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Testimony of
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Before the United States Commission on Civil Rights

A Litigator's Perspective of Laws Affecting Voter Access Since *Shelby.*

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I am President and General Counsel for the Public Interest Legal Foundation, a non-partisan charity devoted to promoting election integrity and preserving the constitutional decentralization of power so that states may administer their own elections. In the last few years we have litigated election cases in Nevada, Texas, Mississippi, Florida, the District of Columbia, North Carolina, Virginia and Pennsylvania and have filed as amicus in many others.

Thank you for the opportunity to testify in this important matter. Separating fact from fiction about the Supreme Court's recent decision in *Shelby County* is essential to chart future effective, constitutionally permissible and popularly supported civil rights enforcement. I served for five years as a career attorney in the Voting Section at the United States Department of Justice from 2005 through 2010. There, I investigated and brought a range of cases to protect minority rights under the Voting Rights Act, and also cases to enforce obligations under National Voter Registration Act/Help America Vote Act. I worked on cases in Texas, Alabama, Mississippi, Florida, South Carolina, Pennsylvania, Vermont and elsewhere. I reviewed preclearance submissions, such as Congressional redistricting, under Section 5 of the Voting Rights Act as well.

One of the most effective ways to preserve the viability of civil rights laws is to remove partisan politics from civil rights enforcement. As soon as a sizeable segment of the public believes that civil rights laws are being leveraged for partisan ends, a sizeable segment of the public will stop supporting civil rights. The Voting Rights Act has enjoyed broad bipartisan support for decades. But if enforcement of the law is hijacked by partisan interests, the law will lose this bipartisan support.

Some would be happy to travel the dangerous road of turning the Voting Rights Act into a partisan weapon. Some are brazen and open about their goal of

turning the Voting Rights Act into a partisan tool to help Democrats. A few years ago, for example, a law review article was written by University of Michigan Law Professor Ellen D. Katz calling for such an outcome.[1] It was titled – "Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All" and was published at *Stanford Law & Policy Review*.

To this end, reasonable state election laws have been challenged under the Voting Rights Act in a concerted effort by lawyers representing partisan interests. Right now, for example, there is a challenge to the very existence of recall elections in Nevada using the Voting Rights Act. The case makes the immoral and bigoted claim that minority voters are less capable of voting in a recall election because they don't pay close enough attention to public issues to have to vote twice. The Public Interest Legal Foundation is a defendant-intervenor on the side of Nevada defending the state recall elections against this partisan use of Section 2 of the Voting Rights Act.

If the theory of the Nevada lawsuit is the future of the Voting Rights Act, the enforcement of that law will eventually enjoy support among only a small fringe far outside of the mainstream. Predicating enforcement of the law on the idea that racial groups aren't smart enough to pay attention not only offends the dignity of those individuals, it is outside the well-established jurisprudence of the Voting Rights Act. My view is such a nakedly partisan use of the Voting Rights Act will erode support for the law.

Enforcing Section 2 using disparate impact theories is what is enabling a partisan approach to enforcing the law. This is especially true when there are unprecedented levels of racial polarization. Courts reviewing Section 2 cases should

[1] University of Michigan Law School Scholarship Repository/Stanford Law & Policy Review; Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All (2012), https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1962&context=articles

utilize longstanding jurisprudence requiring much more than statistical disparities in analyzing election laws for compliance with the Voting Rights Act and ask whether an actual real world equal opportunity to participate and comply with the law exists. Unfortunately many activists and interest groups would prefer that the Voting Rights Act utilize a disparate impact theory, or a disparate impact theory masquerading as something else. As I stated earlier, this both jeopardizes popular support for the Voting Rights Act, but also endangers Section 2's constitutionality.

What does a disparate impact theory of Section 2 look like? It looks much like the review that occurred under Section 5 before the *Shelby County* decision, save for the burden shift of Section 5. That is, if there is any statistically different effect on minorities for any voting change, then Section 2 is implicated. That is not the law.

Racial bloc voting is the second component to turning the Voting Rights Act into a partisan weapon. Bloc voting cohesion coefficients among African-American voters have increased significantly in the last decade. I conclude this based on recurring extreme precinct analysis as well as some other studies and cases which utilize ecological regression. White cohesion has also increased, but does not approach the same levels. Regardless of why this has happened, it threatens to make race and partisan identification synonymous for purposes of the Voting Rights Act.

Democrats became the beneficiary of extraordinary levels of racial bloc voting. The relevance of this trend to the Voting Rights Act is obvious. The use of federal power, whether through Section 2 or Section 5, to enhance minority voting clout will necessarily enhance Democratic Party clout. If racial polarization levels remain high among racial minorities while whites are less polarized, one party may benefit. This circumstance further illustrates why various interests and factions were desperate to seek out a new means to preserve as many elements of the pre-*Shelby County* mechanisms of federal power as possible – as they did here in North Carolina.

One such mechanism was to turn Section 2 of the Voting Rights Act as a tool to block election laws which have any disparate statistical impact, no matter how small. Turning the Voting Rights Act into a law that does not look to real world causality – where a state law actually has a real world impact on minority voting – will cause the broader population to question support of the Voting Rights Act.

Many argue that after *Shelby*, state election laws that violate the Voting Rights Act were passed suddenly by state legislatures in a conspiratorial effort to block minority voting. Yet, inexplicably, the Department of Justice dramatically reduced enforcement activity under Section 2 and 203 of the Voting Rights Act after January 20, 2009. If it was such a target rich environment, why wasn't the Department of Justice shooting at targets. Resource issues are a fake excuse. The Voting Section had excess capacity and lawyers who were idling with no work. Indeed, I brought one of the last cases the Department filed to challenge at-large elections in a jurisdiction – almost a decade ago. A more recent DOJ case – filed against Eastpointe, Michigan late in 2016 – appears to have a number of significant defects were the defendants savvy enough to press those defenses – which so far they have not. Simply, the Department of Justice with its vast arsenal of resources hardly brought any cases at all for violations of the Voting Rights Act after 2009 and after *Shelby.*

This relative inactivity in enforcing Section 2 was in stark contrast to enforcement activity from 2001 to 2009. Section 2 cases were brought across the country – multiple cases in Ohio and Florida, South Carolina, Pennsylvania, and Massachusetts. Yet enforcement of Section 2 virtually stopped after 2009 – apart from two cases in Texas and North Carolina not related to at-large elections.[2] Why?

[2] This barely touches the disparity. See, Adams and von Spakovsky, "The Con Job on Voting Rights Cases," National Review, May 19, 2014.

It's not as if Section 2 cases don't exist. Why did the Justice Department refuse to bring a Section 2 case against Fayette County, Georgia, in 2010 that the NAACP eventually brought and won?[3] Certainly it wasn't for a lack of resources, as the Voting Section had plenty of capacity to add a single case to their docket. The almost complete lack of enforcement of Section 2 after January 2009 might reasonably lead one to believe that credible meritorious cases are legitimately lacking and that no conspiracy exists to deny the right to vote after *Shelby*.

What is most striking about the post-*Shelby* world is how little difference the decision seemed to make to actual voting. It is easier to register and vote now in the United States than it ever has been in the history of the country. Nothing about *Shelby* affected that undeniable fact. Lawyers have struggled to find actual plaintiffs who face insurmountable obstacles to voting. In one famous incident in Philadelphia, a plaintiff challenging a state voter ID law claimed she could not acquire acceptable identification to register to vote. When a lower court threw out her case, she visited a PennDOT office and received her ID the same day before her lawyers could stop her, and thus mooted out her appeal.[4] This is the sort of farce that accompanies some of the recent challenges to state election laws.

States were given the power to run their own elections in our Constitution. Naturally, they must do so in conformity with the various amendments to the Constitution affecting elections. The presumption that states may manage their own elections is not some accidental choice. It was a choice informed by the lessons of history that centralized federal control is eventually adverse to individual freedom

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http://www.nationalreview.com/article/378241/con-job-voting-rights-cases-hans-von-spakovsky-j-christian-adams

[3] Read the District Court judgment at http://www.naacpldf.org/files/case_issue/GA%20State%20Conference%20NAACP%20v%20Fayette%20County%20BofC%20Opinion.PDF.

[4] Pittsburgh Post-Gazette; Lead plaintiff in Pennsylvania voter ID case gets photo ID (8/18/2012), http://www.post-gazette.com/news/state/2012/08/18/Lead-plaintiff-in-Pennsylvania-voter-ID-case-gets-photo-ID/stories/201208180187

and liberty. The Founders knew that a central authority with control over state elections would invariably erode liberty. As the Supreme Court put it in *Shelby*, "the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"

Thank you for the opportunity to submit testimony.

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Respectfully submitted,
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