Testimony of

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Written Testimony of Ann Marie Tallman,
President and General Counsel of MALDEF,
Regarding the Nomination of John G. Roberts, Jr.
as Chief Justice of the United States of America
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Mr. Chairman and Members of the Committee, thank you for the invitation to testify regarding the nomination of John G. Roberts, Jr. to the post of Chief Justice of the United States. I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund.

MALDEF was established in 1968 to advance the civil rights of Latinos. For the past 37 years, as the Latino community has grown to over 40 million people and become the largest ethnic minority group in America, MALDEF has provided legal advocacy on matters such as education, voting rights, immigrant rights, access to justice and fair employment - critical areas in which success leads to Latinos achieving our American dreams.

The Supreme Court's fundamental role within our federal constitutional framework is to protect the constitutional rights of all, including minority groups, against any unconstitutional majoritarian tendencies of the elected legislative and executive branches. After a thorough review of John Roberts's available record, we are not fully assured that he properly respects this crucial function of the Court. Judge Roberts's legal opinions in the areas of MALDEF's core mission often place him in opposition not only to equal justice for Latinos, but opposed to positions taken by bipartisan majorities in Congress and the Reagan Administration that he served. His legal record also raises serious questions about Roberts's willingness to subordinate the protection of fundamental civil rights to the maxim of "judicial restraint."

For example, as Special Assistant to the Attorney General, John Roberts criticized the 1982 U.S. Supreme Court decision in Plyler v. Doe. In Plyler, the U.S. Supreme Court, following two lower courts, struck down a Texas law that effectively barred undocumented children from the state's public school classrooms. Roberts criticized the U.S. Solicitor General's office for not standing up for what he described as "judicial restraint" and supporting the State of Texas's arguments on the Equal Protection Clause, which, he wrote, "could well have . . . altered the outcome of the case." The nominee, it is apparent from this memorandum, would not have used the constitutional authority of the Supreme Court to vindicate the constitutional rights of these immigrant children.

As Associate White House Counsel, Roberts wrote of his support for national identification cards and derided as "clinging to symbolism" civil liberty and privacy concerns surrounding them. In disagreeing with the Reagan Administration's opposition

to a national identifier, he failed to recognize the potential for harmful discrimination in the pretextual singling out of Latinos and African Americans that would likely occur if such a system were in place. Again, Roberts failed to respect the constitutional interests of the minority whom the Court is designed to protect.

Regarding equal access to education, John Roberts wrote in support of curtailing the federal government's ability to investigate and eradicate discrimination by gender and disability in education programs that receive federal funds. Mr. Chairman, you and many members of this Committee led the way to overturning that interpretation in 1988. Further, the nominee was an architect of the Administration's unsuccessful proposals to strip federal courts of their jurisdiction to establish remedies to end unlawful school segregation.

Regarding voting rights, Roberts mischaracterized the bipartisan efforts of the Chairman and other members of this Committee to restore the "effects test" in voting discrimination cases. He was wrong when he wrote in 1981 that your efforts "would establish essentially a quota system for electoral politics."

John Roberts is out of step with the American public on many issues of fundamental concern to Latinos and all Americans. If just a few of Judge Roberts's written legal views had been adopted and became settled federal law, 1) thousands of undocumented immigrant children may have been barred from American public schools through no fault of their own, left largely illiterate and without hope as members of a permanent American underclass; 2) a national system of identification cards might be in place, representing an unprecedented intrusion into Americans' privacy and placing minorities at a greater risk of racial profiling; and, 3) electoral empowerment of Latinos, African Americans, Asian Americans and Native Americans and election of a record number of minority elected officials that are currently serving the American people at the federal, state, and local level would likely not have been achieved.

This confirmation process is about more than a career record of opposition to important core principles of equality. The next Chief Justice will lead the Court in decisions that will have a lasting impact upon Latino and all American families well into the middle part of this century. We need men and women on the Court who will understand the changing nation. Strikingly, on official White House Counsel and Justice Department memoranda that we have reviewed, Judge Roberts displayed a disturbing pattern of dismissive, derisive, and flippant comments that demonstrate a possible lack of respect for Latinos, women, and Native Americans.

John G. Roberts, Jr. has consistently advanced extreme positions and displayed insensitive attitudes that compel us to oppose his confirmation to be Chief Justice of the United States of America.

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Specific findings from MALDEF's research into the legal record of John G. Roberts, Jr. follow.

I. Roberts's Reagan-Era Record

A. Immigrants' Rights

1. Plyler v. Doe

The Supreme Court's 1982 ruling in Plyler v. Doe affirmed the constitutional

right of undocumented immigrant children to participate in K-12 public education programs on an equal basis with other children. In striking down a Texas law that effectively prevented undocumented children from attending the state's public schools, the Plyler Court held that the Fourteenth Amendment and its guarantee of "equal protection of the laws" apply to undocumented immigrants. The Court then ruled that Texas had no substantial interest in preventing these children from becoming educated, productive members of society. MALDEF represented the schoolchildren in Plyler.

The Plyler Court recognized that upholding the Texas statute would, in effect, sanction the creation of a permanent underclass of American residents who are "encouraged by some to remain here as a source of cheap labor, but nevertheless denied benefits that our society makes available to citizens and lawful residents." The Court noted with concern that "[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law." Further, the Court noted that the children at issue in Plyler bore no responsibility for their immigration status and that to punish them for a condition that is beyond their control offends fundamental American conceptions of justice.

A memorandum co-authored by John Roberts on the day of the Plyler decision raises serious questions about his views on the equal protection principle established in Plyler v. Doe and the fundamental conception of justice that it reflects. This memorandum expresses regret over the fact that the Solicitor General's Office failed to submit a brief "supporting the State of Texas - and the values of judicial restraint - [that] could well have . . . altered the outcome of the case."

The Plyler decision has permitted undocumented children to have a considerable positive impact upon American society. The effect of the landmark ruling in Plyler has been to allow undocumented children to earn an education at their local primary and secondary schools, participate more fully in their communities, and contribute more to American society and the national economy than they would have if the discriminatory Texas statute had been upheld. Roberts's evident disappointment at the government's failure to change the outcome in Plyler is therefore deeply concerning.

2. National Identification Cards

As Associate White House Counsel, Roberts took the opportunity of a routine Justice Department clearance of INS testimony before a Congressional committee to offer his personal views on immigration. In an October 21, 1983 memorandum, Roberts wrote:

> I recognize that our office is on record in opposition to a secure national identifier, and I will be ever alert to defend that position. I should point out, however, that I personally do not agree with it. I yield to no one in the area of commitment to individual liberty against the spectre of overreaching central authority, but view such concerns as largely symbolic so far as a national I.D. card is concerned. We already have, for all intents and purposes, a national identifier - the social security number - and making it in form what it has become in fact will not suddenly mean Constitutional protections would evaporate and you could be arbitrarily stopped on the street and asked to produce it. And I think we can ill afford to cling to symbolism in the face of the real threat to our social fabric

posed by uncontrolled immigration.

The ease with which Roberts dismisses civil liberty and privacy concerns surrounding national identification cards and his failure to credit the valid concerns of Latinos and others regarding discriminatory law enforcement stops is as disturbing as his characterization of "uncontrolled" immigration as a "real threat to our social fabric." Further, while Roberts is often portrayed as supporting a limited role for the federal government, here he endorses an unprecedented intrusion by the federal government in the private sphere of Americans.

3. "Illegal amigos"

In a September 30, 1983 memorandum that offers an apparent attempt at ethnic humor, the nominee recommends that written remarks for publication in the periodical "Spanish Today" refer to a legalization program in the pending immigration legislation. Roberts wrote, "I think this audience would be pleased that we are trying to grant legal status to their illegal amigos" (emphasis in original). The nominee's willingness to ascribe a single perspective to all Latinos fails to capture the reality that the Latino community is as rich and varied as any other American community. Further, that Roberts would draft, initial, and circulate within the Justice Department a memorandum containing an apparent ethnic joke about Hispanics is greatly troubling.

B. Minority Voting Rights

Judge Roberts's record from his service under President Reagan reveals his involvement in Reagan's efforts to prevent Congress from restoring the Voting Rights Act (VRA) following the Supreme Court ruling in City of Mobile v. Bolden. In City of Mobile, a divided Court held that minority voters must prove racially "discriminatory intent" when litigating cases under Section 2 of the VRA. (Previously, it was sufficient to show "discriminatory effects" to make a claim under Section 2.) Two years later, Congress, by overwhelming majorities in both the House and the Senate, legislatively overturned City of Mobile's discriminatory intent requirement and amended Section 2 to make clear that the provision extends to discrimination both in intent and effect. It did so over the prolonged and vociferous objections of the Reagan Administration.

E. Judge Roberts's Support for Limiting Federal Judicial Authority to Remedy Violations of Federal Civil Rights Statutes

In debates over school desegregation and the separation of federal powers under the Constitution, Roberts, as both Special Assistant to Attorney General French and as Associate White House Counsel, advanced ideological positions more extreme than those held by many of his colleagues in the Reagan Administration. Notably, Roberts was a vigorous proponent of legislative proposals to strip lower federal courts of the power to order busing as a remedy, thereby reducing the role of the courts in remedying unlawful discrimination. These memoranda can fairly be described as advocacy pieces in support of his view that busing is not a required remedy for school desegregation. More broadly, these memoranda may be viewed as advocating a reduced role for the federal courts in remedying federal civil rights violations.

Among Roberts's writings on this issue is a February 15, 1984 memorandum in which he describes an "extended internal debate" that took place in the Justice Department over the separation of powers in fashioning remedies for unlawful segregation in the schools. Roberts noted that Ted Olson "reads the early [Supreme Court] busing decisions as holding that busing may in some circumstances be constitutionally required, and accordingly concludes that Congress may not flatly prohibit busing. To do so would prevent federal courts from remedying a constitutional violation." Roberts, however, notes that he advocated the position that "it is within Congress's authority to determine that busing is counterproductive and to prohibit the federal courts from ordering it." If Congress is empowered to strip the Supreme Court of the power to devise remedies for constitutional violations, as Roberts believed, both the independence of the judiciary and the power of federal courts to remedy civil rights violations may be severely threatened.

II. Judge Roberts's Record as Deputy Solicitor General in the George H.W. Bush Administration

The White House has announced that it intends to withhold records from Roberts's tenure as principal deputy Solicitor General in the first Bush Administration. Many Senate Judiciary Committee members immediately denounced this move and made specific requests for documents related to 16 cases upon which Roberts worked; these cases involved affirmative action, redistricting, equal opportunity in education, the First Amendment, school prayer, and voting rights. The White House continues to refuse to disclose the requested information, arguing that internal deliberations require an assurance of confidentiality in order to be effective. The administration's argument that confidentiality is necessary to allow attorneys to express freely their own legal views runs counter to the Administration's argument that Roberts's memos and filings do not necessarily express his own views but are those of his client alone.

Public reports and publicly-filed briefs indicate that Roberts participated in the following key cases, among others:

A. Commerce Clause

In Rancho Viejo, LLC v. Norton, a real estate developer filed suit in federal court alleging that application of the Endangered Species Act of 1973 ("ESA") to protect the arroyo toad, an endangered species, exceeded Congress's powers under the Commerce Clause. The district court granted summary judgment in favor of the defendants, finding that Congress has the constitutional authority under the Commerce Clause to regulate private lands in order to protect the toad. The district court relied on the "takings" provision of the ESA to conclude that "taking" of the arroyo toad in order to build homes was an economic activity that substantially affected interstate commerce.

The developer appealed the decision and petitioned for rehearing by a panel of judges of the Court of Appeals for the D.C. Circuit Court. This petition was denied, but Judge Roberts dissented from the denial of rehearing and wrote that the district court had inappropriately focused upon whether the challenged regulation (the building of homes) substantially affected interstate commerce, rather than whether the activity being regulated (the arroyo toad) did so. Roberts would have granted a rehearing order to "consider alternative grounds [other than the Commerce Clause] for sustaining

application of the Act that may be more consistent with Supreme Court precedent."
The Commerce Clause is a critically important instrument for Congress to enact legislation protective of individual rights and freedoms. Judge Roberts's opinion in Rancho Viejo suggests a willingness to contract the scope of Congress' power under the Commerce Clause. Although it is possible that the final line of Roberts's dissent, urging consideration of "alternative grounds for sustaining application" of the ESA, may mitigate the balance of his dissent, the opinion is sufficient to raise serious concerns that the nominee may seek to promote a jurisprudence in which the Commerce Clause's role in enabling protective civil rights and environmental protection legislation is severely cut narrowed from its current state.

B. Individual Rights/Access to the Courts

Judge Roberts's opinion in Taucher v. Brown-Hruska raises serious concerns regarding his philosophy on access to the courts. In Taucher, the Court of Appeals reversed and vacated an award for attorneys' fees that was granted under the Equal Access to Justice Act (EAJA). EAJA is a critical tool for public interest attorneys who work to enforce and vindicate civil rights, and opens the courthouse doors for plaintiffs who might not otherwise be able to raise and litigate their claims.

EAJA allows for an award of attorneys' fees in cases where a plaintiff is a prevailing party against the U.S. government, unless the government's legal position is "substantially justified." Judge Roberts, writing for the majority in Taucher, vacated the award for attorneys' fees by finding that the Commission's defense was a reasonable one on the merits. The Commission, Roberts wrote, did not "act in defiance of a string of losses" or in conflict with an "unbroken line of authority."

Judge Harry T. Edwards issued a strong dissent from Roberts's majority opinion. Judge Edwards noted that a federal appellate court is bound to engage in a strictly limited review under an abuse-of-discretion standard. Further, he wrote that the "Government's positions bordered on frivolous" and that it was "absolutely clear on the record at hand" that the district court did not abuse its discretion in awarding attorneys' fees.

In Acree v. Republic of Iraq, American soldiers who were held as prisoners of war by the Iraqi government while serving in the 1991 Gulf War brought suit in district court under the terrorism exception to the Foreign Sovereign Immunities Act (FSIA). Plaintiffs sued defendants, including the Republic of Iraq and Saddam Hussein, for compensatory and punitive damages for the torture suffered during their captivity. The district court entered a default judgment for plaintiffs and awarded over $959 million in damages. Following judgment for plaintiffs, the United States filed a motion to intervene, contesting the district court's subject matter jurisdiction. The district court denied the motion as untimely.

The appellate panel held that the district court abused its discretion in denying the United States's motion to intervene. Although the Court of Appeals rejected the government's argument that the FSIA was inapplicable to Iraq, it nonetheless vacated the district court's judgment for the soldiers and dismissed the lawsuit for failure to state a cause of action.

Judge Roberts concurred with the majority's judgment, but on a different basis. Judge Roberts agreed with the United States's argument that the FSIA is inapplicable to Iraq, and held that the Presidential Determination of May 7, 2003 stripped federal courts

of jurisdiction in the case. Thus, Judge Roberts would have dismissed the case for want of jurisdiction.

Judge Roberts, in his Acree analysis, acknowledged that the jurisdictional question was a close one, and conceded that the majority had case law on its side. Yet he opted in his opinion to accept, unlike the majority, the interpretation that was more restrictive of a plaintiff's right to sue. Again, the ruling raises questions about whether Judge Roberts has shown an appropriate commitment to protecting litigants' right of access to the courts under applicable statutory and constitutional provisions.

Judge Roberts again blocked a civil rights litigant's access to the courts in International Action Center v. United States, invoking the doctrine of qualified immunity, which is often used to bar actions against government wrongdoers. In this case, Judge Roberts, writing for the majority, reversed and remanded the district court's decision that denied summary judgment for police supervisors based on qualified immunity grounds for the inaction theory of liability. Plaintiffs, in a §1983 action, claimed the supervisors were personally liable for constitutional torts because they failed to properly train and supervise subordinate officers, which led to tortious conduct. The supervisors sought interlocutory review of the district court's denial of qualified immunity as it pertained to this theory of liability. The Court of Appeals held that, absent an allegation that the supervisors had actual or constructive knowledge of past transgressions or were aware of

"clearly deficient" training, the supervisors did not violate any constitutional right through inaction.

C. Criminal Justice/Prisoners' Rights

In Hamdan v. Rumsfeld, Judge Roberts joined in a recent D.C. Circuit decision that granted the Bush Administration extraordinary power to try suspected terrorists in special military tribunals without basic due process protections, denied these detainees the ability to enforce the provisions of the Geneva Convention in federal court, and undermined bedrock principles of international human rights law. In permitting the military tribunals to go forward, the majority gave an expansive reading to Congress's resolution authorizing the President to respond to the September 11 attacks.

The Hamdan decision is troubling both in its erosion of fundamental due process rights and in the tremendous deference and expansive wartime authority that the court bestows upon the executive branch of the federal government. Given that Latino immigrants and other members of the Latino community have become caught in the wide net cast by the "War on Terror," the Hamdan decision raises serious questions about how far Roberts would be willing to take that deference to executive power if his is confirmed as Chief Justice.

Roberts's participation in the Hamdan decision also raises the ethical question of whether he should have recused himself from the case because the Bush Administration was the party-defendant and, The Washington Post has reported, White House aides were interviewing Roberts about his possible nomination to the Court during the same time that he sat on the panel for Hamdan. Under applicable law governing judicial ethics, a "judge must recuse himself or herself in any case in which the judge's 'impartiality might reasonably be questioned.'"

CONCLUSION

A thorough review and analysis of Judge Roberts's available legal record, as

described in part above, has led MALDEF to oppose his confirmation to the post of Chief Justice of the United States. We are not convinced that Judge Roberts properly respects the crucial constitutional function of the Supreme Court in protecting the civil rights of the minority. Further, Judge Roberts has advanced legal opinions in areas of MALDEF's core mission that place him in opposition not only to equal justice for Latinos, but outside of the American mainstream.

We urge Senate Judiciary Committee Members and the full Senate to vote in opposition to the nomination of John G. Roberts, Jr. as Chief Justice of the United States.

Ann Marie Tallman, MALDEF President and General Counsel

Ann Marie Tallman is a native of Iowa, as are her parents. Her Mexican-American mother is the child of migrant farm workers, and her father is of German descent. Ms. Tallman graduated with honors from the University of Iowa and received her law degree from U.C. Berkeley's Boalt Hall School of Law.

Ms. Tallman began her legal career with the Denver law firm of Kutak Rock, where she specialized in public finance law. In 1993, she was appointed by Mayor Wellington Webb to the post of Deputy Director of the Planning and Community Development Agency of the City and County of Denver. In this capacity, she advised Mayor Wellington Webb on housing and community development matters. Between 1994 and 2004, Tallman served as an executive with the mortgage lender Fannie Mae.

Ms. Tallman began working with MALDEF as a law student at U.C. Berkeley, where she enlisted MALDEF's support in ensuring equal public funding for a student-edited law journal on legal issues affecting the Hispanic community. Upon receiving her law degree, Ms. Tallman collaborated with MALDEF during her tenure as Executive Director of the Colorado Hispanic League, where she spearheaded statewide Hispanic census outreach and was actively involved in MALDEF's reapportionment and political redistricting efforts. Ms. Tallman also recruited a team of private attorneys to support MALDEF's voting rights litigation strategies in Colorado.

Ms. Tallman was appointed to MALDEF's Board of Directors in 1998 and named President and General Counsel of MALDEF in 2004. Founded in 1968, MALDEF advances the civil rights of Latinos through advocacy, legal action, community education, and leadership development. MALDEF focuses on the program areas of education, employment, immigrants' rights, political access, public resource equity, and access to justice.

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