions.

- During the Committee on House Administration hearing on July 12, 2021, Kentucky Secretary of State Michael Adams reiterated this point when he urged the Committee to "let Kentucky be Kentucky, let Louisiana be Louisiana and Vermont be Vermont, and respect the laboratories of democracy that lead to innovation in a decentralized election

[30] *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Isabel Longoria, Elections Administrator, Harris County, TX).

[31] *Strengthening American Democracy Before the H. Comm. on H. Admin.*, 117th Cong. (2021) (statement of Shenna Bellows, Secretary of State, Maine).

[32] *See generally, Strengthening American Democracy:* Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Ricky Hatch; *The Elections Clause: Constitutional Interpretation and Congressional Exercise*: Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Michael G. Adams; *Voting in America: Ensuring Free and Fair Access To The Ballot:* Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Kim Wyman; *The Impact Of COVID-19 On Voting Rights And Election Administration: Ensuring Safe And Fair Elections*: Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of R. Kyle Ardoin; The Impact Of COVID-19 On Voting Rights And Election Administration: Ensuring Safe And Fair Elections: Hearing before the Subcomm. on Elections, 117th Cong. (2021), written testimony of John H. Merrill; *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Donald Palmer.

system."[33]

- On April 22, 2021, when asked whether states were best situated to administer elections at a House Judiciary Subcommittee hearing, North Carolina Lieutenant Governor Mark Robinson testified: "Absolutely the states should remain in charge . . . . We need to stop this at the insinuation that somehow the people in Washington, D.C., know better than the people in North Carolina. You. Do. Not. And we will not tolerate it."[34]

- On February 25, 2021, in his written testimony before the Committee on House Administration, Weber County, Utah, Clerk/Auditor Ricky Hatch noted that "[c]ounties are integral in elections administration and therefore, federal policies should provide flexibility for local decision-making and in the nation's elections system."[35]

It is unfortunate that Democrats seem to forget that the goal of election reform in prior efforts was to promote state flexibility, not dictate to states how to run their elections.[36] Taking power and flexibility away from state and local elections officials creates an unnecessary and purely partisan nationalization of our country's elections system contrary to the Constitution and principles of federalism.

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[33] *The Elections Clause: Constitutional Interpretation and Congressional Exercise:* Hearing Before the Subcomm. on Elections, 117th Cong. (2021) (statement of Michael Adams, Kentucky Secretary of State).

[34] *Oversight of the Voting Rights Act: The Evolving Landscape of Voting Discrimination:* Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary, 117th Cong., at 37 (2021) (statement of Lt. Gov. Mark Robinson, North Carolina).

[35] *Strengthening American Democracy,* Hearing before H. Comm. on Admin. (Feb. 25, 2021) (written testimony of Ricky Hatch, Clerk/Auditor, Weber County, Utah, at 3, https://docs.house.gov/meetings/HA/HA00/20210225/111246/HHRG-117-HA00-Wstate-HatchCPAR-20210225.pdf).

[36] Conference Report on H.R. 3295, Help America Vote Act of 2002, 148 Cong. Record 133, H7838 (Oct. 10, 2002), https://www.congress.gov/107/crec/2002/10/10/CREC-2002-10-10-pt1-PgH7836-4.pdf

> (I want to stress that the name of the commission, the Election Assistance Commission, is not an accident. The commission's purpose is to assist States with solving their problems. It is not meant and does not have the power to dictate to States how to run their elections. This will not be a bill where Washington D.C. turns around and says, this is the way you do it. It will not have rulemaking authority. The fundamental premise of the legislation on the commission was to have no rulemaking authority, and it cannot impose its will on the States . . . .This leaves the power of responsibility for running elections right where it needs to be: in the hands of the citizens of this country. Local control has the further added benefits of allowing for flexibility so that local authorities can tailor their procedures meet demands and unique community needs . . . . By necessity elections must occur at the State and local level. One-size-fits-all solutions do not work and only lead to inefficiencies. States and locales must retain the power and the flexibility to tailor solutions to their own unique problems. This legislation will pose certain basic requirements that all jurisdictions will have to meet, but they will retain the flexibility to meet the requirements in the most effective manner.).

D. The Supreme Court Has Noted Changing Circumstances

In 1965, Congress passed the VRA because some Democrat-led southern states were taking active steps to prevent minorities from voting.[37] In enacting the VRA, Congress cited its enforcement authority under the Fifteenth Amendment,[38] which provides "that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude."[39] According to the 2006 Senate report from the VRA's last amendment, Congress initially enacted the VRA "to remedy 95 years of pervasive racial discrimination in voting, which resulted in the almost complete disenfranchisement of minorities in certain areas of the country."[40] In two recent decisions, the Supreme Court has noted how the United States has changed since the 1960s and reinforced that states have the power to enhance election integrity.[41]

1. Preclearance Was an "Extraordinary" Measure to Remedy "Exceptional Conditions"

In 2013, the Supreme Court held in *Shelby County v. Holder* that Section 4 of the VRA was unconstitutional "in light of current conditions."[42] By 2010, Alabama remained a covered state under Section 4 of the VRA, meaning jurisdictions in Alabama had to seek preclearance for voting changes. Shelby County, located within the state, sued the U.S. Attorney General seeking a declaratory judgment, finding that the VRA's coverage formula and preclearance requirement was unconstitutional.[43] Preclearance "turned on whether a jurisdiction had a voting test in the 1960s or 1970s, and had low voter registration or turnout at the time."[44] Shelby County argued that conditions had changed dramatically in the decades since the 1960s, making Section 5 an unnecessary infringement on state sovereignty.[45]

In 2013, the case went before the U.S. Supreme Court. In its decision, the Court noted that in 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide."[46] In addition, Census Bureau data showed that African American voter turnout exceeded white voter turnout in five of the six states that Section 5 originally covered and in that final state the gap was less than 0.5 percent.[47] In its holding, the

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[37] *See generally* S. REP. NO. 109-295, at 2 (2006).
[38] Voting Rights Act of 1965, 79 Stat. 437, 89 Pub. L. 110 ("An Act To enforce the fifteenth amendment to the Constitution of the United States and for other purposes."). *Compare with* Rep. Terri Sewell, Congressional Authority Statement for H.R. 4 (117th Cong.), Constitutional Authority Statement for H.R. 4, Congressional Record Vol. 167, No. 147, available at https://www.congress.gov/117/crec/2021/08/17/167/147/CREC-2021-08-17-pt1-PgH4338-2.pdf.
[39] *History and Enforcement of the Voting Rights Act of 1965:* Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Justice, 116th Cong. (2019), written testimony of Paige Whitaker at 2, https://crsreports.congress.gov/product/pdf/TE/TE10033 (Last accessed 8/23/2021).
[40] S. REP. NO. 109-295, at 2 (2006).
[41] *See, generally*, *Shelby County v. Holder,* 570 U.S. 529 (2013); *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321, (2021)
[42] *Holder*, 570 U.S. at 531.
[43] *Id.* at 529.
[44] *Id.*
[45] *Id.* at 547.
[46] *Id*. at 525.
[47] *Id.* at 548.

Court invalidated the Section 4 coverage formula as outdated, finding that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[48] Chief Justice Roberts, writing for the Court, said that the Court's decision "in no way affects" Section 2 of the VRA, nor did the Court issue a holding on Section 5.[49] Chief Justice Roberts wrote:

> Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.[50]

The Court shared this chart to demonstrate the tremendous progress made from 1965 to 2004.[51]

	1965			2004		
	White	Black	Gap	White	Black	Gap
Alabama	69.2	19.3	49.9	73.8	72.9	0.9
Georgia	62.[6]	27.4	35.2	63.5	64.2	-0.7
Louisiana	80.5	31.6	48.9	75.1	71.1	4.0
Mississippi	69.9	6.7	63.2	72.3	76.1	-3.8
South Carolina	75.7	37.3	38.4	74.4	71.1	3.3
Virginia	61.1	38.3	22.8	68.2	57.4	10.8

[48] *Id.* at 535.
[49] *Id.* at 557.
[50] *Id.*
[51] *Id. at 548.*

And the trends over the past two midterm and presidential elections have continued in a positive direction.

Voter Turnout Trends in the United States[52]

Turnout	2014	2016	2018	2020
Total	41.9	61.4	53.4	66.8
White (Non-Hispanic)	45.8	65.3	57.5	70.9
Black	39.7	59.4	51.1	62.6
Asian	27.1	49	40.6	59.7
Hispanic	27	47.6	40.4	53.7

In essence, the Court stated that the current formula in Section 4 is unconstitutional because it fails to reflect the reality of the tremendous progress the country has made since 1965. Although the Court struck down Section 4, Section 2 remains in place. This section provides an avenue for citizens to sue when they believe voting practices or procedures in their state discriminate on the basis of race, color, or membership in a specific language minority group. Additionally, Section 3(c) remains an effective tool within the VRA. This provision, also known as "bail-in" coverage, requires that when a court finds "intentional discrimination" on the part of a state or political subdivision in violation of the 14th and 15th Amendments justifying equitable relief, that the court "retain jurisdiction" and require the political subdivision to obtain approval from the court for any electoral change.[53]

Despite the clear facts standing against them, Democrats are desperate to expand federal power, even to the point of moving the goal posts to achieve their ends. Noted progressive activist Stacey Abrams served as a Democrat witness at a Committee on House Administration hearing on February 25, 2021, where she made the shocking pronouncement that voter turnout does not matter for voter suppression analyses. She testified:

> Rep. Barry Loudermilk: In your written testimony, you explain that Georgia saw record high turnout in the 2020 general election including from communities of color. . . . I understand your work focuses on ending voter suppression . . . and you allege that the suppression continued

[52] *The Diversifying Electorate–Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)*, Thom File, U.S. CENSUS BUREAU (May 2013), https://www.census.gov/library/publications/2013/demo/p20-568.html; *Voting and Registration in the Election of November 2014*, U.S. CENSUS BUREAU (July 2015), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html; *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU (May 2017), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html; *Voting and Registration in the Election of November 2018*, U.S. CENSUS BUREAu (Apr. 2019), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html; *Voting and Registration in the Election of November 2020*, U.S. CENSUS BUREAU (Apr. 2021), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html.

[53] *Id;* 52 U.S.C. § 10302(c).

	during the 2020 election. So, my question is, can you explain how you reconcile the record of high turnout with allegations of voter suppression particularly in light of Georgia's photo ID requirements for in-person voting?
Ms. Abrams:	So, I would begin by stating that there has never been a direct correlation between turnout and suppression.[54]

Democrats, including President Joe Biden, like to claim that the country is currently experiencing what they call "Jim Crow 2.0." This is simply not true.[55] As the Supreme Court stated in *Shelby County,* the nation has made tremendous progress since the 1960s. Voter registration and minority turn-out have hit record levels and continue to grow.[56] Judicial Watch senior attorney Russell Nobile testified before a House Judiciary Subcommittee that "minority participation is exponentially better now than it was in 1965. Based on this data, it is hard to contend that Section 5 needs to be expanded as proposed in H.R. 4."[57] Nobile stated that "registration disparities in Texas, Florida, North Carolina, Louisiana, and Mississippi—all previously covered (in whole or part) by Section 5—are all below the national average" and are lower than the registration disparities in "California, New York, Connecticut, D.C., Delaware, and Virginia."[58] As for turnout, Nobile testified that the "2020 election had a higher turnout across all racial groups" and in Mississippi, a previously covered jurisdiction, "turnout for black voters . . . exceeded that of whites."[59]

2. States have Authority to Protect the Integrity of Elections

On July 1, 2021, the Supreme Court issued its opinion in *Brnovich v. Democratic National Committee*,[60] a case concerning section 2 of the VRA. In 2016, the Democratic National Committee (DNC), the Arizona Democratic Party, and other liberal groups challenged two of Arizona's voting regulations under Section 2.[61]

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[54] *Strengthening American Democracy,* Hearing before H. Comm. on Admin., 117th Cong. (Feb. 25, 2021), https://www.youtube.com/watch?v=fI77J1RlVm4&t=4150s.
[55] *See, among others*, Andrew E. Busch, *'Jim Crow 2.0' Is Imaginary – and Divisive*, Commentary, Real Clear Politics (Aug. 20, 2021), https://twitter.com/thehill/status/1428748912966438922.
[56] *Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. Hans von Spakovsky, Senior Legal Fellow, Center for Legal Studies, The Heritage Foundation, at 3 and 4).
[57] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. (2021) (prepared statement of Mr. T. Russell Nobile, Senior Counsel, Judicial Watch, Inc., at 6).
[58] *Id.*
[59] *Id.*
[60] No. 19-1257, 594 U. S. ____ (2021), https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.
[61] Complaint, *Democratic Nat'l Comm., et al. v. Hobbs*, et al., No. 2:16-cv-01065-DLR (Ariz. D.C. Apr. 15, 2016).

- Arizona's precinct-based election day voting regulation requires in-person voters to cast ballots on Election Day at their assigned precinct. If the voter casts a ballot at the wrong precinct, election officials do not count the ballot.[62]

- In 2016, the Arizona made it a crime "for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot either before or after it has been completed."[63] This measure prohibits what is commonly referred to as "ballot harvesting."[64]

The DNC alleged that Arizona's ballot collection restriction and refusal to count out-of-precinct ballots had an "adverse and disparate effect" on Arizona's Native American, Hispanic, and African American citizens in violation of Section 2 of the VRA.[65] The DNC also alleged that Arizona legislators enacted the ballot collection restriction with discriminatory intent in violation of Section 2 and the Fifteenth Amendment.[66]

The Court held that Arizona's laws governing out-of-precinct voting and ballot collection do not violate Section 2 and that the legislature did not enact the ballot collection measure with discriminatory intent.[67] Justice Samuel Alito, writing for the majority, "identif[ied] certain guideposts" that led to the decision.[68] The Court explained that a Section 2 violation is established if:

> [B]ased on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not *equally open* to participation by members of a class of citizens protected by [Section 2] 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.[69]

To determine whether political processes leading to nomination and election are equally open to minority and non-minority groups, the VRA already requires courts to consider the

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[62] Syllabus, *Brnovich v. Democratic Nat'l Comm.,* No. 19-1257 at 1 (U.S. 2021).
[63] *Id.*
[64] Republicans are generally opposed to ballot harvesting due to the opportunities for and real-life examples of fraud. *See* Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., Report, *Political Weaponization of Ballot Harvesting in California*, U.S. H. of Reps. Comm. on H. Admin. (Minority), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf; *Top North Carolina election official alleges illegal ballot harvesting effort in key House race*, CNBC (Feb. 18, 2019), https://www.cnbc.com/2019/02/18/north-carolina-9th-district-house-election-saw-ballot-harvesting-official.html; Joseph Choi, *North Carolina political operative pleads guilty to ballot fraud*, THE HILL (June 21, 2021), https://thehill.com/homenews/state-watch/559508-north-carolina-political-operative-pleads-guilty-to-ballot-fraud.
[65] Complaint, *Democratic Nat'l Comm. v. Hobbs*, No. 2:16-cv-01065-DLR at 41 and 42 (D. Ariz. Apr. 15, 2016) *See also Brnovich v. Democratic Nat'l Comm.,* Slip Op., No. 19-1257, 594 U.S. ____ (2021), https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.
[66] *Brnovich* v. *Democratic Nat'l Comm*., No. 19-1257, 594 U.S. ____ at 9.
[67] *Brnovich v. Democratic Nat'l Comm*., No. 19-1257, 594 U.S. ____.
[68] *Id.* at 13.
[69] Voting Rights Act of 1965, 52 U.S.C. § 10301(b) (1982) (emphasis added).

"totality of circumstances."[70] The Court in *Brnovich* offered five circumstances that courts should consider when evaluating whether Section 2 has been violated:

1. *Size of the Burden.* "[T]he size of the burden imposed by a challenged voting rule is highly relevant."[71] Justice Alito noted that "mere inconvenience is insufficient."[72] He explained that "voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is 'equally open' and that furnishes equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'"[73]

2. *Departure from Standard Practice.* "The degree to which a voting rule departs from what was standard practice when §2 was amended in 1982 is a relevant consideration."[74] Justice Alito concluded that Congress did not intend for Section 2 to "uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States."[75]

3. *Size of Disparity.* "The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider." A rule that causes a small disparity in its effect on minorities is less likely to indicate that a voting system is not equally open.[76] Justice Alito stated that there must be a "meaningful comparison" between minority and non-minority groups when assessing the size of a disparity and that "[w]hat are at bottom very small differences should not be artificially magnified."[77]

4. *Opportunities Across Entire Voting System.* "Consistent with §2(b)'s reference to a States 'political processes,' courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision."[78] Justice Alito concluded 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 also taking into account the other available means."[79]

5. *Strength of State Interest.* "The strength of the state interests—such as the strong and entirely legitimate state interest in preventing election fraud—served by a challenged voting rule is an important factor."[80] If a strong state interest supports a voting rule, it is less likely that the rule violates Section 2.[81] Justice Alito noted that

[70] Voting Rights Act of 1965, 52 U.S.C. § 10301(b) (1982).
[71] Syllabus, *Brnovich*, 594 U.S. at 3.
[72] *Id.*
[73] *Id.*
[74] Syllabus, *Brnovich*, 594 U.S. at 3.
[75] *Id.* at 18.
[76] *Id.*
[77] *Id.*
[78] Syllabus, *Brnovich*, 594 U.S. at 3-4.
[79] *Id.* at 18-19.
[80] Syllabus, *Brnovich*, 594 U.S. at 3-4.
[81] *Id.* at 19.

states have an important interest in preventing election fraud and ensuring votes are cast without intimidation or undue influence.[82]

II. H.R. 4 Is Unnecessary, Unconstitutional, and a Politically Motivated Power Grab

Under the guise of updating the VRA, H.R. 4 would establish unprecedented federal control over state-administered elections. The VRA "employed extraordinary measures to address" pervasive state resistance to removing racially discriminatory barriers that prevented minorities from exercising their right to vote. In 2013, the U.S. Supreme Court's *Shelby County v. Holder* decision recognized an obvious fact: "things have changed dramatically" since 1965. It is easier to vote today than ever before in our nation's history. Yet Democrats are claiming "sweeping voter suppression" to justify for H.R. 4's radical expansion of the extraordinary measures in the VRA.

On June 24, 2021, Sara Frankenstein, an attorney who litigates VRA cases and the Vice Chair of the South Dakota State Advisory Committee for the U.S. Civil Rights Commission, testified before the Subcommittee on Elections on the prospect of a new preclearance formula. She explained:

> Rep. Steil: Recognizing that the voting access for minorities in 1964 and 1965 was very different than it is today in 2021, and that, thankfully, we've made a lot of progress in righting historic wrongs—is a preclearance formula necessary, in your opinion, Ms. Frankenstein?[125]
>
> Ms. Frankenstein: In my opinion, it is not. I've cited to you the statistics of South Dakota and those laws that sought preclearance in our previously covered counties, as you heard me testify earlier none were—none were not granted preclearance.[126]

The reality is the Democrats' case for adopting H.R. 4 is both a cynical contrivance and politically motivated. While Democrats often allege that Georgia's Republican state officials engage in voter suppression, African Americans in Georgia register to vote and vote in elections at a greater rate than in the Democrat-controlled states of Illinois, New York, and California.[83] Arizona, a target for Democrat-aligned activist litigation for its prohibition on ballot harvesting and out-of-precinct voting,[84] has higher voter turnout for minority groups than neighboring

[82] *Id.* at 19.
[83] *See*, Table 4b, U.S. Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020).
[84] *See, e.g.*, Brnovich v. Democratic National Committee, No. 19-1257 (S. Ct. Arg. Mar 2, 2021) (challenging Arizona's prohibition of ballot harvesting and out-of-precinct voting).

California where ballot harvesting, out-of-precinct voting, and same-day voter registration are legal.[85]

H.R. 4 is nothing more than a backdoor attempt to have partisan bureaucrats in Washington, D.C., control the elections process. Requiring states to seek federal permission to make any change to election administration is another prime illustration of the Washington, D.C. swamp's desire to take over our country's election system. This very point was highlighted in written testimony by Mark F. (Thor) Hearne, II, at the June 24, 2021, Subcommittee on Elections of the Committee on House Administration hearing. He testified:

> Preclearance empowers partisan bureaucrats in the Voting Section of the Civil Rights Division of the Justice Department to veto or rewrite state election laws. Chief Justice Roberts observed, "the preclearance process at the Department of Justice is famously opaque and usually the States and municipalities have to go through or had to go through several layers of back and forth, … its sort of a bargaining process." *Wesley Harris v. Arizona Independent Redistricting Comm'n*, 578 U.S. ___, 136 S.Ct. 1301 (2016), oral argument transcript, p. 7. In 2013 the Department of Justice Inspector General found the officials in the Voting Section of the Civil Rights Division hired its lawyers from essentially five left-leaning advocacy groups. The point is this, the preclearance process, in practice, has proven to be an arbitrary, standardless (and now determined to be unconstitutional) intrusion into State's constitutional authority to conduct elections. And, not only that, but the preclearance process has been exploited for partisan and ideological ends that have nothing to do with the goal of protecting every citizen's right to vote irrespective of their race, color of their skin or their language. In short, preclearance devolved into a process that was arbitrary, partisan, and standardless.[86]

Congress would be wise to remember Thomas Jefferson's admonition that "[t]he government governs best that is closest to the people."[87] No state legislature should be compelled to engage in the drastic remedy of seeking the approval of partisan bureaucrats in the Biden

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[85] *See* Editorial Board, *What Was That About Voter Suppression*, WALL ST. J. (May 3, 2021), https://www.wsj.com/articles/what-was-that-about-voter-suppression-11620081220. *See also* Table 4b, U.S. Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020).

[86] *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting, Hearing before Comm. on H. Admin. Subcomm. On Elections (June 24, 2021), written statement of Mark F. (Thor) Hearne, II, at 12-13 (*citing *A Review of the Operations of the Voting Section of the Civil Rights Division,* U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, OVERSIGHT REVIEW DIVISION, March 2013*, p. 203, available at* http//org.justice.gov/reports/2013/s1303.pdf) (internal citations omitted).

[87] Merrill Peterson, The Jefferson Image in the American Mind 79 (1960) (cited in *That government is best which governs least (Spurious Quotation),* THOS. JEFFERSON ENCYCLOPEDIA, https://www.monticello.org/site/research-and-collections/government-best-which-governs-least-spurious-quotation). Peterson refers to this phrase as a "Jeffersonian maxim". *Id*.

Administration to enact laws or make policy changes that are necessary to ensure the integrity of the elections process.

A. Democrats Manufacture a Crisis to Justify H.R. 4

In *City of Boerne v. Flores*, the Supreme Court held that congressional action pursuant to the 14th Amendment must be congruent and proportional to the harm that Congress seeks to redress or prevent.[88] Specifically, the Court ruled that "there must be a congruence between the means used and the ends to be achieved" and that an act of Congress relying on the 14th Amendment must have "proportion to supposed remedial or preventive object . . . [in order to be] responsive to, or designed to prevent, unconstitutional behavior."[89] The Court stated that this was necessary to prevent Congress from "attempt[ing to enact] a substantive change in constitutional protections" and enacting laws that "pervasively prohibit[] constitutional state action in an effort to remedy or to prevent unconstitutional state action . . . ."[90]

Although the *City of Boerne* case concerned the 14th Amendment, its logic "applies equally" to the 15th Amendment.[91] The 15th Amendment contains an identical enforcement provision to that of the 14th Amendment and "*Boerne* conflates the two amendments throughout."[92] Therefore, when Congress uses its power to enforce the mandates of the 15th Amendment, the use of this power must be congruent and proportional to the harm it seeks to address.

The Court has held that the VRA "imposes current burdens and must be justified by current needs" because "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[93] Congress has previously justified the VRA's Section 5 preclearance requirements as an exercise of its power to "enforce the fifteenth amendment of the Constitution.[94] Historically, the VRA has been upheld by the Court because "[t]he blight of racial discrimination in voting had infected the electoral process in parts of our county for nearly a century."[95] However, "[n]early 50 years later, things have changed dramatically."[96]

Data from recent elections and DOJ enforcement activity under the Obama-Biden Administration suggest that the burdens that H.R. 4 will impose on states far exceed what would be constitutional. For instance, the Census Bureau reports that turnout for the 2020 Election was 66.8% of the eligible voting age population.[97] This level of turnout was just shy of the 67.7%

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[88] *See City of Boerne v. Flores*, 521 U.S. 507, 530-532 (1997).
[89] *Id*.
[90] *Id.* at 532-533.
[91] Honest Elections Project, *Memorandum on Potential Legal Challenges to a New Preclearance Regime* (Aug. 6, 2021) (on file with the U.S. H. of Reps. Comm. on H. Admin.).
[92] *Id.*
[93] *Shelby County v. Holder*, 570 U.S. 529, 542 (2013) (internal citations omitted).
[94] *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).
[95] *Shelby County*570 U.S. at 545 (quotations omitted).
[96] *Id*. at 547.
[97] Press Release, *2020 Presidential Election Voting and Registration Tables Now Available*, Census Bureau, (Apr. 29, 2021).

achieved in 1992, the modern record.[98] Turnout among all races has also increased in recent presidential elections.[99] Racial minorities have also grown as a share of the overall electorate.[100] If there were rampant racial discrimination in voting of the sort necessary to justify the measures in H.R. 4, these statistics would simply not be possible.

Similarly, if the Supreme Court's decision in *Shelby County* had "emboldened states to pass voter suppression laws" as some Democrats like Associate Attorney General Vanita Gupta have claimed, then DOJ would have accordingly increased its enforcement activity utilizing authorities of the VRA and other voting rights laws that were not affected by *Shelby County*.[101] In fact, then-Attorney General Eric Holder announced after the Court issued its decision in *Shelby County* that DOJ would "shift resources to the enforcement of Voting Rights Act provisions that were not affected by the Supreme Court's ruling—including Section 2."[102] Despite this rhetoric, DOJ enforcement activity actually decreased.[103] The Obama-Biden Administration filed just four Section 2 enforcement actions compared to the 16 that were filed during the Bush Administration.[104] The Obama-Biden DOJ similarly filed few or no enforcement actions utilizing other authorities to combat voter suppression,[105] suggesting that there was no flood of voter suppression following the Court's decision in *Shelby County*.

Today, it is clear that the preclearance regime is no longer congruent and proportional to "a pattern of constitutional violations."[106] Instead, to support H.R. 4's exceptional deviation from the principles of federalism and the burdens it imposes on states, Democrats manufacture a crisis in voting rights—one that is unsupported by the data.

B. Democrats Double Down with Overly Broad Practice-Based Preclearance

In addition to the false basis for H.R. 4—that the United States in the midst of Jim Crow-era levels of voter suppression—H.R. 4 violates the basic constitutional principle that states have the primary role of passing election laws and administering elections.[107] H.R. 4 goes beyond the requirements of the original preclearance regime in the VRA by requiring all states to seek Justice Department approval for certain voting laws regardless of whether the laws are discriminatory or

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[98] *See Oversight of the Voting Rights Act: Potential Legislative Reforms: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 117th Cong. (2021) (prepared testimony of Hans von Spakovsky).
[99] *See Id*.
[100] *Id*.
[101] Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1158 (2019).
[102] *Id*.
[103] *Id*.
[104] *See Id*. at 1158-1159.
[105] *See Id*. at 1171-1179.
[106] Memorandum from Honest Elections Project on Potential Legal Challenges to a New Preclearance Regime (Aug. 6, 2021).
[107] U.S. Const. Art. 1 § 4. *See also* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

the State has met any threshold for coverage by a preclearance regime. Under the bill, this "practice-based preclearance" would apply immediately and would cover certain election law changes like modifying jurisdictional boundaries or voter ID laws.

Practice-based preclearance is a radical nationalization of elections with no basis in law or reality. According to Heritage Foundation Senior Legal Fellow Hans von Spakovsky, the practices in this provision "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."[108] Thus, if implemented, states would be unable to enact commonsense and practical election integrity reform laws—such as voter identification and voter roll maintenance laws—without first obtaining preclearance from the DOJ. The practice-based coverage provision seems to be "designed to target popular voter integrity provisions."[109] As Judicial Watch Senior Attorney Russell Nobile testified at a House Judiciary Subcommittee hearing, "[i]f nationwide registration disparities did not justify nationwide Section 5 coverage during the Jim Crow era, it is hard to see what data from 2020 supports imposing a nationwide preclearance requirement today."[110]

C. Legal Standards and Authorities Favoring Leftist Advocacy Groups Will Inject Confusion into Elections

In addition to creating the unconstitutional practice-based preclearance requirement, H.R. 4 also institutes a number of other problematic changes to existing election law. First, H.R. 4 institutes a new legal standard for courts to grant injunctive relief in VRA-related actions. Currently, the legal standard for granting a preliminary injunction requires the 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."[111] H.R. 4 lowers to the bar, allowing a plaintiff to simply raise 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 . . . ."[112]

Additionally, H.R. 4 will embolden leftist advocacy groups to work hand in hand with partisan bureaucrats within the DOJ to file meritless litigation against states and localities. The bill allows any aggrieved citizen (in addition to the Attorney General) to seek relief under the VRA and related voting laws.

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[108] Hans von Spakovsky, *Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act (H.R. 4),* HERITAGE FOUND. (May 24, 2021).
[109] *Oversight of the Voting Rights Act: A Continuing Record of Discrimination, Hearing before H. Comm. on the Judiciary,* 117th Cong. at 12 (2021) (written statement of Mr. Russell Nobile, Senior Attorney, Judicial Watch).
[110] *Id.*
[111] Hans von Spakovsky, *Enabling Partisan Federal Bureaucrats to Control State Election Laws: The Unnecessary and Unconstitutional John Lewis Voting Rights Advancement Act (H.R. 4),* HERITAGE FOUND. (May 24, 2021), https://www.heritage.org/election-integrity/report/enabling-partisan-federal-bureaucrats-control-state-election-laws-the.
[112] *Id.* The current legal standard for granting a preliminary injunction requires the 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."

Likewise, H.R. 4 contains a new provision that will inject confusion into elections by undermining the *Purcell* principle—a principle that asserts federal "courts should not change election rules during the period of time just prior to an election because doing so could confuse voters and create problems for officials administering the election."[113] In *Purcell v. Gonzalez*, the Supreme Court noted that "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[114]

In April 2020, the Supreme Court relied on this principle in its decision to block a lower court order that extended the absentee ballot deadline for Wisconsin's spring election.[115] In an emergency ruling, the U.S. Supreme Court overruled the district court order that "fundamentally alter[ed] the nature of the election" by unilaterally ordering Wisconsin to count ballots that were mailed and postmarked after the primary election day so long as they arrived at election offices within a week. [116] The Court stated:

> Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election . . . . This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election . . . .[117]

H.R. 4 would fundamentally alter the *Purcell* principle, making it harder for courts to halt last-minute attempts to change election administration laws in the lead-up to an election. For example, H.R. 4 prohibits courts from considering proximity to an election a valid reason to deny, stay, or vacate relief unless the opposing party can prove, by clear and convincing evidence, irreparable harm to the public interest or that the relief would impose a serious burden. Distorting the *Purcell* principle could lead to further chaos and confusion in states and localities when election laws are radically altered so close to an election.

D. H.R. 4 Expands Section 3(c) Bail-In Coverage

H.R. 4 dramatically expands courts' "bail-in" coverage. Section 3(c) of the VRA requires that when a court finds "intentional discrimination" on the part of a state or political subdivision in violation of the 14th and 15th Amendments justifying equitable relief, the court "retain jurisdiction" and require the political subdivision to obtain approval for any electoral change.[118] Under this section, either the court must find or the jurisdiction must admit that the state or political subdivision committed a constitutional violation. Section 3(c) actions are initiated as Section 2

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[113] *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSblog, https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/ (last accessed Aug. 18, 2021).
[114] *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, (2006).
[115] *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___, at 2 (2020).
[116] *Id.*
[117] *Id*.
[118] *Id.*

suits, and Section 3 allows the court to use its discretion as to the length of time it retains jurisdiction over the state or political subdivision.

H.R. 4 expands a courts ability to "bail in," or retain jurisdiction over, a state or political subdivision for preclearance coverage not just for violations of the 14th and 15th Amendments, but also allows a court to "bail in" a jurisdiction for "violations of any Federal law that prohibits discrimination in voting on the basis of race, color, or membership in a language minority group."[119] These provisions would dramatically expand court jurisdiction far beyond what was intended in the VRA.

E. Bifurcation of Section 2 Claims Target States' Interest to Protect Against Fraud

On July 31, 2021, the U.S. Supreme Court issued its decision in *Brnovich v. Democratic National Committee.* Since then, Congressional Democrats vowed to undo the decision, even saying that *Brnovich* made "it far more difficult to challenge" states' voter integrity laws.[120] On August 17, 2021, the Democrats revealed their new H.R. 4 for the 117th Congress, with ten pages of legislative text in response to the *Brnovich* decision.

The *Brnovich* decision halted efforts to further politicize the VRA and usurp authorities rightly reserved to the states. The *Brnovich* decision helped "resolve[] an unsettled question of law" regarding Section 2 VRA challenges.[121] This new section of H.R. 4 is wholly unnecessary and out of line with recent Supreme Court precedent.

H.R. 4 bifurcates Section 2 claims into vote dilution cases, cases relating to time, place, or manner voting rules, and cases related to discriminatory intent.[122] Democrats selectively apply Supreme Court precedent, codifying precedent from *Thornburg v. Gingles* for vote dilution cases but specifically prohibiting prohibit courts reviewing time, place, or manner voting rule claims from taking into account most of the factors identified by Justice Alito in the *Brnovich* decision.[123] In that opinion, Justice Alito specifically noted that the analysis and factors used in vote dilution cases from *Thornburg,* are "plainly inapplicable in a case that involves a challenge to a facially neutral time, place, or manner voting rule."[124]

F. Retrogression Will Make it Almost Impossible to Change States' Election Laws

The new legislative text for H.R. 4 adds a new subsection to Section 2 of the VRA that allows the Attorney General or private parties to stop changes in voting that states enact or seek to administer. Specifically, H.R. 4 states that a violation of Section 2 occurs when a state or political subdivision enacts or seeks to administer any qualification or prerequisite to voting or voting

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[119] H.R. §2(a), 116th Cong. (2019).
[120] Press Release, Rep. Jerry Nadler, Nadler & Cohen Statement on SCOTUS Ruling in *Brnovich v. Democratic National Committee* (Jul 1, 2021).
[121] *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses, Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong. at 9 (2021) (written statement of Mr. Robert D. Popper, Senior Atty, Judicial Watch, Inc.).
[122] *Id.*
[123] *Id.*
[124] Syllabus, *Brnovich v. Democratic Nat'l Comm*., No. 19-1257 at 4 (U.S. 2021).

practice for any election that has the purpose, or will have the effect, of diminishing the ability of citizens, on account of race or color, or membership in a language minority group, to participate in the electoral process or elect their preferred candidate. The bill retroactively applies this subsection to "any action" taken by a state or locality after January 1, 2021. Thus, this new provision is a direct attack on the recent election integrity reform efforts undertaken in states such as Georgia.

Further, this provision is all about control. Maureen Riordan, Litigation Counsel at Public Interest Legal Foundation, testified before the Subcommittee on the Constitution of the House Judiciary Committee that a retrogression standard is "lower" than the current "Section 2 evidentiary standard."[125] She explained that "[t]his standard would make it almost impossible for a state to ever make changes to its election laws."[126] This is just another provision of H.R. 4 that attempts to nationalize election administration.

III. H.R. 4 is Part of Democrats' Broader Strategy to Nationalize Elections

Democrats want to radically overhaul the nation's election system. Their goal is to transfer control of the nation's election laws and administration from the states to bureaucrats in the federal government. The Democrats' H.R. 1 and H.R. 4 would prevent states from establishing commonsense election laws, such as voter ID requirements or list maintenance requirements. Instead, these bills would create an onerous regime that would benefit Democrats' partisan goals, perfectly exemplified by their proposed public funding of congressional campaigns.

Throughout the floor debate of H.R. 1, the 18 Committee on House Administration's Subcommittee on Elections hearings, and the six House Judiciary Constitution, Civil Rights, and Civil Liberties Subcommittee hearings leading up to the introduction of H.R. 4, Democrats repeatedly stated numerous false claims in an attempt to justify their unconstitutional bills to nationalize election law.

A. Democrats Claim "Voter Suppression" to Make Permanent Emergency, Temporary Voting Measures Implemented During the COVID-19 Pandemic

Many states adopted temporary voting procedures for the 2020 election to reduce public health risks, despite prominent public health officials saying that in-person voting was safe.[127] These temporary measures, including expanded and universal mail-in voting—of which there are documented examples of abuse[128]—opened the door to election administration errors and harmed

[125] *Id.* at 8 (written statement of Ms. Maureen Riordan, Litigation Counsel, Public Interest Legal Found.).
[126] *Id.*
[127] Nsikan Akpan, *What Fauci says the U.S. really needs to reopen safely*, NAT'L GEOGRAPHIC (Aug. 13, 2020).
[128] *See A Sampling of Recent Election Fraud Cases from Across the United States*, HERITAGE FOUND., https://www.heritage.org/voterfraud (last visited Aug. 2, 2021); Ray Van Dusen, *Judge rules for new Aberdeen Ward 1 alderman election*, MONROE JOURNAL (Mar. 1, 2021); Press Release, GA Secretary of State, Election Fraud Cases Sent to Prosecution as Dominion Refutes Disinformation (Feb. 24, 2021); Joseph Curl, *1,000 people Double-Voted in Georgia Primary, Face 10 Years in Prison, $100,000 Fine*, DAILY WIRE (Sept. 8, 2020); Press Release, New Jersey Office of the Attorney General, AG Grewal Announces Fraud Charges Against Paterson Councilman Michael Jackson, Councilman-Elect Alex Mendez, and Two Other Men (Jun. 25, 2020).

election integrity.[129] In addition, some state election officials and state courts bypassed the constitutionally-vested authority of their state's legislature to make unprecedented changes to state election laws.[130]

Recognizing the temporary nature of these voting procedure changes, Attorney General William Barr directed the Civil Rights Division to adopt an enforcement policy that would "presume[] lawful" a state's re-adoption of prior election laws or procedures.[131] However, on July 28, 2021, Attorney General Merrick Garland issued a new guidance that suggests that states may not return to voting laws and procedures that existed prior to the pandemic, saying those laws and procedures may not be "presumptively lawful."[132]

The new Biden Administration guidance is misguided and contrary to Congressional intent. Many of the changes that state and local governments made to voting procedures in 2020 were temporary, emergency changes to "promote both the safety of their citizens and robust democratic participation" during the pandemic.[133] These jurisdictions should be allowed to evaluate the changing circumstances and their experiences in 2020 and make appropriate lawful changes, without the threat of litigation from the federal government. With the new guidance, the Department instead takes the position that these temporary, emergency measures are the new baseline from which to judge compliance with the VRA—contrary to Congress's intention in passing the legislation.[134]

B. There is No Record of Widespread Voter Suppression

Democrat lawmakers have repeatedly pushed to "restore" and revise the VRA, citing the passage of "sweeping voter suppression laws" in several states following the *Shelby County* decision.[135] However, if the Supreme Court's decision in *Shelby County* had "emboldened states to pass voter suppression laws" as some Democrats claimed, then the DOJ would have accordingly increased its enforcement activity utilizing authorities of the VRA and other voting rights—which the Department did not.[136] One commentator called the voter suppression claims "leftovers reheated for the third time."[137] However, in both Committee on House Administration and House Judiciary Subcommittee hearings, Democrats' efforts to demonstrate massive voter suppression fell flat.

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[129] Republican Staff Report, *How Democrats are Attempting to Sow Uncertainty, Inaccuracy, and Delay in the 2020 Election,* H. Comm. on the Judiciary & Comm. on Oversight & Reform, at 1-3 (Sept. 23, 2020).
[130] Mark Levin, *On January 6 we learn whether our constitution will hold,* THE BLAZE (Dec. 30, 2020).
[131] Memorandum from Hon. William P. Barr, Atty Gen., U.S. Dep't of Justice to Assistant Atty Gen. of the Civil Rights Division (Dec. 22, 2020).
[132] U.S. DEP'T OF JUSTICE, GUIDANCE CONCERNING FEDERAL STATUTES AFFECTING METHODS OF VOTING 1 (2021).
[133] *Id.*
[134] *See generally* S. REP. NO. 109-295, at 2 (2006).
[135] Sen. Patrick Leahy, John Lewis Voting Rights Advancement Act, https://www.leahy.senate.gov/imo/media/doc/John%20Lewis%20Voting%20Rights%20Advancement%20Act%20one%20pager.pdf (last visited Apr. 14, 2021).
[136] *Id.*; Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1158 (2019).
[137] Ken Blackwell, *Claiming state voting reforms are racist is ridiculous. I should know,* USA Today (Apr. 8, 2021).

At a May 24, 2021, Subcommittee on Elections of the Committee on House Administration hearing, Democrat witness Dr. Nazita Lajevardi, claiming that voter suppression reduced minority participation in 2016,[138] admitted to using faulty data. Her analysis and model studies relied merely on self-reported voter information from online "YouGov" surveys to reach her conclusions.[139] Furthermore, as Rep. Steil pointed out, her conclusion did not take into account the presence of a historically bad candidate such as Hillary Clinton. Dr. Lajevardi's studies did not control for the differences between a dynamic candidate like Barack Obama and an uninspiring candidate like Hillary Clinton. She admitted "that was not a variable we controlled for . . . we simply looked at the difference in voter turnout in counties between 2012 and 2016."[140]

During an April 22, 2021 hearing for the Judiciary Committee, Republican witness North Carolina Lieutenant Governor Mark Robinson testified that voter discrimination "absolutely is not" occurring in America today.[141] He further opined that "[t]here is no rampant discrimination against voters . . . . [I]t doesn't exist."[142] Further, during a June 29, 2021 hearing, Public Interest Legal Foundation attorney Maureen Riordan testified that "rampant acts of discrimination" do not exist:

> Rep. Johnson: You testified the Voting Rights Act is still working today without the preclearance requirement, which is a dated requirement, as you pointed out. It still clearly prohibits discrimination, but you noted—and I am very interested in this—the DOJ has only brought five section 2 cases since *Shelby County* was handed down 8 years ago? Are they ignoring rampant acts of discrimination out there? What do you think?
>
> Ms. Riordan: I think that the rampant acts of discrimination do not exist.[143]

Regarding H.R. 4, Ms. Riordan further explained that the bill is "looking to reauthorize a provision of the Voting Rights Act that is no longer necessary, because there is no rampant

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[138] *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Nazita Lajevardi, Professor, Michigan State University at 3-6), https://docs.house.gov/meetings/HA/HA08/20210524/112670/HHRG-117-HA08-Wstate-LajevardiN-20210524.pdf).

[139] *Id.*

[140] *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Nazita Lajevardi, Professor, Michigan State University).

[141] *Oversight of the Voting Rights Act: The Evolving Landscape of Voting Discrimination: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 35 (2021) (statement of Lt. Gov. Mark Robinson, North Carolina).

[142] *Id*. at 36.

[143] *The Need to Enhance the Voting Rights Act: Preliminary Injunctions, Bail-in Coverage, Election Observers, and Notice: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 37 (2021) (statement of Ms. Maureen Riordan, Atty, Public Interest Legal Found.).

discrimination in voting."[144] T. Russell Nobile, Senior Attorney with Judicial Watch and a former trial attorney in the Justice Department's Civil Rights Division, also affirmed that there is no widespread voter suppression across the country today.[145]

C. Democrats Want More Money in Politics—Including Taxpayer Dollars

Democrats mislead the public by claiming that they want less money in politics. During the debate on H.R. 1, House Speaker Nancy Pelosi stated at least 13 times that we need to get "big, dark money" out of politics.[146] Repeating this meaningless statement over and over again, apparently unaware of the irony, Democrats' H.R. 1 bill actually increases the amount of money in politics.

Even worse, H.R. 1 puts public money in congressional campaign coffers.[147] H.R. 1 would establish a six-to-one funding match to any small donor contributions of $200 or less in a congressional or presidential campaign, meaning for every $200 spent, the federal government would match it with $1,200 of public funds.[148] Furthermore, H.R. 1 would create a new voucher pilot program that grants eligible voters a $25 voucher to donate to any campaign of their choosing.[149] These provisions would yield the exact opposite of what Democrats claim to seek and instead put more money into politics.

Additionally, at the June 11, 2021 hearing, Democrat witness Ms. Isabel Longoria, Election Administrator of Harris County, Texas, admitted to Ranking Member Steil that Harris County sought grants from the Center for Technology and Civic Life (CTCL), the Facebook CEO Mark Zuckerberg-affiliated nonprofit, received $9,663,446 from the group, and then spent a significant portion of that money on Facebook advertisements.[150] This raises the important question as to how private groups' donations to election administrators may influence how local elections are run.

D. Democrats' Push for Ballot Harvesting Undermines Election Integrity

While ballot harvesting is a relatively new concept, instances of fraud and abuse have already occurred. Last year, the Republicans on the Committee on House Administration released

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[144] *Id.* at 50.
[145] *The Need to Enhance the Voting Rights Act: Practice-Based Coverage: Hearing Before Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary,* 117th Cong., at 55 (2021) (statement of Mr. T. Russell Nobile, Senior Atty, Judicial Watch).
[146] 167 Cong. Rec. 979-980 (2021).
[147] *See, generally*, the For the People Act, H.R. 1 (117th Cong.).
[148] *Id*. at Title V, Subtitle A.
[149] *Id*.
[150] Committee on House Administration Republicans, in response to Administrator Longoria's bombshell admission, made public records requests for complete, unredacted documents, communications, and information in custody of the Harris County Election Administrator's office referring to the grant funding Harris County received from CTCL. Harris County shared the following timeline: On September 24, 2020, Harris County submitted an official application to the CTCL requesting $9,663,446. Included in this request is $343,000 for "voter communications," which is later confirmed by Elections Administrator Isabel Longoria at the Subcommittee hearing to have included Facebook ads. *See Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Isabel Longoria, Elections Administrator, Harris County, TX).

a report on the political weaponization of ballot harvesting in California, stating that "unlimited ballot harvesting led to the defeat of seven Republican candidates in the California 2018 midterm election."[151] In California, ballot harvesting is legal and has almost no restrictions or safeguards.[152]

The report went on to discuss an instance of fraud in North Carolina, in which ballot harvesting is illegal. In 2018, North Carolina's 9th Congressional election was overturned because of practices of ballot harvesting.[153] In the days after the election for North Carolina's 9th Congressional District, affidavits were submitted by voters and by individuals who worked for McRae Dowless, a political consultant to the Republican candidate.[154] One voter attested that she handed her signed absentee ballot over to Dowless but left her ballot blank.[155] One individual hired by Dowless to pick up ballots testified that she was instructed to pick up ballots and deliver them to Dowless's office, where he allegedly had stacks of absentee ballots on his desk.[156] Additionally, an analysis of absentee ballots received over the course of the election concluded that the rate of unreturned absentee ballots was "significantly irregular," probably affecting the outcome of the election.[157] Ultimately, the North Carolina State Board of Elections declined to certify the result of North Carolina's 9th Congressional election "in light of claims of numerous irregularities and concerted fraudulent activities related to absentee by-mail ballots and potentially other matters," and ordered a new election be held.[158] The ballot harvesting ban in North Carolina played a key role in catching election fraud and the state passed a law to strengthen protections against its practice.[159]

As Ashlee Titus, Board Member and Corporate Secretary of the Lawyers Democracy Fund, stated in her written testimony at a hearing titled "Voting In America: The Potential For Polling Place Quality And Restrictions On Opportunities To Vote To Interfere With Free And Fair Access To The Ballot" before the Subcommittee on Election of the Committee on House Administration in reference to California's ballot harvesting law:

> This law has since had a dramatic effect on how elections are run in California, demonstrating how such laws can undermine election integrity and voter confidence. Unlimited ballot harvesting can allow paid political operatives to recruit and pressure voters to vote by mail at the behest of campaigns, unions, and special interest groups. Harvesters can influence voters to cast their ballot a particular way and in doing so undermine the secrecy of the ballot

[151] Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., *Political Weaponization of Ballot Harvesting in California*, U.S. H. of Reps. Comm. on H. Admin. (Minority), 117th Cong. (2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf.
[152] *Id.*
[153] *Id.* at 4-5.
[154] *Id.* at 4.
[155] *Id.*
[156] *Id.*
[157] *Id.* at 4-5.
[158] *Id.* at 5.
[159] *Id*. at 4-5.

box, a long-held essential principle of American elections intended to protect voters.[160]

Ballot harvesting increases the risk of voter fraud, threatens national security, and decreases voter confidence in our elections.[161] Despite these demonstrated risks, Democrats continue to insist it is a safe way to vote and necessary way to vote. When the Democrats succeed in nationalizing elections, liberal California style voting methods like ballot harvesting will be imposed on every state.

E. Democrats Will Stop Voter List Maintenance that Promotes Election Integrity

If enacted into law, H.R. 1 would make it significantly harder for states to ensure their rolls are accurate before an upcoming election. Regular voter list maintenance is an important part of good election administration. Further, list maintenance strengthens voter confidence in the integrity of our elections processes and outcomes by ensuring only eligible persons are registered to vote, such as by removing those who pass away or move to a different precinct or state. H.R. 4 would similarly hinder election integrity measures.

Federal law includes a number of fail-safes to ensure people are not removed improperly from state voter rolls, including by prohibiting states from removing individuals from voter rolls solely for their failure to vote;[162] prohibiting states from performing comprehensive list maintenance within 90 days of a federal election;[163] and allowing individuals who believe they have been improperly removed from the voter list to cast a provisional ballot and address the issue with elections officials.[164]

Before the Subcommittee on Elections of the Committee on House Administration, Kaylan Phillips, an attorney with the Public Interest Legal Foundation (PILF), testified that "chronic inaccuracy and lack of integrity in the voter rolls that list the individuals registered to vote in local, states, and federal elections" is "a significant problem facing America's electoral process."[165] In 2016, PILF found that a Pennsylvania resident "had seven active registrations because a third-party voter drive registered him seven times in the weeks before the 2016 election."[166] PILF also recently settled a lawsuit with Pennsylvania because they found "an excess of 21,000 registered voters positively matched against verifiable death records – some with dates of death dating as far

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[160] *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Ashlee Titus at 5.
[161] Ranking Member Rodney Davis, U.S. H. of Reps. Comm. on H. Admin., *Political Weaponization of Ballot Harvesting in California*, U.S. H. of Reps. Comm. on H. Admin. (Minority), 117th Cong. (2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/CA%20Ballot%20Harvesting%20Report%20FINAL.pdf.
[162] 52 U.S.C § 20507(b).
[163] National Voter Registration Act of 1993 § 8(c)(2)(A), 52 U.S.C. § 20507 (2002).
[164] Help America Vote Act of 2002 § 302, 107 Pub. L. 252, 116 Stat. 1666.
[165] *Voting in America*: *The Potential for Voter List 'Purges' to Interfere with Free and Fair Access to the Ballot*: Hearing before the Subcomm. On Elections, 117th Cong. (2021), testimony of Kaylan Phillips at 2.
[166] *Id*.

back as the late 1990s."[167] Then in Las Vegas for the 2020 Primary and General Elections, following the decision to send every registered voter a ballot, PILF found "that a total of 223,000 primary ballots and other 92,000 general election ballots were directed to outdated addresses and were returned undeliverable."[168]

Conducting regular voter list maintenance is a commonsense solution to ensure ballot integrity and strengthen voter confidence in elections. In discussing the importance of accurate voter lists, Republican witness Harmeet Dhillon noted in her written testimony at the Subcommittee on Elections May 24, 2021, hearing that former President Obama's bipartisan Presidential Commission on Election Administration also recognized the value of clean and accurate voter lists in its 2014 report:

> Accurate voter lists are essential to the management of elections. . . . The quality of the list can affect the ability of people to vote, of election offices to detect problems, and of courts and others monitoring elections to detect election fraud or irregularities. A list with many incorrect records can slow down the processing of voters at polling places resulting in longer lines. . . . Election officials across the political spectrum recognize the value of accurate and manageable voter rolls.[169]

However, H.R. 4 would prohibit states from conducting effective voter list maintenance to ensure that only eligible citizens are voting in our elections. Under H.R. 4, states would need to preclear when changing procedures for voter roll maintenance.

The main goals of maintaining an accurate voter roll are to ensure that only eligible voters cast ballots, to prevent voters from voting twice, and to speed up voter check-in at polling locations.[170] To maintain accurate voter rolls, state and county election officials must update a precinct's roll of registered voters after residents move away, die, or become ineligible to vote. Democrats oppose cleaning up inaccurate voter roll information and skewed voting numbers, referring to this practice as "purging" and baselessly accusing their opponents of suppressing votes.[171]

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[167] *Id*. at 3.
[168] *Id*.
[169] *Voting In America: The Potential For Voter ID Laws, Proof-Of-Citizenship Laws, And Lack Of Multi-Lingual Support To Interfere With Free And Fair Access To The Ballot, Hearing before H. Comm. on H. Administration Subcomm. On Elections* (May 24, 2021), written statement of Harmeet Dhillon at 2 (citing Presidential Comm'n on Election Admin., *The American Voting Experience:*
Report and Recommendations of the Presidential Commission on Election Administration (Jan. 2014)).
https://www.eac.gov/sites/default/files/eac_assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.).
[170] Nat'l Conference of State Legislatures, Voter List Accuracy (Mar. 20, 2020),
https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx.
[171] Pam Fessler, *Are states purging or cleaning voter registration rolls,* NPR (Dec. 20, 2019).

In 2012, Pew reported that "[a]pproximately 24 million—one of every eight—voter registrations are no longer valid or are significantly inaccurate."[172] In 2014, the Election Assistance Commission—a nonpartisan, independent federal agency—found that states removed over 14.8 million voters from registration lists that election cycle.[173] These errors are surprisingly common despite the fact that the National Voter Registration Act of 1993 (NVRA) requires jurisdictions to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" if they are deceased or move away.[174]

F. Democrats Want to Get Rid of Voter ID, a Widely Popular Policy

Democrats continue to falsely claim that voter ID laws lead to a decrease in voter turnout, specifically minority voters. On July 10, 2021, Vice President Kamala Harris bizarrely stated that rural Americans cannot photocopy their identification to prove their identity to vote because "there's no Kinkos, there's no OfficeMax near them."[175] However, as Subcommittee on Elections Ranking Member Bryan Steil cleverly noted by appearing for a remote hearing from a Wisconsin corn field, it is quite possible that the Vice President is out of touch with rural America, which has plentiful access to all sorts of scanning equipment, including mobile phones with cameras and internet access.[176] Requiring voter ID is a common-sense safeguard to protect the integrity of and increase confidence in the election process.

There is broad support for requiring ID to vote. A recent Rasmussen poll showed that 75 percent of likely voters surveyed believe voter ID is necessary for "a fair and secure election process."[177] Additionally, a Monmouth poll found that the overwhelming majority of Americans, 81 percent, support voter identification laws—including 62 percent of Democrats who participated in the poll.[178] Further, two polls show broad support for voter ID among African American and other minority communities. Rasmussen found 69 percent of African Americans support voter ID,

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[172] Pew Ctr. on the States, Inaccurate Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade (Feb. 2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/pewupgradingvoterregistrationpdf.

[173] Election Assistance Comm., Fact Sheet: Voter Registration List Maintenance, https://www.eac.gov/sites/default/files/eac_assets/1/6/FACT_SHEET_-_Voter_Confidence_and_NVRA.pdf (last visited Jul. 19, 2021).

[174] National Voter Registration Act of 1993 § 8(a)(4), 52 U.S.C. § 20507 (2002).

[175] Kelsey Koberg, *Kamala Harris slammed for claiming rural Americans can't photocopy their IDs,* FOX NEWS (Jul. 10, 2021).

[176] Rep. Bryan Steil, @RepBryanSteil, Twitter (July 12, 2021), https://twitter.com/RepBryanSteil/status/1414660506942689280 ("I visited rural America today for our @HouseAdmnGOP election law hearing and — this might shock Kamala Harris — I found that people have camera phones that they can use to take pictures of their photo IDs. Running water and electricity too! Haven't found a Kinkos yet.").

[177] Rasmussen Reports, *75% Say Voter ID Necessary, Majority Oppose Georgia Boycott* (April 06, 2021), https://www.rasmussenreports.com/public_content/politics/general_politics/april_2021/75_say_voter_id_necessary_majority_oppose_georgia_boycott.

[178] Alison Durkee, *80% of Americans support voter ID rules—but fewer worried about fraud, poll finds,* FORBES (Jun. 1, 2021).

while the *Atlanta Journal-Constitution* found two-thirds of voters in Georgia support it.[179] Contrary to the Democrats' claim that voter ID requirements lower voter turnout, states with voter ID laws saw record turnout in the 2020 elections.[180] Even the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker, III, considered voter ID to be an important safeguard for election integrity. The bipartisan Commission recommended:

> [T]hat states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), and photograph and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to all non-drivers free of charge.[181]

North Carolina Lieutenant Governor Mark Robinson, the Republican witness for the House Judiciary Subcommittee's April 22, 2021, hearing, testified, "[r]equiring an ID to vote is just simple American responsibility."[182] Lt. Gov. Robinson elaborated:

> Why do we look at poor people and Brown people and think that they are less than and that they can't figure out how our systems work, they can't figure out where the DMV is, they can't figure out where this agency is to go down and get this ID that is being offered . . . . The notion is absolutely asinine and ridiculous.[183]

At the House Committee on Administration hearing on May 24, 2021, Democrats continued to make the false claim that voter ID laws suppress minority votes, essentially claiming that voter ID laws are racist. Ranking Member Davis showcased the hypocrisy of Speaker Nancy Pelosi and the Democrats by opposing photo ID for voting, yet violating Americans' First Amendment rights to petition their government by requiring photo ID to enter the Capitol. Ranking Member Davis asked the following question of Republican witness Harmeet Dillon:

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[179] Andrew Mark Miller, *Poll: Sixty-nine percent of black voters and 75% overall support voter ID laws,* Washington Examiner (March 17, 2021), https://www.washingtonexaminer.com/news/poll-75-percent-americans-support-voter-id.
Mark Niesse, *AJC poll: Georgia voters back absentee ID but oppose new restrictions,* The Atlanta Journal-Constitution (Feb. 01, 2021), https://www.ajc.com/politics/ajc-poll-georgia-voters-back-absentee-id-but-%20oppose-new-restrictions/PPV2SLO7FRFUTKI2OOH4JGAQ7A/

[180] Kevin Schaul, Kate Rabinowitz, Ted Millnick, *2020 turnout is the highest in over a century,* The Washington Post (Nov. 05, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/?request-id=c2493dfa-7b4a-4ff5-9c95-b45617d6229b&pml=1.

[181] *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting,* Hearing before Comm. on H. Admin. Subcomm. On Elections, 117th Cong. (June 24, 2021), written record document, Commission on Federal Election Reform, Building Confidence in the U.S. Elections 19, 21 (Sept. 2005-https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf

[182] *Oversight of the Voting Rights At: The Evolving Landscape of Voting Discrimination,* Hearing before H. Comm. on the Judiciary*,* 117th Cong. at 42 (statement of Hon. Mark Robinson, Lieutenant Governor, North Carolina).

[183] *Id.* at 36.

> Rep. Davis: Part of our Constitution specifically relays that our elections should be run at the state and local level. Another very important part of our Constitution is the right of every American to petition their government, right? . . . Part of the First Amendment. Here we are today, having another hearing about voter ID, and at the same time Speaker Pelosi is requiring anyone who visits the United States Capitol to come Petition their Government to show an ID. So, is Speaker Pelosi racist?
>
> Ms. Dillon: I would say that it is very unfortunate that Speaker Pelosi has limited the right of petition, in fact I have a lawsuit pending against Speaker Pelosi and the United States Congress concerning the right of people to pray on Capitol Grounds. So, certainly some Constitutional Rights are more important than others today.[184]

Courts have found state laws that require proof of identification to cast a ballot to be constitutional. As attorney Mark F. (Thor) Hearne, II, who successfully defended the Commonwealth of Virginia's voter ID law, explained in his written testimony before the June 24, 2021, Subcommittee on Elections of the Committee on House Administration hearing:

> Requiring an individual to identify themselves with photo identification before casting a ballot is a commonsense measure to protect the integrity of elections. Of course, the state must provide the photo identification without cost. The constitutionality of requiring photo identification before an individual may cast a ballot has been reviewed by and approved as constitutional by the Supreme Court. See *Crawford*, 553 U.S. at 202. See also *Lee*, 843 F.3d at 607, in which Virginia's voter identification law was upheld against constitutional challenge. In *Lee*, the unanimous Fourth Circuit panel held, "just as Congress in HAVA found it beneficial to the voting process and the public perception of the voting process to require photo IDs, and just as the Carter-Baker Commission found similarly, Virginia found it beneficial to require photo identification in all elections." Virginia's and Indiana's voter identification laws are a model for a constitutional voter identification law that protects the integrity of the election and does not impose an impermissible burden upon any voter. Indeed, in the *Lee v. Virginia* litigation, those challenging Virginia's law could not identify a *single person*

[184] *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot Before the H. Comm. on H. Admin. Subcomm. on Elections*, 117th Cong. (2021) (statement of Harmeet Dhillon, Founding Partner, Dhillon Law Group).

> in the entire Commonwealth who was denied the right to cast a ballot due to Virginia's voter identification law. As the Carter-Baker Commission noted, and as the voter identification laws that have been upheld provide, the required identification must be available to any person who does not possess the required identification without cost.[185]

H.R. 1 prohibits states from requiring ID to vote, and H.R. 4 allows partisan bureaucrats within the DOJ to prohibit commonsense voter ID laws on the state level from ever going into place. Nevertheless, Speaker Pelosi seems to have no problem with requiring photo identification when it comes to Americans entering the United States Capitol to petition their elected representatives. Instead of establishing commonsense solutions to make acquiring an ID a simple, free process, Democrats would prefer to ban the use of them.

Democrats seem to have begun realizing that their views on voter ID are at odds with the views of the American people. Democrats, such as former Georgia gubernatorial candidate Stacey Abrams and House Majority Whip James Clyburn, have now made statements in support of voter ID, seeming to have conveniently forgotten their previous statements against voter ID made just weeks and months before.[186] The *Washington Post* even gave Representative Clyburn "Four Pinocchios" for recently stating, "No Democrat has ever been against voter ID." [187]

IV. Democrats' Effort to Nationalize Elections Undermines the Constitution

Historically, Congress has relied upon its authority under the Fourteenth and Fifteenth Amendments to pass the Voting Rights Act.[188] However, facing multiple, high-profile and

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[185] *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing before Comm. on H. Admin. Subcomm. On Elections, 117th Cong. (June 24, 2021), written statement of Mark F. (Thor) Hearne, II, at 15-16 (internal citations omitted).

[186] Aaron Blake, *Stacey Abrams and the Democrats' evolution on voter ID*, Wash. Post (June 21, 2021, 11:58 AM), https://www.washingtonpost.com/politics/2021/06/21/democrats-voter-id/.

[187] Glenn Kessler, Rep. Clyburn's false claim that 'no Democrat' has opposed voter ID laws, Wash. Post (July 15, 2021, 3:00 AM), https://www.washingtonpost.com/politics/2021/07/15/clyburns-false-claim-that-no-democrat-has-opposed-voter-id-laws/.

[188] *See Shelby Co. v. Holder*, 570 U.S. 529, 536 (2013)

> (The Fifteenth Amendment was ratified in 1870, in the wake of the Civil War. It provides that '[t]he right of citizens of the United States shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it gives Congress the "power to enforce this article by appropriate legislation. The first century of congressional enforcement of the Amendment, however, can only be regarded as a failure . . . . Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act.

(internal quotation marks and citations omitted)). Of course, the Fourteenth Amendment overturned the abominable *Dred Scott v. Sandford* (60 U.S. 393 (1857)) decision, which had held that previously enslaved African Americans were not and could not become "'citizen[s]' within the meaning of the Constitution of the United States." (*Id*. at 1). The Fourteenth Amendment holds that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside."

unfavorable judicial rulings,[189] Democrats adjusted their strategy. In August, Democrats submitted an updated Congressional Authority Statement for this Congress' version of H.R. 4, claiming specifically that the Elections Clause allows Congress to act with *carte blanche* authority over congressional elections, passing whatever legislation it wants, for whatever purpose, with no limitation.[190]

The Constitution reserves to the States the primary authority to set election legislation and administer elections—the "times, places, and manner of holding of elections"—and Congress' power in this space is purely secondary to the States' power.[191] Congress' power is to be employed only in the direst of circumstances.[192] History, precedent, the Framers' words, debates concerning ratification, the Supreme Court, and the Constitution itself make this exceedingly clear.[193]

The Framing Generation grappled with the failure of the Articles of Confederation, which provided for only a weak national government incapable of preserving the Union. Under the Articles, the States had *exclusive* authority over federal elections held within their territory,[194] but

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[189] *See, e.g.*, *Shelby Co. v. Holder*, 570 U.S. 529 (2013) and *Brnovich v. DNC*, Slip. Op., 594 U.S. ____ 2021, https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.

[190] *Compare* Rep. Terri Sewell, Congressional Authority Statement for H.R. 4 (117th Cong.), Constitutional Authority Statement for H.R. 4, Congressional Record Vol. 167, No. 147, available at https://www.congress.gov/117/crec/2021/08/17/167/147/CREC-2021-08-17-pt1-PgH4338-2.pdf *with* Rep. Terri Sewell, Congressional Authority 35 for H.R. 4 (116th Cong.), Constitutional Authority Statement for H.R. 4, Congressional Record Vol. 165, No. 147, https://www.congress.gov/116/crec/2019/02/26/CREC-2019-02-26-pt1-PgH2234-3.pdf. *See also, generally*, Rep. Terri Sewell, *Executive Summary of H.R. 4, the John R. Lewis Voting Rights Advancement Act of 2021* (Aug. 17, 2021), *available at* https://twitter.com/sahilkapur/status/1427687717803073546); Elections Subcommittee on Elections Chair G.K. Butterfield (D-NC), *Report on Voting in America: Ensuring Free and Fair Access to the Ballot* 14, U.S. H. of Reps. Comm. on H. Admin, Subcomm. On Elections, 117th Cong. (2021), https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf; Press Release, Speaker Nancy Pelosi, *Pelosi Statement on the Introduction of H.R. 4, the John R. Lewis Voting Rights Advancement Act* (Aug. 17, 2021), https://www.speaker.gov/newsroom/81721. *See also* Voting Rights Act of 1965, 79 Stat. 437, 89 Pub. L. 110 ("An Act To enforce the fifteenth amendment to the Constitution of the United States and for other purposes.").

[191] U.S. CONST., Art. 1 § 4. For a full discussion of this topic, *see* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

[192] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010) (describing the origins of the Elections Clause, the meaning of "manner of" versus "manner of holding" elections, the debates leading to its adoption, and the promises made and compromises reached that led the author to conclude quite plainly, "In any event, the ratifiers clearly informed future generations how to resolve such questions: The power of Congress to regulate its own elections is a power that, while necessary to address unusual situations, nevertheless invites self-dealing and abuse. In cases of doubt, it must be narrowly construed." (*Id*. At 15.))

[193] *See* Rodney Davis, Ranking Member, U.S. H. of Reps., Comm. on H. Admin. (Minority), Report: *The Elections Clause: States' Primary Constitutional Authority over Elections*, U.S. H. of Reps. Comm. on H. Admin. (Minority) (Aug. 12, 2021), https://republicans-cha.house.gov/sites/republicans.cha.house.gov/files/documents/Report_The%20Elections%20Clause_States%20Primary%20Constitutional%20Authority%20over%20Elections%20%28Aug%2011%202021%29.pdf. A full copy of this report is also available in the H.R. 4 (117th Cong.) Floor debate record.

[194] ARTS. OF CONFED'N, Art. 5, . § 1.

the national government had experienced difficulties with State cooperation (*e.g.*, the failure of Rhode Island to send delegates to the Confederation Congress).[195]

The Federalists, including Alexander Hamilton,[196] were concerned with the possibility that the States, in an effort to destroy the federal government, simply might *not hold* elections or that an emergency might prevent the operation of a State's government, leaving the Congress without Members and the federal government unable to respond. Quite plainly, Alexander Hamilton, a leading Federalist and proponent of the Constitution, understood the Elections Clause as serving only as a sort of emergency fail-safe, not as a cudgel used to nationalize our elections process.[197] Indeed, as staff for the Democrat Members of the Committee on House Administration so keenly observed:

> Following the failings of the Articles of Confederation, the Founders looked for processes that would insulate Congress from recalcitrant states. Indeed, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation[,]" and that "***the Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'***"[198]

When questioned at the States' constitutional ratifying conventions with respect to this provision, the Federalists confirmed this understanding of a constitutionally limited, secondary congressional power under Article 1, Section 4:[199]

> N. Carolina: "An occasion may arise when the exercise of this ultimate power of Congress may be necessary . . . if a state should be involved in war, and its legislature could not assemble, (as was the case of South Carolina and occasionally of some other states, during the [Revolutionary] war)."[200]

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[195] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010) (citing to various historical documents).
[196] The modern legend of the real Alexander Hamilton is not one who finds his home in solely Republican circles. *See* Nancy Isenberg, *Liberals love Alexander Hamilton. But Aaron Burr was a real progressive hero.*, Wash. Post (Mar. 30, 2016), https://www.washingtonpost.com/posteverything/wp/2016/03/30/liberals-love-alexander-hamilton-but-aaron-burr-was-a-real-progressive-hero/. *See also* Adam Gopnik, *"Hamilton" and the hip-hop case for progressive heroism*, New Yorker, (Feb. 5, 2016), https://www.newyorker.com/news/daily-comment/hamilton-and-the-hip-hop-case-for-progressive-heroism.
[197] *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 11 (Nov. 2010) (quoting *Federalist* no. 59).
[198] Sean J. Wright, *The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections*, 81 ALB. L. REV. 609 (2017-2018) (internal citations omitted) (alterations in original).
[199] *See, generally*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (Nov. 2010).
[200] *Id*.

> Pennsylvania: "Sir, let it be remembered that this power ***can only operate in a case of necessity***, after the factious or listless disposition of a particular state has rendered an interference essential to the ***salvation*** of the general government."[201]

In fact, at least seven[202] of the original 13 states—over half and enough to prevent the Constitution from being ratified—expressed specific concerns with the language of the Elections Clause. However, "[l]eading Federalists . . ." assured them, ". . . that, even without amendment, the [Elections] Clause should be construed as limited to emergencies."[203] Some states specifically made their ratification contingent on this understanding being made express.[204] For example,

> New York: We the said Delegates, in the Name and in [sic] the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises[.][205]

The Framers designed and the ratifying States understood the Elections Clause to serve solely as a protective backstop to ensure the preservation of the Federal Government,[206] not as a font of limitless power for Congress to wrest control of federal elections from the States. This understanding continued into debate during the first Congress that convened under the Constitution. "During the first session of the First Congress . . . . Representative Aedanus Burke unsuccessfully proposed a constitutional amendment to limit the Times, Places and Manner Clause to emergencies."[207] But those on both sides of the Burke amendment debate already understood

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[201] *Id*. at 13.
[202] A record of congressional debate of August 21, 1789, as recorded in the *Annals of Congress*, suggests Maryland might also be included, which would bring the total to eight states. 1 Annals of Cong. 799 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=401.
[203] *See supra* n. 7 at 12.
[204] *Id*. at 13.
[205] *Ratification of the Constitution by the State of New York* (July 26, 1788), *available at* https://avalon.law.yale.edu/18th_century/ratny.asp. *See also Id*. at 13 and n. 189.
[206] *See supra* n. 5 ("EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION."). *See also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 12 (Nov. 2010).
[207] Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 13 (Nov. 2010) (citing 1 Annals of Cong. 797 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=400).

the Elections Clause to limit Federal elections power to emergencies, making the amendment unnecessary.[208]

Similarly, the Supreme Court has supported this understanding. In *Smiley v. Holm*, the Court held that Article 1, Section 4 of the Constitution reserved to the States the primary ". . . authority to provide a complete code for congressional elections."[209] This holding, of course, is consistent with the understanding of the Elections Clause since the framing of the Constitution. The *Smiley* Court also held that while Congress maintains the authority to " . . . supplement these state regulations or [to] substitute its own[]", such authority remains merely "'a general supervisory power over the whole subject.'"[210]

More recently, the Court noted in *Arizona v. Inter-Tribal Council of Ariz., Inc.* that the fail-safe provision in the Elections Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress."[211] The Court explained that the Elections Clause " . . . imposes [upon the States] the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators[.]"[212] The *Inter-Tribal* Court explained, quoting extensively from *The Federalist no. 59*, that it was clear that the congressional fail-safe included in the Elections Clause was intended for governmental self-preservation discussed by the Framers: "[A]n exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs."[213]

The congressional fail-safe described in the Elections Clause vests purely secondary authority over federal elections in the federal legislative branch and the primary authority rests with the States. Congressional authority is intended to be, and as a matter of constitutional fact is, limited to addressing the worst imaginable issues, such as matters that might lead to a State not

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[208] For example, the recorded description of opponent Representative Goodhue's comments notes that he believed the Elections Clause as written was intended to prevent ". . . the State Governments [from] oppos[ing] and thwart[ing] the general one to such a degree as finally to overturn it. Now, to guard against this evil, he wished the Federal Government to possess every power necessary to its existence." With any change to the original text therefore unnecessary to achieve Burke's desired goal, Mr. Goodhue voted against the proposed amendment. Similarly, proponent Representative Smith of South Carolina also believed the original text of the Elections Clause already limited the Federal Government's power over federal elections to emergencies and so thought there would be no harm in supporting an amendment to make that language express. So, even the records of the First Congress reflect a recognition of the emergency nature of congressional power over federal elections. (1 Annals of Cong. 801 (1789), Joseph Gales (ed.) (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=402.)

[209] *Smiley v. Holm*, 285 U.S. 355, 366 (1932) ("not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.).

[210] *Id*. (also quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)).

[211] *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7-9 (2013).

[212] *Id*. at 8.

[213] *Inter-Tribal*, 285 U.S at 8.

electing representatives to constitute the two Houses of Congress.[214] Unfortunately for Democrats, this clear restriction on congressional authority means that the Elections Clause is an unsuitable substitute authority to support Democrats' plans for H.R. 4. Thankfully, the Framers had the foresight to write our Constitution so as to prevent those bad policies from going into effect and preserve the health of our republic.

[214] *See*, *e.g.*, *supra* n. 4.

CONCLUSION

H.R. 4—and its companion legislation, H.R. 1—would radically upend American elections as we know them, giving unprecedented authority over state and local election processes to the courts and the federal government. In an attempt to justify this unconstitutional federal power grab, Democrats falsely claim there is "sweeping voter suppression" and that this country is facing a crisis that requires radically changing how we run our nation's elections. But, as this report documents, the facts do not support these arguments.

It is easier to vote today than ever before in our nation's history. The VRA worked. The exceptional conditions that existed in 1965 no longer exist to justify federal intrusion in state election administration. In fact, during the 2018 and 2020 elections there was record voter turnout among Americans from minority communities. In addition, voter registration has increased dramatically.

Americans should celebrate this progress. This advancement is a testament to a uniquely American ideal, envisioned in the Constitution, of always striving toward a "more perfect union." But instead of acknowledging the progress our country has made, Democrats call the United States a systemically racist country and they target Republican-led efforts to make elections more secure.

Congress passed the VRA during a bleak time in our history when widespread discrimination in voting rights justified the exceptional interference of the federal government. Those conditions do not exist today, as even the Supreme Court has recognized. In the absence of these exceptional conditions, state sovereignty and local control must prevail. In *Brnovich v. Democratic National Committee*, the Court explained that "the Voting Rights Act exemplifies our country's commitment to democracy, but there is nothing democratic about [an] attempt to bring about a wholesale transfer of the authority to set voting rules from the States" to the federal government.[215] Congress would be wise to heed this wisdom.

[215] *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321, 2343 (2021).