The Voting Right Act and Other Legal Requirements in Redistricting

Senate Redistricting Committee
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Introduction

Chairmen and members of the Senate Redistricting Committee, thank you for allowing MALDEF to present testimony regarding the Voting Rights Act and other legal redistricting requirements. My name is Anita Maddali, and I am a Staff Attorney with MALDEF, the Mexican American Legal Defense and Educational Fund. Also here today is Virginia Martinez, the Legislative Staff Attorney for MALDEF.

MALDEF is a national civil rights law firm that works to safeguard the rights of Latinos in the United States. MALDEF has worked to protect the voting rights of Latinos through advocacy and, when necessary, litigation in Illinois since the 1980's and in other parts of the country since the 1960's. Today, we have been asked to address both the Voting Rights Act and other legal requirements involved in redistricting.

Illinois Latino Population

During the last decennial census, in the year 2000, Illinois Latinos comprised 12.3% of the total state population.[1] Today, it is estimated that the Latino population comprises 15.3% of the population.[2] In fact, the growth in the Latino population is likely the reason that Illinois will most likely only lose one congressional seat instead of two after the 2010 census.[3] Because of the importance and significance of the upcoming

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[1] Betsy Guzman, U.S. Census Bureau, *The Hispanic Population: Census 2000 Brief* 4 (2001), *available* at www.census.gov/prod/2001pubs/c2kbr01-3.pdf.

[2] Latino Policy Forum, *Blueprint for Latino Investment: A Legislative Investment* 3 (2009), *available at* http://www.latinopolicyforum.org/programs/other-policy-issues/the-economy/blueprint-for-latino-investment.aspx

[3] America's Voice, *The New Constituents: How Latino Population Growth Will Shape Congressional Apportionment After the 2010 Census*, *available* at http://www.americasvoiceonline.org/pages/the_new_constituents (last visited Dec. 4, 2009).

census, MALDEF has a Regional Census Director[4] who is working to ensure that all Latinos are counted during the 2010 census.

The Voting Rights Act of 1965

The Voting Rights Act of 1965 was passed by Congress to combat discrimination and intimidation used to deny minorities the right to vote. Prior to the enactment of the Voting Rights Act, minorities were prevented from registering to vote through abuses of the voter registration process, violence, and economic coercion. The Voting Rights Act prohibits state laws and practices that deny minorities the right to vote. Section 5 of the Voting Rights Act only applies to "covered jurisdictions, which does not include Illinois, and its provisions were initially enacted with 25 year sunsets.[5] Section 2, however, applies to the entire country and its provisions are permanent.[6] This section prevents the

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[4] Ms. Elisa Alfonso is MALDEF's Midwest Regional Census Director and she can be contacted at (312) 427-0701 ext. 23.

[5] For example, Section 5 of the Act requires certain jurisdictions—mostly in the South—that seek to implement new laws affecting voting, to be enacted *only* if the laws are "precleared" by the United States Department of Justice or a federal court in Washington, D.C. In order to be precleared, district plans must demonstrate that they are not intended to dilute racial and language minority votes and do not leave racial and language minorities worse off than before redistricting. 42 U.S.C. § 1973c; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauhorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Sta. 577 (2006). Although set to sunset in 2007, Congress extended the provisions of Section 5 in 2006 for an additional 25 years with overwhelming support. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauhorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Sta. 577 (2006).

In addition, Section 203 of the Voting Rights Act protects the voting rights of individuals whose primary language is not English. Pursuant to Section 203, particular jurisdictions are required to provide voting materials in other languages if there are a sufficient number of limited English proficient voters of that language who reside in the jurisdiction. United States Department of Justice, Civil Rights Division, *About Language Minority Voting Rights*, *available* at http://www.justice.gov/crt/voting/sec_203/activ_203.php#coverage (last visited Dec. 7, 2009).

[6] Section 2 of the Voting Rights Act provides that:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a *denial or abridgement of the right of any citizen of the United States to vote on account of race or color*, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section. 42 U.S.C. § 1973. (emphasis added).

denial or abridgment of the right of any citizen to vote on account of race or color – such denial or abridgment is often referred to as vote dilution.[7] When enacted, this section prompted little criticism because it tracked the language of the Fifteenth Amendment.[8]

To establish a violation under Section 2 of the Voting Rights Act, the Supreme Court in *Thornburg v. Gingles*, held that plaintiffs must demonstrate:

1) that the minority community is sufficiently large and geographically compact to constitute a majority in a single-member district;
2) that the minority community is politically cohesive; and
3) that the white majority votes as a bloc to defeat the minority's preferred candidate.[9]

Once these three threshold conditions are met, the court will look at the "totality of circumstances,"[10] which may include a history of voting-related discrimination within the State and racially polarized voting.[11] In 1982, Congress amended Section 2 to allow alleged violations of the Voting Rights Act to proceed if the individual could establish that the redistricting had a discriminatory "effect" on the rights of minority voters.[12] In

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Section 2 of the Voting Rights Act provides individuals with a private right of action, which allows voters to mount legal challenges against the State or political subdivision during the redistricting process. *Id.*

[7] Examples of minority vote dilution include: the creation of districts that overly concentrate minority voting strength into a suboptimal number of districts commonly referred to as "packing," or when minority voting concentration is divided in a manner that prevents that group from electing a representative of their choice, which is referred to as either "fracturing," "fragmenting" or "cracking."

[8] *Bartlett v. Strickland*, 129 S.Ct. 1231, 1240-41 (2009). Specifically, the Fifteenth Amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

[9] 478 U.S. 30, 50-51 (1986).

[10] Courts often refer to the Senate Report on the 1982 amendments to the Voting Rights Act which identifies relevant factors for a Section 2 claim. S.Rep. No. 97-417 (1982), U.S.Code Cong. & Admin. News 1982, pp. 177, 206.

[11] *Id.* at 44-45. Another relevant factor is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area. *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

[12] 42 U.S.C. § 1973(a) (2000 ed.).

other words, "intent" to discriminate was no longer required and a consideration of effects could be taken into account.[13]

14th Amendment Equal Protection Concerns

In addition to Section 2, minority voting rights are also protected by the Equal Protection Clause of the Fourteenth Amendment. In the mid 1990's, non-minority voters used the Equal Protection Clause to challenge the use of race in the redistricting process. In *Shaw v. Reno*, Anglo plaintiffs challenged a newly drawn African-American majority district, alleging that it discriminated against them on the basis of race.[14] The Supreme Court held that the "bizarre" shape of the district was evidence that it was illegally drawn primarily on the basis of race. [15] Based on the decision in *Shaw*, absent vote dilution, race cannot be used as a *predominant* factor in redistricting. But the Court noted:

> "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." [16]

Later in *Miller v. Johnson,* the Supreme Court went beyond the "bizarreness" test for intentional discrimination. Now, plaintiffs challenging minority districts must show, either through circumstantial evidence (like the shape of the district or the type of Census data used) or direct evidence, that race was the "predominant factor" in the plan to which "traditional redistricting principles" like contiguity, compactness, respect for political

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[13] *Id.*
[14] 509 U.S. 630 (1993).
[15] *Id.* at 653.
[16] *Id.* at 646.

subdivision or communities were subordinated.[17] If race is only a factor, but does not predominate, then the Constitutional challenge fails at the outset. [18]

However, even if racial considerations predominate in the drawing of the district, this does not mean that the district is unlawful. A legislative body may still justify its plan by proving that it is "narrowly tailored to achieve a compelling state interest."[19] The compelling state interest may be a state's desire to comply with the Voting Rights Act and/or to remedy a history of past discrimination.[20]

Bartlett v. Strickland

In March of this year (2009), the United States Supreme Court issued its decision in *Bartlett v. Strickland*, clarifying the first *Gingles* prong – specifically, what constitutes a "sufficiently large" majority- minority district.[21] In *Bartlett*, the Supreme Court held in a 5-4 decision that a racial minority group must constitute a numerical majority – meaning at least 51% of the voting age population – in a proposed district to invoke the protections of Section 2. The Court also held that Section 2 does not mandate creating or

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[17] 515 U.S. 900, 916-17 (1995).
[18] *Id.*
[19] *Id.* at 921.
[20] In 1991, MALDEF's Midwest Regional Office successfully engaged in litigation which resulted in the creation of the first Latino majority-minority congressional district, namely the Fourth Congressional District. *Hastert v. Ill State Bd. of Election,* 777 F.Supp 634 (N.D. Ill. 1991). The Fourth district, commonly referred to as the "earmuffs" district because of its unique configuration, later faced an Equal Protection challenge by a non-minority voter. Despite the legal challenge, MALDEF led the successful defense of the Fourth Congressional District to the United States Supreme Court. *King v. Ill. Bd. of Elections*, 519 U.S. 978 (1996), vacated and remanded for reconsideration in light of *Shaw v. Hunt and Bush v. Vera*, 517 U.S. 952 (1996). On remand, the three-judge panel held that compliance with Section 2 of the Voting Rights Act was a compelling justification for using race/ethnicity as a primary factor in redistricting. 979 F.Supp. 619 (N.D.Ill. 1997), *summarily affirmed*, 522 U.S. 1087 (1998). The Northern District noted that the Fourth District "remedies the anticipated violation and achieves § 2 compliance, and that its consideration of race (reflected by its noncompactness and irregularity) is no more than reasonably necessary to fulfill its remedial purpose." *King v. Ill. Bd. of Elections*, 979 F.Supp. at 627.
[21] 129 S.Ct. 1231 (2009)

preserving crossover districts.[22] But the Supreme Court noted that it "*does not* consider the permissibility of such district as a matter of *legislative choice or discretion.*"[23] While MALDEF was disappointed with the *Bartlett* decision, we caution against dismantling crossover Latino districts.

Other recent judicial decisions[24] indicate that during redistricting, states and political subdivisions must devote attention to the manner in which they redraw district lines, and they must work to prevent actions that dilute the minority voting right, whether that result is intentional or simply has the effect of diluting a person's right to participate equally in the process.[25]

Illinois Latino Communities of Interest

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[22] *Id.* at 1246-48.

[23] *Id.* at 1248. (emphasis added). In other words, "[a]ssuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal." *Id.* (emphasis added). And, just as important, the Court noted that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."[23] *Id.* at 1249. The Supreme Court in *Bartlett* did not specify whether the numerical majority consists of the voting age population as a whole or citizens of voting age.

[24] In a 2006 case which MALDEF argued before the United States Supreme Court, the Court cautioned against dismantling opportunity districts. In *League of United Latin American Citizens v. Perry*, the Supreme Court found that a district in Texas, which split the Latino population into separate districts, as Latino support for the incumbent was declining in the original district, violated the Voting Rights Act. 548 U.S. 399 (2006). The original district had 57% of the Latino citizenship voting age population, but the new district reduced that number to 46%. *Id.* at 427. The Supreme Court held that Latinos could have had an opportunity district but because of the altering of the lines, the new district took away that opportunity. *Id.* at 438-41. The Court found that the state acted against Latinos who were becoming mobilized and politically active. *Id.* at 438-41.

[25] Section 2 of the Voting Rights Act of 1965, as amended in 1982, 4
2 U.S.C. § 1973 (1994); *see* also *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (holding that plaintiffs in a Section 2 action are not required to present evidence of intentional discrimination, and, in challenging an at-large election system, can establish a violation by showing that the majority is "*usually* . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group.") (emphasis in original).

MALDEF urges committee members, legislative bodies, and/or political subdivisions charged with redrawing future city, county, state and congressional district lines to also consider communities that share social, economic and political interests within a neighborhood or region. Such areas can comprise a "community of interest" that should be respected in the redistricting process. The Supreme Court has held that under Section 2, districts must be compact and take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.[26] In *LULAC v. Perry*, the Supreme Court found that "there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." [27]

In Illinois, Latino communities of interest do exist and support for "communities of interest" in Chicago exists in judicial decisions with which MALDEF has been involved including both the *Bonilla*[28] and *King* decisions. In those decisions, the federal court held that the Latino community in Chicago was politically cohesive and had many shared interests, resulting in a common political agenda. These shared interests include: similar income levels, similar educational backgrounds, similar housing patters, common language and other common issues of concern, such as meaningful access to educational opportunities. Latino communities of interest also exist in areas outside of Chicago and include, for example, communities in outer-Cook County regions, such as Waukegan, Aurora, Elgin, Carpentersville and Joliet. MALDEF urges redistricting decision-makers

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[26] *LULAC v. Perry*, 548 U.S. 399, 433 (2006), *citing Abrams v. Johnson*, 521 U.S. 74, 92 (1997).
[27] *Id.* at 433.

[28] *Bonilla v. City Council of the City of Chicago*, 809 F.Supp. 590 (N.D. Ill. 1992).

to recognize that the Latino community is a community of interest whose needs and concerns should be respected and addressed during the next redistricting process.[29]

Conclusion

In the context of the Voting Rights Act, when a sufficient number of Latinos live near each other, vote cohesively and are unable to elect their candidate of choice because of racial bloc voting, the failure to create a majority-Latino voting district may violate the Voting Rights Act and/or the Fourteenth Amendment.[30]

Unfortunately, MALDEF believes that vote dilution still exists in Illinois, and despite the passage of time, the Voting Rights Act is as relevant today as it was in the past. In fact, in the Supreme Court's March 2009 decision in *Bartlett,* Justice Anthony Kennedy, writing for the majority, stated that "racial discrimination and racially polarized voting are not ancient history."[31]

MALDEF has invoked the provisions of Section 2, as well as other legal requirements, such as the Equal Protection Clause, to assert and protect the voting rights of Latinos in city, county, state and congressional redistricting matters. Illinois' Latino representation has grown in part because of the overall increase in the Latino population throughout the State, but also because of MALDEF's efforts to protect minority voters

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[29] MALDEF understands that there are proposals to amend the Illinois Constitution or enact legislation regarding the manner in which district lines are to be drawn in anticipation of the upcoming census. At this time, MALDEF does not take a position on any proposal, but urges the eventual decision-making body to protect the rights of minority voters and to comply with the Voting Rights Act and other federal laws.

[30] In 1997, two federal district courts in Chicago, in the cases of *Barnett* and *Bonilla v. City of Chicago*, 969 F.Supp. 1359 (N.D. Ill. 1997) and *King v. Ill. State Bd. of Elections*, 979 F.Supp. 619 (N.D. Ill. 1997) found that Latinos in Chicago suffered from vote dilution. That is, the court found that the Latino community was politically cohesive and that Anglo bloc voting existed, which resulted in the Latino community's inability to elect a candidate of its choice.

[31] *Bartlett v. Strickland*, 129 S.Ct. at 1249.

under Section 2 of the Voting Rights Act and other laws. MALDEF fully expects to continue to use these laws in the future to protect the rights of Latinos in the Midwest.

In conclusion, redistricting that dilutes and/or fractures Latino voters across districts lines or "packs" Latino voters into a few districts is still actionable. We strongly encourage all decision-making bodies to make certain that Latino-majority districts remain intact in light of the tremendous increase in the Illinois Latino population and in order to comply with the Voting Rights Act and other federal laws.

Thank you for your time.