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"Restoring the Voting Rights after *Brnovich* and *Shelby County*"

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Mr. Chairman and members of the Judiciary Committee, Subcommittee on the Constitution, thank you for the opportunity to testify regarding the enforcement of the Voting Rights Act in Texas and the impact of *Brnovich* and *Shelby County* on that enforcement. I come to you as a long time litigator, who has represented the minority community in challenges to local, as well as state-enacted practices of voting discrimination. My name is Jose Garza, and I am the voting rights counsel for the Mexican American Legislative Caucus. The Mexican American Legislative Caucus (MALC) was founded in 1973 in the Texas House of Representatives by a small group of lawmakers of Mexican American heritage for the purpose of strengthening their numbers and better representing a united Latino constituency across the State. MALC is the oldest and largest Latino legislative caucus in the United States.

As of 2021, MALC has a membership of 41 House members from all parts of the State and is the largest nonpartisan caucus in the Texas Legislature. MALC Members sit on all Committees in the Texas House of Representatives and work together on matters of consequence to our state's large and growing Latino constituency. For almost 30 years MALC has been active in protecting Latino voting rights, not only in the legislative process, but also in the courts.

Meant to fulfill the promise of the 15th Amendment, to end discrimination in voting, the Voting Rights Act was enacted on August 6, 1965. The VRA was viewed as a crowning moment in the civil rights movement. The VRA gave us tools with which to enforce the protections promised by the Act. Section 2 of the act provides nationwide coverage that targets practices, policies and electoral devices that disadvantage minority voters and deny equal access. Section 5, or preclearance requires states with a known history of discrimination in voting, to obtain "preclearance" of voting changes before implementing those changes.

However, some court rulings have slowed the progress of ridding the country of discrimination in voting by limiting the VRA's reach and thus by limiting its impact, and have created obstacles to full minority voter access. In some instances, these efforts to limit the VRA have been met with restorative Congressional action. For instance, after the Supreme Court in *Mobile* determined that actions under Section 2 of the Act required a showing of intent to establish violations of the Act, Congress acted to restore its effectiveness. Thus, in 1982 Section 2 of the Voting Rights Act was amended to prohibit all States and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which *result* in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of racial and language minorities.

Recent Supreme Court rulings once again require Congressional action to restore the VRA to its intended purpose.

Section 5

First, with its decision in *Shelby County v. Holder*, which concluded that Congress was using an outdated formula to decide which states and jurisdictions were required to go through the preclearance process, while we still have preclearance on the books — no state or jurisdiction currently has to abide by it. Writing for the court in 2013, Chief Justice John Roberts suggested that because times had changed for the better, preclearance may not be needed. However, he pointed to Section 2 as a safeguard: "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in Section 2."

Thus newly enacted discriminatory election practices remain enforceable until challenged and found to violate either Section 2 or the 14th amendment. This of course requires an expensive and time consuming legal process that can have devastating impacts in the meantime.

In one recent case, the real life impact of that difference came to have a devastating impact. In *Veasey v. Abbott*, MALC and other plaintiffs challenged Texas' efforts to infringe on the right of minority voters, especially poor and elderly Texas voters, to participate in the political process by the imposition of an

extremely restrictive voter ID requirement. Poor, elderly Latino and African American clients sued Texas, because the restrictions placed on voting through the Texas voter ID law would disenfranchise them. I represented both MALC and legal aid clients in that action.

In 2011, Texas (the "State") passed Senate Bill 14 ("SB 14"), which required individuals to present one of a limited set of acceptable forms of photo identification to vote. *See* Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619. SB 14 was initially blocked by the Voting Rights Act's preclearance provisions. *See Texas v. Holder,* 888 F.Supp.2d 113 (D.D.C. 2012). However, on June 25, 2013, immediately after the Supreme Court decided *Shelby County, Alabama v. Holder*, Texas began enforcing SB 14, ignoring the findings of discrimination in the Section 5 proceedings. Numerous Plaintiffs, including MALC and my legal aid clients, filed legal challenges to the voter ID law pursuant to Section 2 of the Voting Rights Act as well as the United States Constitution. We alleged that SB 14 was enacted by the State with a racially discriminatory purpose, and that it had a racially discriminatory impact on Latino and African American voters of Texas in that it placed an undue burden on their fundamental right to vote. [1]

[1] The resources necessary to litigate this case were extreme. Without resources devoted to this case by MALC, TRLA, NAACP, BRENNAN CENTER, LAWYERS' COMMITTEE etc. this case could not have been properly prosecuted.

After a nine-day bench trial featuring both live and deposition testimony from dozens of expert and lay witnesses, the Federal District Court issued a comprehensive opinion holding:

> SB 14 creates an unconstitutional burden on the right to vote [under the First and Fourteenth Amendments], has an impermissible discriminatory effect against Hispanics and African-Americans [under Section 2], and was imposed with an unconstitutional discriminatory purpose [in violation of the Fourteenth and Fifteenth Amendments and Section 2]. [SB 14 constitutes an unconstitutional poll tax [in violation of the Fourteenth and Twenty-Fourth Amendments].

Veasey v. Perry, 71 F.Supp.3d 627, 633 (S.D. Tex. 2014) (footnote omitted).

Pursuant to that opinion, the Court entered "a permanent and final injunction against enforcement of the voter identification provisions" of SB 14 and directed the State to "return to enforcing the voter identification requirements for in-person voting in effect immediately prior to the enactment and implementation of SB 14." *Id.* at 707.

However, Texas appealed that decision to the Fifth Circuit and secured a stay of the District Court order. The Fifth Circuit panel affirmed the Court's finding that SB 14 had discriminatory results in violation of Section 2 and remanded for consideration of the proper remedy. *Veasey v. Perry*, 796 F.3d 490, 493, 498 (5th Cir. 2014). The State filed a petition for rehearing en banc, which was granted. *Veasey v. Abbott*, 815 F.3d 958 (5th Cir. 2016) (granting rehearing *en banc*). Upon

rehearing, the full Fifth Circuit again affirmed the District Court's finding that SB 14 violated Section 2 because of its discriminatory results and remanded to determine the appropriate remedy. *Veasey v. Abbott*, 830 F.3d 216, 272 (5th Cir. 2016) (en banc decision).

On August 10, 2016, following the instructions of the full Fifth Circuit, the District Court ordered interim relief for the November 8, 2016 election (as well as prior and subsequent state and local elections) directing, *inter alia*, the State and its election officials to accept several forms of identification in addition to those mandated by SB 14 upon the completion and signing of a reasonable impediment declaration by the voter. This relief remained in place until SB 14 was amended to largely incorporate this Court's interim relief into State law. The Fifth Circuit held that this amendment did not moot the case but, by "essentially mirror[ing the] agreed interim order," constituted an acceptable remedy under the Fifth Circuit's 2016 ruling that SB 14 violated Section 2. *Veasey v. Abbott*, 888 F.3d 792, 804 (5th Cir. 2018).

During the trial, MALC presented evidence of the hostile legislative environment surrounding the enactment. Representatives Ana Hernandez, Rafael Anchia and Trey Martinez Fischer gave dramatic testimony of how the legislation was forced to a vote, rules changed to ensure passage, and the acrimonious atmosphere during debate that infected the process.

Plaintiffs also presented the testimony of the Plaintiffs and of an expert witness, exhibits and arguments that demonstrated the real and personal impact caused by SB 14. The Court cited to that testimony in her opinion. *See Veasey v. Abbott*, 71 F. Supp. 3d 627, 667-678 (S.D. Tex. 2014)(e.g. describing the financial burden imposed by the requirements: "Some Plaintiffs testified that they were either unable to pay or that they would suffer a substantial burden in paying the cost associated with getting a qualified SB 14 ID or the necessary underlying documents." One of my clients, Mr. Mendez testified about his family's "very sad" financial state, explaining that "[e]ach month by the last week there's no food in the house and nothing with which to buy any, especially milk for the children. Then my wife has to go to a place to ask for food at a place where they give food to poor people." Mr. Mendez was embarrassed to admit at trial that having to pay for a new birth certificate was a burden on him and his family. Another of my elderly clients, Mr. Lara described his financial situation by stating that "we got each our little ... small amount of cash ... and we try to ... stretch it out as possible by the end of the month, and sometimes we'll make it and sometimes we won't." His wife, described her financial state as both difficult and very stressful. *Veasey*, 71 F. Supp. 3d at 671-729 (citations omitted). Plaintiffs' expert testified that the financial burdens of compliance with SB 4 on these voters placed an undue burden, unlike others who had the ID. *See e.g. Veasey*, 71 F. Supp. 3d at 668, n.272, and 705, n. 570.

These elderly, poor U. S. citizen voters in our interviews talked about the importance of voting in their lives. They told us about how they had never missed an election. They described the joy of walking, on Election Day, to the polling location in their neighborhood, where everyone knew each other and everyone knew them and the pride they felt when they voted. Yet, without the limited ID allowed by the State, nor the means to secure the IDs allowed, and without the remedy eventually imposed by the trial court, they would miss an election and just simply didn't understand why. In fact, one of our clients, Margarito Lara, missed the last election shortly after trial in the case, because of the stay of the Court's order secured by the State. It was the first election he had ever missed in his adult life. Tragically, Mr. Lara passed away before the remedy in the case was imposed.

Finally, the evidence in the case and the findings of the different courts that reviewed the SB 14, also determined that, while Texas has the right to impose rules for voting, whatever voter misconduct the Voter ID law was supposed to cure, no such problem was ever identified or proven.

Section 2

More recently, in *Brnovich v. DNC*, the Supreme Court weakened Section 2 once again. This decision didn't kill the VRA, but it has substantially weakened the

ability of minority plaintiffs to stop the tide of voter-suppression legislation rising from Republican-led statehouses across the country.

The Arizona laws at issue in *Brnovich* threw out votes cast in the wrong precinct and only allow a voter's relative or caregiver to return a mail-in ballot. In January 2020, the 9th Circuit Court of Appeals struck it down because it discriminated against Black, Native American and Latino voters. In the Supreme Court's decision and writing for the majority, Justice Alito acknowledged the discriminatory impact of the law but decided that courts should consider the size of that disparate impact. Just because there is some disparate impact is not enough. Justice Alito said: "The size of any disparity matters," and any comparisons should be "meaningful": "What are at bottom very small differences should not be artificially magnified." And even though the record in the case did not show any significant voter fraud dealing with these issues in Arizona, Justice Alito gave deference to the State's stated purpose for these restrictions. Perhaps if Justice Alito had known my former client, Mr. Lara's story and what voting meant to him, unproven claims of voter fraud would not have justified the Arizona restrictions on voting Justice Alito deemed too small to protect.

Currently, in Texas, the Legislature is considering election law restrictions that limit the opportunity to vote and that will impact minority voters in particular.

Many of the measures, such as restricting mail-in voting, limiting voter-registration opportunities and narrowing the time frame for early voting, don't address voting fraud. The only reason to limit voting hours from 7 a.m. to 7 p.m., as SB 7 in the Texas Senate proposes, is to make it harder for people to vote. No evidence has been presented in the legislative process describing any voter fraud related to these restrictions. Moreover, the record presented during the hearings on these measures makes it clear that where measures similar to those being restricted have been implemented, voter turnout and participation, especially among voters of color, has increased.

Yet, *Brnovich* has made it more difficult than before to use Section 2 as a shield against the discrimination resulting from adopting these measures.

CONCLUSION

Texas has a long history of imposing restrictions on the right to vote that target minority voters. This practice was evident with the adoption of the voter ID law and in the redistricting plans adopted in 2011 and 2013 and has continued through today. The loss of Section 5 protections and the weakening of Section 2 standards has been severely felt by minority Texas voters already. In addition, while some of the litigation on these issues has been successful to this point, it took years to litigate. In fact the redistricting litigation, commenced in 2011 with two trips to the Supreme

Court continues today. The prosecution of these case required millions of dollars and thousands of hours of legal and expert time to properly develop and present and then defend on appeal.[2] And it just goes on and on.

Reform of the Voting Rights Act is vital. We need some form of Section 5 again. We need to clarify the standards by which a Section 2 plaintiff can prosecute a case of voting discrimination and we need the fee shifting provisions of the Act to be meaningful again.

Thank you.

[2] In addition to the need to reform the substance of the Voting Rights Act, the fee shifting provisions need to be addressed as well. This especially true with the jurisprudence on prevailing party that has developed out of the 5th Circuit. Without a vibrant and realistic standard, VRA enforcement will be greatly hampered. Perhaps a topic for another time.