The Center for
Voting and Democracy

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Adding Flexibility for Section 2 Voting Rights Act Compliance

Testimony from FairVote – The Center for Voting and Democracy
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About FairVote

FairVote – The Center for Voting and Democracy is a non-partisan, non-profit think tank and advocacy organization working since 1992 on reforms ranging from election administration to electoral systems. Based in Takoma Park, FairVote works locally, statewide and nationally. FairVote has advised non-governmental organizations and policy-makers at all levels on the conduct of elections.

Introduction

We thank you for holding this hearing on an exceptionally important and timely topic: "From Selma to Shelby County: Working Together to Restore the Protections of the Voting Rights Act." We believe that the times demand solutions to protection of voting rights that can be sustained over time and be less vulnerable to who controls the levers of power in a jurisdiction. Federal law should ensure all eligible voters have reasonable access to vote in all elections. Similarly, we must look to methods of elections that are fundamentally fair to all Americans and minimize the impact of how district lines are drawn. Our nation has decades of experience with such fair representation voting alternatives to winner-take-all voting rules; we know they work well for all voters and are consistent with our laws and political history. The importance of fair voting methods has become even clearer in the absence of preclearance protections.

To fully realize the goals of the Voting Rights Act, we recommend statutory changes to clarify that states and localities are able to use fair representation voting methods to uphold minority voting rights. We also recommend changes in voting system certification standards to ensure that no jurisdiction wanting to resolve a voting rights case with a fair voting method is denied from doing so because its voting equipment is not ready to run elections under rules already in place in some American jurisdictions.

The Vulnerability of Protected Racial Minorities with Winner-Take-All Rules

Among the most serious impediments to the ability of racial minorities to have full access to the ballot in places with racially polarized voting are election methods that result in vote dilution for racial minorities. In the past, this has typically been seen in local jurisdictions using winner-take-all at-large or multi-member elections, and it has typically been remedied by the use of single-member districts including some number of "majority-minority" districts, which make it possible for racial minorities to elect candidates of choice. The use of majority-minority districts has largely succeeded at ensuring higher levels of representation in places where racial minorities would otherwise be locked out of elections by dilution of their votes' effectiveness.

However, the use of majority-minority districts suffers from limits that raise questions as to whether single-member districts can really be a lasting remedy to racial minority vote dilution. Most importantly, the fairness of such systems for racial minorities is not intrinsic to their adoption; rather, it depends on how district lines are drawn. In an era when oversight of line-drawing is likely to decline in areas of the country where most racial minorities live, this dependency on the fairness of line-drawing raises concerns. As a result, we need to give greater attention to voting methods that, once adopted, are *intrinsically fair* as long as voter turnout is sufficiently comparable among different groupings of voters.

Further, majority-minority districts require encircling a particular area for racial minority representation, leaving most racial minority voters outside of that area with little chance to elect candidates of choice. In fact, racial minorities in all of the states that were covered by Section Five of the Voting Rights live in congressional districts where they are unlikely to elect preferred candidates. Single-member districts also generally result in fewer women being elected compared to multi-member elections. In addition, where racial minorities are too geographically disparate to be effectively grouped into a majority-minority district, single-member districts do not remedy their vote dilution at all. Finally, the U.S. Supreme Court has held that the use of majority-minority districts may violate the equal protection clause of the Fourteenth Amendment to the Constitution where districts are drawn principally for racial classification rather than based on traditional redistricting criteria.

Fortunately, we have a long history of using fair representation alternatives to winner-take-all elections that do not rely on single-member districts and can remedy vote dilution for far more

racial minority voters. For example, the use of cumulative voting in multi-member elections allows voters to "self district" by electing candidates by separate blocks of voters without respect to where they vote geographically. The system was used for more than a century to elect the Illinois House of Representatives, with one outcome being early election of African Americans in white-majority districts. Cumulative voting today is used in jurisdictions that adopted it to remedy racial minority vote dilution claims brought under Section 2 of the Voting Rights Act in Alabama, New York, South Dakota and Texas. In Chilton County (AL), it has consistently allowed the population to elect a candidate of choice in every election since its first use in 1988 – often winning the highest number of votes of any candidate in the election even though African Americans make up about one in eight county residents. More recently, cumulative voting was adopted in Port Chester, New York, following a lawsuit brought under Section 2 of the Voting Rights Act, with similarly positive results – including a Latino candidate finishing first in the 2013 elections. Appended to this testimony is a law review article co-authored by Rob Richie and Drew Spencer for the *University of Richmond Law Review* which addresses legal questions about such fair representation systems and convincingly makes the case for the use of choice voting as a means to uphold racial minority voting rights at all levels of government.

Recommended Statutory Changes

We recommend statutory changes that would make it easier for jurisdictions to turn to fair representation voting methods at different levels of government:

Amending Section 2 of the Voting Rights Act: Section 2 of the Voting Rights Act should be amended to clarify the standard established by in the U.S. Supreme Court in *Thornburg v. Gingles* that the racial minority population must be sufficiently geographically compact to constitute a majority-minority district. Such a requirement is relevant at the *remedies* stage, should plaintiffs seek the use of majority-minority districts as a remedy, but it should not block litigation at the *liability* stage, especially where jurisdictions may have otherwise remediable vote dilution.

California adopted this approach in 2002 when it passed its own California Voting Rights Act. The California Voting Rights Act explicitly noted that the racial minority population does not need to be geographically compact to find liability. The California Court of Appeals noted in *Sanchez v. Modesto* that this change from the federal Voting Rights Act anticipates the use of fair

representation voting methods. California's experience demonstrates that vote dilution claims can be brought under laws that do not require geographical compactness for a finding of liability.

Improve Voting System Certification Standards: The Election Assistance Commission should be required to include in its voting system federal certification requirements the mandate that voting systems be capable of conducting elections under any electoral rules used anywhere in the United States, including cumulative voting and ranked choice voting. It is problematic for voting machine vendors to operate in the United States without the ability to run elections as currently structured – particularly as we know that all the major vendors can meet this standard.

Furthermore, local jurisdictions considering the adoption of fair voting methods that would promote minority representation should not be impeded by a lack of certified voting systems tested for them. Appended to this testimony is a letter signed by civil rights organizations calling for such flexibility to be part of voting equipment standards.

Permit States to Elect Congressional Representatives by Fair Voting: The U.S. Constitution does not constrain states to electing congressional representatives from single-member districts. Indeed, for much of the nation's history, states elected their congressional delegations by a variety of creative means. Only since 1967 have states been required by federal law to adhere exclusively to election by single-member districts.

The 1967 law requiring that states elect their congressional delegations exclusively from single-member districts should be repealed. In its place, states should be required to use fair representation voting methods like cumulative voting when they elect from multi-member districts. Congressman Mel Watt's States' Choice of Voting Systems Act in 1999 would have made this change; it earned support from both Democrats and Republicans in the House and the Department of Justice. Appended to this testimony is 1999 testimony by law professor Nathaniel Persily and the Department of Justice on Congressman Watt's legislation.

Additional Resources:

Civil rights groups' letter supporting voting equipment flexibility for fair representation voting methods: Letter from civil rights groups discussing the importance of flexibility in voting equipment, including the value of equipment being ready to administer elections under rules already in place in American states and localities. Following the letter is a more detailed description of voting equipment flexibility. Available at http://archive.fairvote.org/administration/flexibility.htm.

Nathaniel Persily's 1999 testimony in support of legislation to allow multi-seat district elections for Congress: In September 1999, Stanford law professor Nathaniel Persily, then a staff attorney at the Brennan Center for Justice, provided testimony before the House Judiciary Subcommittee on the Constitution regarding legal and policy issues raised by the States' Choice of Voting Systems Act. Among his points: "Multi-member districts allow for the possibility that traditional political communities, such as counties or cities or even whole states, could be represented as organic units in the Congress -- a practice that was part of the redistricting 'tradition' before the court imposed the one-person, one-vote rule. Under present law, district boundaries rarely overlap with anything that can be defined as a political community. … Thus, instead of working against the grain of geographic districting, which is a frequently heard critique of multi-member districting schemes, such systems can reinforce regional identities for communities that have historical and political meaning for their inhabitants." Available at http://judiciary.house.gov/legacy/pers0923.htm.

Testimony of the Department of Justice, in support of legislation to allow multi-seat district elections for Congress: Anita Earls, then deputy assistant attorney general for the Civil Rights division, testified in September 1999 before the Committee on the House Judiciary Subcommittee on the States' Choice of Voting Systems Act. She said: "The Department of Justice supports this legislation as a valuable way to give state legislatures additional flexibility in the redistricting process…. Giving states greater flexibility in the redistricting process is an important objective. Redistricting is one of the most difficult and complex jobs that a state legislature ever undertakes. The process brings into play a huge number of variable criteria: the one person, one vote requirement of the U.S. Constitution; the Voting Rights Act's requirement that the votes of racial and language minorities not be diluted; the concerns of incumbent officeholders and the needs of diverse constituencies; geography and population distribution; state laws and policies that constrain the legislature's choices; and a host of other political, social, and economic interests and realities." Available at http://judiciary.house.gov/legacy/hodg0923.htm.

Law review article on fair representation voting methods: *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, From City Councils to Congress*, by Rob Richie and Drew Spencer. This article includes detailed analysis of legal questions involving the Voting Rights Act and potential use of fair representation voting methods. Available at http://lawreview.richmond.edu/wp/wp-content/uploads/2013/03/Richie-473.pdf.

FairVote analysis of impact of fair voting on African American voting rights: *A Representative Congress - Enhancing African American Voting Rights in the South with Choice Voting* shows how many more African American voters would be able to elect preferred candidates with fair representation voting methods in southern states. Available at http://www.fairvote.org/a-representative-congress-enhancing-african-american-voting-rights-in-the-south-with-choice-voting#.UeWXIo3VCYI.