

**WRITTEN TESTIMONY OF INDIANA ATTORNEY GENERAL TODD ROKITA ON
H.R. 4
Senate Judiciary Committee
October 6, 2021**

Thank you, Chair Durbin, Ranking Member Grassley, and members of the Committee for inviting me to speak to you today on H.R. 4. My name is Todd Rokita, and I serve as the Attorney General for the State of Indiana. Prior to serving as Indiana’s chief legal officer, I spent several years in the private sector as General Counsel for a company with over 100 employees. I had specific duties over all aspects of employment law and other legal matters for the company and for the company’s clients. I served as a Member of Congress for 8 years representing Indiana’s 4th District. I’ve also had the honor of serving as Indiana’s Secretary of State for 8 years. Given my experience both as Indiana’s chief elections officer and as a candidate for both state and federal office, I know how elections can and should be run to ensure transparency and public confidence.

On March 24, 2021, I testified before the Senate Rules Committee on S. 1. H.R. 4 achieves the same ends as S. 1—federalizing elections—but accomplishes this goal through different means. S. 1 directly micromanaged the election process administered by the states by mandating, among other things, early voting, automatic voter registration, and no-fault absentee ballots while also prohibiting protective measures such as state voter ID laws and voter list maintenance laws. Here, H.R. 4 would allow the United States Department of Justice to usurp the authority states rightly possess over their own elections. H.R. 4 resurrects and expands the Voting Rights Act’s (“VRA”) provisions that were previously struck down by the United States Supreme Court¹ and creates 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.

The simple fact is H.R. 4 is a power grab that erodes trust in our electoral system. It would open the door to fraud by preventing common sense safeguards, and result in chaos in 2022 and beyond. It gives partisan bureaucrats in the Justice Department the power to veto those commonsense protections that courts have upheld and that have endured in many states for more than a decade. The elections of 2020 had numerous irregularities and last-minute modifications issued by judges and election officials which did nothing but sow mistrust with the American public. Enacting many of those misguided policies into law further alienates the electorate and invades states’ rights.

While serving as Indiana’s Secretary of State and chief elections officer, I led the passage and then the implementation of the first-in-the-nation voter ID law. The law requires in-person voters to present an unexpired government-issued photo ID in order to vote. Despite attacks from out-of-state activists, my team helped defend the law all the way to the United States Supreme Court and won. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006). Indiana’s voter ID law became a

¹ See *Shelby Cty. v. Holder*, 570 U.S. 529 (2013); *Brnovich v. Democratic Nat’l Comm.*, 141 S.Ct. 2321 (2021).

model for the nation. Since then, 35 states have followed suit in enacting laws to protect the integrity of our elections.

Yet H.R. 4 would brand such laws as discriminatory while lacking any actual evidence to back up such claims. The House of Representatives simply relied on the testimony of 35 partisan witnesses.² In reality, a study the National Bureau of Economic Research conducted 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.”³

Indiana’s voter ID law did not suppress the vote among Democratic-leaning voters or *any* voter for that matter. Rather, it protected their votes. Since Indiana’s law went into effect in 2006, the Hoosier State has held 16 statewide elections, 8 municipal elections, and dozens of special elections. Not a single legitimate voter has been turned away from the polls due to the inability to produce a photo ID. However, without the photo ID requirements and other similar security measures, legal citizen voters are disenfranchised by the fraud and illegal voting that will result and dilute legal citizen votes. While H.R. 4 focuses on vote dilution of protected minorities, it does nothing to address vote dilution of legal voters and fails to take any real action against illegal voting.

It is clear to me that voters are concerned about their elections and want to have a voice. Citizens are concerned about their votes diluted by illegal votes. States across the country are considering changes to their voting systems. If H.R. 4 passes, states will have to seek approval from the Department of Justice before effecting their new election laws and procedures. There will be numerous lawsuits further muddying the electoral waters. Some might say that states should wait for Congress to act, or do not view it as a problem as long as their preferred policy is passed. However, a federal takeover of elections will impose unconstitutional mandates on states and reverse the decentralization of the American election process and open the door to fraud and abuse.

Earlier this month, 22 of my attorney general colleagues joined me in a letter to Congressional leadership opposing H.R. 4. As we wrote in that letter, the Act has several deficiencies that, if passed, would federalize state elections, and impose burdensome costs and regulations on state and local officials.

1. 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. That distinction is not an accident. 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. The exclusivity of state power to

² 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.

³ 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.

define the time, place, and manner of holding elections means that Congress may not decide which election procedures are valid or require approval of those procedures. 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.

2. H.R. 4 seeks to reinstate and expand the VRA. 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.⁴ 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 Cty. v. Holder*, 570 U.S. 529, 553 (2013). However, instead of acknowledging these developments when it came time to reauthorize the bill in 2006, Congress 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. In the way the Supreme Court did, we must recognize “[n]early 50 years later, things have changed dramatically.” *Shelby*, 570 U.S. at 547. 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.⁵ 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.”⁶ The Census Bureau’s May 2013 report on the 2012 election showed that blacks voted at a higher

⁴ “About Section 5 of the Voting Rights Act,” *The United States Dept. of Justice*, September 11, 2020, <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

⁵ “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>.

⁶ 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.

rate than whites nationally.⁷ That same report shows that black voting rates exceeded that of whites in Virginia, South Carolina, Georgia, Alabama, and Mississippi, all of which were covered in whole by Section 5 of the VRA.⁸ In another example, Georgia, a previously covered state, had a higher turnout of black Americans than white Americans in 2018 and 2020 than in New York for both elections.⁹

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.¹⁰ 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.¹¹ 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.

3. H.R. 4 dramatically lowers the burden of proof for plaintiffs in vote denial and vote dilution 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. While a vote dilution violation occurs essentially if “the residents of that district who are not the members of the protected class usually vote sufficiently as a bloc to enable them to defeat the preferred candidates of the members of the protected class.” In essence, if white voters vote as a bloc which enables minority candidates to be defeated, this equates to vote dilution. 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 on any plaintiff filing under the VRA.

H.R. 4 encourages courts to consider specific factors for vote denial and vote dilution 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. The factors allow a court to consider any “history” of voter discrimination in a state or political subdivision, not even limited to the past 50 years, in determining whether a vote denial or vote dilution violation occurred. 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*. These factors to determine whether a violation occurred are completely subjective and frankly unreasonable—it will be difficult for any state or political subdivision to prevail.

⁷ Hans A. von Sparkovsky, “The Myth of Voter Suppression and the Enforcement Record of the Obama Administration,” 49 U. Mem. L. Rev. 1147, 1155 (2018-2019).

⁸ *Id.*

⁹ “2020 Presidential Election Voting and Registration Tables Now Available,” U.S. Census Bureau, Press Release (April 29, 2021).

¹⁰ *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%.”

¹¹ H.R.4 at 10.

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.

4. 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 law violations within the last 25 years. The threshold coverage is as few as *three* violations in jurisdictions where the state administers the elections. A state government and all of its political subdivisions will be placed under preclearance for ten years if there are 15 voting rights violations by a local jurisdiction in the previous 25 years. So, a state government could have preclearance imposed upon it even if that state has no supervision or authority over the local elections. In the same way, a local government that has never engaged in discriminatory actions and has no control over the state legislature or other local governments decisions, will have preclearance imposed upon them for ten years if ten voting rights violations occurred in the prior 25 years.

H.R. 4 establishes that VRA violations occur where a United States court finds an election procedure contradicts either the 14th or 15th Amendments or H.R. 4, specifically any violation that results in vote dilution, denial, or abridgement. "Voting rights violations" are not just final court judgments, but H.R. 4 would also create violations where there is a denial of a declaratory judgment, including temporary or preliminary injunctions, where there is an objection of the Attorney General, or when any consent decree, settlement, or agreement in favor of plaintiffs is approved by an official or adopted by a court of the United States. Settlements of meritless litigation that a state or local jurisdiction enters into to avoid the cost of litigation counts as a voting rights violation for the purpose of triggering preclearance. 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 itself on the full merits or on appeal, rather than the entire record regarding whether intentional discrimination exists. H.R. 4 will incentivize frivolous lawsuits by plaintiffs to rack up VRA violations by states and political subdivisions. It encourages the Department of Justice to scrutinize each state and political subdivision with the intention and hope of uncovering a new violation.

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 after enactment of H.R. 4, such as voter ID requirements, voting locations, redistricting, or maintenance of voter registration lists, the reform is automatically subject to the preclearance process. If a state currently has voter ID requirements in place, as Indiana does, and

individual does not present identification to vote, H.R. 4 allows the individual to vote by sworn written statement. This effectively nullifies the law. These “practices” that would have to be approved by the Department of Justice before taking effect are so broad and cover such a wide spectrum of election administration procedures and rules that every state would be under federal control. 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.

H.R. 4 would permit the federal government to install federal election monitors in states that are subject to the preclearance requirements. The attorney general would have discretion to install such monitors, and one can imagine the hoops a state or political subdivision would have to jump through to terminate their presence.

5. H.R. 4 would interfere with state legislatures’ ability to protect their voters and the integrity of the election process. State election laws, such as voter ID and voter registration list maintenance, should, as intended by the Constitution, be made and implemented at the state level.

Government-issued photo identification has been the global standard for documentary identification for decades, and, as previously noted, there are numerous occasions which require Americans to show identification. In most instances, one has to show proof of identification to receive a COVID-19 vaccine.¹² One also needs to show identification when purchasing cold medicine.¹³ In addition, Americans need to show ID when going through security to board a flight. Why shouldn’t the same be true for voting? Increasing access to voting and increasing the security of the ballot are not mutually exclusive, and reduced oversight dilutes the value of each valid vote and makes a mockery of our system.

Nearly twenty years ago, in the Help America Vote Act, Congress required first-time voters who register by mail without proof of identification to present identification either to the county voter-registration office or at the polls.¹⁴ It thereby acknowledged the potential for voter fraud and the capacity of documentary identification to prevent it.¹⁵ Then, in 2005, a bi-partisan commission headed by former President Jimmy Carter and Secretary of State James Baker recognized the existence of in-person voter fraud and endorsed a photo-identification requirement. In the wake of these endorsements, states, like Indiana, began passing voter ID laws, and over a decade ago the Supreme Court upheld Indiana’s voter ID law—one of the most robust in the nation.¹⁶

¹² <https://www.latimes.com/california/story/2021-03-03/how-to-sign-up-to-get-your-covid-19-vaccine-appointment-in-los-angeles>

¹³ See The Combat Methamphetamine Epidemic Act of 2005 (Title VII of Pub. L. 109-177).

¹⁴ 42 U.S.C. § 15483(b).

¹⁵ 148 Cong. Rec. S10489 (Oct. 16, 2002) (statement of Sen. Bond) (“By passage of this legislation, Congress has made a statement that vote fraud exists in this country.”).

¹⁶ See *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Allowing someone inclined to vote illegally to do so only by signing a statement does little to ensure that voters are who they say they are. Worse, it vitiates the capacity of voter ID requirements to protect against improper interference with voting rights. Before the advent of voter ID laws, partisans stationed at polling places could challenge voters based only on suspicions about identity, a process that prompted concerns about voter intimidation. Robust voter ID laws, however, require *all* voters to present photo identification, *i.e.*, objective, on-the-spot confirmation of the right to vote that immediately refutes bad-faith challenges based on vaguely articulated suspicions. Fair election laws treat all voters equally. Thus, requiring all voters to show proof of identity is, by definition, a fair election law.

Limiting states' ability to maintain accurate voter registration rolls erodes the integrity of elections. States and localities work to keep voter registration rolls up to date to account for voters who move or pass away. It should come as a surprise to no one that most citizens are not vigilant about keeping their state and local election boards apprised of changes to residency that may affect the validity of their voter registrations. Consequently, as citizens move about the country, their voter registrations become out-of-date and transform into seedbeds for voter fraud. As a fraud-prevention measure, states and localities routinely remove the registrations of individuals who (1) have not voted in many consecutive elections, and then (2) fail to respond to multiple efforts to verify current residency. Under the H.R. 4, "any change to the maintenance of voter registration lists that adds a new basis for removal" or "incorporates new sources of information in determining a voter's eligibility to vote" requires approval. With out-of-date voter rolls and a lack of voter ID laws, any individual who wishes to vote in-person under someone else's name will be a slip of paper away from making that a reality.

Finally, 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 explicitly admitted, in regard to states updating their election laws after the 2020 election, that it "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."¹⁷ 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 jurisdiction's 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.¹⁸ Giving the Department of Justice unlimited authority over state election laws is not only unnecessary but also unconstitutional.

Despite recent calls for political unity, H.R. 4 takes a one-sided approach to governing and usurps states' authority over elections. With confidence in elections at a record low, the country's focus should be on building trust in the electoral process.¹⁹ Around the country, the 2020 general

¹⁷ "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>.

¹⁸ *Id.*

¹⁹ Justin McCarthy, *Confidence in Accuracy of U.S. Elections Matches Record Low* <https://news.gallup.com/poll/321665/confidence-accuracy-election-matches-record-low.aspx> (last visited February 19, 2021).

elections generated mass confusion and distrust—problems that the Act would only exacerbate. Should the Act become law, I am prepared to seek legal remedies to protect the Constitution, the sovereignty of all states, our elections, and the rights of our Indiana citizens.