



**Testimony of Thomas A. Saenz  
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**Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
of the Committee on the Judiciary**

**Hearing on Oversight of the Voting Rights Act: Potential Legislative Reforms.**

**August 16, 2021**

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 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 appear before you remotely today from the city of 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 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, 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 Arkansas, Colorado, Georgia, Nevada, and New Mexico.

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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 is currently being used to justify new voter suppression proposals 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 legislative 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. These changes are perceived as threatening to the long-term privilege of those currently in power who have not garnered support among ascendant minority voter groups. The reaction of too many is not to change policy positioning to appeal to the voter groups in ascendance, but 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 experience. 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 Voting Rights Act 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 to voter suppression. As I have explained in previous testimony to this subcommittee, litigation under Section 2 is costly – in direct resources and opportunity costs – and time-consuming. Pre-clearance review benefits jurisdictions by dramatically reducing their costs in defending potential elections changes, and benefits voting rights by yielding more timely resolution of voting rights disputes. Litigation under Section 2 is too often unable to secure resolution before any election moves forward with the taint of voting rights violations attached.

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. Such gaming of the system, catalyzed by inadequate resources to challenge all instances of voter suppression



nationwide, would undermine confidence in our democracy and present a clear constitutional crisis.

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In the aftermath of the 2013 Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), MALDEF originated the idea of practice-based pre-clearance coverage as a limited complement to a geographic, history-based formula for broader pre-clearance coverage. Practice-based coverage was proposed as a means to address the increasing introduction and enactment of voter suppression measures precisely in response to the growth of the local Latino community to a level viewed as a threat to the political powers that be. Most often, where the Latino community reaches that “tipping point” where they are perceived as a political threat, it is the first minority community to reach such a point, meaning that the jurisdiction involved had no reason to engage in race-targeted voter suppression – or to be challenged for such acts – previously in the jurisdiction’s history. This means that building a record of adjudications against race-targeted voter suppression sufficient to invoke geographic coverage would take many years and involve substantial cost to plaintiffs and, even more so, to the jurisdiction. The result could well be a severely budget-challenged city (or other jurisdiction) just as the numerically ascendant minority group is provided sufficient voter protection to enable it to exercise controlling political power in the city.

Moreover, the simple fact of ongoing United States demographic change, highlighted again last week in the many headlines surrounding the first release of detailed data from the 2020 Census, predicts that more and more local and state jurisdictions will face that “tipping point” of perceived political threat from an ascendant minority group -- likely Latino in the next many years, but joined by Asian Americans in a similar position down the line. With so many jurisdictions coming to that tipping point, we cannot reasonably expect that expensive and time-consuming litigation under Section 2 of the Voting Rights Act – and the distant prospect of sufficient successful litigation to trigger geographic pre-clearance coverage – will remotely suffice to meet the scope of the nationwide challenge. Failure to meet the challenge would permit entrenched powers across the nation to sacrifice democracy to their own retention of authority. It is no exaggeration to characterize such widespread abuses of authority as an existential threat to our democracy and a constitutional crisis of major proportion.

An adequate response demands recourse to the powerful and effective alternative dispute resolution (ADR) mechanism in pre-clearance review under the VRA. As I have previously testified to this subcommittee, like the best ADR, pre-clearance saves time and money, efficiently addressing potential violations of voting rights without overburdening the courts and parties with burdensome volumes of litigation under Section 2 of the VRA, with its time-consuming and resource-intensive “totality of the circumstances” test. The greatest benefit from

the ADR of pre-clearance inures to the elections-administering jurisdictions themselves, which face massive costs in losing Section 2 litigation because of fee-shifting under the VRA. Under pre-clearance, by contrast, the jurisdictions receive timely and protective approvals of their covered elections changes without facing the daunting prospect of lengthy and costly defense of a Section 2 lawsuit.

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Of course, the benefits of pre-clearance as effective ADR extend beyond the specific circumstances of practice-based coverage and the demography-driven “tipping point” phenomenon that is becoming increasingly widespread in the United States. These benefits also inure to geographies that may be covered under a geographic formula for pre-clearance grounded in recent historical patterns of voting rights violations. Here, the pre-clearance formula steps in, as almost a tripped fuse or breaker box, to stop jurisdictions with a pattern of race-targeted vote suppression from continuing to engage in such behavior and from perpetuating the expensive prospect of successful challenges to that vote-suppressive behavior. Instead, the geographic formula substitutes the ADR of pre-clearance in place of costly litigation.

In other ways, the two pre-clearance coverage formulas are symbiotic to one another. That is to say, practice-based coverage is a complement to, not a substitute for, a geographic pre-clearance formula. As I have said colloquially, the two formulas together allow us to use the powerful pre-clearance mechanism to target both serial vote killers and copycat vote killers. By focusing on jurisdictions with a longstanding, yet recent, pattern of race-targeted, vote-suppressive conduct, the geographic formula does the former. By targeting jurisdictions using practices employed in the past by many other jurisdictions to suppress votes, practice-based coverage accomplishes the latter.

Changing metaphors, no one in their right mind would have suggested in the face of a dangerous pandemic that science focus solely on finding successful treatment for infected persons, without also seeking a vaccine to prevent serious infection from occurring among others. Conversely, no one with any humanity would have suggested that science only seek to develop a vaccine, while allowing those already infected to simply suffer and possibly die with no scientific efforts to find effective treatments. Here, the geographic coverage formula addresses jurisdictions already showing signs of severe infection with the disease of voter suppression, while practice-based coverage uses the science of pre-clearance to prevent serious infection among those jurisdictions showing susceptibility to it.

Neither coverage formula can address all legitimate voting rights concerns; both are needed. For example, because practice-based coverage only reaches specified changes in elections-related practices, it cannot work to prevent proliferation of any new and crafty mechanisms devised to limit the right to vote of voters of color. By contrast, geographic

coverage, in reaching all elections-related changes, does have the ability to stem any new or obscure means of accomplishing voter suppression. Moreover, this distinction is rational because serial vote suppressers, having unsuccessfully tried other means of vote suppression (indeed, it is past challenges to discriminatory vote suppression that triggers pre-clearance coverage under the geographic formula), are those most likely to seek out and attempt to implement craftier means of suppressing and deterring voter participation. The jurisdictions covered by practice-based coverage are less likely to seek to devise new means of vote suppression because they can just copy mechanisms used elsewhere to swiftly stem the perceived threat from an ascendant minority voter group.

Of course, over time, any jurisdiction – including those initially engaged in changes triggering practice-based coverage – that engages in successive and different means of attempting to suppress minority votes will ultimately find itself subject to the broader geographic pre-clearance coverage. In this way, the two formulas are complementary as well. Neither is a substitute for the other. The worst rights-violating jurisdictions may start with facing pre-clearance of certain known practices, but ultimately face pre-clearance for all elections-related changes under geographic coverage. While practice-based coverage may delay triggering coverage under the geographic formula for some of the jurisdictions most tenaciously-committed to vote suppression, that is all to the good because the delay occurs because specified practices with a discriminatory intent or effect will have been blocked through practice-based coverage. Finally, the use of practice-based coverage to efficiently prevent certain rights-violating changes from being implemented, will also enable scarce enforcement resources – in both the Department of Justice and in the private sector – to be marshalled toward Section 2 litigation challenging the more innovative means of vote suppression that may be attempted in the future. It is in these novel and knotty cases that court adjudication of the totality of the circumstances is most appropriate.

Ultimately, of course, practice-based coverage may have the effect of deterring jurisdictions from engaging in the targeted practices at all. If we reach that point, many years from now, we can celebrate the highly effective deterrent of pre-clearance. In the meantime, practice-based coverage is needed to sufficiently address the challenge of voter suppression through historically established practices, especially as we face today's suppression proposals and as we look to a future of substantial demographic change that will challenge the ability of many officeholders and political leaders nationwide to cede power voluntarily without attempting to manipulate democracy through suppression of electoral participation by ascendant minority voter groups.

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Practice-based coverage is constitutionally sound, within the plain authority of Congress. There is no more important goal, no goal more central to our national existence, than to prevent race-targeted voter suppression. Our history demonstrates the ongoing harm from such suppression. Practice-based coverage, grounded in demonstrated history of use of these practices to suppress the votes of minority groups growing in population, is an appropriate and measured response to the challenge facing a nation of rapid demographic change.

There are numerous constitutional bases of authority to enact practice-based coverage. The most important of these are the congressional implementation provisions of the Fourteenth and Fifteenth Amendments of the Constitution, and the Elections Clause of the Constitution. The Elections Clause plainly would support practice-based pre-clearance in application to federal elections.

Under its Fourteenth and Fifteenth Amendment authority, Congress may enact practice-based coverage because the formula responds directly to the federalism and equal sovereignty concerns expressed in the Supreme Court decision in *Shelby County v. Holder*. By restricting the pre-clearance obligation to specified changes – changes that have historically correlated with efforts at suppression of growing groups of minority voters -- rather than to all elections-related changes, practice-based coverage limits the intrusion on state policymaking and elections administration, answering the *Shelby County* majority's federalism concerns.

In addition, by applying to all jurisdictions, rather than to specifically identifiable states or other jurisdictions, practice-based pre-clearance coverage responds to the equal sovereignty concerns expressed by Chief Justice Roberts in *Shelby County*. No stigma would even theoretically attach to any state based on its history or previous policymaking. The only threshold for coverage rests on demography, which is largely beyond the scope of historical or ongoing policymaking of the jurisdictions that meet the threshold for coverage of specified changes in elections practice. This threshold is a necessary bow to efficiency and cost. It rationally relates to where voter suppression is more likely by excluding jurisdictions that are overwhelmingly comprised of a single racial group. From a constitutional perspective, the threshold supports the congruence and proportionality of the response, in practice-based coverage, to the danger of race-targeted vote suppression. Because vote suppression that is not targeted at race, or with disproportionate effect by race, lies beyond the scope of the Fourteenth and Fifteenth Amendments, requiring jurisdictions without a history of discrimination that are nearly all white (or increasingly likely, nearly all comprised of some other single race) would be incongruent with the Amendments and disproportional to the actual danger of race-targeted vote suppression.

Some have recently raised concerns about this threshold because it relies on measures of population by race. These concerns are unwarranted; our Constitution does not require ignorance of matters like racial differences and their correlation with differences in voting preferences. Indeed, the Supreme Court has acknowledged this correlation in its Voting Rights





Act Section 2 jurisprudence. Unlike in that context, however, no liability rests in whole or in part on any assumption (versus proof) of that correlation; it merely triggers the application of pre-clearance review, a less costly and more efficient means of addressing potential vote suppression.

Moreover, the threshold does not distinguish among the races; all that is required is the presence of any two racial groups, each comprising a significant proportion of those potentially eligible to vote in the near future in the jurisdiction. Although today, one of those two groups, in virtually every jurisdiction, is most likely to be whites, that will almost certainly change over time. Eventually, the threshold will be satisfied by other combinations of two racial groups in a jurisdiction, like Latino-Native American (in New Mexico, perhaps), or Asian American-Latino (in Hawaii, perhaps), or Black-Latino (in Georgia perhaps), or Black-Asian American (in Virginia, perhaps) in specific states or sub-state jurisdictions.

Indeed, it is unlikely that the Supreme Court would see the demographic threshold as a race-based classification at all. Jurisdictions, not people, face a legislative consequence from the demographic threshold, such that racially mixed jurisdictions are treated differently from racially isolated jurisdictions. As pointed out above, that distinction is rationally grounded in the constitutional legislative purpose of targeting race-targeted vote suppression. Not without reason, some would assert that the *Shelby County* decision itself, through the “equal sovereignty” notion, anthropomorphized states to an extent never seen before, focusing on human emotions like stigma with respect to states. Nonetheless, it would be hard to conclude that the Court is prepared to anthropomorphize jurisdictions to the point of asserting that they have a “race.”

Indeed, the Congress and President have for many years, through the Higher Education Act and its reauthorizations, provided funding and support targeted to HBCUs (historically Black colleges and universities) and HSIs (Hispanic-serving institutions). This is an award of support to colleges and universities based primarily on how racially-mixed their enrollments have been historically and are today. This has occurred without credible challenge through an assertion that these colleges and universities each have their own “race” and are being benefitted unconstitutionally because of their specific “race” through an improper racial classification.

The recent Supreme Court decision in *Schuette v. BAMN*, 572 U.S. 291 (2014), may also be instructive. There, in a plurality opinion announcing the Court judgment, Justice Anthony Kennedy essentially rejected the notion that issues or policy areas could be judicially determined to have a “racial focus” because they inure to the primary benefit of a specific race or races. He cautioned against assumptions about how different racial groups feel about a particular issue or policy, and about classifying the issues themselves on that basis. This suggests that, whatever the Supreme Court’s tendency toward anthropomorphizing entities – closely-held businesses, states – it is not yet prepared to extend that trend to the peculiarly human attribute of “race.”

Because the demographic threshold does not distinguish among the races, does not impose consequences on people (as opposed to jurisdictions) of any specific race or on the basis of race, and does not assign a “race” to jurisdictions but distinguishes based solely on racial isolation, MALDEF does not believe the Supreme Court would characterize the threshold as a constitutionally suspect racial classification. Moreover, without belaboring the point, MALDEF also believes that, even were it so characterized, the threshold would survive strict scrutiny as necessary and tailored sufficiently to serve the compelling government purpose of preventing and deterring race-targeted voter suppression.

I should also note that some have recently questioned – whether from concerns of constitutionality or practical utility – why the demographic threshold established in the proposed practice-based coverage utilizes voting-age population (VAP), rather than citizen, voting-age population (CVAP). Because practice-based coverage is grounded in perceived threat from a growing group of minority voters, something other than total population is appropriate because large numbers of children, particularly younger children, are not an electoral threat to the political powers that be. Indeed, this may be why so many young people of all races believe elected officials to be inattentive to their concerns. Using CVAP instead of VAP would also exclude another set of current non-voters – immigrants not yet naturalized. Initially, I note that VAP data from the Census is more accurate than CVAP data, which comes only from American Community Survey (ACS) estimates, normalized over several years.

But, more important is the fact that the powers that be in jurisdictions hitting the “tipping point” of perceived political threat are forecasting future electoral threats to their perpetuation in office. This generally means that they are looking four years out – to their next potential re-election – assuming a four-year term of office. The vast majority of immigrants not yet naturalized are lawful permanent residents. All lawful permanent residents, except the small number disqualified from naturalizing, are three to five years or less from eligibility to naturalize and to vote. Thus, political-threat perception projected four years to the next election should include immigrants not yet naturalized; therefore, VAP is the better measure of the potential for perceived political threat by those in power. Indeed, because of the likely four-year time horizon, it would be best to include also those from age 14 to 17, but doing so would be unduly cumbersome to implement. VAP is the best, most readily available measure for these purposes. Professor Bernard Fraga’s recent testimony and report demonstrates strong empirical support for this conclusion.

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As explained above, practice-based pre-clearance coverage was conceived many years ago in response to *Shelby County*. It has been continually refined since. Most recently, voting





rights advocates have proposed some important modifications since the version of practice-based coverage passed in the last Congress.

First, with respect to the redistricting practice, which only triggers pre-clearance coverage where there is a significant minority population that has experienced substantial growth in the decade since the previous redistricting, the proposed amendment ensures that these demographic triggers (which may apply to any racial group, including whites, that is the second-largest racial group in the jurisdiction) are expressed only in percentage, not numerical, terms. This change is to prevent triggering coverage in very heavily populated jurisdictions based on high numerical changes that are not significant in percentage terms. The change is consistent with the “political-threat perception” rationale described above.

The second proposed amendment would change the description of the voter identification practice that is subject to pre-clearance. The change would align the description with other pending voting-related congressional legislation and would make clear that all changes made to voter identification changes after enactment of this bill would be subject to pre-clearance review. This amendment also ensures that undue voter registration requirements are also subject to pre-clearance review.

The third proposed amendment would ensure that pernicious new attempts to prohibit providing sustenance to voters waiting in line to vote do not proliferate. This amendment would make such requirements put in place after enactment of this bill subject to pre-clearance review.

The fourth proposed amendment would limit pre-clearance review of voter purges to those with a disparate impact on any racial or language-minority group. This amendment would thus exempt from pre-clearance review all evenhanded purges necessary to adequate maintenance of voter rolls.

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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 including practice-based coverage, together with geographic coverage, to reinvigorate the powerful pre-clearance mechanism, in the John Lewis Voting Rights Advancement Act. Thank you.