U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 2 6 2019

The Honorable Jerrold Nadler
Chairman
Judiciary Committee
U.S. House of Represenatives
Washington, DC 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice ("Department") on H.R. 4, the "Voting Rights Advancement Act of 2019." The Department would like to inform Congress of several constitutional issues raised by H.R. 4 and make recommendations for alleviating those concerns.

1. Section 5 Transparency Requirements

Section 5 of the bill would amend the Voting Rights Act of 1965, 52 U.S.C. § 10301 et seq., ("VRA") by adding a new section imposing transparency requirements related to elections for Federal office by, for example, requiring States and localities to provide notice of certain "change[s] in any prerequisite to voting or standard, practice, or procedure with respect to voting in any election for Federal office." H.R. 4, sec. 5, § 6(a)(1). But it would also require notice of demographic information related to "any change in the constituency that will participate in an election for Federal, State, or local office or the boundaries of a voting unit or electoral district in an election for Federal, State, or local office." *Id.* § 6(c)(1). Although the former type of transparency measures, because they are targeted at elections for Federal office, find purchase in the Elections Clause of the Constitution, U.S. Const. art. I, § 4, cl. 1, the latter provision has a substantially broader scope and would likely be unconstitutional if applied to non-Federal elections.

The Elections Clause empowers Congress to prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, thereby conferring to Congress "broad" authority to regulate Federal elections, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013). In using its authority under the Elections Clause and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, "Congress may regulate 'pure' federal elections, but not 'pure' state or local elections," *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981). Congress may also regulate elections in which federal candidates appear on the same ballot as state and local candidates. *See United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999). Accordingly, the bill's requirement that certain transparency measures be undertaken in an "election for Federal, State, or local office," H.R. 4, sec. 5, § 6(c)(1), would be beyond the scope of the Elections Clause if the election in question

did not include a Federal office. Nor is it evident how this transparency requirement could be supported by the enforcement powers conferred on Congress by the Fourteenth or Fifteenth Amendments, U.S. Const., amend. XIV, § 5; amend. XV, § 2, absent evidence that the provision appropriately targets discriminatory conduct. *Cf. Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (examining legislative record for "a pattern of . . . state discrimination" supporting exercise of Fourteenth Amendment enforcement power). We accordingly recommend that this provision be revised to make clear that it applies only where an election includes a Federal office.

2. Section 3 Preclearance Requirements

Section 3 of the bill would amend the VRA by replacing the coverage formula identifying the States and political subdivisions subject to the VRA's preclearance requirements. H.R. 4, sec. 3, § 4(b); *see* 52 U.S.C. § 10303(b). The bill would also add a new section to the VRA requiring any State or locality undertaking certain specified changes in their voting procedures to submit those changes for preclearance. H.R. 4, sec. 4, § 4A.

Under the VRA's preclearance requirements, "no change in [State or local] voting procedures could take effect until it was approved by federal authorities in Washington, D.C.—either the Attorney General or a court of three judges." *Shelby County v. Holder*, 570 U.S. 529, 537 (2013). The Supreme Court held that applying such preclearance requirements to changes in State voting procedures "imposes substantial federalism costs and differentiates between the States," *id.* at 540 (internal quotation marks omitted), and so "must be justified by current needs," *id.* at 550 (internal quotation marks omitted). The Court found that the coverage formula used by the VRA, because it "focus[ed] on decades-old data relevant to decades-old problems," did not satisfy this test, and held that section of the VRA unconstitutional. *Id.* at 553.

Under *Shelby County*, section 3 of the bill would impose an unconstitutional burden on the States absent "compelling evidence justifying the preclearance remedy and the coverage formula." *Id.* at 551. And a coverage formula based on evidence of "current conditions . . . is an initial prerequisite to a determination that exceptional conditions still exist justifying" the preclearance remedy. *Id.* at 557. We are not in a position to evaluate the evidentiary record, if any, for the coverage formula adopted in the bill that would again subject States and localities to preclearance requirements, but, as noted above, a supporting evidentiary record would be critical. *See also id.* at 554 (noting as a "fundamental problem" that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions"). Similarly, we are not in a position to evaluate whether there is a "current need[]," *id.* at 550, to impose a preclearance requirement on all the practices targeted by the bill. Absent such a legislative record, section 3 would be unconstitutional.

Thank you for the opportunity to present our views in support of this legislation. We hope this information is helpful, and we look forward to continuing to work with Congress on this important legislation. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Stephen E. Boyd
Assistant Attorney General

IDENTICAL LETTER SENT TO THE HONORABLE DOUG COLLINS, RANKING MEMBER, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES; THE HONORABLE LINDSEY GRAHAM, CHAIRMAN, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE; THE HONORABLE DIANNE FEINSTEIN, RANKING MEMBER, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE.

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Office of the Assistant Attorney General

Washington, D.C. 20530

APR 26 2019

The Honorable Doug Collins
Ranking Member
Committee on the Judiciary
U.S. House of Represenatives
Washington, DC 20515

Dear Representative Collins:

This letter presents the views of the Department of Justice ("Department") on H.R. 4, the "Voting Rights Advancement Act of 2019." The Department would like to inform Congress of several constitutional issues raised by H.R. 4 and make recommendations for alleviating those concerns.

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The Elections Clause empowers Congress to prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, thereby conferring to Congress "broad" authority to regulate Federal elections, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013). In using its authority under the Elections Clause and the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, "Congress may regulate 'pure' federal elections, but not 'pure' state or local elections," *United States v. Bowman*, 636 F.2d 1003, 1011 (5th Cir. 1981). Congress may also regulate elections in which federal candidates appear on the same ballot as state and local candidates. *See United States v. McCranie*, 169 F.3d 723, 727 (11th Cir. 1999). Accordingly, the bill's requirement that certain transparency measures be undertaken in an "election for Federal, State, or local office," H.R. 4, sec. 5, § 6(c)(1), would be beyond the scope of the Elections Clause if the election in question

did not include a Federal office. Nor is it evident how this transparency requirement could be supported by the enforcement powers conferred on Congress by the Fourteenth or Fifteenth Amendments, U.S. Const., amend. XIV, § 5; amend. XV, § 2, absent evidence that the provision appropriately targets discriminatory conduct. *Cf. Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (examining legislative record for "a pattern of . . . state discrimination" supporting exercise of Fourteenth Amendment enforcement power). We accordingly recommend that this provision be revised to make clear that it applies only where an election includes a Federal office.

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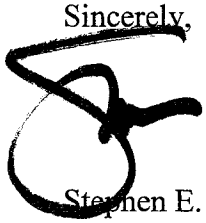

Stephen E. Boyd
Assistant Attorney General

THE HONORABLE JERROLD NADLER, CHAIRMAN, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRSENTATIVES; THE HONORABLE LINDSEY GRAHAM, CHAIRMAN, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE; THE HONORABLE DIANNE FEINSTEIN, RANKING MEMBER, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE.

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APR 26 2019

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

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APR 26 2019

The Honorable Dianne Feinstein
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

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