Testimony of Thomas A. Saenz
President and General Counsel, MALDEF

Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary

Hearing on
Legislative Proposals to Strengthen the Voting Rights Act

October 17, 2019

Good morning. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which has, for over 51 years now, worked to promote the civil rights of all Latinos living in the United States. MALDEF is headquartered in Los Angeles, with regional offices in Chicago; San Antonio, where we were founded; and Washington, D.C.

Since its founding, MALDEF has focused on securing equal voting rights for Latinos, and promoting increased civic engagement and participation within the Latino community, as among its top priorities. MALDEF played a significant role in securing the full protection of the federal Voting Rights Act (VRA) for the Latino community through the 1975 congressional reauthorization of the 1965 VRA. MALDEF has over the years litigated numerous cases under section 2, section 5, and section 203 of the VRA, challenging at-large systems, discriminatory redistricting, ballot access barriers, undue voter registration restrictions, and failure to provide bilingual ballot materials. We have litigated significant cases challenging statewide redistricting in Arizona, California, Illinois, and Texas, and we have engaged in pre-litigation advocacy efforts, as well as litigation related to ballot access and local violations, in those states, as well as in Colorado, Georgia, Nevada, and New Mexico. As the growth of the Latino population expands, our work in voting rights increases as well.

Before the divided Supreme Court decision in *Shelby County v. Holder*, MALDEF relied heavily upon the application of the section 5 pre-clearance requirements – particularly in Arizona, Texas, and portions of California – to deter violations of Latino voting rights and to block any discriminatory proposals that were submitted for pre-clearance. These beneficial effects of pre-clearance – and others, including even the basic tracking of electoral changes with potential impacts on the right to vote – have been absent following *Shelby County* because of the failure to enact a new coverage formula after the 2013 Court decision.

This has affected MALDEF's ability to respond to the many challenges faced by the growing Latino voting community. For example, while MALDEF played a significant role in litigation before the *Shelby County* decision when the state of Texas sought to pre-clear its newly restrictive voter identification law, we decided to forego participating as counsel in the section 2 litigation challenging the same law after *Shelby County*. While we have great confidence in our colleagues who litigated that challenge, we were unable to provide our perspective as the longstanding legal representative of the Texas Latino community in voting rights issues. Our efforts were instead channeled to a successful, though costly, challenge to a change in the city council electoral system in Pasadena, Texas – a change linked directly by the then-mayor to the lifting of the pre-clearance obligation by the *Shelby County* decision.

As both a rapidly growing population and the nation's largest minority population, Latinos are regularly and increasingly seen as a threat to those currently in political power. As a result of this perceived threat to incumbents, the Latino community regularly faces violations of the VRA in several election-related areas. Those in power, whether at state or local level, think about the perceived threat from the growing Latino voter pool in racial terms, even if that perspective is not explicitly acknowledged, and the violations of the VRA take conspicuously racialized forms even if justified in other terms – of seniority protection for incumbent legislators, of competitiveness, or of continuity of representation, for example.

In the post-*Shelby County* absence of the protections of pre-clearance, the dual nature of the pre-clearance provision in section 5 of the VRA has become apparent – and much missed. Section 5 has accurately been characterized as perhaps the most effective civil rights provision ever written into federal law. It has prevented the implementation of many, many electoral changes that would have dealt significant harm to minority voting rights. From discriminatory precinct changes to dilutive redistricting, section 5 likely deterred substantially more proposed or conceived electoral changes than the many hundreds it blocked or modified through a determination made in pre-clearance review. The civil rights effectiveness of Section 5 is acknowledged by all, even those who wrongly believe it is no longer needed.

Yet, apart from its success as a civil rights protection, section 5 should also be celebrated as perhaps one of the first and most effective alternative dispute resolution (ADR) provisions ever written into federal law. Like more typical ADR mechanisms, pre-clearance permits a faster, less costly resolution of disputes that would otherwise be resolved in more cumbersome and resource-intensive court litigation. Like other ADR mechanisms, pre-clearance involves streamlined review by a non-judicial officer who considers the contentions of both sides on the matter at issue. Of course, unlike mandatory ADR in other contexts, section 5 allows jurisdictions to opt out and go directly to court proceedings, in the D.C. federal court, with in-court expedited review that bypasses the intermediate appellate court.

Like the most effective ADR, pre-clearance saved lots of money when it was broadly in effect, most of it for taxpayers in covered jurisdictions. VRA litigation generally involves fee

awards for prevailing plaintiffs. Thus, covered jurisdictions under pre-clearance received quick decisions without having to pay their own attorneys – ordinarily outside counsel who charge a premium for their VRA expertise – and expert witnesses, and without also having to pay a prevailing plaintiff's fees and costs. It is no exaggeration to assert that pre-clearance saved taxpayers in covered jurisdictions billions of dollars through avoiding costly litigation.

It is one of the unexplained ironies of modern policymaking that those who champion mandatory ADR in consumer and employment contexts are often among those who most vehemently oppose the revivification of section 5 of the VRA through enactment of a new coverage formula following the *Shelby County* decision. Nonetheless, the nation plainly continues to need the protections and efficiencies of pre-clearance in voting rights, and so Congress must enact a vigorous, fair, and efficient coverage formula as a substitute for the one in section 4 that the Supreme Court narrowly struck down in *Shelby County*.

To meet the needs of the growing Latino voting community – and not incidentally to continue to save state and local defendants from the high and rising costs of defending against litigation under section 2 of the VRA and under other provisions of federal law – the best coverage formula would again include rolling measures of recent historical experience to ensure that recent voting rights violators with significant voter participation differentials among racial groups are required to avail themselves of pre-clearance ADR before implementing any electoral changes.

In addition, however, the new coverage formula must also address the Latino community's experience of facing tried and true obstacles to equal electoral participation just as the Latino voter population approaches critical mass to threaten the future prospects of those currently in power. In these circumstances – a fast-growing, but only recently significant, minority population – a history-based coverage formula alone would not suffice to prevent and deter, or to quickly and cost-effectively evaluate, changes that could seriously harm minority voting rights. Jurisdictions seeking to disenfranchise an insurgent political threat posed by a fast-growing minority group should also be required to pre-clear certain, but not all, electoral changes.

Here, pre-clearance would focus on suspect practices and dangerous situations arising in the context of rapid growth of a minority group, rather than on the specific history of a single jurisdiction. "Known practices coverage" (KPC) would single out for pre-clearance specific practices in circumstances that pose a significant potential, demonstrated by broad historical experience, for violations of voting rights. Creation of at-large seats, annexations of suburban populations, reductions in multilingual voting materials, changes in voter qualifications, reductions in voting places, and redistricting completed by incumbents all raise concerns when they occur in a jurisdiction that has experienced recent, significant growth of a specific minority population. Utilizing pre-clearance ADR rather than costly and time-consuming litigation in

these and other situations would save taxpayers from paying significant sums to defend entrenched, powerful incumbents.

"Known practices coverage" (KPC) is a supplemental coverage formula incorporated in the proposed Voting Rights Advancement Act. It would ensure that the efficiencies of pre-clearance are enjoyed with respect to specific changes that have historically been employed to restrict the rights of minority voters, including members of growing minority communities that have reached a size to be perceived as a threat by current government officials. Unlike the main coverage formula that it is designed to supplement, "known practices coverage" would not be limited to jurisdictions with troubling and consistent histories of voting rights suppression. In addition, KPC would not subject every elections-related change to pre-clearance, only the specific changes identified in the legislation.

Thus, as the name suggests, KPC focuses on practices rather than jurisdictions. Still, KPC would not apply universally, but only to jurisdictions that satisfy thresholds of demographic diversity and growth. The thresholds ensure that pre-clearance would only apply where the identified change may have the intent or effect of suppressing minority voting rights, including the ability to elect well-qualified candidates of choice. The limitation to specific practices also means that the Department of Justice would rapidly regain its expertise in evaluating the statutorily identified electoral changes, thus further enhancing the efficiency of pre-clearance as an ADR mechanism.

The overarching goal of pre-clearance is to efficiently and effectively prevent the implementation of changes that would result in minority vote suppression. The pre-clearance mechanism recognizes that once an election occurs with a change that suppresses minority votes, it is extremely difficult, if not impossible, to remedy the voting rights violation satisfactorily. In light of the overarching goal, the Congress should address both serial voting rights suppressors – those jurisdictions whose histories demonstrate a propensity for using electoral changes that result in significant suppression of minority voting rights – as well as copycat voting rights suppressors – those jurisdictions that adopt changes used in the past by other jurisdictions to suppress minority voting rights.

The two proposed pre-clearance coverage formulas are complementary; the history/geography formula reaches serial voting rights violators, while KPC reaches copycat voting rights violators. Applying pre-clearance in both contexts ensures that significant voting rights violations can be prevented before irreparable harm is done, and that resolution of voting rights concerns can occur in a more timely and less costly manner than otherwise.

Again, the identified practices that would potentially be subject to pre-clearance under the proposed KPC are practices with a significant history of being reviewed and held to cause minority vote suppression. Many of the practices are widely recognized as troubling practices, particularly when undertaken in a context of significant demographic change such that a minority

group is newly perceived as a threat to the continued dominance of the officeholders who are effectively elected solely by the long-dominant racial group in a jurisdiction.

Because the growth of the Latino community is too often today – and this will surely only increase in the future – assumed to be a threat to those currently holding political power in a jurisdiction, the enactment of KPC as a part of the new coverage formulas for pre-clearance under Section 5 of the Voting Rights Act is critical. MALDEF urges the enactment of H.R. 4, the Voting Rights Advancement Act, with "known practices coverage" incorporated.