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August 30, 2022

Senator Richard J. Durbin
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

VIA ELECTRONIC MAIL

Dear Senator Durbin:

This letter is in response to your letter of August 25, 2022 forwarding to me questions from two Committee members following my testimony at the Senate Committee on the Judiciary, Subcommittee on The Constitution, hearing entitled “Restoring the Voting Rights Act after *Brnovich* and *Shelby County*” on Wednesday, July 14, 2021. My responses to the questions are appended to this letter.

Please let me know if you have any further questions.

Very Truly Yours,

A handwritten signature in blue ink that reads "Richard L. Hasen". The signature is written in a cursive style with a horizontal line at the end.

Richard L. Hasen

QUESTIONS FROM SENATOR FEINSTEIN

1. I am concerned that the Supreme Court's decisions in *Shelby County v. Holder* and *Brnovich v. DNC* have made it easier for states to pass and defend discriminatory voting measures.

a. How do you think Congress can improve on the *John Lewis Voting Rights Advancement Act* so that we are doing all that we can to protect the right to vote?

The John Lewis Voting Rights Advancement Act could be improved through additional congressional hearings before passage that would demonstrate that the mechanisms for preclearance (both the formula based upon previous adverse voting rights determinations and those based upon particular types of laws) are appropriately tailored. The Supreme Court in the *Shelby County* case has indicated it will look for recent evidence of intentional racial discrimination in voting to justify a preclearance measure when challenged by states as an infringement on state sovereignty. The stronger the record that Congress can create, the better the chances that the measure will sustain a constitutional attack.

b. In addition to the *John Lewis Voting Rights Advancement Act*, what other federal legislative measures do you believe are necessary to limit the ability of states to restrict voting rights?

Congress has broad powers under the enforcement powers contained in the Elections Clause of Article I, Section 4, as well as in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to pass a great deal of federal legislation protecting voters. One important piece of legislation would put the onus upon states to justify laws placing new burdens on voting or voter registration by demonstrating with actual evidence that such laws actually promote important state interests and are suitably tailored to advance those interests. Many state election laws passed today in the name of preventing voter fraud or promoting voter confidence do not serve these goals but instead put roadblocks in front of voters for no good reason.

2. In your testimony, you wrote that if Congress considers legislation to restore Section 2 or Section 5 of the *Voting Rights Act*, “it will have to offer record evidence showing constitutional voting rights violations within the states, and the need for congruent and proportional legislation to deal with the scope of the constitutional violations.”

a. Can you elaborate on the type of evidence you believe Congress must demonstrate with regard to legislation restoring Sections 2 and 5 of the *Voting Rights Act*?

Such evidence includes evidence of lawsuits proving intentional discrimination or settlements of such lawsuits; statements of legislators and others that are probative as to discriminatory intent; and comparisons of rates of voting and registration in areas alleged to engage in intentional discrimination with those that do not engage in such discrimination.

b. In your view, is the *John Lewis Voting Rights Advancement Act* a congruent and proportional response to constitutional violations of the right to vote that have occurred since the *Shelby County* decision?

I believe that Congress has the power to pass the John Lewis Voting Rights Advancement Act, and that there is record evidence that Congress has and can create that would meet the Supreme Court’s (in my view, incorrect) congruence and proportionality test. I am uncertain, however, whether the current Supreme Court would uphold parts of the Act if it is passed despite the existence of this evidence because members of the Court have shown general hostility toward voting rights and voting rights legislation in recent years.

c. What can Congress do to restore Section 2 of the *Voting Rights Act* so that people who are disparately impacted by a state voting restriction still have the ability to bring a lawsuit to protect their right to vote?

Congress can pass legislation explicitly explaining that the Supreme Court’s interpretation in *Brnovich* of Section 2 of the Act was incorrect and restoring the earlier standards used by lower courts to determine when election administration laws violate Section 2. Congress can also clarify the scope of

Section 2 as applied to redistricting in advance of the Supreme Court's expected decision this term in the Alabama redistricting case, *Milligan v. Merrill*. It should explicitly reject the race neutral standard that Alabama has argued for in the Supreme Court, which would turn Section 2 on its head.

- d. **You describe the section of *Brnovich*, in which the majority asserts that a disparate impact test for Section 2 violations might “deprive states of their authority to establish non-discriminatory voting rules,” as “a threat to find new congressional voting rights legislation unconstitutional.” In light of this threat, what measures can Congress take to ensure legislation to restore Section 2 can withstand a constitutional challenge?**

In light of the hostility to voting rights shown by some Justices on the Supreme Court in recent years, it is possible that nothing that Congress does can insulate a revised Voting Rights Act from an adverse ruling. Nonetheless, my advice is to create the strongest evidentiary record possible showing that a revised Voting Rights Act is necessary, and that the means that Congress has crafted are appropriately tailored to the problems voters face. Congress may also consider writing provisions with backup legislation to kick in should the Supreme Court hold parts of voting rights legislation unconstitutional. Congress should also include a section on severability.

3. In 2006, you warned that without changes to the coverage formula in Section 4, the Supreme Court could strike down the preclearance provisions of the Voting Rights Act.

- a. **Do you believe the *John Lewis Voting Rights Advancement Act* would strengthen the Section 5 preclearance regime so that it is less vulnerable to a potential constitutional challenge, and if so, why?**

Yes, the John Lewis Voting Rights Advancement Act would be less vulnerable to Constitutional challenge because it uses triggers for coverage that are more closely tied to current conditions in voting in the states. The Supreme Court in *Shelby County* held that the failure to update the coverage formula for preclearance (using data from the 1960s and 1970s) rendered this part of the Act once constitutional no longer constitutional.

- b. How do you think Congress can improve on the preclearance provisions included in the *John Lewis Voting Rights Advancement Act* so that it can best withstand a potential constitutional challenge?**

See my answer to Question 1.a above.

- c. Do you interpret the Supreme Court’s doctrine of “equal sovereignty” to mean that federal pre-clearance provisions must apply equally to all states? If not, do you believe Congress has the power to pass legislation applying additional scrutiny to states that have exhibited a history of racial discrimination?**

No. Although the doctrine of “equal sovereignty” that the Supreme Court used in *Shelby County* has not been fully developed, the best understanding is that it prohibits treating similarly situated states unequally. Thus, if two states have equal histories of racial discrimination in voting, it would be impermissible to subject one state to preclearance and not the other. Under this understanding, Congress has the power to pass legislation applying additional scrutiny to states that have exhibited a recent history of racial discrimination in voting.

4. Some of the best tools available to establish the discriminatory impact of state voting laws are social science models. However, you argue that Chief Justice John Roberts exhibits “real or pretextual naiveté about what social scientists and, by extension, courts can know about voters’ political behavior.”

- a. What measures can Congress take to ensure that courts give full consideration to social science and other forms of data on voter behavior, so that it can be effectively used to demonstrate the disparate impact of state voting laws?**

Congress can amass a clear legislative record demonstrating disparate impact, with explanations that elucidate the scientific method used for determining that impact. Relying upon peer reviewed studies helps to assure the accuracy and fairness of the analyses.

QUESTIONS FROM SENATOR BLUMENTHAL

Questions for Prof. Richard Hasen:

1. Statements at the hearing reflected that “the gap between minority voting participation and white voting majority participation shrunk to almost zero.”
 - a. Is it correct that the racial gap in voting has shrunk to “almost zero?”
 - b. Is this the appropriate metric to use to evaluate whether Congress should enact voting protections specifically for minority communities? If not, why not?

Far from “almost zero,” since 1996, the racial voting gap (between White voters on the one hand and Black, Hispanic, and Asian voters on the other) in presidential elections has only shrunk following elections in 2008, 2012, and 2020, and in all these times of fluctuation, the narrowest gap was still eight percentage points according to U.S. Census Bureau data.¹ Though voter turnout surged in 2020, among all racial demographics, the gap between minority voting participation and the white voting majority shrank only from 12.6% in the 2016 presidential election to 12.5% in 2020.² More specifically, in the southern states previously covered by “preclearance” under the Voting Rights Act of 1965, the racial voting gap in 2020 grew between white and black voters following the closing of the gap in these states in 2012.³ Only Mississippi retained a higher percentage of black voter turnout in comparison to white voter turnout in the 2020 election, and the remaining preclearance states range in the black-white voting gap from 3.1% in North Carolina to 15.1% in South Carolina.⁴

Additionally, in midterm elections, the racial gap is even more pronounced. Since 1986, the narrowest racial voting gap in a midterm election was 9.47% (in the 1986 election).⁵ Since that time, the racial voting gap has reached as high as 15.97% in the 2006 midterm election.⁶ In the most recent 2018 midterm, the gap was 13.2%.⁷ Similar to presidential elections, the racial voting gap has shrunk only following midterms in 1998, 2010, and 2018.⁸ Though the racial voting gap is yet to be determined in the upcoming 2022 midterm election, current trends indicate it will be nowhere near “almost zero.” Further, when looking at previously covered preclearance states under the Voting Rights Act, the voting gap expanded between white and nonwhite voters from the 2014 midterm

¹ Kevin Morris & Coryn Grange, *Large Racial Turnout Gap Persisted in 2020 Election*, BRENNAN CENTER FOR JUSTICE (Aug. 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/large-racial-turnout-gap-persisted-2020-election>

² *Id.*

³ Kevin Morris, Peter Miller & Coryn Grange, *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act*, BRENNAN CENTER FOR JUSTICE (Aug. 20, 2021), <https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-voting-rights>

⁴ *Id.*

⁵ *Voter Turnout Demographics*, UNITED STATES ELECTION PROJECT, <http://www.electproject.org/home/voter-turnout/demographics> (last visited Aug. 29, 2022).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

election up to the 2018 election in Alabama, Louisiana, North Carolina, Florida, and Texas.⁹ The voting gaps in these states in the 2018 midterm election ranged from a low of 4.9% in Louisiana to 19% in Texas.¹⁰

Not only do recent and current voter turnout data indicate the existence of a racial voting gap, but there is evidence of flaws in the data used to analyze turnout among demographic groups that could mean even greater turnout gaps exist among racial groups.¹¹ The Current Population Survey (CPS) has been relied upon by researchers for data on turnout rates among racial groups.¹² Comparisons of data between 2008-2018 from the CPS and six southern states' voter files (digital databases compiled from public records indicating voter registration and voting in past elections) revealed that, in all elections during that time period, the CPS consistently overestimated voter turnout among Black and Hispanic voters.¹³ In some cases, such as the CPS estimate of turnout among Hispanics in 2010, the difference in estimates was greater than 19 percentage points.¹⁴ In comparison, the CPS slightly overestimated white voter turnout in the six southern states in 2008, 2010, 2014, and 2018 while actually underestimating white turnout in 2012 and 2016.¹⁵ Explanations for this discrepancy between CPS and voter file data include a greater likelihood of nonresponse to survey questions on registration and turnout by minority groups causing overestimation, a difference in misrepresentation of turnout among racial groups, and differential panel attrition, meaning a greater likelihood of minority groups being overrepresented on the CPS due to a higher rate of attrition after the first round of surveys.¹⁶

Comparing the CPS and voter files, the racial voting gap is likely even more extreme than CPS data indicate. For this reason, using these data to evaluate whether Congress should enact voting protections for minority communities can skew the perception of such protections' necessity. However, even CPS data show a significant gap still exists among racial groups' voter turnout in both midterm and presidential elections.¹⁷ Though flawed, an analysis of the racial gap in voting provides a relevant metric for measuring both the inequities that still exist in voting and the results of restrictive voting laws enacted. In 2008, high turnout among nonwhite voters led to an increase in restrictive voting laws, and following the increased turnout in 2020, similar measures are being put into place.¹⁸ With such measures being enacted, an understanding of the racial turnout gap helps to understand the effects that restrictive laws are having on minority voters.

While a racial gap in turnout is relevant to voting rights legislation, it is not the only way of measuring whether minority voters are made worse off by particular voting laws or whether they have

⁹ Morris, Miller & Grange, *supra* note 3.

¹⁰ *Id.*

¹¹ Stephen Ansolabehere, Bernard L. Fraga & Brian F. Schaffner, *The Current Population Survey Voting and Registration Supplement Overstates Minority Turnout*, 84 J. POL. 1850 (2022).

¹² *Id.*

¹³ *Id.* at 1852; Drew Desilver, *Q&A: The Growing Use of "Voter Files" in Studying the U.S. Electorate*, PEW RESEARCH CENTER (Feb. 18, 2018), <https://www.pewresearch.org/fact-tank/2018/02/15/voter-files-study-qa/>

¹⁴ Ansolabehere, Fraga & Schaffner, *supra* note 11, at 1852.

¹⁵ *Id.*

¹⁶ *Id.* at 1853-54.

¹⁷ *Voter Turnout Demographics*, *supra* note 3.

¹⁸ Morris & Coryn, *supra* note 1.

less opportunity than other voters to participate in the political process and to elect representatives of their choice.

2. Statements and testimony at the hearing indicated that the Voting Rights Advancement Act would require preclearance for “mere allegations” and “not proof of voter discrimination,” and that “all it takes is allegations . . . by the Attorney General” for states to fall under the preclearance requirement.
 - a. Is this true or false?
 - b. How do the coverage formulas trigger application of preclearance requirements to jurisdictions under the VRAA?

This statement is false. Under the VRAA Section 5(b)(3), there are five different ways in which a state or political subdivision may have committed a “voting rights violation” for purposes of determining if there have been enough violations to trigger preclearance. These include judicial determinations that a state has violated the Constitution or provisions of the Voting Rights Act. One of the ways to show a voting rights violation, contained in Section 5(b)(3)(D), is through an “objection by the attorney general” brought against a state or political subdivision that is already subject to preclearance under the Voting Rights Act. The Department of Justice has developed in the past, and would develop in the future, criteria to be applied to determine when it should raise an objection consistent with the standards Congress itself sets forth in the Voting Rights Act. The Attorney General is bound to apply the law, not to use a standardless veto based upon mere allegations of a Voting Rights Act violation. More importantly, any jurisdiction that wishes to defend itself against an objection interposed by the Attorney General may challenge that determination in court, assuring that “mere allegations” are not enough to trigger further voting rights scrutiny.

3. There was testimony at the hearing that federal voting protections amount to a “veto” of state legislatures and undermine democracy.
 - a. Do the enforcement mechanisms under the VRAA amount to a “veto” of state-level voting laws?

No. When the states ratified the Reconstruction Amendments, they specifically gave Congress the power to enforce them with “appropriate legislation.” In the 1960s, Congress determined that states that had a history of racial discrimination in voting needed to put their laws through an extra layer of judicial (or, at the state’s option, administrative) review to assure that protected minority voters were not made worse off. The VRAA would restore that review for states that have a recent history of racial discrimination in voting and for

laws that generally may have a racially discriminatory impact. This extra layer of judicial review is not a veto of legislation. It enhances democracy rather than threatens it.

- b. Does Congress have an interest in ensuring voting laws are nondiscriminatory before voters are required to vote under conditions imposed by the law?

Yes; I would argue that Congress has a constitutional obligation under the Fourteenth and Fifteenth Amendments to ensure there is no racial discrimination in voting occurring in the states, and it has further authority to regulate federal elections under the Elections Clause that it may exercise to ensure voting laws are nondiscriminatory.

- c. What is the extent of Congress' authority to enact enforcement legislation that protects the right to vote against discriminatory or overly burdensome state and local voting procedures?

Congress has broad latitude to protect voting rights under the enforcement powers contained in the Elections Clause of Article I, Section 4, as well as in the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

- d. Does the VRAA adhere to principles of federalism?

Yes. The Reconstruction Amendments shifted power from the states to Congress to prevent racial discrimination in voting. Following the Civil War, Congress did not do enough to prevent certain states from discriminating in voting on the basis of race. The Voting Rights Act of 1965 sought to remedy that failing by Congress, and the VRAA would further the process that Congress began in 1965. Protecting all Americans from racial discrimination in voting does not violate principles of federalism, because both states and the federal government must not act in ways that are racially discriminatory.

- e. Does federal voting rights legislation such as the VRAA enacted pursuant to a Congress' constitutional powers "undermine democracy"?

The VRAA would enhance democracy, rather than undermine it, for reasons I gave in my earlier answers.