



**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 Oversight of the Civil Rights Division of the Department of Justice

September 24, 2020

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 52 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. I appear before you remotely today from the city of Los Angeles.

MALDEF focuses its work in four subject-matter areas: education, employment, immigrant rights, and voting rights. With the possible exception of immigrant rights, where our litigation has tended to place our work within the realm of other divisions of the Department of Justice, our areas of expertise and litigation overlap with areas within the responsibility of the Civil Rights Division. Unfortunately, at MALDEF, we have seen the Division alter its formal alignment and legal position in pending cases, decrease its role and interest in cases where it has previously performed an important part, and turn its attention to issues that do not fall within the broad realm of protecting the rights of communities, including Latinos, that have faced ongoing problems of discrimination, inequity, and exclusion. As a result, the current Civil Rights Division cannot be expected to play an appropriate and significant role in responding to concerns around constitutional policing and law enforcement reform, even as the nation continues to discuss and debate these critical issues.¹

As we approach a new decade and the decennial necessity of redrawing electoral districts for Congress, state legislatures, and local governing bodies, the Division's activities do not suggest that it will participate actively in ensuring that redistricting in 2021 will protect the

¹ I should note that there are many career lawyers who continue to perform admirable work in the Civil Rights Division; however, leadership and focus are extraordinarily important to civil rights enforcement, particularly during challenging times, like those our nation currently faces.

voting rights of communities of color and ensure compliance with the Constitution and the federal Voting Rights Act (VRA). Of course, the United States Senate's ongoing refusal to deliberate on a new coverage formula for the preclearance provisions in section 5 of the VRA precludes the Division from playing the same critical role of reviewing redistricting plans that it has played in every redistricting round since the VRA's original enactment.

Nonetheless, the Division can and should be an active participant in challenging redistricting plans – drawn wherever in the nation and by whatever the assigned body – that violate the prohibition of minority vote dilution in VRA section 2. Instead, what we have seen is withdrawal from a position of supporting such claims and a switch to supporting line-drawing wrongdoers. For example, MALDEF was a leader in the litigation that began in 2011 against the initial and subsequent redistricting plans enacted by the Texas Legislature following the last Census. This litigation began before the 2013 Supreme Court decision in *Shelby County v. Holder* disabled the preclearance provisions in section 5, so the courtroom contest commenced in two different three-judge courts – one in Texas under section 2 and the other in Washington, D.C. where the state sought judicial preclearance under section 5. Eventually, the *Shelby County* decision effectively nullified the D.C. court's jurisdiction and its findings of serious misconduct, effectively restricting the litigation to the three-judge panel in Texas.

The section 2 litigation continued until 2019 through several trials, and included equally damning evidence of both vote dilution and of intentional discrimination by the Texas Legislature. The United States, represented by the Civil Rights Division, participated in the case on the side of plaintiffs. The Division helped plaintiffs' counsel, representing numerous parties, to marshal and present evidence of intent to discriminate; it was clear to all that one significant purpose of proving intent to discriminate, which is otherwise not required to prove a violation of VRA section 2, was to build the necessary prerequisite for a request to the three-judge panel to order the state be subject to a judicially-ordered preclearance requirement, in particular for its 2021 redistricting plan.

Consistent with those well-known intentions and with the robust showing of intentional discrimination recognized by the three-judge court, the plaintiffs sought a so-called “bail-in” order to require Texas once more to preclear its election-related changes, as it had been required to do prior to *Shelby County*. In January 2019, the Civil Rights Division filed a motion indicating that the United States had changed positions and seeking to file a brief opposing the “bail-in” order in support of Texas. Thus, even after collecting and presenting evidence of intentional discrimination, the Division sought to prevent the consequence of such evidence in the form of a court-ordered preclearance requirement. The three-judge court ultimately declined to enter a “bail-in” order, so Texas will in 2021 be free to adopt new district lines without having to seek preclearance; this is despite several decades of court judgments against the state of Texas

for its decennial redistricting. Moreover, the state and its citizens will be unable to avail themselves of the more efficient and cost-effective alternative dispute resolution device presented by preclearance review.

In our education work, MALDEF has had a different, but also disturbing, experience with the Civil Rights Division. MALDEF continues to represent a class of Latino students in longstanding litigation regarding desegregation of the Tucson Unified School District in Arizona. Even though nine years have passed since the Ninth Circuit Court of Appeals reversed a premature grant of unitary status to the district, there remain ongoing and significant issues about the district's compliance with numerous obligations under the unitary status plan (USP). After the development of the new USP following the Ninth Circuit's 2011 decision, the United States, through the Civil Rights Division, had been an important participant in ongoing discussions about compliance in several areas of the USP; in particular, the Division had been a critical partner on issues of disparate discipline, a matter of concern to both Latino and African American plaintiff classes.

Despite the continued concerns regarding compliance with the USP, in recent years, the Civil Rights Division has been decidedly less active and engaged on those issues, including the issues related to discipline. Moreover, the Division has now taken a position in support of granting unitary status to the Tucson Unified School District, even though both plaintiff classes continue to raise significant concerns and the District Court itself has indicated that future obligations are appropriate for the school district.

Aside from MALDEF's own litigation experiences, we can readily observe a significant shift in the priorities of the Civil Rights Division. This shift has been away from addressing traditional civil rights concerns faced by communities of color. Yet, the current pandemic and the associated significant economic downturn have only accentuated and brought to more prominent public attention the disparities confronted by people of color, including Latinos, in the areas of economics, education, health care, housing, and voting rights. In addition, recent demonstrations nationwide have brought renewed attention and even greater discussion and awareness around issues of police conscious and subconscious bias, and the systemic disparities in law enforcement violence faced by both Blacks and Latinos in the United States. In such times, the Civil Rights Division and its Special Litigation Section should be an acknowledged leader in identifying and pursuing legal and litigated solutions to these disparities.

In particular, the Civil Rights Division should be an active and recognized locus for seeking systemic reforms of law enforcement agencies. Many years ago, I served as Counsel to the Mayor of the City of Los Angeles during a time when the Los Angeles Police Department was continuing to implement a negotiated federal consent decree, which was the result of

important work by the Civil Rights Division of the United States Department of Justice. I saw firsthand the critical role that systems-reform litigation and a detailed consent decree can play in helping to change embedded law enforcement cultures that are contrary to constitutional and civil rights guarantees. More is certainly required – ongoing community engagement, leadership and government commitment, resources – but decrees have contributed critically to past law enforcement reforms.

This is plainly a time when we should be considering more significant and broader reforms than are reflected in the police department consent decrees of the last generation. Nonetheless, next-generation decrees and necessary complementary reforms are an area where the Civil Rights Division should be playing a far more significant part in being creative to ensure that the current crisis in law enforcement practices results in lasting and real commitments to respecting constitutional and civil rights of all community members.

The current Civil Rights Division seems to subscribe to a different world view than many of its predecessors. At bottom, the Division seems to accept as normal and expected the significant disparities that harm the lives and livelihoods of people of color, including Latinos. The Division seems to have focused instead on targeting private actors that undertake to address some of these disparities, as epitomized by the Civil Rights Division actions to target admissions practices at Harvard University and more recently at my own alma mater, Yale University.

This world view is contrary to long and successful practice in the area of civil rights enforcement. Since the enactment of the Civil Rights Act of 1964, the identification of significant disparities that work to the detriment of people of color – in many different social milieus – and the attempted elimination of those disparities that cannot be well-justified as serving some social necessity, in education, business, or other government endeavor, has been perhaps the critical component in enforcing civil rights and constitutional guarantees of equal protection. This is an essential component of rooting out irrational discrimination, however disguised.

A Civil Rights Division whose leadership views unsupportable disparate impacts and discriminatory results as the norm, even attacking attempts to change those impacts, is not a Division that is serving well the interests of our Constitution or of our nation.