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 Voter Suppression and Continuing Threats to Democracy.

January 20, 2022

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 53 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. We will soon open a new regional office in Seattle. I thank you for this opportunity to appear before you to address recent experiences nationally with effects on the voting rights of the Latino community. Today, I am testifying remotely from Los Angeles.

MALDEF focuses its work in five subject-matter areas: education, employment, immigrant rights, voting rights, and freedom from open bias. Since its founding, MALDEF has worked diligently to secure equal voting rights for Latinos, and to promote increased civic engagement and participation within the Latino community, as among its top priorities. MALDEF played a leading 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. In court, MALDEF has, over the years, litigated numerous cases under the Fourteenth and Fifteenth Amendments, and under Section 2, Section 5, and Section 203 of the VRA, challenging at-large systems, discriminatory redistricting, ballot access barriers, undue voter registration requirements, voter assistance restrictions, and failure to provide bilingual ballot materials. We have litigated numerous significant cases challenging statewide redistricting in Arizona, California, Illinois, Texas, and Washington; we have also engaged in pre-litigation advocacy efforts, as well as litigation related to ballot access and local voting rights violations, in those states, as well as in Arkansas, Colorado, Georgia, Nevada, and New Mexico.

Comparative rates of voter registration and voter participation among racial groups, including Latinos, continue to demonstrate that voter suppression – through vote denial, as well as vote deterrence – remains a salient flaw of our democracy. It is one of the unexplained ironies of our national discourse that an election -- the 2020 presidential general election -- that showed unprecedented numbers of voters participating, and rates of eligible participation unseen in a century, has not been universally celebrated as a milestone in reducing voter suppression, but has

instead been used to justify increased efforts to reduce minority voter participation in future elections.

The fact that one presidential candidate has refused to date to accept the legitimacy of his own substantial defeat at the polls was used and has continued to be used to justify voter suppression measures in too many states across our country. The unprecedented egotism of Donald Trump, despite positive past examples from presidents of both parties in graciously accepting electoral defeat, has led to an attempted insurrection and is currently catalyzing too many state and local attempts at suppression of minority voters.

Unfortunately, this continues a recent pattern of increasing voter suppression efforts. This longer-term increase stems from ongoing demographic changes, including in particular the unprecedented growth of the Latino voting community. Data released last month from the 2020 Census confirms this ongoing phenomenon. Latinos, while making up almost 19 percent of the total United States population, nonetheless accounted for over 51 percent of the nation's population growth between 2010 and 2020. Moreover, contradicting assumptions that Latino population is overwhelmingly comprised of recent immigrants, over 44 percent of the growth in the United States citizen, voting-age population (CVAP) came from the Latino community in the ten years prior to 2019. CVAP growth is a useful proxy for growth in the eligible voter population. These changes are perceived as threatening to the long-term privilege of those currently in power who have failed to seek and to garner support among ascendant minority voter groups.

The reaction to demographic change of too many leaders is not to adjust policy positioning to appeal to the voter groups in ascendance, or to work to convince those voters to change their views, but instead to engage in expanded efforts at voter suppression. These suppression efforts have taken the form both of new mechanisms to obstruct, such as restricting access to food and water while waiting in line to vote, as well as through the proliferation of longstanding mechanisms to suppress meaningful participation, such as targeted voter purges, creation of at-large elected positions, and precinct changes that do not respond to recent elections' in-person voting experiences. In addition, we have seen restrictions on voter registration through undue regulation of groups and individuals seeking to increase civic participation by registering voters, and we have seen attempts to limit the ability to vote remotely to a select group of voters that is generally whiter in proportion compared to the total voting-eligible population. The expected continued national demographic change, affecting more and more parts of the country, does not present reason for optimism that voter suppression will diminish nationwide in ensuing years.

While litigation, by private parties and by the Department of Justice, under Section 2 of the VRA remains a powerful means to stop voter suppression that has significant effects on minority voters, such litigation is not sufficient to face the current and future potential for elections changes tied inextricably to voter suppression. Litigation under Section 2 is costly – in direct resources and opportunity costs – and time-consuming. Federal regulation to ensure

greater uniformity of voter experience nationwide is critically important to prevent and deter voter suppression measures. In addition to direct regulation, reinvigorating pre-clearance review under the VRA also prevents and deters measures to restrict the vote, in and beyond covered jurisdictions. At the same time, pre-clearance review benefits jurisdictions by dramatically reducing their costs to defend elections-related changes, and benefits minority and other voters by yielding more timely resolution of voting rights disputes. In addition, litigation under Section 2 is too often unable to secure resolution before an election moves forward with the taint of voting rights violations attached; once an election occurs, it is virtually impossible for the court system to enforce a remedy that would undo the damage in that completed election.

Resources are simply insufficient to challenge all voter suppression measures under Section 2. When resources are insufficient, too many jurisdictions will gamble that they can violate voting rights without ever being restrained, or at least not until numerous elections have occurred, with the attendant damage of voter suppression affecting the outcomes in those elections. Such rational "gaming" of the legal system, catalyzed by inadequate resources to challenge all instances of voter suppression nationwide, undermines confidence in our democracy and presents a clear constitutional crisis.

Our nation's history confirms, through multiple empirical examples, that growth of the population of a racial minority group, such as Latinos, frequently catalyzes attempts to limit and delay the growth in political and voting power that should accompany population growth in any democracy. Latinos and their demographic growth remain to this day a perceived "threat" to those who have exercised apical political power over long periods of time in many jurisdictions. This perception of "threat" to those in power from the significant growth of the Latino population often becomes most pointed during the decennial redistricting process. Incumbent officeholders of both political parties often seek to protect themselves from the growing Latino voter population by seeking a limited – and in some cases, substantially reduced – Latino proportion of the electorate in their specific districts. More broadly, incumbents, as well as those who support them, often seek to avoid the creation of new Latino-majority districts because such districts threaten incumbent officeholders, who may be squeezed into competing against one another, and may present a cumulative threat to an incumbent political group with substantial, controlling power. (In my testimony today, I use the term "Latino-majority district" to mean districts where Latinos comprise a majority of the citizen voting-age population (CVAP). As I note above, CVAP is an appropriate proxy for the voter-eligible population.)

The current redistricting process nationally has already conformed to this pattern, even as many jurisdictions, especially localities, continue the line-drawing and district adoption process. Retrogression – a reduction in the number of Latino-majority seats despite a growing population – and vote dilution – the failure to create new Latino-majority districts where Latino population growth and voting patterns warrant it – are both significant features of this decade's redistricting

process to date. It would be no exaggeration to state that this has already become the decennial redistricting process most disrespectful of rules against vote dilution since the enactment of the VRA in 1965. Of course, that should come as no surprise because this is also the first decennial redistricting process since the Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), in which the Court majority struck down the preclearance coverage formula, with no substitute formulae yet enacted by Congress.

MALDEF has already seen, and is currently litigating, some of the manifestations of this emboldened opposition to protections against vote dilution, despite the VRA's clear, albeit now incompletely effectuated, prohibition on dilution. We have filed suits challenging aspects of statewide redistricting in Texas, Illinois, and Washington. I am confident that all three of these suits would have been unnecessary, or at least substantially limited, if the preclearance formulae passed by the House in the John Lewis Act were in place for this redistricting process.

In Texas, for example, MALDEF and numerous other legal groups have challenged statewide redistricting plans on behalf of voters of color in the state. Our MALDEF suit, now the lead case in several consolidated actions, challenges every redistricting plan adopted by the legislature and governor – congressional, state House, state Senate, and state Board of Education. Even though the Texas congressional delegation rose by two through reapportionment, the adopted plan reduces the number of Latino-majority congressional districts. The state House plan also reduces the number of Latino-majority districts. Each of the four challenged plans fails to create new Latino-majority districts even though the Latino community in Texas continues to grow at a faster rate than the remainder of the state population. Despite what is likely to be a significant undercount of Latinos in Texas, data from the 2020 Census shows that the Latino population grew at a higher rate (20.9 percent) than the non-Latino population (12.9 percent) in the state over the last decade. According to the 2020 Census, Latinos now comprise nearly 40 percent of the Texas population, so the pattern of retrogression of extant Latino-majority districts and of failure to create new Latino-majority districts is not reflective of the changing Texas population.

Yet, the delayed release of Census data used in redistricting to August 2021 and the fast-approaching deadlines for the Texas primary in March of this year means that the non-representative, retrogressive redistricting plans adopted in Texas will, with one possible exception, be used in the 2022 elections to choose Texas congressmembers, state legislators, and state board of education members. This would not be the case were a preclearance formula in place for this decade's redistricting. Because of Texas' recent, adjudicated history of intentional discrimination in voting, the state would be covered by a new geographic coverage formula. In addition, the size and rate of Latino population growth in the past decade would also have required submission of the state's redistricting plan under the practice-based preclearance coverage formula in the John Lewis Act.

There is a similar story in Illinois where the state legislature and governor first enacted a redistricting plan using estimates from the American Community Survey (ACS) rather than wait for decennial Census data, with the result being grossly malapportioned districts. After MALDEF and others challenged these redistricted lines in court, the legislature redrew lines using Census data. The new lines reduced by two the number of Latino-majority districts in the state House and state Senate. In addition, the newly proposed lines failed to create seven compact Latino-majority state legislative districts that could have been drawn. In short, the adopted plans deprive the Latino community of a net total of five additional Latino-majority legislative seats. This outcome is not commensurate with population growth in the state of Illinois. Again despite a likely undercount of the Latino count, the 2020 Census showed that the Illinois Latino population increased by over 300,000 people in the last decade, for a growth rate of 15.3 percent. By contrast, the non-Latino population in Illinois actually decreased over the last decade by three percent.

As in Texas, the Illinois demographic story and the redistricting story do not match. The size of the Latino population, now over 18 percent of Illinois, and its growth rate over the last decade, would have subjected Illinois statewide redistricting to preclearance review under the practice-based coverage formula in the proposed John Lewis Act. The mere fact of coverage would likely have catalyzed different behavior in line-drawing by the powers-that-be in Illinois statewide politics. At MALDEF, we know that the Senate's failure to act on the John Lewis Act has harmed Latino community rights in the redistricting process this decade.

To be clear, this voting rights issue is most decidedly not a partisan issue. The Texas redistricting process lay firmly in the hands of the Republican Party, while the Illinois process was controlled by the Democratic Party. Each of these states continues to allocate the power to redistrict to the state legislature, but even in states with redistricting commissions, we have seen violations of voting rights that operate to stem the growing and earned political power of the Latino community. In Washington state, a commission drew a Latino-majority legislative district in a portion of the state with significant Latino population growth. Indeed, as in so many other states, Latino population growth in Washington as a whole has outpaced non-Latino population growth. According to the 2020 Census, the Washington Latino population grew by 40.1 percent over the last decade, accounting for over 69 percent of the state's total population growth.

The problem with the Latino-majority legislative district drawn by the commission is that turnout differences indicate that it will not likely elect candidates of choice of the Latino community. The commission had before it other configurations of a Latino-majority district in the same area that would perform to elect Latino-preferred candidates. This type of non-performing Latino-majority district would almost certainly have been prevented under a preclearance regime; the size and growth of the Latino community in Yakima County would have subjected the district to pre-review were the John Lewis Act in place. The benefit of the

pre-clearance would have benefited Washington as well as the Latino community. MALDEF joined other voting rights groups in filing VRA litigation yesterday to challenge the state. Defense expenses could have been avoided under the John Lewis Act because preclearance is a form of alternative dispute resolution (ADR) that saves resources and time compared to litigation under section 2 of the VRA.

The growth of the Latino community nationwide in the last decade, and the oft-perceived threat to those in power, will almost certainly result in additional violations of Latino voting rights through vote dilution as the redistricting process is completed at state and local level this year. In the end, we can expect that the nationwide costs – in rights violations and in the costs of litigation -- of this decennial process moving forward without the benefit of a preclearance regime will be substantial.

Political powers' perception of a threat to their own incumbency in the growth of the Latino population, often manifested through redistricting, has a correlative in the "demographic fear" carried by many members of the general public – at bottom a concern that demographic change and the ascendance of non-white racial groups will change the fundamental familiarity of the United States and its national culture. More irresponsible political aspirants have exploited this demographic fear by engaging in dog-whistle and even more explicit political appeals to target members of specific racial minority groups in exclusionary public policies.

In the past year, we have seen dog-whistle politics again let loose in the voting arena through completely unsupported allegations of widespread voter fraud, often implicitly or even explicitly attributed to non-citizen, immigrant Latinos. Voter fraud allegations are intended to elicit demographic fear that the size and growth of the Latino community and other communities of color will result in negative change implemented through "un-American" political leaders elected by fraudulent voters. By affecting the right to vote of too many Americans, voter-fraud mythology is the most pernicious and irresponsible exploitation of demographic fear in our politics today. It should be recognized as such, rather than as some justification for deterring and preventing voter participation through draconian and discriminatory new state laws.

In the realm of voting, negative actions in response to the perceived threat of growing Latino political power have included attempts to render much more difficult voter participation by new, and increasingly Latino, eligible electoral participants. Examples lie in policies to impose new barriers to voter registration, only for new registrants, and to complicate the voting process by restricting alternative voting mechanisms – such as remote voting and ballot drop-off – and by permitting or facilitating the creation of intimidating features around the traditional in-person, election-day voting experience. Most recently, in a repeat of unlawful behavior challenged in court by MALDEF and others just a few years ago, the state of Texas has again

begun targeting voters that it knows or should know are naturalized for potential removal from the voter rolls as noncitizens.

Where these and other voting-related changes are motivated by a desire to limit the political power of a growing racial minority group, the changes stem from intentional racial discrimination; because intent constitutes a violation of the Constitution's Fourteenth and Fifteenth Amendments, such changes are therefore unconstitutional. Federal laws, including an advanced VRA, are necessary to prevent the continuation of unconstitutional and anti-democratic policymaking in the states.

In general, race-based and race-motivated discrimination in voting coincides with an interest by those in power to delay or prevent political ascendance for growing minority groups. The size and continued growth of the Latino population in the United States as a whole, unprecedented in our national history, thus presents a particular challenge to those charged with protecting our democracy and the hallmark right to voter participation regardless of race or ethnicity.

Our changing nation faces significant challenges in the future with the growing presence of minority voters, and in particular the unprecedented growth of the Latino voting population. These significant changes present an opportunity to ensure that our democracy thrives based on real, core values of fairness and non-discrimination. Unfortunately, we have already seen a tendency among some political leaders, including the disgraced former president, Donald Trump, to resist those demographic changes through lies around election integrity that catalyze attempts at further race-targeted voter suppression. We can only hope to effectively counter these threats and to seize the opportunity to build a thriving democracy by exercising constitutional power to create a solid floor for a shared voting experience across our United States, through regulation of elections and through a reinvigorated preclearance process in the John Lewis Act.