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September 13, 2021

The Honorable Nancy Pelosi
Speaker of the House of Representatives
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The Honorable Kevin McCarthy
Minority Leader
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Washington, DC 20515

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
322 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
317 Russell Senate Office Building
Washington, D.C. 20510

Dear Madam Speaker Pelosi, Minority Leader McCarthy, Majority Leader Schumer, and
Minority Leader McConnell:

As the chief legal officers of our states, we write regarding the *John Lewis Voting Rights Advancement Act* (“H.R. 4”) to express our concerns regarding the devastating impact this reckless piece of legislation would have on our election systems. The bill, as introduced, would allow the United States Department of Justice to usurp the authority states rightly possess over their own elections, essentially federalizing the election system. If these provisions are enacted, rest assured that the undersigned will aggressively defend our citizens’ rights to participate in free and fair elections without unconstitutional federal intrusion.

The Supreme Court rejected the coverage formula requirements in *Shelby County v. Holder*, 570 U.S. 529 (2013). The drafters of H.R. 4 seek to change the Voting Rights Act’s (“VRA”) coverage formula under Section 4(b) to resurrect and enact new federal preclearance requirements in jurisdictions targeted for litigation by activist groups. H.R. 4 implements practice-based preclearance that would require all states and political subdivisions, regardless of whether they are covered, to preclear certain election reforms such as voter identification (“ID”) requirements and voter list maintenance laws before they can be enacted. Thus, the legislation seeks to overturn common sense election integrity reforms approved by the United States Supreme Court in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), enacted in most states,¹ and of which 80% of Americans support.²

¹ 36 states as of January 1, 2021 - <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

² “Public Supports Both Early Voting And Requiring Photo ID to Vote”, June, 21, 2021 Monmouth Poll - “31. In general, do you support or oppose requiring voters to show a photo I.D. in order to vote? Support 80%; Oppose 18%; (VOL) Depends 2%; (VOL) Don’t know 1%.” https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_062121.

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H.R. 4 further amends Section 2 of the VRA, establishing new requirements for vote denial claims. This new version of H.R. 4 is an obvious attempt to overrule the Supreme Court’s recent decision in *Brnovich v. DNC*, 141 S. Ct. 2321 (2021). H.R. 4’s new requirements under Section 2 would open the flood gates to litigation in states as opponents of secure elections try to overturn common-sense election laws in court or force state election officials to concede, settle, or abandon their election integrity efforts. Why? Because such efforts would qualify as violations, which would be compiled by the Department of Justice and then used against the states in order for the Department to subvert any and all election laws the states may try to enact in the future. Thus, H.R. 4 imposes an unnecessary and undue burden on states, particularly on the part of state legislatures, state election officials, and the chief legal officers of the states. H.R. 4, as it currently exists, contains serious constitutional defects.

The Constitution reserves to the states the primary role of establishing “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives.” Const. Art. I, § IV. The founding fathers purposely and thoughtfully gave Congress a secondary role in election decision-making. H.R. 4 seeks to flip this Constitutional mandate on its head, turning the Department of Justice into a federal “election czar,” wielding the power to challenge any new or existing election law based on the whims of the party in power and its desire to manipulate election laws to increase its chances to remain in power. H.R. 4 seeks to do just that. These changes would give the Biden Administration and administrations to follow (Republican and Democrat) the power to exert considerable control over state and local election laws without *any* finding of intentional discrimination. “[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.” *Gregory v. Ashcroft*, 501 U.S. 452, 461–62, (1991) (citing *Oregon v. Mitchell*, 400 U.S. 112, 124–125 (1970)). Not only does H.R. 4 undermine the integrity of meaningful legislation reform duly passed in state legislatures around the country designed to address issues specific to each state, but it also subverts the will of the people to govern *their* own states through their chosen representation in those state legislatures. H.R. 4 flies in the face of state sovereignty, and “there is nothing democratic about the [] attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts.” *Brnovich*, 141 S. Ct. at 2343.

When the VRA was enacted in 1965, federal oversight over state election laws was necessary to combat discrimination in a limited number of jurisdictions. The original intent was to ensure that the rights of Americans were not infringed upon at the ballot box based on their race. The law rightfully targeted states and jurisdictions that used tests and other devices that “[restricted] the opportunity to register and vote”, but it was always intended to be temporary legislation.³ Thankfully the VRA did exactly what it was intended to accomplish: “voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers.” *Shelby* at 553. However, instead of acknowledging these developments when it came time to reauthorize the bill in 2006, Congress

³ “About Section 5 of the Voting Rights Act,” *The United States Department of Justice*, September 11, 2020, <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

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kept “the focus on decades-old data relevant to decades-old problems, rather than current data reflecting on current needs.” *Id.* Ultimately, the Supreme Court in *Shelby* held that “Congress must ensure that the legislation it passes to remedy [racial discrimination in voting] speaks to current conditions.” *Id.* at 557. Times have changed, and Congress, as a living embodiment of the country, must legislate in accordance with those changes.

H.R. 4 looks backwards to the conditions of 1965, not the “current conditions” that exist in 2021. Today, the ability to vote is widely accessible. Despite claims that “key protections” were “gutted by the Supreme Court” through the *Shelby* decision, there is no evidence that voter suppression is on the rise.⁴ On the contrary, it has been found that “[in] the wake of *Shelby* ... minority registration and turnout in formerly preclearance counties have been flat or increasing relative to counties that were not covered” and “the aggregate affect appears to be a small increase in registration and voting among Black and Hispanic voters.”⁵ Today, the main concern among citizens is no longer voter discrimination, it is in preventing voter fraud, safeguarding the right to vote, and ensuring that every legal vote is counted undiluted by illegal votes. Public confidence in our election system is at record lows with more than 30% of the electorate believing that the 2020 election was stolen due to voter fraud.⁶ H.R. 4, which is more concerned with political rhetoric, instead has no interest in addressing criminal activity in cases of vote dilution and vote denial.⁷ If courts cannot consider states’ interests in curbing voter fraud, their hands will be forever tied in favor of the Department of Justice and the desires of the federal government.

In the Committee on House Administration’s Subcommittee on Elections report in support of H.R. 4, it was concluded that “[the] testimony and data show definitively that the voting and election administration practices examined can and do have a discriminatory impact on minority voters and can impede access to the vote.”⁸ The report, in part, refers to state voter ID laws, which have repeatedly been a target of this Congress, even though such laws have stood the test of time and have become best practice for election administration. The Supreme Court upheld Indiana’s voter ID law, one of the most robust in the nation, in *Crawford, supra*, and 35 other states have enacted their own voter ID laws. H.R. 4 brands such laws discriminatory while lacking any actual evidence to back up such claims. The House of Representatives simply relied on the testimony of 35 partisan witnesses.⁹ In reality, a study the National Bureau of Economic Research conducted

⁴ “Rep. Sewell Introduces H.R. 4, the John R. Lewis Voting Rights Advancement Act, to Restore Protections of the Voting Rights Act of 1965,” *U.S. House of Representatives*, August 17, 2021, <https://sewell.house.gov/media-center/press-releases/rep-sewell-introduces-hr-4-john-r-lewis-voting-rights-advancement-act>.

⁵ Mayya Komisarchik and Ariel White, “Throwing Away the Umbrella: Minority Voting after the Supreme Court’s *Shelby* Decision,” *Massachusetts Institute of Technology*, July 8, 2021, https://arwhite.mit.edu/sites/default/files/images/vra_post_shelby_current.pdf.

⁶ *Infra*, Monmouth Poll, Question “No. 23 - Do you believe Joe Biden won the 2020 election fair and square, or do you believe that he only won it due to voter fraud? Fair and square 61%; Due to voter fraud 32%.”

⁷ H.R.4 at 10.

⁸ Chair G.K. Butterfield, “Voting In America: Ensuring Free And Fair Access To The Ballot,” *Subcommittee on Elections of the Committee on House Administration*, July 2021, https://cha.house.gov/sites/democrats.cha.house.gov/files/2021_Voting%20in%20America_v5_web.pdf.

⁹ *Id.*

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between 2008-2018 found that strict voter ID laws have had “no negative effect on registration or turnout, overall or for any specific group defined by race, gender, age or party affiliation.”¹⁰

H.R. 4 dramatically lowers the burden of proof for plaintiffs in vote denial claims under Section 2 of the VRA. Under H.R. 4, vote denial would occur when a person faces greater difficulty in complying with the requirements and this greater difficulty is, *at least in part*, caused by or linked to social and historical conditions that have produced or currently produce such challenged discrimination against them. This directly attacks the “ordinary burdens of voting” standard that has long been used by courts to uphold common-sense reforms and essentially stacks the deck in favor of any plaintiff filing under the VRA. H.R. 4 encourages courts to consider specific factors in vote denial claims that weigh heavily in favor of plaintiffs and are unpreventable by election officials, including, among other factors: the existence of discrimination outside of voting processes—such as in employment, education, and health care—the use of overt or subtle racial appeals in political campaigns, and the extent to which members of the protected class have been elected to public office in the jurisdiction. Most shockingly, H.R. 4 pressures judges to consider the factor of whether a jurisdiction uses photo ID requirements for voting in analyzing vote denial claims—directly attacking the Supreme Court’s standard in *Crawford*.

H.R. 4 unabashedly prohibits courts from considering vital factors that have been outlined by the Supreme Court in vote denial claims, such as the overwhelming degree to which members of a class are *not* burdened by an election procedure, how long an election procedure has been lawfully and historically used, whether identical or similar election procedures are used by other jurisdictions, the availability of alternative means of voting, and the state’s interest in preventing fraud. Instead, courts would be required to consider factors that weigh heavily in favor of prospective plaintiffs in addition to only having to meet a watered-down burden of proof to show a violation of the law. This severely hinders states’ ability to defend their laws, including those that have been on the books for years. Attorneys General have an uphill battle defending any election reforms if H.R. 4 is passed. This will lead to even more litigation, including a dramatic increase in frivolous lawsuits designed to slow the election process, and which will be litigated with a heavy federal thumb on the scales of justice.

Moreover, H.R. 4 excessively expands the coverage formula with the potential to subject numerous states to preclearance requirements. First, it expands traditional preclearance that would specifically target state election laws enacted within the last 25 years. The threshold coverage is as few as three violations in jurisdictions where the state administers the elections. H.R. establishes that VRA violations would occur where a United States court finds a procedure contradicts either the 14th or 15th Amendments or H.R. 4. But H.R. 4 would also create violations where there is a denial of a declaratory judgement, including temporary or preliminary injunctions, where there is an objection of the Attorney General, or when any consent decree, settlement, or agreement in

¹⁰ Enrico Cantoni and Vincent Pons, “Strict ID Laws Don’t Stop Voters: Evidence from a U.S. Nationwide Panel, 2008-2018,” *National Bureau of Economics Research*, February 2019, https://www.nber.org/system/files/working_papers/w25522/w25522.pdf.

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favor of plaintiffs is approved by an official or adopted by a court of the United States. State laws stand in jeopardy over mere preliminary judgments and consent decrees. The new formula unfortunately looks at wins in court, even temporary or preliminary ones that may later be reversed by the trial court on the full merits or on appeal, rather than the entire record regarding whether intentional discrimination exists.

Second, H.R. 4 requires “practice-based” preclearance for certain election laws in all 50 states, not just the states subject to the new coverage formula. If States enact election laws within any of these areas, such as voter ID requirements, voting locations, redistricting, or maintenance of voter registration lists, the reform is automatically subject to the preclearance process. States must seek a declaratory judgement from the United States District Court for the District of Columbia or submit the law to the Department of Justice before implementation. The VRA was never intended to require every jurisdiction in the country to submit to this federal control. H.R. 4 permits politically appointed bureaucrats to meddle in state affairs, is unlawful, and violates state sovereignty.

This legislation is a misguided, clumsy, and heavy-handed effort to circumvent Supreme Court decisions, state sovereignty, and the will of the people. Unfortunately, the Department of Justice, seeking to undertake its new role as a federal elections czar, has already signaled, in regard to states updating their election laws after the 2020 election, that they “will review a jurisdiction’s changes in voting laws or procedures for compliance with all federal laws regarding elections, as the facts and circumstances warrant.”¹¹ States that create laws based on what works best for their jurisdiction to respond to a crisis of confidence in our elections systems, will inevitably be targeted by the Department of Justice leading to more confusion, litigation, and concerns over the validity of elections going forward. Because the Department of Justice “[does] not consider a jurisdictions’ re-adoption of prior voting laws or procedures to be presumptively lawful,” it shows that the federal bureaucrats are actively looking for opportunities to circumvent the will of the people.¹² Giving the Department of Justice unlimited authority over state election laws is not only unnecessary but also unconstitutional.

Though “[state] legislation may not contravene federal law . . . [the] Federal Government does not, however, have a general right to review and veto state enactments before they go into effect.” *Shelby* at 542. We strongly urge you, our nation’s highest leaders, to model the leadership this country needs and to prevent any further division between the states and the federal government. Please be advised that should H.R. 4 become law, we will seek action to protect the sovereignty of all states and the rights of our citizens.

¹¹ “Guidance Concerning Federal Statutes Affecting Methods of Voting,” *U.S. Department of Justice*, July 28, 2021, <http://cdn.cnn.com/cnn/2021/images/07/28/voting.methods.guide.pdf>.

¹² *Id.*

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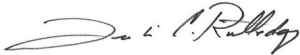
Sincerely,



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Steve Marshall
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Arkansas Attorney General



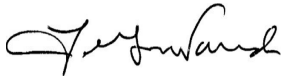
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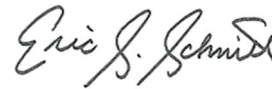
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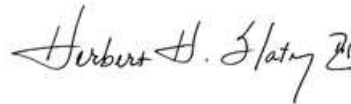
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