Testimony Before the United States Senate Judiciary Committee's Subcommittee on the Constitution

Hearing on "Restoring the Voting Rights Act after Brnovich and Shelby County"
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Good Morning Chairman Blumenthal, Ranking Member Cruz, Members of the Subcommittee, and my fellow witnesses. Thank you for the invitation to speak with you today.

My name is Russ Nobile. I am a Senior Attorney at Judicial Watch Inc. and part of its election integrity group. Judicial Watch is the largest conservative public interest group in the United States. It is dedicated to promoting transparency and restoring trust and accountability in government, politics, and the law. For almost a decade, Judicial Watch has been involved in ensuring the honesty and integrity of our electoral processes.

I have been practicing as a litigator for 16 years. I have specialized knowledge and expertise in voting law. I served as a Trial Attorney for the Civil Rights Division of the U.S. Department of Justice for seven years. During this time, I led numerous voting rights investigations, litigation, consent decrees, and settlements in dozens of jurisdictions. I received several awards during my time at the Department, including a Commendation in 2006 and a Service Award in 2010.

From 2006 to 2012, I worked in the Civil Rights Division's Voting Section, which is responsible for enforcing all provisions of the Voting Rights Act of 1965 ("VRA"),

National Voter Registration Act of 1993 ("NVRA"), and the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). At different times during my tenure, I was the primary attorney assigned to monitor and receive reports out of certain Section 5 covered jurisdictions, such as South Carolina, Georgia, Mississippi, and Texas. I am particularly familiar with the VRA, which is the subject of my testimony today.

Some of my voting work at the Department of Justice included the 2008 case against Waller County, Texas over how its Registrar handled voter registration applications from students at Prairie View A & M University, an historically black university. That case ultimately led to a consent decree resolving violations of Section 5 and Title I of the Civil Rights Act of 1964.[1] The Justice Department's website shows that the Waller County case was one of the last Section 5 cases it brought before the 2013 U.S. Supreme Court decision in *Shelby County v. Holder*.[2] In 2011, I was part of the trial team that represented the United States at trial against Texas in the massive Section 5 case Texas filed over its 2010 redistricting.[3]

In 2012, I went into private practice in Mississippi, where I continued handling civil rights and voting cases, including litigating cases involving NVRA and Section 2 of the VRA. My clients included Section 5 covered jurisdictions.

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[1] *U.S. v. Waller County, et al.*, 4:08-cv-03022 (S.D. Tex. Oct. 17, 2008).

[2] *See* Dept. of Justice, Civil Rights Division, "List of Cases Raising Claims Under Section 5 of the Voting Rights Act" available at https://www.justice.gov/crt/voting-section-litigation (last visited May 25, 2021).

[3] *Texas v. United States,* 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated,* 570 U.S. 928 (2013) (citing *Shelby County v. Holder*, 570 U.S. 529 (2013)).

I joined Judicial Watch in 2019. Since joining Judicial Watch, I have litigated voting cases in several states and have filed numerous friend-of-the-court briefs before the U.S. Supreme Court and courts of appeal.

I. Brnovich v. DNC

In *Brnovich*,[4] the Supreme Court outlined for the first time a framework for how challenges to state time, place, and manner regulations ("TMP regulations") are handled under Section 2 of the Voting Rights Act. I do not believe the ruling departed from the traditional understanding of Section 2, as some have claimed. Rather, I see the *Brnovich* decision as providing much needed guidance regarding how Section 2's "totality of circumstances" analysis applies to vote denial claims. Much of the ruling would have been unremarkable had it been issued before the last fifteen years or so of relentless Section 2 challenges to election integrity regulations.

To put *Brnovich* in context, a brief overview of Section 2 is useful. The text of Section 2 allows two types of claims: intent-based and results-based claims. Section 2 cases can largely be categorized as either vote dilution or vote denial cases. The distinction between dilution and denial cases is often overlooked and, thus, one of the most significant aspects of the *Brnovich* ruling is that it firmly established that these categories require different analyses.

[4] *Brnovich v. Democratic Nat'l Comm.*, Nos. 19-1257 and 19-1258, __ S. Ct. __, 2021 U.S. LEXIS 3568 (July 1, 2021).

Since its enactment, Section 2 cases have largely involved dilution claims.[5] *Brnovich* does not alter how those claims are handled going forward. Conversely, vote denial cases have largely proliferated over the last 15 years or so. These cases have generally involved challenges to race-neutral state TPM regulations. Many of these challenges have been directed at longstanding election integrity practices or other race-neutral regulations such as voter ID. These new type of denial claims often depend on statistics that amply allege burdens caused by targeted regulations. Yet, despite well-publicized claims of voter suppression during this same period, minority registration and turnout has continued to increase, while racial disparities have decreased.

Though it involved both intentional and result-based claims, the critical parts of the *Brnovich* ruling deal with how result-based vote denial cases are handled under Section 2. To assist in this process, the Court highlighted five "relevant circumstances" (*i.e.*, extent of any burden, departure from a historical benchmark, the significance of any disparity, other opportunities to register and vote, and the strength of the state's interest) than can be used to evaluate denial cases. Most of these "relevant circumstances" are the usual consideration any election lawyer would consider in preparing a Section 2 case. Importantly, the Court made clear that it was "not attempt[ing] to compile an exhaustive list," leaving the door open for future litigants to raise any other circumstances they contend are important to their claims. The Court then addressed which dilution considerations were

[5] This fact is cemented by Congress' decision in 1982 to add a proviso at the end of Section 2 that expressly refutes any belief that its protections entitled protected classes to proportional representation.

useful for analyzing denial claims. In particular, the Court addressed the preconditions and Senate factors set forth in the seminal vote dilution case of *Thornburg v. Gingles* and discussed how, if at all, these applied to denial cases. The tools used to consider whether an at-large election system dilutes minority votes are often of little probative value in determining whether a TPM regulation denies or abridges someone's right to vote. The Court, however, did note that considerations such as past discrimination and lingering effects of past discrimination were relevant to a denial claim.

Ultimately, very little in *Brnovich* is new to anyone familiar with Section 2 enforcement. Vote denial raises different issues than vote dilution. Dilution-based metrics are often not material.

Justice Kagan's Dissent

I would like to address a point raised by Justice Kagan in her *Brnovich* dissent. Discussing Congress' use of the word "opportunity" in the 1982 amendment to Section 2, she wrote:

> That equal "opportunity" is absent when a law or practice makes it harder for members of one racial group, than for others, to cast ballots. When Congress amended Section 2, the word "opportunity" meant what it also does today: "a favorable or advantageous combination of circumstances" for some action. See American Heritage Dictionary, at 922. In using that word, Congress made clear that the Voting Rights Act does not demand equal outcomes. *If members of different races have the same opportunity to vote, but go to the ballot box at different rates, then so be it—that is their preference, and Section 2 has nothing to say. But if a law produces different voting opportunities across races—if it establishes rules and conditions of political participation that are less favorable (or advantageous) for one racial group than for others—then Section 2 kicks in.* It applies, in short, whenever the law makes it harder for citizens of one race than of others to cast a vote.

2021 U.S. Lexis 3568, *79 (emphasis added). Justice Kagan is correct that the text of Section 2 is not concerned about "outcomes." However, based on my experience at the Department of Justice and in private practice, many of those bringing Section 2 cases do not share her view. In fact, many recent Section 2 cases are launched because groups decide electoral practices are unequal after their preferred or expected outcomes do not occur and file suit in hopes the outcomes will be different under new court-ordered practices.

Section 2 enforcement practices at the Department of Justice often emphasized outcomes. This often involved consulting with in-house or outside consultants to develop explanations as to why outcomes were not as expected or why minority turnout failed to materialize in districts where they should (in theory) control electoral outcomes. Where the outcomes did not meet staff's expected outcomes, staff was encouraged to identify a discriminatory explanation as to why different races "go to the ballot box at different rates" (i.e., turnout).

In private practice, I have seen advocacy groups bring cases based solely on the failure of registered voters to turnout. For example, in 2019 I was part of a team that defended Mississippi's redistricting plan, which was being challenged as part of a vote dilution case brought by a national advocacy group representing local clients. Relevant here, plaintiffs there claimed that a state senate district violated Section 2 even though its black voting age population (BVAP) exceeded 50% and had been precleared under Section

5. *Thomas v. Bryant*, 938 F.3d 134, 140 (5th Cir. 2019).[6] In ruling for the plaintiffs, the district court concluded that black voters did not have an *equal opportunity* with white voters, despite the obvious tension between that ruling, the facts on the ground, and the text of Section 2. Yet, when the members of a racial group constitute a *real* majority of the voting age population, they by definition have a *greater* opportunity to elect their candidates of choice.

II. Civil Rights Division

Before turning to *Shelby County v. Holder* and the proposed legislation expanding the VRA, I would like to touch briefly on my experiences while a trial attorney at the Civil Rights Division. Various proposals being public discussed suggest that the Department of Justice's Voting Section will have significantly enhanced responsibilities under almost every scenario.

There has been tremendous recent debate over the use of Critical Race Theory ("CRT") by public and private institutions. While it has been almost nine years since I left the Civil Rights Division, I submit based on my experience there are few places in the federal government that are more dominated by the assumptions that underlie CRT. The partisanship and hostility towards staff that do not hold the same assumptions is startling. Section staff (both professional and administrative) know how to identify other staffers who do not subscribe their views. While many of the staff simply ignore the views of those they disagreed with, others showed a shocking level of intolerance to those they disagreed

[6] The ruling was later vacated before the appeal could be completed. *Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020).

with and, in some cases, actively harassed them as recounted in the 2013 report issued by the Department of Justice's Inspector General.[7] I personally witnessed many of the episodes chronicled in the OIG report and several that were not. Even within arguably the most political town in the country, the culture of the Voting Section stands out for its partisanship. Any legislation that shifts greater federal power to the Department's Voting Section will make elections worse, not better.

III. Section 5 of the VRA and Shelby County

As the committee knows, Section 5 of the VRA was a temporary, extraordinary remedy to address an extraordinary problem. Before its passage, the democratic process in much of the South was failing because of intentional state-sponsored and/or state-supported efforts to disenfranchise black voters. Because of this discrimination, elections did not accurately reflect popular support in those jurisdictions. The registration data showed just how much the system was failing in 1965. Before the enactment of the VRA, only 19.4 percent of black citizens of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi. *See Shelby County*, 570 U.S. at 529. These figures reflected a roughly 50 percent or greater disparity between the registration rates of black and white voters. *Id.*

This data led Congress to enact the Voting Rights Act of 1965, which was comprised of permanent statutes banning discrimination as well as a unique, temporary statute, Section 5. Congress developed Section 5 after it "found that case-by-case litigation was

[7] https://oig.justice.gov/reports/2013/s1303.pdf

inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Through Section 5, Congress created an unusual remedy to limit discrimination without the need for prior adjudication, and to do so by subjecting only a specific set of jurisdictions to these extraordinary provisions. *Id.* As structured, Section 5 *presumed* that any voting change by a covered jurisdiction was implemented out of discriminatory intent or effect, until the jurisdiction proved otherwise. The Supreme Court ruled this presumption of guilt without a trial was justified in the context of the terrible racial discrimination occurring in 1965.

While Section 5 was originally a temporary provision set to expire after five years, Congress extended it for 66 years before the Supreme Court intervened in 2013 with its *Shelby County* decision. However, that does not mean that intentional or effect-based discrimination in voting are legal following the *Shelby County* decision. Permanent provisions of the VRA, such as Section 2, still prohibit such discrimination and provide the tools needed for the Justice Department or private litigants to challenge election standards, practices, or procedures that are enacted with discriminatory intent or that result in minorities having less opportunity than others to participate in the electoral process.

After *Shelby County*, it was reasonable to expect that the Justice Department would have shifted strategies focusing its resources on Section 2 enforcement. It would not have been surprising to see a large increase in the number of Section 2 cases brought by the Department since 2013, especially given the media's reporting of "rampant voter

suppression." Yet, there has been no noticeable uptick in the number of Section 2 cases brought during this time. In fact, the Justice Department has only brought five Section 2 cases since the *Shelby County* decision, two of which were a replacement for the Section 5 redistricting cases against Texas that were vacated following the *Shelby County* decision.[8] In fact, looking all the way back to the start of the Obama administration in 2008, the Justice Department has filed a total of ten Section 2 enforcement cases.[9] This is not to suggest that racism no longer exists. Nor is it an attack on my former DOJ colleagues' sincere desire to bring Section 2 cases. Rather, this is simply objective data that speaks to the issue of whether the Attorney General needs new authority to combat "rampant" voter suppression such that a case-by-case approach would be ineffective.

At bottom, the central question is whether current circumstances still necessitate Section 5's extraordinary remedies to combat "widespread and persistent discrimination in voting." *See Katzenbach*, 383 U.S at 328. Actual data, not social media postings, directly answers this question. It is hard to maintain "that case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting" in 2021, given the small number of Section 2 cases initiated by the Justice Department over the 8 years since the *Shelby County* decision.

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[8] *United States v. State of Texas* (W.D. Tex. 2013) and *United States v. State of Texas* (S.D. Tex. 2013). See Dept. of Justice, Civil Rights Division, "List of Cases Raising Claims Under Section 2 of the Voting Rights Act" available at https://www.justice.gov/crt/voting-section-litigation (last visited May 25, 2021).

[9] *Id.*

Registration and Turnout Data[10]

Data, not pop culture nor hyperbole from those that oppose race-neutral election integrity laws, tells the true story of ballot access in America. To objectively evaluate whether racial minorities have an equal opportunity to participate in the electoral process, you must look at racial registration and turnout data. Looking at the most recent data, the opportunity to participate 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.

Registration. Current data shows that black registration has completely rebounded and, in some instances, exceeds White registration rates. In fact, the data shows that eight years after *Shelby County*, 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. In fact, black registration in Mississippi is 4.3% *higher* than White registration. Registration disparities in these former Section 5 states are lower than the disparities in California, New York, Connecticut, D.C., Delaware, and Virginia. In fact, the four biggest registration disparities, *i.e.*, where White registration most exceeds black registration, are found in Massachusetts, Wisconsin, Oregon, and Colorado, all of which President Biden won in 2020.

[10] All registration and turnout data regarding the 2020 election is from an April 2021 report from the Census Bureau. *See* Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2020)(Table 4b) https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html (last visited May 25, 2021).

Turnout. The 2020 election had a higher turnout across all race groups.[11] Voter turnout disparities in Mississippi, North Carolina, Georgia, Florida, and Texas were all smaller than the national average. In fact, the disparities in turnout in Massachusetts, Wisconsin, Oregon, Colorado, New Jersey, and New York were higher than turnout disparities in these former Section 5 states. Again, turnout for black voters in Mississippi outperformed that of Whites.

There is a significant disconnect between the data and the media narrative. However one views any talking points about "rampant voter suppression," the data cannot be ignored: registration rates and turnout data in 2020 far exceed that in 1965. When black citizens now register and turnout at higher rates in places like Mississippi, it is simply not credible to claim that Jim Crow style voter suppression currently exists.[12]

IV. Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019)

Though it purports to remedy the problems highlighted by the Supreme Court in *Shelby County*, the truth is that H.R. 4 goes far beyond any civil rights law enacted during the height of the civil rights era. Rather, it is part of a grander plan to shift control of American elections away from individual state legislatures and into the hands of a single federal bureaucratic department. It accomplishes this by giving the Attorney General a

[11] "Despite Pandemic Challenges, 2020 Election Had Largest Increase in Voting Between Presidential Elections on Record," Dept. of Commerce, Census Bureau, Apr. 29, 2021, available at https://www.census.gov/library/stories/2021/04/record-high-turnout-in-2020-general-election.html (last visited on May 25, 2021).

[12] Editorial, *'Jim Eagle' and Georgia's Voting Law: Biden Compares State Voting Bills to Jim Crow, Never Mind the Facts*, WALL STREET JOURNAL, March 26, 2021, available online at https://www.wsj.com/articles/jim-eagle-and-georgias-voting-law-11616799451 (last visited May 26, 2021).

previously unseen level of authority over elections. Even more troubling than this change to our constitutional tradition of leaving elections to the states, H.R. 4 will ultimately lead to lasting damage to the Department of Justice's credibility.

H.R. 4 Gives the Attorney General Powers That Go Far Beyond Voting

H.R. 4 proves that Congress indeed hides elephants in mouseholes.[13] Buried deep in its final pages, H.R. 4 grants the Attorney General authority to enjoin "any act prohibited by the 14th or 15th Amendment" of the Constitution.[14] This little-noticed provision will abolish a longstanding legal principle, leading to highly contentious litigation between states and the Attorney General. It is difficult to overstate the risk that this new law creates to the Department of Justice and the states. Congress should end this unprecedented effort to further inject the Justice Department into partisan election disputes before it goes any further.

Under current law, the Attorney General is only authorized to bring civil rights claims under specific statutes, typically those statutes prohibiting discrimination, and has no authority to sue directly for certain violations of the Constitution. Private plaintiffs can, and do, allege violations of the Constitution, but the Justice Department does not. This proposed change is a major power shift, allowing the Justice Department to become involved in a whole range of 14th Amendment cases that previously it would have been unable to pursue. The opportunity for any administration, Republican or Democratic, to exploit this new law is significant.

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13 *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

14 Sec. 7(a) of H.R. 4.

In the election context, we need only look to the 2020 presidential election to see the impact this provision would have had. Virtually every dispute during the 2020 election involved a 14th Amendment claim. While many praised Attorney General Barr's restraint in not involving the Department of Justice in that litigation, he undoubtedly declined to act because, as the Attorney General, he lacked standing over 14th Amendment disputes. If H.R. 4 had been implemented in 2019, the Justice Department would have been under enormous pressure to intervene or bring its own 14th Amendment case, such as suing to stop last last-minute changes to election laws rushed through Pennsylvania, Arizona, Wisconsin, North Carolina, Georgia, and Michigan. The exact same can be said about the highly partisan dispute in *Bush v. Gore*.

Of course, it is not just presidential elections in which the Attorney General could use these new powers. He or she will have the opportunity going forward to bring constitutional claims to "help" resolve election disputes involving preferred congressional candidates too. It is impossible to quantify the long-term effects on our electoral process if the Justice Department begins resolving highly-partisan electoral disputes.

What is more alarming is that the new 14th Amendment powers in H.R. 4 are not limited to voting rights.[15] As written, the Attorney General will be allowed to bring *any*

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[15] As amended by H.R. 4, 52 USC §10308(d) will provide as follows:

> d) Civil action by Attorney General for preventive relief; injunctive and other relief
> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by the 14th or 15th Amendment, this Act, or any Federal voting rights law that prohibits discrimination on the basis of race, color, or membership in a language minority group, *the aggrieved person or (in the name of the United States) the Attorney General may institute* an action for preventive relief,

action under the 14th Amendment, which could include actions to promote (or restrict) gun rights, religious liberties, and abortion rights. How the Attorney General exercises these new powers will, of course, depend on whichever direction the political winds are blowing at that time. Members of Congress who support H.R. 4 may feel radically different when another administration takes control.

Ultimately, this new authority raises more questions than can possibly be addressed today. For now, though, there are real questions about what this new power means for private constitutional and § 1983 litigation.

H.R. 4's Trigger Formula For Traditional Section 5

H.R. 4's new coverage formula for traditional Section 5 creates incentives that pervert civil rights enforcement. Under H.R. 4, jurisdictions that have had a number of "voting rights violations" over a period of time will be subject to Section 5 coverage. The most obvious problem with this new coverage formula is the incentives it creates. H.R. 4 defines "voting rights violations" broadly, capturing minor settlements that never resolved

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including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under chapters 103 to 107 of this title to vote and (2) to count such votes.

Currently, section (d) of 52 U.S.C. §10308 provides:

> (d) Civil action by Attorney General for preventive relief; injunctive and other relief
> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 10301, 10302, 10303, 10304, 10306, or 10307 of this title, section 1973e of title 42,1 or subsection (b) of this section, *the Attorney General may institute for the United States, or in the name of the United States*, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under chapters 103 to 107 of this title to vote and (2) to count such votes.

the merits of any claims. This definition actually retroactively penalizes jurisdictions that previously entered into good faith settlements motivated by their desire to amicably resolve disputes and limit public costs without regard to the legitimacy of the claims. Having handled affirmative civil rights litigation, I can say firsthand that discouraging settlement is counterproductive to the enforcement of civil rights laws.

Moreover, it is not just the Justice Department who brings voting lawsuits. H.R. 4 creates something akin to the "heckler's veto" for the loudest private interest groups, encouraging them to drive up "voting rights violations" (i.e., minor settlements) against targeted jurisdictions. Under this coverage formula, advocacy groups and other litigants will be incentivized to "sue and settle" cases, before running to the Justice Department to claim they triggered Section 5 coverage. Such incentives could further encourage collusive settlements – where local officials enter into meritless settlements with groups to which they are aligned – artificially driving up "voting rights violations." Ultimately, H.R. 4's coverage formula does not correct the problems raised in *Shelby County*. In fact, it aggravates the problems by replacing the data-based approach for Section 5 coverage with a new easily corruptible process that rewards litigious parties. This will further encourage the type of close coordination between the Justice Department and advocacy groups criticized in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *affirmed*, 515 U.S. 900 (1995). This is not how Section 5 coverage should be determined.

Regardless of coverage, it goes without saying that the bureaucratic nature of Section 5 discouraged jurisdictions from making good faith improvements to their voting laws. We may disagree on the degree, but anytime you drive up costs and increase

regulation, it discourages the targeted behavior (i.e., non-discriminatory changes to elections practices from 1966 – 2013). Much has been made of new voting changes implemented by covered jurisdictions since 2013, but such changes are to be expected. For 48 years, there were substantial costs and risks (both legal and political) associated with making even minor changes to how elections were conducted in Section 5 jurisdictions. The fact that changes have been made post-*Shelby County* does not mean that all of those changes were racially motivated.

There Is No Data Supporting Nationwide Section 5 Coverage

Inexplicably, H.R. 4 imposes a new nationwide preclearance coverage called "Practice-Based Preclearance Coverage." Whatever the lingering effects are from the civil rights era, there is no data that supports expanding Section 5 nationwide. Because this new preclearance coverage targets certain standards, practices, and procedures such as voter identification and list maintenance, it is reasonable to conclude that nationwide preclearance is designed to target popular voter integrity provisions. Clearly, it is not because the Congress determined that "case-by-case litigation [by the Department of Justice is] inadequate to combat widespread and persistent discrimination in voting." If 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.