Testimony of

Mr. John Trasvina

Interim President and General Counsel
Mexican American Legal Defense and Educational Fund (MALDEF)
June 13, 2006

Written Testimony of Mr. John Trasviña,
Interim President and General Counsel, MALDEF
Re: The Continuing Need for Section 203 of the Voting Rights Act
United States Senate Committee on the Judiciary
June 13, 2006

Chairman Specter, Senator Leahy, and Members of the Committee: Thank you for your leadership regarding the continuing need for Section 203 of the Voting Rights Act and for the opportunity to testify before you today. I am John Trasviña, interim President and General Counsel of the Mexican American Legal Defense and Educational Fund (MALDEF).

I am pleased to be back before this Committee to testify about the critical matter of language assistance in elections. One of my proudest moments from my period of service as Senator Paul Simon's General Counsel on the Constitution Subcommittee was working with Senator Hatch and many members of your staff on the 1992 Voting Rights Act language amendments. When this Committee displays bipartisanship on language assistance as it did in 1992, you make a powerful statement to the American people and the world about the sanctity with which we hold the right to vote in the United States of America.

Combating discrimination in U.S. elections is the right thing to do. Voting was once an exclusive privilege reserved for white, property-owning males, but it is now available to all eligible United States citizens regardless of race, gender, wealth, or national origin. Forty years ago, Congress passed the Voting Rights Act to provide for minority access to the polls, and it has helped to make our shared democratic principles a reality. It is now our responsibility to renew the Act's critical provisions because the nation's citizens still require their protections.

On May 10, 2006 the U.S. House of Representatives Committee on the Judiciary affirmed the continuing need for protections against unlawful discrimination in voting by approving by a vote of 33-1 the Voting Rights Amendments and Reauthorization Act of 2006, H.R. 9. The House and Senate bills to reauthorize the protections of the Voting Rights Act enjoy broad bipartisan support in each chamber because you and other congressional leaders recognize that combating discrimination in elections is among the most important responsibilities of our government.

The Origins of Section 203

Protections against language discrimination in voting were included in the original Voting Rights Act of 1965, which prohibited the enforcement of English-language literacy tests for voters. Congress enacted these protections to protect the rights of Puerto Rican U.S. citizens who were educated in American flag schools in Puerto Rico where instruction took place in Spanish.

Section 203 was included during the 1975 reauthorization of the Voting Rights Act because Spanish-speaking Latino citizens in the Southwest and elsewhere, as well as members of certain other language minority groups, were still being subjected to laws and practices that effectively denied them the right to vote, much as similar laws and practices denied the right to vote to African Americans living in the South. Among the many discriminatory laws and election practices preventing Latino citizens from voting were poll taxes, the widespread refusal by election officials to register eligible Latino voters, and the frequent omission of registered Latino voters from voting lists. Because of

discriminatory election practices, only 34.9% of eligible Latino citizens were registered to vote in 1974, compared with 63.5% of whites. Only 22.9% of Latino citizens actually voted in the 1974 congressional elections, compared with 46.3% of whites.

When Congress first reauthorized the Voting Rights Act in 1975, after thorough debate and review of a substantial record it extended the Act's protections to better address the discriminatory impact in elections of de jure segregation and unconstitutional discrimination in public schools that rendered many U.S. citizens unable to vote effectively in English-only elections without language assistance. After hearing testimony about the denial of equal educational opportunities by state and local governments that had left many Latinos, Asian Americans, and American Indians functionally illiterate in English, Congress found it "necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices." Section 203, which has provided for language assistance in the election process in areas with low rates of both English proficiency and literacy among covered ethnic minority groups, was the congressional remedy devised to counter the effects of language-based discrimination upon U.S. citizens' right to vote.

The Continuing Need for Section 203

Unconstitutional discrimination in elections and education has created persistent discriminatory conditions which continue to require the congressional remedy of Section 203. Many of the U.S. citizens subject to intentional discrimination in public education systems, which lasted well into the 1970s in Texas and other states, continue to require language assistance in order to cast a meaningful, informed vote. While they may speak conversational English well, these U.S. citizens may not be fully proficient in written English because they were intentionally denied the academic instruction necessary to vote effectively in English-only elections that employ complicated language and terminology. Although the full English fluency of all U.S. residents remains the goal of our public education system, we have not yet attained this goal such that language assistance in voting is no longer needed.1 In the State of Texas alone, the U.S. Census found in 2002 that there were 818,185 Latino voting-age citizens - nearly one out of every four Latino voting-age citizens in the state - not yet fully proficient in English. These citizens continue to suffer from inadequate access to English as a Second Language programs that would allow them to become fully proficient in English as adults.2

The record supporting the current reauthorization of the Voting Rights Act demonstrates significant ongoing discrimination on the basis of language and race in U.S. elections. While there has been an increase in Latino voter registration and turnout rates since 1972, a large disparity between Latino and Anglo registration and voting patterns remains. MALDEF has developed a report for the record that documents ongoing discrimination in voting against Latino and other minority voters in the State of Texas; other elements of the record show ongoing discrimination in elections against language minority voters in other jurisdictions covered by Section 203.

MALDEF's report on voting discrimination in Texas demonstrates the persistence and breadth of discrimination in voting and documents the continued need for legislative efforts to protect minority citizens' voting rights. Since 1982, more successful Section 5 enforcement actions have been brought in Texas, 29, than in any other state. Over the past 25 years, the Department of Justice has issued Section 5 objections to voting changes in Texas involving a wide variety of discriminatory election rules, procedures, and methods of election, including:
? Bilingual procedures that violate Section 203 of the Voting Rights Act.
? Discriminatory redistricting practices to deny minorities an equal opportunity to elect their chosen candidates.
? Discriminatory use of numbered posts and staggered terms.
? Discriminatory imposition of majority vote and/or runoff requirements.
? Polling place or election date changes that deny minorities equal voting opportunities.
? Discriminatory absentee voting practices.
? Discriminatory annexations or deannexations.
? Dissolution of districts, reductions in the number of offices, or revocation of voting rules when minority candidates of choice are about to be elected to office.

These Section 5 objections, detailed further in the MALDEF Texas state report, range in time from October 1982, immediately following the Voting Rights Act's last full reauthorization, to an objection in May of 2006 to the discriminatory reduction of polling places in the North Harris Montgomery Community College District.
The number and breadth of Section 5 objections made by the DOJ in Texas since 1982 illustrates the continuing

nature of voting discrimination against Latino citizens in elections and the variety of practices still used exclude minority voters from the political process. 3 In total, the DOJ has issued 201 Section 5 objections to proposed electoral changes in Texas since the State was covered in 1976. Of those, 52 percent, 107, occurred after the 1982 reauthorization of Section 5. Ten of the post-1982 objections were interposed in response to statewide voting changes. Discriminatory election practices in Texas affect a very large number of minority voters. Since 1982, the DOJ has prevented the implementation of discriminatory electoral changes in nearly 30 percent, 72,4 of Texas's 254 counties, where 71.8 percent of the State's non-white voting age population resides.

The City of Seguin, Texas, provides a notable example of ongoing discrimination against language minorities in elections and how jurisdictions have employed a variety of tactics to dilute minority voting strength. In 1978, Latino plaintiffs sued the City for failing to redistrict when the previous districts had become malapportioned. While Seguin's population was 55% minority, there had never been more than two minority candidates elected to the 8-member city council. A federal court enjoined the 1978 election and the following year adopted a new redistricting plan proposed by the city.

The city failed to redistrict after the 1980 and 1990 Census. By 1993, 60% of Seguin's population was minority but only 3 of 9 city council members were Latino. Latino plaintiffs sued again and won a settlement from the city in 1994 that created 8 single-member districts, five of which had a majority of minority voters. Following the 2000 Census, Seguin redistricted again but spread the city's Latino population across its electoral districts in order to preserve the incumbency of an Anglo member of the city council. When the Department of Justice refused to grant Section 5 preclearance to the city's redistricting plan, Seguin corrected the violation but then closed its candidate filing period so that the Anglo incumbent would run for office unopposed. Latino plaintiffs sued once again and secured an injunction under Section 5 of the Voting Rights Act. The parties eventually settled after negotiating a new date for the election.

Discrimination against minority voters is not a thing of the past; many acts of discrimination against Latino voters occurred during the 2004 election. For example, an elderly Latina voter in San Antonio, Texas was told by the election judge at her polling place that she was not on the voter registration list and could not vote with a provisional ballot, despite the recently enacted Help America Vote Act, which provides for provisional ballots in such situations. She and her family had been voting at the same location for over 20 years. The election judge refused to unlock a box containing provisional ballots until a MALDEF attorney arrived and negotiated on behalf of the Latina voter. Had MALDEF not acted, it is very likely that this Latina voter would have been disfranchised.

Spanish-speaking Latinos continue to suffer language-based discrimination and marginalization in other critical election processes, further demonstrating the continued need for the protections of Section 203. In 2003, the Chairman of Texas House Redistricting Committee stated that he did not intend to hold redistricting hearings in the Rio Grande Valley in South Texas, where many U.S. citizens are limited English proficient Spanish-speakers, because only two members of the Redistricting Committee spoke Spanish. Chairman Crabb stated that the members of the Committee who did not speak Spanish "would have a very difficult time if we were out in an area other than Austin or other English speaking areas to be able to have committee hearings to be able to converse with the people that did not speak English."5 Many citizens living in areas of Texas with high concentrations of limited English proficient citizens would have been excluded from participating in local Redistricting Committee hearings had Latino advocates not interceded on their behalf. Section 203 is needed to protect the right of members of covered language minority groups to receive full access to all critical elements of the election processes.

The Voting Rights Act has contributed to increased political representation for Latinos, African-Americans, and Asian Americans in Texas. In 1973, there were 565 Latino elected officials in the state. By 1984, the number had grown to 1,427. By January 2005, the number had increased to 2,137 Latino elected officials in Texas, nearly four times the number in 1973. The growth of Latino elected officials elected to Congress and to the state legislature has been particularly significant. Between 1984 and 2005, the number of Latino Members of Congress doubled from 3 to 6, the number of state Senators nearly doubled from 4 to 7, and the number of state Representatives increased from 21 to 29. Despite these gains, Latinos and continue to be significantly underrepresented at every level of federal, state, and local government.

The Constitutional Basis of Section 203

Section 203 is a proper exercise of Congress's authority to enforce the Fourteenth and Fifteenth Amendments, which grant Congress the power to enforce equal protection of the laws and non-discrimination in voting through appropriate remedial legislation. The Supreme Court has repeatedly found that Congress may adopt strong remedial and preventative measures to respond to the widespread and persisting deprivation of constitutional rights resulting from a history of racial discrimination.

In 1966, the Supreme Court first upheld the constitutionality of the Voting Rights Act, finding that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."6 In a separate decision issued that same year, the Supreme Court upheld the Voting Rights Act's ban on State laws requiring English-language literacy tests for voters, which discriminated against Spanish-speaking citizens in violation of the Equal Protection Clause of the Fourteenth Amendment.7

Any remedies enacted by Congress under its Fourteenth Amendment authority must be "congruent and proportional" to remedy a specific constitutional injury under City of Boerne v. Flores, a 1997 Supreme Court decision.8 City of Boerne, it should be noted, specifically cites the Voting Rights Act as an example of a properly congruent and proportional congressional remedy. City of Boerne announced that the Court would apply a three-part test to determine congruence and proportionality: Congress must 1) identify unconstitutional discrimination, 2) develop a record that justifies a congressional remedy, and 3) implement only those remedies that are proportional to the constitutional injuries.9
Section 203 is intended, as I have previously noted, to remedy language-based discrimination in voting. The statutory language of Section 203 explicitly states that it is targeted at remedying identified discrimination against language minorities in U.S. elections, and its legislative history confirms this.

As required under the second prong of the City of Boerne test, Congress currently has before it a substantial record that documents significant present discrimination against language minority citizens living in Section 203 covered jurisdictions. Based on this evidence, the Voting Rights Act reauthorization bills contain findings that support the continuing need for language assistance in voting among the covered populations. Congress has thus satisfied the "congruence" requirement of City of Boerne.

Section 203 is also proportional to the constitutional harm that it is designed to redress, as required under the final element of City of Boerne's three-part test. A significant body of Supreme Court precedent has upheld provisions of the Voting Rights Act as proper exercises of Congress's authority to remedy discrimination in voting. Further, the current congressional record clearly demonstrates that discrimination in elections is longstanding, pervasive, and continuing, while the remedy of language assistance in elections does not unduly burden state and local election officials. Section 203 has, the record shows, efficiently and effectively increased language minority voter registration and turnout, at little or no cost to covered jurisdictions. Because the discrimination at issue is pervasive and egregious and Section 203 has proven to be an effective remedy to this discrimination, the language assistance that Section 203 requires is "proportional" under the standard announced in City of Boerne.

Section 203 is an appropriate exercise of Congress's authority under the Fourteenth and Fifteenth Amendments because it is also no broader than necessary to redress the constitutional injuries found. The Section 203 coverage formula requires both a heavy concentration of language minority citizens and a lower-than-average literacy rate among the covered population. Congress has found that these conditions reflect persistent discrimination on the basis of language. Section 203, is, therefore, narrowly tailored because its coverage formula targets those areas where discrimination on the basis of language has occurred and is most likely to recur, and Section 203 is no more intrusive than necessary to remedy the constitutional injury.

Because language assistance required under Section 203 is congruent and proportional to the discrimination that it addresses and it is no broader than necessary to redress this discrimination, it is a proper exercise of Congress's constitutional authority under the Fourteenth and Fifteenth Amendments.

Dispelling Persistent Myths Surrounding Section 203

Many Section 203 opponents argue that because immigrants must speak English to become naturalized citizens, language assistance in voting is not needed. Complicated ballot provisions demand a higher level of English

language proficiency than do the naturalization requirements, however. Even native speakers of English often find the legalistic language of many ballot provisions difficult to interpret. Further, English language naturalization requirements do not apply to native-born citizens, many of whom, as noted above, suffer from limited English proficiency as a result of discriminatory education systems.

Section 203 is not costly to implement. I have studied implementation of the Voting Rights Act in San Francisco since 1978, first for Mayor Moscone, then when Mayor Dianne Feinstein appointed me to the Citizens Advisory Committee on Elections, and later as a member of the Elections Commission. In San Francisco, implementation of language assistance in three languages averaged less than three percent of all election costs, just 16 ten-thousandths of one percent of the city budget. A recent Arizona State University study found that Section 203 presents no additional costs to most jurisdictions and costs very little in those jurisdictions which do incur additional costs. Those jurisdictions that do incur additional costs often do so because they are not implementing the requirements of Section 203 as efficiently as do their counterparts in other jurisdictions. This study has been made part of the record supporting the current reauthorization of the Voting Rights Act.

Nor does Section 203, as some of its opponents have suggested, facilitate voter fraud. In the many thousands of pages of congressional record developed to support reauthorization, there is no evidence of non-citizens fraudulently registering to vote because of the existence of language assistance in the election process. Opponents of Section 203 would certainly have submitted evidence of widespread fraud caused by Section 203, but have not done so.

Section 203 removes barriers between the electoral process and U.S. citizens. National voter turnout is low enough without discouraging citizens with complex language. It is easier and more cost-effective than ever to provide language assistance in registration and at the polls. The VRA ensures that receiving the ballot in the language they best understand is not the privilege of solely English-speaking citizens. And, let me add, the necessity to read and write English to get ahead everyday is not diminished by getting a bilingual ballot on Election Day. The vast majority of language minority citizens in the U.S. have attained some degree of English proficiency, and most wish to improve their language skills further so that they can participate more fully in the U.S. economy and culture. As a matter of sound public policy and as a constitutional remedy to discrimination in voting, we should facilitate these citizens' participation in American political systems, and we should provide language assistance in voting to those who are unable to participate fully without it.

Conclusion

The Voting Rights Act is the single most effective piece of civil rights legislation in our nation's history. The substantial record developed to support the Act's renewal clearly shows that its critical legal protections are still very necessary today. Section 203 is an integral component of the Voting Rights Act's remedies against unconstitutional discrimination in elections. Section 203 is also a congruent and proportional remedy that addresses an identified and significant constitutional injury and therefore a proper exercise of Congress's authority under the Fourteenth and Fifteenth Amendments to remedy discrimination.
Although my testimony today has been focused upon Section 203, I will also note in closing that Latino citizens are equally concerned with the renewal and restoration of Section 5 of the Act. Almost as many Latinos as African Americans live in Section 5 jurisdictions, so the protections of Section 5 continue to be essential for these Latino citizens.

Thank you for your leadership in introducing the Voting Rights Act Reauthorization and Amendments Act of 2006. I urge you to enact the Senate bill as introduced.