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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 thank you for this opportunity to appear before you to address practice-based coverage and it impact on voting rights concerns of the Latino community.

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 the Fourteenth and Fifteenth Amendments, and 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.

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 voter suppression measures 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. Data released last month from the 2020 Census confirms this ongoing phenomenon. Latinos, while making up almost 19 percent of the total United States population, nonetheless accounted for over 51 percent of the nation's population growth between 2010 and 2020. Moreover, contradicting assumptions that Latino population is overwhelmingly comprised of recent immigrants, over 44 percent of the growth in the United States citizen, voting-age population (CVAP) came from the Latino community in the ten years prior to 2019. CVAP growth is a useful proxy for growth in the eligible voter population. 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, or to work to convince those voters to change their views, but instead 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' in-person voting experiences. 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 VRA 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 inextricably to voter suppression. 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 to defend elections-related changes, and benefits minority and other voters by yielding more timely resolution of voting rights disputes. In addition, litigation under Section 2 is too often unable to secure resolution before an election moves forward with the taint of voting rights violations attached; once an election, it is virtually

impossible for the court system to enforce a remedy that would undo the damage in that completed election.

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 in those elections. Such rational gaming of the system, catalyzed by inadequate resources to challenge all instances of voter suppression nationwide, undermines confidence in our democracy and presents a clear constitutional crisis.

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 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. 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. Such a result is in no one's interests, not residents', not current or future elected officials', not the judicial system's.

Moreover, the simple fact of ongoing United States demographic change, highlighted again 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 significant proportion.

An adequate response demands recourse to the powerful and effective alternative dispute resolution (ADR) mechanism in pre-clearance review under the VRA. Like the best ADR, pre-clearance saves time and money, efficiently addressing potential violations of voting rights without overburdening the courts and opposing parties with burdensome volumes of litigation under Section 2 of the VRA, applying Section 2's 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 for prevailing plaintiffs 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.

Our nation's history confirms, through multiple empirical examples, that growth of the population of a racial minority group, such as Latinos, frequently catalyzes attempts to limit and delay the growth in political and voting power that should accompany population growth in any democracy. Latinos and their demographic growth remain to this day a perceived "threat" to those who have exercised apical political power over long periods of time in many jurisdictions. This perception has a correlative in the "demographic fear" carried by many members of the general public – at bottom a concern that demographic change and the ascendance of non-white racial groups will change the fundamental familiarity of the United States and its national culture. More irresponsible political aspirants have exploited this demographic fear by engaging in dog-whistle and even more explicit political appeals to target members of specific racial minority groups in exclusionary public policies.

In the realm of voting, negative actions in response to the perceived threat of growing Latino political power have included attempts to render much more difficult voter participation by new, and increasingly Latino, eligible electoral participants. Examples lie in policies to impose new barriers to voter registration, only for new registrants, and to complicate the voting process by restricting alternative voting mechanisms – such as remote voting and ballot drop-off – and by permitting or facilitating the creation of intimidating features around the traditional in-person, election-day voting experience. Where these and other voting-related changes are motivated by a desire to limit the political power of a growing racial minority group, the changes stem from intentional racial discrimination; because intent constitutes a violation of the Constitution's Fourteenth and Fifteenth Amendments, such changes are therefore unconstitutional, even if they are ultimately challenged and struck down on statutory grounds through the VRA.

In general, race-based and race-motivated discrimination in voting coincides with an interest by those in power to delay or prevent political ascendance for growing minority groups. The size and continued growth of the Latino population in the United States as a whole, unprecedented in our national history, thus presents a particular challenge to those charged with

protecting our democracy and the hallmark right to voter participation regardless of race or ethnicity. This challenge led to the proposal of a practice-based coverage formula for pre-clearance under the VRA.

For the Latino community, in particular, two well-supported conclusions undergird the need for a practice-based pre-clearance coverage formula: 1) the relatively rapid growth of the Latino voting population in so many different jurisdictions across the country – and the expected backlash against that growth in voter suppression measures – would overtax the Department of Justice and the private non-profit organizations, such as MALDEF, that work to challenge race-based voter suppression in the federal-court system; and 2) accumulating the requisite adjudications of voting rights violations as to trigger history-based pre-clearance coverage for these jurisdictions – most of which do not have long histories of significant minority voting populations – would involve so many resources as to delay such coverage for many years while voter suppression continues in the jurisdictions largely unabated. Stated more succinctly, practice-based coverage is necessitated by the scale and scope of the potential problem in the future and by the costs involved in court-based adjudication of voting rights issues.

Others have well documented the historical pattern of targeting growing populations of racial minorities in order to stem their political ascendancy and threat to extant power holders. MALDEF has had its own experiences with this phenomenon over the course of virtually our entire organizational existence. One experience of note in recent years followed the Supreme Court decision in *Shelby County*, striking down the longstanding coverage formula in Section 4 of the VRA, which had included the entire state of Texas. Soon after that decision was released and jurisdictions across the country escaped the obligation to submit electoral changes to pre-review by the Department of Justice, the mayor of Pasadena, Texas announced that he would seek to restructure city government, a change he would never have pursued were it subject to pre-clearance review under the VRA.

The change 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; voter turnout differentials virtually ensured that the white population would elect its choices for the at-large seats in elections characterized by a racially-polarized vote. This would have ensured that Latino residents of Pasadena would continue to face policies made by a city council majority that Latinos did not support and that, in turn, showed little responsiveness to the concerns of the Latino community, which comprised a majority of the city's total population.

Absent pre-clearance review, MALDEF had to challenge the change in federal court under Section 2 of the VRA. After a hard-fought trial, 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. The finding of intent signaled that the change catalyzed by the mayor was also unconstitutional. The court's findings and conclusions resulted in the first contested "bail in" order after the *Shelby County* decision, requiring Pasadena to pre-clear future electoral changes. That favorable outcome followed lengthy and costly trial preparation and

trial, all of which would likely have been avoided had the challenged change been subject to pre-clearance review, as it would have been before the *Shelby County* decision.

More recently, MALDEF pursued litigation under both the Fourteenth Amendment prohibition of intentional discrimination and Section 2 of the VRA to challenge a targeted attempt to remove naturalized Latino voters from the rolls. In early 2019, the Texas state secretary of state directed counties to send letters questioning the right to vote of thousands of registered voters who were not yet citizens when they sought driver's licenses many years earlier at the Texas Department of Public Safety (DPS). Disregarding the fact that the vast majority of those targeted had naturalized since the Texas DPS collected their information, the secretary of state plowed forward, targeting voters who, as naturalized citizens, were overwhelmingly from Latino and other racial minority communities. After MALDEF and others moved swiftly to challenge the proposed purge of voters, the federal judge assigned to the case opined that the state's "threatening correspondence" epitomized "the power of government to strike fear and anxiety and to intimidate the least powerful among us." Order, Feb. 27, 2019 in *Texas LULAC v. Whitley*, Case No. SA-19-CA-074-FB (W.D. Tex.), at 1. Indeed, many of the thousands of legitimate Latino voters who were on the state list were greatly intimidated. Ultimately, the litigation caused Texas to abandon its efforts to purge the targeted voters, but, to a great extent, the damage to many voters was already done. And, because naturalized voters were targeted, most of the damage was borne by racial minorities, including Latinos.

Beyond these specific, litigated examples of how the specified practices in practice-based pre-clearance have been used recently to engage in unconstitutional racial discrimination in voting, others have extensively documented longer histories of misuse of these practices. For example, Professor Luis Fraga has explained the consistent misuse of some of these practices to suppress the vote of racial minority groups. Luis Fraga, "Vote Dilution and Voter Disenfranchisement in United States History" (2021) (copy submitted with this testimony). That is not to say that these practices are inevitably misused, but pre-clearance provides a mechanism to quickly and efficiently assess where misuse has occurred. The demographic threshold to limit the pre-clearance obligation to jurisdictions where the size of at least one minority group has reached a point of perceived threat, ensures greater efficiency by focusing on jurisdictions where unconstitutional vote suppression is more likely to occur. Professor Bernard Fraga has explained why the demographic threshold is rational and appropriate. Bernard Fraga, "A Population-Limited Trigger for Practice-Based Preclearance Under the Voting Rights Act" (2021) (copy submitted with this testimony).

The Pasadena reversion to at-large seats and the Texas attempted purge of naturalized voters were each ultimately ended through litigation by private parties under Section 2 of the VRA. The undeniable fact, well-supported by ubiquitous experience of those engaged in voting rights litigation, is that such court litigation is notoriously costly and time-consuming. The operative test for resolving these cases, as established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), involves a court's careful and searching evaluation of the "totality of the circumstances." As the name of the test implies, these cases involve tremendous work for litigants and court; they generally involve multiple expert witnesses on both sides, multiple

percipient witnesses – both elected government officials and community voters – from the jurisdiction involved, and pages and pages of documentary evidence. The range of different issues addressed by these witnesses and evidence generally yields findings of fact from the court that can readily exceed 100 pages. The scope of what is involved in Section 2 litigation has resulted in the fact that only a handful of litigating organizations nationwide engage regularly in this kind of litigation. The voting rights bar is small, and it is experiencing only incremental growth even as the scope of possible litigation has increased significantly in the aftermath of the *Shelby County* decision.

While the scope of Section 2 litigation in the vote-dilution context – in challenges to unfair redistricting or to at-large elections systems as in Pasadena, Texas – has been well-established for many years, the scope of Section 2 litigation in the vote-denial context, such as challenging voter purges, is still developing. That development trends toward even greater cost and time for such cases. The Supreme Court's recent decision in *Brnovich v. Democratic National Committee* (decided July 1, 2021) will have many effects on such litigation in the future, but the clearest impact is to render such litigation even more time- and resource-intensive.

The "totality of the circumstances" test is essentially a review and evaluation of all relevant circumstantial evidence that may support a conclusion that discrimination is afoot. The very nature of our society means that such evidence is often highly contested. There is simply no way to avoid the extensive cost and time involved in court litigation under Section 2 of the VRA. By providing a more efficient and less costly mechanism to resolve potential contention about the legality of voting-related changes, such as reversion to at-large seats or improperly targeted voter purges, practice-based provides an effective form of alternative dispute resolution (ADR) to prevent unconstitutional and unlawful voting changes that target racial minority communities.

Of course, the benefits from pre-clearance, as highly 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 accrue 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 research efforts to find effective treatment. 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 with the disease 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 racial minorities. 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 simply copy mechanisms used elsewhere to 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, applying the "totality of the circumstances" test, 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, discriminatory 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.

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 the 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 step to greater efficiency and lower cost in administering practice-based pre-clearance. 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 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. Moreover, under practice-based pre-clearance coverage, 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, which would result in permission to move forward if the standards of pre-clearance review are met.

Of course, 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 constitutionally-authorized 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" or could have a "race classification."

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 premised on perceptions of 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. Use of VAP is superior to use of CVAP in this specific context. 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 contest – 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.

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.