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Testimony of
Logan C. Churchwell

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Subcommittee on Elections

"Voting Rights and Election Administration in Florida"

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Logan C. Churchwell
Communications and Research Director
Public Interest Legal Foundation
32 E. Washington Street, Suite 1675
Indianapolis, Indiana
lchurchwell@publicinterestlegal.org

Chairpersons Lofgren and Fudge, Ranking Member Davis, and Members of the Committee, thank you for the invitation to participate in today's hearing.

My name is Logan Churchwell. I am the Communications and Research Director for the Public Interest Legal Foundation, a non-partisan, nonprofit law firm dedicated to election integrity.

I would first like to sincerely thank this body for not only holding discussions in Washington, D.C. about voting issues and the Voting Rights Act of 1965 – but doing so around the nation. The current protections of the Voting Rights Act ("VRA") are a success story that has done a tremendous job in eliminating racial discrimination in voting.

Section 2 of the Voting Rights Act has proven to be an extremely effective tool to combat barriers to the ballot box and protect the ability to elect representatives of choice. When properly used, the VRA can be leveraged as a force for good.

Because of the Voting Rights Act, it has never been easier to register to vote and vote as it is in America in 2019.

Contrary to the assertions without evidence by some, the VRA was not "gutted" by the Supreme Court in 2013. Activists and political candidates campaigning on "reinstating" the law are fearmongering, fundraising, or both. 2019 is not 1965. The heavy hand of federal micromanagement of state election law was justified in 1965. It is not in 2019.

The VRA was originally designed to be operated on two tracks. First, the law empowered the Justice Department and private parties to challenge state election procedures and statutes on the basis they were enacted with a racially discriminatory intent or had racially discriminatory effects. Second, the VRA's preclearance provisions in 1965 were an extraordinary exercise of federal power that required approval of any election change in jurisdictions with deep histories of

racially discriminatory behavior. Preclearance obligations were, in part, constitutional because they had an expiration date. This Congress, however, continued to extend the power beyond the provision's constitutional shelf-life.

Unfortunately, the preclearance power became a power that was abused. From South Carolina voter ID to Georgia redistricting, Justice Department lawyers exercised powers that they did not possess by blocking states' laws that were neither discriminatory in purpose or effect, and in some cases, courts handed down sanctions.

Section 5 also flipped evidentiary burdens on subject jurisdictions to prove *they were not discriminatory* with each procedural reform. This concept of *guilty until proven innocent* was inherently un-American and the Supreme Court took note of this unprecedented burden shift when it struck down Section 4's triggers in *Shelby County v. Holder*.

Whether or not the old preclearance regime can be fully credited for the actual progress made in creating a more just voting system – history will show that the program had a proper time and place – and that time has passed. I contend to this body and the general public that trying to resuscitate the concept of 20th Century-style preclearance will prove an inefficient use of federal resources and will always be at least one step behind emerging population and demographic trends. While the framers of the VRA were certainly prescient, it is doubtful they could've predicted international migration trends where their country was on track to absorb nearly a million people crossing illegally between ports of entry in a single year.[1]

Targeted, affirmative enforcement of the VRA is the way of the future. Perhaps the American people need a reminder of the tools available under the law. Section 2 can be used to confront almost any discriminatory hurdle in its wake. From classic poll taxes to vote diluting

[1] *The Washington Post*; Nielsen says Homeland Security is on track to detain 900,000 migrants this fiscal year (March 6, 2019)

maps and even tribal lineage tests on voter participation[2], this Section can help any affected eligible voter anywhere. Section 11(B) addresses efforts to intimidate or coerce voters, whether they are Klan, New Black Panther, or designs from any other group or individual. Some elements of the law can protect voters in need of bilingual ballots and election administration, based on local demographic trends. Finally, preclearance is still a possibility. If a jurisdiction's actions warranted it, Section 3 would bail that locale back under administrative review.

For those arguing that affirmative enforcement of the VRA is too slow or hard to keep track of emerging threats, they need to take a closer look at the case record provided by the DOJ. The lull in actions became apparent during the Obama Administration, but well before *Shelby County*. Simply, apart from one or two high profile, headline-earning lawsuits in Texas and North Carolina, the DOJ sat largely dormant for eight years, barely enforcing Section 2. It's reasonable for any fair-minded person to infer that if the Department did not bring very many cases under the Voting Rights Act, then not very many cases of racial discrimination must have existed. Worse, based upon several internal and external governmental reviews of the DOJ[3], the Department's Voting Section hardly seems the proper place to vest so much extraordinary power today. Simply, Section 5 lends itself to abuse of power, and the unit in charge of enforcement has exhibited rank ideological bias in its proven abuses.

It is crucial that the Trump Administration set a tone for what litigation-based enforcement of the Voting Rights Act will look like for the generations to come. But without some cultural shifts within the DOJ itself, said enforcement will remain stagnant, and if

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[2] *Davis v. Guam* No. 17-15719

[3] DOJ-OLA letter to Rep. James F. Sensenbrenner dated April 12, 2006
https://www.scribd.com/document/48673021/2006-0412-Ltr-to-House-of-Rep-re-Voting-Rights-Act-Procedures
See also: DOJ-OIG; A Review of the Operations of the Voting Section of the Civil Rights Division (March 2013), https://oig.justice.gov/reports/2013/s1303.pdf

preclearance is returned, it will certainly again become abusive. Courts have noted the improper relationship between the Voting Section and private third parties. They have fallen behind historic trends in bringing litigation under non-preclearance sections of the Voting Rights Act. The parent Civil Rights Division paid out $4.1 million in fees and court costs after bringing faulty actions from 1993 to 2000 (half belonging to the Voting Section alone).[4]

Under the previous administration, the Voting Section led from behind – and the litigation record clearly proves it.

We offer a simple yet potentially substantial conversation starter for how the Trump DOJ can modernize enforcement of the VRA – and it probably won't even require an act of Congress. Decades of preclearance no doubt served to physically cloister the federal attorneys and staff in Washington – sometimes thousands of miles from the civil rights fires they were entrusted to douse. The Trump Administration should seriously consider breaking up and physically scattering these federal voting rights monitors on a permanent basis as they do with the Community Relations Service of the Civil Rights Division, so they can better embed within their communities. Physical, real-time presence can carry with it a whole new outlook on civil law enforcement that improves both monitoring and responses to emerging threats.

We are doing our nation a disservice if we let nostalgic laments cloud our ability to innovate civil rights strategies. Know this: if too many voices claim that the Voting Rights Act of 1965 is "gutted," bad actors will find ways to take advantage of that mindset.

Thank you for the invitation to testify.

Respectfully submitted,

Logan C. Churchwell

[4] See note 3