



**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 the
History and Enforcement of the Voting Rights Act of 1965**

March 12, 2019

Good afternoon. My name is Thomas A. Saenz, and I am president and general counsel of MALDEF (Mexican American Legal Defense and Educational Fund), which is currently celebrating 50 years promoting 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 expands as well.

Before the split 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 discriminatory proposals that make it to pre-clearance submission. These beneficial effects of pre-clearance – and others, including 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 in which 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 have 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 tied directly by the mayor to the lifting of the pre-clearance obligation by the *Shelby County* decision.

As a rapidly growing population, Latinos are regularly and increasingly seen as a threat to those in political power. In anticipation 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.

One area where MALDEF continues to see and to challenge this phenomenon is in the failure – or better described, refusal – of map drawers to create new Latino-majority districts where the growth of the community and the extent of racially polarized voting warrant such districts. For example, this decade, as in previous decades, MALDEF has had to challenge the refusal of the Texas state legislature to recognize the growth of the state's Latino voter population by creating additional Latino-majority districts. Even with four additional congressional districts earned after the 2010 Census, following a decade when the Latino community accounted for the vast majority of the state's population growth, Texas initially drew none of the new congressional districts as a Latino-majority district.

Our litigation, joined by others, to challenge Texas statewide redistricting in the case of *Perez v. Abbott*, continues even now, with two trips to the Supreme Court already having occurred, as the three-judge trial court considers final remedies, including adjudicating a request for a judicial order that Texas be subject again to pre-clearance. While an interim remedy has been in place, the length of this case's lifespan provides a prime example of the cost and inefficiency of litigation under section 2 of the VRA, as compared to the streamlined pre-clearance process.

Even in California, viewed with some accuracy as a progressive bastion in policy areas including voting rights, the impulse to protect empowered incumbents has proved a formidable obstacle. After the 2011-12 redistricting cycle following the 2010 Census, MALDEF identified at least nine counties in California where the governing board of supervisors should have created

an additional Latino-majority seat, and failed to do so. In a five-person body, the tendency to protect incumbents, even across party lines in a technically non-partisan board, appears to be overwhelming, if the statewide results are an accurate indication. After three failed attempts to secure California state legislation that would streamline litigation challenging such discrimination against minority voters, MALDEF commenced a VRA section 2 challenge to one of those nine counties in *Luna v. Kern County Board of Supervisors*. That litigation, which proved hard-fought and expensive, did result in a post-trial victory and subsequent settlement creating a second, new Latino-majority supervisorial district.

At-large electoral systems have also continued to be an area where Latino voting rights are regularly threatened. The perpetuation or introduction of at-large electoral systems, in a context of racially-polarized voting, can ensure that those in power retain a near-complete stranglehold on local government until a minority group becomes a substantial majority of the eligible voter population. For this reason, many jurisdictions seem to cling to at-large systems even when it results in heavy concentration of elected officials from a single neighborhood or results in large electoral pools, with concomitantly expensive electoral campaigns that strongly favor incumbents over any and all challengers.

The post-*Shelby County* case against Pasadena, Texas, mentioned earlier, involved the conversion of a city council comprised of eight members elected from districts, to a council with six district representatives and two seats elected at large. This change was plainly undertaken to prevent the growing Latino voting population from electing a majority of the city council; participation differentials virtually ensured that the white population would elect its choices for the at-large seats in elections characterized by a racially-polarized vote. The case went to trial, following which the district court judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to accomplish that aim. This resulted in the first contested "bail in" order, requiring Pasadena to pre-clear future electoral changes. However, again, that favorable outcome followed lengthy and costly trial preparation and trial, all of which would likely have been avoided had the challenged change itself been subject to pre-clearance review, as it would have been before the *Shelby County* decision.

In California, 16 years ago, the legislature enacted the California Voting Rights Act (CVRA) to streamline challenges to at-large local elections in any jurisdiction experiencing racially-polarized voting – where the voting preferences of those from a minority group ordinarily diverge from the choices of voters who are not members of the minority group. In the years since the CVRA legislation, which was co-sponsored by MALDEF, took effect, dozens and dozens of local jurisdictions – cities, school districts, community college districts, and special districts – have converted to district elections. Almost without exception, these conversions have been accomplished in pre-litigation or early litigation settlements, prior to expensive discovery and trial preparation, once a challenger demonstrates racially-polarized voting, which is not only a central concern under the CVRA but under section 2 of the federal VRA as well. However, by focusing on racially-polarized voting as the main determinative

factor, the CVRA accomplishes the same aims with respect to at-large voting systems as the VRA, but at much lower cost and in much less time.

In the last two decades, the nation has witnessed an accelerating pattern of ballot-access restrictions enacted to address baseless myths of widespread voter fraud. Like Donald Trump's post-election false accusations of millions of improper votes – all extraordinarily for his opponent, who won the popular vote by a significant number – many of these propagated fallacies have implicitly or explicitly targeted the growing Latino vote. Increasingly restrictive voter identification requirements, proof-of-citizenship requirements for new voter registrants, and restrictions on who and when voter registration drives may occur are all state electoral changes seemingly implemented to stem the growing Latino vote in Texas, Arizona, and other states.

As some of these attempts to restrict ballot access and to deter voter participation have been less effective than their architects would like -- both because of successful legal challenges and concentrated counter-organizing -- some states have turned to unwarranted voter purges. For example, MALDEF is currently challenging the Texas attempt to remove voters from the rolls, and not incidentally to deter voter participation more broadly, by targeting naturalized citizen voters through a completely faulty method of identifying potential ineligible voters. This focus on qualified, immigrant voters is an increasing danger in light of rhetoric from the White House that regularly, and without any factual basis, depicts immigrants as fraudulent voters.

In the aftermath of the *Shelby County* decision, MALDEF and others in the small nationwide contingent of non-profit organizations that engage in voting rights litigation have challenged these ballot-access restrictions in federal court under section 2 of the VRA and other provisions of federal law. This has been expensive and arduous litigation, straining limited agency resources, both human and material. Under an operational pre-clearance regime, such ballot-access restrictions could have been quickly and efficiently blocked if adopted in covered jurisdictions, simultaneously deterring adoption of similar proposals in non-covered jurisdictions.

These examples demonstrate the dual nature of the pre-clearance provision in section 5 of the VRA. It 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 pre-clearance review. Its civil rights effectiveness is acknowledged by all, even those who wrongly believe it is no longer needed. Indeed, imagine how much more our nation might have progressed in achieving equal educational opportunity had Congress implemented as a part of the Elementary and Secondary Education Act a similar pre-clearance regime for school districts and states with a history of discriminatory practices and an expanding achievement gap.

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. 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 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 of 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.

Given these benefits of a fully operational pre-clearance regime and the ongoing and escalating challenges to Latino voting rights, it is imperative that Congress enact a substitute coverage formula 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 newly 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” would single out for pre-clearance specific practices or situations that pose a significant potential, demonstrated by broad historical experience, for violations of voting rights. Creation of at-large seats, annexations of suburban populations, 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.

To be clear, the optimal coverage formula would incorporate both specific, history-based criteria to subject all of certain jurisdiction’s electoral changes to pre-clearance, and a “known practices” formula to subject only certain changes to pre-clearance anywhere in the context of rapid and significant growth of a minority voter population. In the effort to efficiently and cost-effectively eliminate voting rights violations, we should target both serial violators and copy-cat violations for pre-clearance ADR.