H.R. 4 – The John R. Lewis Voting Rights Advancement Act (2021) Analysis

Overview

While the new version of H.R. 4 introduced in 2021 still includes all the bad policy contained in the prior version, 2021's H.R. 4 goes far beyond the 2019 version and would establish a more extreme takeover of both election processes and judicial proceedings. Instead of repairing some of the constitutional defects of the previous version, the new H.R. 4 supersedes them to create an even more constitutionally suspect bill. On top of the many ways the 2019 version of the bill amended Sections 4 and 5 of the Voting Rights Act (VRA), the 2021 version establishes new requirements for cases brought under Section 2 of the VRA. Undoubtedly, the new provisions are an attempt to overrule the Supreme Court's 6-3 decision in *Brnovich v. DNC*.

New Factors for Vote Dilution Claims under Section 2 of the VRA

H.R. 4 now includes factors a court is required to consider when conducting a totality of circumstances analysis for vote dilution claims, including vague considerations such as:

A. The history of official voting discrimination in the state or subdivision,
B. The extent to which voting in the elections is racially polarized,
C. The extent to which the state or subdivision has used voting practices or procedures that tend to enhance opportunities for discrimination – for instance, simple reforms like majority vote requirements,
D. The existence of discrimination outside of voting processes – such as employment, education, and health – that hinder effective participation of the protected class in the political process,
E. Whether political campaigns have been characterized by overt or subtle racial appeals, and
F. The extent to which members of the protected class have been elected to public office in the jurisdiction.

A court is permitted to also consider whether officials have failed to cater to the particular needs of the protected class in the political process and whether the policy behind the use of the procedure is tenuous.

New Definitions for Vote Denial or Abridgment Claims under Section 2 of the VRA

H.R. 4 (2021) establishes new definitions for vote denial claims, holding that vote denial occurs where:

1. Persons face greater difficulty in complying with the requirements – directly attacking the "ordinary burdens of voting" standard that has long been used by courts to uphold reforms, and
2. 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 the persons.

For vote denial claims, H.R. 4 establishes similar factors as those mentioned for vote dilution claims but also includes:

- The extent the jurisdiction has used photo voter ID, proof of citizenship or residence, or other voting procedure beyond federal law that impair minority access to voting, and

- The use of overt or subtle racial appeals either in political campaigns or surrounding the adoption or continuance of the procedure.

Ironically, the totality of circumstances analysis is meaningless, for the plaintiff is not required to show any particular number or combination of factors to establish a violation.

Perhaps most alarming is how H.R. 4 uproots Justice Alito's totality of circumstances factors from the Supreme Court's 6-3 decision in *Brnovich v. DNC*. Directly responding to the majority's holding in that case, H.R. 4 excludes the following factors from a court's analysis in vote denial claims brought under Section 2:

1. The total number or share of members of a protected class that are not burdened by the procedure – e.g., if 99.9% of the class is not burdened,
2. Whether the procedure has a long pedigree or was in widespread use at some earlier date,
3. The lawful use of identical or similar procedures in other states or jurisdictions,
4. The availability of alternative means of voting unless the state expands those other means simultaneously when passing a reform that limits one means of voting,
5. How the reform will prevent crime (e.g., ballot harvesting) if that crime has not occurred in the jurisdiction in substantial numbers, and
6. The state's interest in preventing fraud.

All of these factors were identified as important by Justice Alito in his holding in *Brnovich*; H.R. 4 precludes courts from ever being able to use these factors again in the future in vote denial claims.

Additional New Provisions

H.R. 4 (2021) upends the Purcell Doctrine, which requires federal courts to refrain from changing election procedures when an election is near. The new version establishes that proximity to the election will be presumed not to constitute a harm to the public interest or a burden on the party opposing relief when a challenge is brought within 30 days of the new reform's passage or more than 45 days out from an election.

H.R. 4 (2021) now requires a court to give substantial weight to the public's interest in expanding access to the right to vote and is told to ignore a state's interest in enforcing its enacted laws. Furthermore, H.R. 4 requires a court to give substantial weight to the reliance interests of citizens who challenged a procedure, offending the longstanding principle that a court serve as an unbiased, neutral arbitrator.

Lastly, for the purposes of determining when a state is subject to preclearance, H.R. 4 (2021) explicitly considers each provision challenged within a lawsuit as an individual violation where those provisions are overturned, struck down, or abandoned, rather than each successful lawsuit or challenge.

Conclusion

The new version of H.R. 4 contains all the concerning provisions it once contained regarding Sections 4 and 5 of the VRA; however, the new provisions amending Section 2 are equally, if not more, concerning for how they undermine the neutrality of the judiciary and preclude a court from considering relevant factors when ruling on vote denial claims.