

**Section by Section Analysis**  
**The John R. Lewis Voting Rights Advancement Act of 2021 (S. 4)**  
**117<sup>th</sup> Congress**

**TITLE I – Amendments to the Voting Rights Act**

*Section 101. Vote Dilution, Denial, and Abridgement Claims.*

- This section restores and updates Section 2 of the VRA, which is the permanent nationwide prohibition against race-based discrimination in voting. Section 2, as currently written, prohibits states from imposing any voting rule or procedure that results in the right to vote being denied or abridged on account of race, color, or membership in a language minority group. Section 2’s protections extend to both vote denial and vote dilution claims and claims can arise as a purposeful discrimination claim or an “effects” claim. However, the Supreme Court’s July 2021 decision in *Brnovich v. DNC* greatly diminished the availability of Section 2 to successfully bring vote denial claims in particular, which, after the nullification of preclearance in *Shelby County*, plaintiffs had been able to since use to successfully block racially discriminatory photo ID laws, cuts to early voting, voter registration restrictions, and numerous other discriminatory voting changes.
- This section codifies and updates existing protections under Section 2 and attempts to fix the Court’s harmful decision in *Brnovich*. First, for Section 2 “effects” claims, this section expressly codifies the long-established legal standard for Section 2 vote dilution claims articulated in *Thornburg v. Gingles*, which established the specific factors courts must consider in a “totality of the circumstances” analysis. Second, also for “effects” claims, this section corrects the *Brnovich* decision by establishing a distinct “totality of the circumstances” standard applicable to Section 2 vote denial and abridgement claims, which largely corresponds with the *Gingles* factors. Finally, the section articulates a specific test for Section 2 “purpose” claims.
- The Senate bill’s updates to Section 2 largely track the House bill’s proposal. Notable differences include (1) incorporating by reference the existing vote dilution standard under *Gingles* (the House bill explicitly lists, and slightly modifies, the factors in the *Gingles* analysis) and (2) some substantive tweaks to the “totality of the circumstances” standard for vote denial and abridgement claims (however both the Senate and House bill largely adopt a similar analytical framework).

*Section 102. Retrogression.*

- This section further strengthens Section 2 by incorporating a distinct “retrogression” legal standard to Section 2 claims. Simply put, retrogression prevents any “backsliding” of minority voting rights. Under a retrogression analysis (which is already the legal standard applicable to preclearance review under Section 5), a violation of Section 2 would be established where a voting change makes minority citizens worse off than the status quo with respect with their ability to vote. Specifically, a violation is established if a

challenged voting rule “has the purpose or will have the effect of diminishing the ability” of any citizen to vote on account of race, color, or language minority status.

- This section applies retroactively to any voting law or rule changes that takes place on or after January 1, 2021.

*Section 103. Violations Triggering Authority of Court to Retain Jurisdiction.*

- This section expands the judicial “bail in” remedy under Section 3 of the VRA by permitting courts to bail jurisdictions into federal preclearance where a court has determined that a jurisdiction has violated the VRA or any other federal prohibitions against race-based voting discrimination. Currently, courts are only permitted to bail a jurisdiction into preclearance where a violation of the Fourteenth or Fifteenth Amendment has been established.
- “Bail in” allows courts to retain jurisdiction to oversee voting changes in areas of the country not subject to preclearance under one of the geographic coverage formulas, but where the court has found violations of federal voting rights laws justify application of preclearance to the jurisdiction.

*Section 104. Criteria for Coverage of States and Political Subdivisions.*

- This section establishes a new geographic preclearance coverage formula under Section 4 of the VRA in response to the Supreme Court’s directive in *Shelby County* for Congress to adopt a coverage formula that responds to current conditions of discrimination. Under the new coverage formula, a State (and all political subdivisions within the State) will be covered under the formula if, during the 25 previous calendar years (1) 15 or more voting rights violations occurred in the State; *or* (2) ten or more voting rights violations occurred in the State and at least one of the ten violations was committed by the State itself. Additionally, a political subdivision within a State would be individually covered under the new formula if three or more voting rights violations occur within the political subdivision within the previous 25 years.
- In order to ensure the preclearance remedy is narrowly tailored and responds to current conditions of voting discrimination, a State or political subdivision automatically drops out of preclearance coverage if it has a clean voting rights record for ten years (i.e. no voting rights violations within the jurisdiction for ten years).
- As compared to H.R. 4, the Senate bill’s geographic coverage formula:
  - Does not contain a coverage formula that triggers preclearance where three or more violations occurred in the State during the previous 25 years in States where the State itself administers elections.
  - Excludes judicial grants of preliminary or temporary relief in voting rights cases from counting as a “voting rights violation,” for purposes of triggering geographic coverage.

- Requires consent decrees, settlements, or other agreements pertaining to the resolution of federal voting rights litigation to contain an admission of liability in order to count as a “voting rights violation,” for purposes of triggering geographic coverage.
  - Establishes a new provision for expedited preclearance review by the Attorney General for voting changes made within 30 days of an election under exigent circumstances (e.g. natural disasters).
- As compared to H.R. 4, the Senate bill establishes distinct “bail out” procedures:
    - The Voting Rights Act permits jurisdictions subject to preclearance under the geographic coverage formula, but which have had a clean voting rights record for 10 straight years, to file a declaratory judgment action in the D.C. federal district court to request “bail out” of preclearance coverage.
    - Both the House and Senate bill strengthen the bail out procedure, but do so in distinct ways. While the House bill puts the onus on the Justice Department to proactively identify jurisdictions that would be eligible to immediately “bail out” of preclearance review, the Senate bill takes a different approach to make it easier for jurisdictions to bail out under the existing statutory procedures, thus minimizing the role of the Justice Department in making bail out determinations and improving administrability.
    - To ensure the coverage formula is narrowly tailored, the updated bail out provisions permit jurisdictions to bail out of coverage in three distinct ways: (1) a State or political subdivision can bail out of coverage if it has a clean record (i.e. no voting rights violations) for the ten years immediately preceding the request for bailout; (2) a political subdivision that had already bailed out of preclearance prior to enactment of the VRAA would be grandfathered so that the jurisdiction would not be subject to preclearance under one of the new statewide geographic triggers (unless the political subdivision became independently covered); (3) a political subdivision that becomes covered due to one of the new statewide geographic triggers can immediately move to bail out of coverage if they have had a clean record during the previous ten years.
    - Finally, the updated VRAA permits jurisdictions to request that the Attorney General consent to a motion for a declaratory judgment to bail out, further simplifying the process.

*Section 105. Determination of States and Political Subdivisions Subject to Preclearance for Covered Practices.*

- This section establishes a new type of preclearance coverage formula under Section 4 of the VRA. This new “practice-based” preclearance formula requires jurisdictions with growing minority populations (identified through certain demographic triggers) to obtain preclearance for a defined set of voting changes that are most likely to have historically been employed to discriminate against minority communities. These practices include: (i) changes to methods of elections; (ii) annexations and de-annexations; (iii) changes to jurisdictions boundaries made through redistricting; (iv) voter identification and proof of

citizenship requirements; (v) reductions to multilingual voting materials; (vi) polling places closures and consolidations; and (vii) new voter list maintenance processes.

- Each of these covered practices would be subject to preclearance only in jurisdictions that have experienced a rapid growth in their minority population, further cabining the reach of preclearance coverage to parts of the country where violations are most likely to occur. For example, to trigger preclearance for a change to the method of elections, the change must take place where (1) two or more racial groups or language minority groups each represent 20% of the voting-age population in a State or subdivision; or (2) a single language minority group represents 20% or more of the voting-age population on Indian lands located in subdivision. These population-based triggers were developed based on empirical data demonstrating a strong relationship between the racial composition of a state or county and the likelihood that the jurisdiction will engage in a violation.
- The Senate version of this section is substantially similar to the House version. However, unlike H.R. 4, the Senate bill does not require preclearance under this section of any voter ID requirement that does not permit an affidavit in lieu of an ID.

*Section 106. Promoting Transparency to Enforce the Voting Rights Act.*

- This section imposes new notice and disclosure requirements on states for three types of voting related issues: (1) changes to voting rules or procedures that are adopted within 180 days of an election for federal office; (2) polling place resources (*e.g.* information concerning precincts or polling locations, the voting age population and number of registered voters served by the precinct or polling location, the number of voting machines, and the number poll workers); and (3) redistricting, reapportionment, and other changes in voting districts involving federal, state, and local elections.
- Makes compliance with these transparency and disclosure provisions voluntary for smaller jurisdictions.
- The Department of Justice can initiate enforcement actions against states that fail to comply with these transparency requirements.

*Section 107. Authority to Assign Observers.*

- Section 8 of the VRA currently allows the Attorney General to certify the need for federal election observers in jurisdictions covered by the VRA's coverage formula where the Attorney General has received "meritorious complaints" from residents, local officials, or organizations that voting violations are likely to occur, or where the Attorney General determines that assignment of observers is "otherwise necessary" to enforce the Fourteenth or Fifteenth Amendment. This section would expand the set of circumstances where the Attorney General may seek to assign federal observers, including in instances where necessary to enforce the protections of the Voting Rights Act (*i.e.* not just the Fourteenth and Fifteenth Amendments) and circumstances where the Attorney General

receives meritorious complaints from members of the public or local officials that federal observers are necessary to enforce federal language minority protections or the Attorney General comes to an independent determination that observers are needed to enforce such protections.

*Section 108. Clarification of Authority to Seek Relief.*

- This section directly responds to Justice Gorsuch’s concurrence in *Brnovich*, which averred that there may not be a private right of action available to enforce Section 2 of the Voting Rights Act. This assertion is plainly incorrect, since a private right of action to enforce the VRA’s protections has been recognized and used for decades. The leading case, *Morse v. Republican Party*, generally established the availability of private rights of action to enforce the VRA, and a private right of action has been generally presumed and recognized by every federal Circuit until the *Brnovich* concurrence offered an enormous shot across the bow.
- This section makes explicit that a private right of action exists under the VRA to enforce its various provisions. Specifically, it establishes that an ordinary citizen (or the Attorney General) can institute an action for preventive relief wherever someone has engaged in or is about to engage in an act that would deny citizens the right to register to vote, cast a ballot, or have a ballot properly counted and included in the appropriate totals of votes cast.

*Section 109. Preventive Relief*

- This section establishes a new standard for plaintiffs to secure preliminary relief against likely voting rights violations to ensure that, in parts of the country where preclearance does not apply, there is still a remedy at law available to block voting changes that are likely to be problematic from being enforced while the merits of the litigation are decided. Specifically, this section requires a court to grant preliminary relief if it determines that the complainant has raised a serious question as to whether the challenged voting practice violated federal voting rights statutes or the Constitution, and whether, on balance, the hardship imposed on the plaintiff would be greater than the hardship imposed on the defendant absent the relief.

*Section 110. Bilingual Election Requirements*

- Extends the language minority protections under Section 203 by five years.

*Section 111. Relief for Violations of Voting Rights Laws*

- This section addresses federal courts’ misapplication of the judicial doctrine known as the “*Purcell* doctrine,” which effectively operates as a *per se* bar against judicial intervention in election procedures “too close” to an election. In practice, federal courts have applied this doctrine to deny or stay preliminary injunctions for potential voting rights violations,

even when a litigant has met their burden of demonstrating a likelihood of success on the merits.

- This section would address the over-application of the *Purcell* doctrine by establishing that proximity to an election alone is not a sufficient reason to deny relief without clear and convincing evidence that the ordered relief would harm the public interest or impose serious burdens on elections officials. Establishing this clear standard ensures that voting rights claims get a full hearing, and also honors the original intent of *Purcell* by leaving room to block requested election-rule changes because of valid concerns about voter confusion or unreasonable burdens on elections officials caused by the proximity to an election.
- To further ensure appropriate application of the *Purcell* doctrine, this section establishes a “safe harbor” period where, if relief is sought within 30 days of the voting change being adopted, or more than 45 days before an election, a legal challenge will be presumed *not* to constitute a harm to the public interest or a burden on election administrators. This gives guidance and clarity to litigants as to how close to an election you can be before a potential *Purcell* problem is triggered (i.e. within 45 days of an action), but also allows for challenges to late-breaking election rule changes, so long as plaintiffs move quickly (i.e. within 30 days of the voting change). This two-pronged approach is necessary and reasonable to discourage last minute changes to election rules and practices, as well as last minute frivolous litigation.
- Finally, this section addresses the Supreme Court’s “shadow docket” that involve voting rights claims, by requiring courts to issue a written explaining their reasoning in granting, denying, staying, or vacating a grant of equitable relief for voting rights claims.

#### *Section 112. Protection of Tabulated Votes*

- This new section would amend sections 11 and 12 of the VRA to expand the list of prohibited acts under the VRA. Specifically, in order to protect certification of aggregate tabulations and certification of elected candidates in the same way as existing protections for casting, counting, and tabulating individual voters’ ballots, it newly prohibits any person acting under color of law from (1) willfully failing or refusing to tabulate, count, and report votes; or (2) willfully failing or refusing to certify the aggregate tabulations of votes or certify the election of candidates receiving sufficient votes to be elected to office. It would also amend section 12 of the Voting Rights Act to align existing prohibitions against destroying, defacing, or altering ballots or voting records with temporal requirements for record retention under 52 USC 20701. These provisions are a new addition and not contained within the House bill.

#### *Section 113. Enforcement of Voting Rights by Attorney General*

- This section would empower the Attorney General or their designee to require a person to produce information and documentation if they have reason to believe that such person may be in possession, custody, or control of documents relevant to an investigation under the VRA or other federal voting rights statutes.

#### *Section 114. Definitions*

- This section clarifies several definitions related to the Native American voting population under the VRA.

#### *Section 115. Attorneys' Fees*

- This section clarifies the definition of “prevailing party” under the VRA.

#### *Section 116. Other Technical and Conforming Amendments*

- This section provides a series of non-substantive technical and conforming amendments.

#### *Section 117. Severability*

- Section 16 adds a robust severability clause to the bill, providing that if any part of the VRAA or any amendments made by the Act, or any application of any part of the Act or amendments made by the Act, is held to be unconstitutional or is otherwise enjoined or unenforceable, the rest of the VRAA, and the remainder of the Act and any amendments made by this Act, and the application of the provisions and amendment to any person or circumstance, and any remaining provisions of the VRA, shall not be affected by the holding.

#### *Section 118. Grants to Assist with Notice Requirements under the Voting Rights Act of 1965*

- This section requires the Attorney General to make grants each fiscal year to small jurisdictions that submit applications for financial assistance to comply with the VRA’s notice requirements, and defines small jurisdictions to be political subdivisions with a population of 10,000 or less.

#### **TITLE II – Election Worker and Polling Place Protection (Sections 201-202)**

- This title incorporates the *Election Worker and Polling Place Protection Act*, which expands and clarifies protections for election workers, polling places, and other election infrastructure against threats, harassment, and violence.
- Specifically, this provision amends 18 U.S.C. § 245 to: (1) expand and clarify protections for election workers to include other persons involved in the administration of elections, like volunteer election workers, those involved in the supply and maintenance of election equipment, and family members of election officials; (2) broaden the scope of threats currently prohibited by law to include threats of harm not only to persons but also their property, and (3) prohibit intentionally damaging polling places, tabulation centers, or other places being used as election infrastructure.
- Damage or threats to property in violation of the statute are punishable by a fine, up to one year imprisonment, or both. More serious injury against persons, such as death,

kidnapping, or sexual abuse, are punishable by fine, any term of prison sentence, or a life sentence.

- This bill was not included in H.R. 4.

### **TITLE III – Native American Voting Rights Act (Sections 301-318)**

- This title incorporates the *Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021*. Key provisions of NAVRA 2021 are described below. H.R. 4 does not incorporate NAVRA 2021.
- Directs the Office for Civil Rights at the Office of Justice Programs of the Department of Justice to establish and administer a \$10 million Native American voting task force grant program to eligible applicants to establish a Native American Voting Task Force in each State with a federally recognized Indian Tribe.
- Amends the National Voter Registration Act of 1993 to ensure each Tribe is entitled to a minimum of one voter registration site at a Tribally-designated building on Indian lands.
- Directs every state whose territory contains all or part of an Indian Tribe’s Indian lands to provide a minimum of one polling place per precinct on Indian lands, with procedures for Tribes to request additional polling places and procedures to facilitate access to the ballot (such as mail-in/absentee voting).
- Establishes procedures for specific changes to voting system practices that would require prior notification and consent granted by the affected Tribe(s), the U.S. Attorney General, or the U.S. District Court for the District of Columbia.
- Ensures that any identification card issued by a federally recognized Tribal government, the Bureau of Indian Affairs, the Indian Health Service, or any other Tribal or Federal agency issuing identification cards to Indian voters shall be a valid form of identification for voting purposes.
- Permits any person to collect and drop off ballots for another voter residing on Indian lands without restriction or penalty. It prohibits States and precincts from putting a limit on how many ballots any person can return and allows any person to return voter registration applications, absentee ballot applications, or absentee ballots to ballot drop boxes provided for these purposes.
- Directs States and political subdivisions to provide absentee or mail-in voting materials in the language of the applicable minority group as well as in the English language, bilingual election voting assistance, and written translations of all voting materials in the language of the applicable minority group (per section 203 of Voting Rights Act).