MEMO

Ten Ways the Voting Rights "Advancement Act" Pushes America Backwards

To: FGA Partners

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Background

The John Lewis Voting Rights Advancement Act (often referred to as "H.R. 4" or "S. 4263") seeks to restore the "preclearance formula" to the Voting Rights Act of 1965. That formula required certain jurisdictions, primarily in Southern states, to get preapproval from either the Department of Justice or the U.S. District Court for D.C. before making any changes to their state election laws.[1] The formula that was used to determine which states had to face this burdensome pre-approval process and which did not was struck down by the Supreme Court in 2013 in the *Shelby County v. Holder* decision.[2] There, the Court found the formula to be outdated, recognizing that the racial disparity that had once justified the formula was simply no longer at play. The Court noted that, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[3]

Now, almost a decade later, U.S. Senators Joe Manchin (D-WV) and Lisa Murkowski (R-AK) are leading an effort to restore this formula to the Voting Rights Act. On May 17, 2021, the pair wrote a letter to congressional leaders promoting passage of the act as an alternative to H.R. 1 and/or S. 1.[4] This new law would restore the formula with just enough modifications to possibly satisfy the Supreme Court's complaints regarding the old formula, while still allowing the federal government to exert sweeping control over state election laws, primarily in Southern states such as Georgia, Florida, Texas, and others with Republican-controlled state legislatures.[5]

To date, neither the House nor the Senate have reintroduced this bill, but with Manchin and Murkowski's letter, and the presumed inevitable doom of H.R. 1 on the horizon, it is likely that S. 4263, a bill the two Senators co-sponsored last year, will be reintroduced in the coming months. Passage of such a bill would cause disastrous effects upon our country. Here are just ten of them:

1. Sweeping Federal Control of State and Local Affairs

The hundreds of election integrity bills currently undergoing consideration in state legislatures across the country would be subject to heightened federal review if S. 4263 were to become law. S. 4263 would give the federal government a huge power called "preclearance," which means that certain state and local election changes must receive federal approval through the U.S. Department of

Justice (DOJ) or a court in Washington, D.C. *before* becoming law. The preclearance requirements in S. 4263 would apply to state and local changes to redistricting voting area boundaries, voter ID, voting locations, changing between at-large and single- or multiple-member district elections, non-English language translated voting materials, and tribal voting.[6-7-8-9-10-11-12] In addition to legislative measures, the federal government would be able to exercise unprecedented oversight into small administrative and local decisions, such as moving the address of a polling place.

As the Supreme Court noted in *Shelby County*, the principle of federalism, embodied in the U.S. Constitution, allocates power in a manner that promotes "the integrity, dignity, and residual sovereignty of the States" securing "to citizens the liberties that derive from the diffusion of sovereign power."[13] In the end, S. 4263 would serve as a sharp departure from this foundational principle of our government, giving the federal executive branch unimaginable control over state and local matters.

2. Guilty Until Proven Innocent, But Only for Some States

Under S. 4263, a state or locality has the burden to *disprove* that they are discriminating against racial minorities and foreign language speakers through the election reforms they seek to pass.[14] In other words, the starting point of the S. 4263 test of a voting change is a presumption of guilt. Therefore, even a reasonable state election reform will be presumed to be discriminatory (but only in those states subject to preclearance) unless that state proves it is not, an extremely hard burden to meet. At the same time, another state (not subject to preclearance) could pass an identical reform and face no scrutiny at all.

For example, a state subject to the preclearance formula under this proposed law might seek to pass a reform aimed at regulating ballot harvesting, a practice where political operatives gather stacks of absentee ballots from vulnerable voters at places like nursing homes or long-term care facilities promising to turn them in on behalf of the voter. Since the groups and individuals that harvest ballots are generally highly partisan, legitimate concerns exist that they might tamper with ballots or otherwise exert improper influence over voters as they fill them out. In fact, the bipartisan Commission on Federal Election Reform—which was co-chaired by former President Jimmy Carter—concluded in 2005 that "absentee balloting is vulnerable to abuse in several ways" and that "citizens who vote at home, at nursing homes, in the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation."[15]

Under S. 4263, only those states that fall into the select group that must undergo "preclearance" would have to prove the reform did not discriminate, even though there has been bipartisan agreement that the practice must be carefully regulated. This is a clear violation of what the U.S. Supreme Court has characterized as a "fundamental principle"—that of "*equal* sovereignty" among the States.[16]

3. Responsibility for the Past Bad Acts of Others

S. 4263 does not apply equally to federal, state, and local governments across the country. Instead, current state and local legislators are held responsible for laws written, lawsuits settled, and judicial orders made by those who are no longer in office.

As mentioned above, S. 4263 uses a formula to determine which states or localities need to preclear their voting-related bills by counting how many times over the past 10-25 years the U.S. Attorney General objected, a judge issued a consent decree, or a state or local government settled a lawsuit in a challenge to a violation of the 14th Amendment, 15th Amendment, the Voting Rights Act, or any federal racial or language voting discrimination law.[17] Meritless lawsuits are settled all the time, not because they have merit, but because state and local governments lack the resources to stand up to well-funded out-of-state law firms and special interest groups. Under S. 4263, such settlements would count as a strike against the state or local government, increasing the probability that it would be subjected to the preclearance process.

Another unfortunate result of this formula is that it would permit a small town to be held responsible for discriminatory behavior elsewhere in the state that it was not responsible for and has no power to reform. Under S. 4263, nine bad acts by any locality plus one by the state legislature within the past decade triggers preclearance for *every* locality in that state. In addition, the entire state and all localities in it would be under review if DOJ objected 15 times to the same locality over the past 25 years.

4. Encourages Activists to Sue States and DOJ to Deny Preclearance

As mentioned, S. 4263 counts certain legal actions under the 14th Amendment, 15th Amendment, the Voting Rights Act, and any federal racial or language voting discrimination law in order to trigger preclearance.[18] By doing this, the formula encourages activists to bring more lawsuits, even frivolous ones, in order to increase the likelihood of subjecting a particular state to federal preclearance (whichever state[s] the activists decide to attack).

In addition, the law also incentivizes DOJ to deny preclearance if the current administration wishes to keep its power over certain states while fostering an environment that encourages non-government activists to collude with activist government attorneys in lawsuits.

5. Focuses on Color-Conscious Results Rather than on Equal Opportunity

To prove their activity is not discriminatory under S. 4263, states and localities must show that minorities can elect the candidate they want and demonstrate that the power of minority voting blocs are not diminished.[19] Currently, the Voting Rights Act already prohibits race from being the reason for making voting changes. However, to do the analysis under S. 4263, states and localities will be *obligated* to take race into account and track demographic data.

Thus, under S. 4263, instead of analyzing whether a change in voting law denies a person the *opportunity* to cast a vote on the basis of their race, the focus will be on the results of the election,

while wrongly assuming that if minority groups don't vote for a certain political party, then discrimination must be at play.

6. A Partisan Power Play

S. 4263 seeks to prohibit a state or local government from preventing minorities from electing their chosen candidate.[20] This is a seemingly worthy objective, but in practice DOJ has repeatedly interpreted "preferred" candidate of minorities to mean Democrats.[21] For instance, the DOJ under the Obama-Biden administration highly scrutinized states like Texas and Georgia who had Republican leadership at the time, while ignoring states like New Hampshire where Democrats held power.[22]

In other words, under S. 4263, where a minority Democrat candidate running for office in a Republican controlled state fails to get elected, there will be a presumption that the state or local government somehow prevented minorities from electing their chosen candidate. In Democrat controlled states, on the other hand, where a minority Republican candidate fails to win, the presumption will be that the election was fair, and the outcome is a reflection of the people's will. S. 4263 gives Biden's DOJ the ability to exercise partisan power over Republican controlled states.

7. Costly Litigation for States

S. 4263 could empower DOJ to bankrupt states using the vast annual budget of DOJ's Civil Rights Division—$148.2 million.[23-24] In the past, states have had to spend millions of dollars in lawsuits to successfully defend their voting laws against the Obama-Biden DOJ.[25] Due to inaction by the Biden DOJ, other states had to go to court and sue DOJ to compel them to preclear them.[26] S. 4263 will reintroduce these same problems into the political landscape leading to a massive waste of taxpayer money by both the federal and state governments.

8. Delays in State and Local Reforms

S. 4263 gives the federal government power to delay election reforms, which might be used to prevent state legislatures from implementing election integrity reforms before future key elections, such as Biden's own in 2024. After a state applies for preclearance, DOJ has 60 days to decide whether to object or clear the bill.[27] Even if DOJ says that it will not object before the 60 days expires, S. 4263 allows the Attorney General to change his or her mind at any point—and authority to ignore the recommendations of career staff—up to the 60th day.[28]

As a result, states wishing to pass commonsense reforms would need to do so more than 60 days in advance of when they need those reforms to be in place and would have no guarantee at all that the proposed reforms would even succeed. If they don't succeed, states might not know that until 60 days after applying, forcing them to restart the process of passing legislation in their state, followed by another 60-day period for DOJ to review. States will essentially be locked into the status quo, unable to pass reforms quickly enough to keep up with the ever-changing nature of modern elections.

9. More Power for Litigious Activists

In addition, S. 4263 would allow an activist group to secure an order from a court commanding the state to stop a law from going into effect by simply raising "a serious question."[29] This new standard for approval of these kinds of court orders introduced by S. 4263 is unprecedented. Never before has such a low standard been applied to the issuance of court orders halting a state from carrying out one of its constitutionally prescribed duties.

As a result of S. 4263, activists armed with only a frivolous lawsuit might be able to bring meaningful state election reforms to a screeching halt by merely raising "a serious question." Under current law, the standard is much higher for an activist to do this, requiring someone to show that the election law would cause "irreparable harm," rather than merely raising "a serious question." The result will be that far more court orders commanding the state to stop at the behest of activists will be granted, giving individuals, out-of-state law firms, and special interest groups tremendous power over the duly elected state legislatures, and a financially lucrative new practice area for D.C.-based law firms.

10. More Burdensome Paperwork and Bureaucratic Inefficiency

Under S. 4263, localities are required to keep burdensome paperwork tracking age and racial demographic data over time, and DOJ could request more detailed data in order to secure DOJ preclearance.[30] These paperwork requirements coupled with the time, energy, and resources that both states and the DOJ will have to expend in carrying out the process resurrected through S. 4263 will create tremendous burdens, reduce operational efficiency, and waste precious resources including taxpayer dollars.

Conclusion

For all these reasons, the policies proposed in S. 4263 are altogether bad for America. They would harm states and subject them to burdensome requirements and an unprecedented level of federal interference. Rather than advancing civil rights, S. 4263 will do the opposite, taking America back to a system the Supreme Court found unconstitutional and outdated almost a decade ago. It is time for America to move forward.

[1] Shelby County v. Holder, 570 U.S. 529 (2013).
[2] Ibid.
[3] Id. at 540 (quoting Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (1990).
[4] U.S. Senator Joe Manchin (D-WV) and Lisa Murkowski (R-AK), Letter to House Speaker Pelosi, House Minority Leader McCarthy, Senate Leader Schumer and Senate Minority Leader McConnell (May 17, 2021), https://www.manchin.senate.gov/imo/media/doc/210517%20Bipartisan%20Voting%20Rights%20Act%20Reauthorization%20Letter.pdf.
[5] Shelby County v. Holder, 570 U.S. 529 (2013).

[6] H.R. 4, p. 14, lines 7-13; S. 4263, p. 18, lines. 24-25, p. 19, lines 1-9.
[7] H.R. 4, p. 13, lines. 15-24, p. 14, lines 1-6; S. 4263, p. 18, lines 8-23.
[8] H.R. 4, p. 14, lines 18-25; S. 4263, p. 19, lines 10-20 (voter ID).
[9] H.R. 4, p. 15, lines 11-19; S. 4263, p. 20, lines 3-15 (voting locations).
[10] H.R. 4, p. 12, lines 13-25; S .4263, p. 17, lines 7-25, p. 18, 1-8.
[11] H.R. 4, p. 15, lines 5-10; S. 4263, p. 19, lines 22-25, p. 20, lines 1-2.
[12] S. 4263, p. 3, lines 22-25.
[13] Shelby County v. Holder, 570 U.S. 529, 543 (2013).
[14] "Voting Rights Ruling By Supreme Court Draws Mixed Reactions," National Public Radio (June 26, 2013), https://www.npr.org/2013/06/26/195787492/justices-voting-rights-ruling-draws-mixed-reactions.
[15] "Report of the Commission on Federal Election Reform," Center for Democracy and Election Management, American University, Pg. 46, (2005), https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf.
[16] Shelby County v. Holder, 570 U.S. 529, 544 (2013).
[17] H.R. 4, p. 32; S. 4263, p. 10-20.
[18] H.R. 4, p. 32; S. 4263, p. 10-20.
[19] H.R. 4, p. 19, lines 11-14; S. 4263, p. 22, lines 21-24.
[20] H.R. 4, p. 19, lines 11-14; S. 4263, p. 22, lines 21-24.
[21] Hans von Spakovsky and Christian Adams, "The Con Job on Voting Rights," The National Review (May 19, 2014), https://www.nationalreview.com/2014/05/con-job-voting-rights-cases-hans-von-spakovsky-j-christian-adams.
[22] J. Christian Adams, "DOJ's Granite State Free Ride," PJ Media, (Apr. 5, 2012), https://pjmedia.com/jchristianadams/2012/04/05/dojs-granite-state-free-ride-n121078.
[23] U.S. Department of Justice, "General Legal Activities Civil Rights Division (CRT)" Budget Request (FY 2021), https://www.justice.gov/doj/page/file/1246816/download.
[24] National Association of State Budget Offices, State Expenditure Report, Fiscal Annual Reports 2018-2020 (2020), https://www.nasbo.org/reports-data/state-expenditure-report .
[25] "Voting Rights Ruling By Supreme Court Draws Mixed Reactions." National Public Radio (June 26, 2013), https://www.npr.org/2013/06/26/195787492/justices-voting-rights-ruling-draws-mixed-reactions (South Carolina attorney general Alan Wilson said, "Because we were under the pre-clearance standard of Section 5, we were guilty until proven innocent. And that cost us $3 million to prove our innocence.").
[26] Hans von Spakovsky and Christian Adams, "The Con Job on Voting Rights," The National Review (May 19, 2014), https://www.nationalreview.com/2014/05/con-job-voting-rights-cases-hans-von-spakovsky-j-christian-adams.
[27] H.R. 4, p. 18; S. 4263, p. 21, lines 20-25; p. 22, lines 1-4.
[28] H.R. 4, p. 18; S. 4263, p. 21, lines 20-25; p. 22, lines 1-4.
[29] H.R. 4, p. 31, lines 19-25; S. 4263, p. 34-37.
[30] H.R. 4, p. 21-24; S. 4263, p. 29, lines 15-24.