

# VOTING RIGHTS IN CALIFORNIA: 1982–2006

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## INTRODUCTION TO THE VOTING RIGHTS ACT

The purpose of this report is to assess whether discrimination against minority voters and minority voting strength exists in California.<sup>1</sup> In assessing whether such discrimination exists, this report will chronicle the efforts of minority communities in California to secure access to the political process utilizing the Voting Rights Act of 1965<sup>2</sup> (VRA) from 1982, the year the VRA was reauthorized and amended, to the present. This chronicle indicates that two important provisions of the VRA have played a pivotal role in assisting racial and ethnic minority communities, as well as language minority groups,<sup>3</sup> to secure greater access to the political process

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<sup>1</sup> Excerpts of this report were presented before the Western Regional Hearing of the National Commission on the Voting Rights Act held on September 27, 2005 in Los Angeles, California. The findings and conclusions of this report are derived from original research conducted in preparation for this report commissioned by the Leadership Conference on Civil Rights Education Fund. These findings and conclusions have subsequently been incorporated in an article published by the Law Review for the Seattle University School of Law. See Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE U. L. REV. 313 (2006). Part of this report will also form the basis of a larger article to be submitted to the Stanford Journal of Civil Rights and Liberties. Part III of this report involving Section 203 of the Voting Rights Act was prepared by Eugene Lee, Project Director, Asian Pacific American Legal Center of Southern California and Terry M. Ao, Senior Staff Attorney, Asian American Justice Center.

<sup>2</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

<sup>3</sup> The VRA provides protection to certain “language minority groups.” This term was included within the VRA to expand the application of the anti-discrimination provisions of the Act to racial and ethnic groups other than African-Americans. See 42 U.S.C. § 1973b(f)(2), (4). The term refers to individuals who are American Indian, Asian-American, Alaska Natives and of Spanish heritage. See 42 U.S.C. § 1973aa-1a(c). The same term also is incorporated in language assistance provisions that require certain political jurisdictions to provide an electoral process in a language from an applicable language minority group when persons belonging to the language minority group cannot effectively par-

and, in some instances, to increase minority electoral representation: Section 5<sup>4</sup> and Section 203.<sup>5</sup> However, the continued effectiveness of these provisions is in jeopardy since both of these provisions are due to expire in 2007.<sup>6</sup> In addition, the results of this study support the conclusion that voting discrimination is still a persistent hallmark of California electoral politics that has prevented minority communities from completely achieving an equal opportunity to participate in the political process and elect candidates of their choice<sup>7</sup> despite electoral gains by minority communities.<sup>8</sup>

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ticipate in the political process because of their limited-English proficiency. See 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a(c), (e).

<sup>4</sup> 42 U.S.C. § 1973c. A political jurisdiction subject to Section 5 must submit a change affecting voting to the United States Attorney General for administrative approval or preclearance. See *id.* If the Attorney General does not approve the voting change, the Attorney General issues a letter of objection. See 28 C.F.R. §§ 51.44(a), 51.52(c) (2007). The political jurisdiction can also file an action in the U.S. District Court for the District of Columbia seeking a declaratory judgment approving the proposed voting change even after the Attorney General has issued a letter of objection. See 42 U.S.C. § 1973c(a). Under Section 5, the burden is on the covered jurisdiction to demonstrate the absence of a discriminatory effect on minority voting strength and the absence of a discriminatory purpose in the adoption of the proposed voting change. See *id.*; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). Section 5 has been effective. During the time period from June 19, 1968 to June 25, 2004, the Attorney General issued 1027 letters of objection. See Department of Justice, Section 5 Objection Determinations, [http://www.usdoj.gov/crt/voting/sec\\_5/obj\\_activ.htm](http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm) (last visited Nov. 11, 2007). These administrative determinations prevented the implementation of voting changes that had the potential to discriminate against minority voting strength. Avila, *supra* note 1, at 330. Also, as noted previously, apart from the preclearance requirements, certain jurisdictions subject to Section 5 are also required to make elections more accessible to persons who are of limited-English proficiency and who belong to an applicable language minority group. See 42 U.S.C. §§ 1973b(f)(4), 1973l(c)(3). This accessibility is accomplished by providing translated written materials related to the electoral process in an applicable minority language, by providing bilingual oral assistance and by engaging in community outreach efforts to encourage language minority eligible voters of limited-English proficiency to register to vote and participate in the political process. See 42 U.S.C. § 1973b(f)(4); 28 C.F.R. §§ 55.5, 55.14–55.20.

<sup>5</sup> 42 U.S.C. § 1973aa-1a. As with the Section 5-covered jurisdictions subject to the language assistance provisions, Section 203-covered jurisdictions are also required to make elections more accessible to persons who are of limited-English proficiency and who belong to an applicable language minority group. See *id.* § 1973aa-1a(b). This accessibility is accomplished by meeting the same requirements for translated written materials, bilingual oral assistance and community outreach as specified for Section 5 covered jurisdiction. See *id.* § 1973aa-1a(b)(3)(A). The standards for meeting these statutory requirements are identical for Section 5 and Section 203 covered jurisdictions. See 28 C.F.R. §§ 55.5, 55.14–55.20.

<sup>6</sup> After this report was written and submitted, Congress did, in fact, renew expiring provisions of the VRA. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577 (2006).

<sup>7</sup> A denial of minority access to the political process is particularly noteworthy since according to the 2000 Census, California is quickly becoming a majority minority state. Moreover, updated figures for the year 2004 show a trend of increased minority population growth. For 2000 and 2004, the racial and ethnic composition of the State was as follows: Latina/o: 32.4% (2000)/34.7% (2004); Black or African-American alone: 6.7% (2000)/6.8% (2004); Asian alone or Native Hawaiian and other Pacific Islander alone: 11.2% (2000)/12.5% (2004); American Indian and Alaska Native alone: 1.0% (2000)/1.2% (2004); White alone, not Hispanic or Latina/o: 46.7% (2000)/44.5% (2004). See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P6, available at <http://factfinder.census.gov> (last

visited Nov. 12, 2007); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 27 tbl.23 (2006), <http://www.census.gov/prod/2005pubs/06statab/pop.pdf> [hereinafter STATISTICAL ABSTRACT]. In 2006, California had a total population of 36,457,549 persons of which 13,074,155 were of Latino origin. U.S. Census Bureau, Population Estimates (2006), <http://factfinder.census.gov> (select "California"; then select "Total Population"); U.S. Census Bureau, Hispanic or Latino by Specific Origin (2006), <http://factfinder.census.gov> (select "California"; then select "Hispanic or Latino by Origin"). The Asian one race category for California in 2006 totaled 3,697,513, while the Native Hawaiian and Other Pacific Islander category totaled 116,961 and the African-American one race category was 2,263,882. U.S. Census Bureau, California Fact Sheet for Race, Ethnic, or Ancestry Group, <http://factfinder.census.gov> (select "California"; then select "Fact Sheet for a Race, Ethnic, or Ancestry Group"; then select "Asian alone," "NHPI alone" and "Black alone"). Finally, the minority concentrations at the kindergarten level for 2004–2005 provide a compelling portrait of racial and ethnic concentrations in California in the not-too-distant future: Latina/o: 51.5%; African-American alone: 6.8%; Asian alone or Native Hawaiian and other Pacific Islander alone: 10.2%; American Indian and Alaska Native alone: 0.7%; White alone, not Hispanic or Latina/o: 27.8%. California Department of Education, California Public Schools: Statewide Report (2004–2005), <http://dq.cde.ca.gov> (select year; select "State"; then select "Enrollment by Gender, Grade and Ethnic Designation").

Based upon this Census data and school enrollment data, Latinas/os and Asian Pacific Islander Americans (APIAs) will likely continue to be the fastest growing minority groups within California. Such an observation is further supported by comparing the growth rates of the Latina/o and APIA communities and the State as a whole during the decade of the 1990s: total State growth: 13.8%; Latina/o: 42.6%; White (Non-Latina/o): negative 7.1%; African-American (Non-Latina/o): 4.3%; Asian or Native Hawaiian and other Pacific Islanders (both Non-Latina/o): 38.5%; American Indian and Alaska Native (Non-Latina/o): negative 51.7%. See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P4, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007); U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P008, P010, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007). Growth rates are approximations, as Census data for the population from the 1990 and 2000 Census cannot be directly compared due to several changes made in the 2000 Census, including allowing respondents the option to choose more than one race when answering the race question.

<sup>8</sup> The substantial demographic growth has not translated into significant electoral representation. For example, in California, the House congressional delegation consists of fifty-three members of which at least seven, or about 13% are Latina/o. See U.S. House of Representatives, Member Search By State, <http://www.house.gov/house/MemStateSearch.shtml#ca> (last visited Nov. 13, 2007). Efforts to create another congressional district in Los Angeles where Latinas/os would have another opportunity to elect a candidate of their choice were unsuccessful. See *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003). Latinas/os in 2000 constituted about a third of the state's population, yet in 2004, there were only 535 Latina/o elected officials, NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS, 2004 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS 22 (2004), or 11% out of 4850 elected local school board members, E-mail from Susan Swigart, Director of Member Services, California School Board Association, to Joaquin G. Avila (May 17, 2005) (on file with authors), and there were 357 Latinas/os or 14.2% out of 2507 elected officials serving on city councils. California Secretary of State, 2005 California Roster, [http://www.sos.ca.gov/executive/ca\\_roster/2005/2005-ca-roster.pdf](http://www.sos.ca.gov/executive/ca_roster/2005/2005-ca-roster.pdf). Even lower levels of representation are evident for Asian and Pacific Americans for the year 2003–2004 at the levels of mayor (only eighteen in California) and members of city councils (only thirty-eight in California). UCLA ASIAN AM. STUDIES CTR., NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC 52 (11th ed. 2003–2004). For African-Americans, the representation levels are also at low levels. See STATISTICAL ABSTRACT, *supra* note 7, at 262 tbl.403. When focusing on elected county supervisors there are only a small number of Latina/o supervisors (fourteen) in counties containing more than a 20% Latina/o population. See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P4, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007). The Latina/o political representation percent-

In California, this voting discrimination often occurs within the context of racially polarized voting.<sup>9</sup> When a Section 5-covered jurisdiction<sup>10</sup> seeks to implement a voting change and elections are characterized by racially polarized voting, the potential for a discriminatory impact on minority voting strength is enhanced. Accordingly, the U.S. Attorney General has objected to the implementation of changes in voting practices and procedures ranging from redistricting plans,<sup>11</sup> to annexations<sup>12</sup> and to a conversion from election districts to an at-large method of election.<sup>13</sup> Without

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age was obtained by visiting the county's website for each of the counties. With respect to African-Americans, according to the 2000 Census, there are no counties in California containing a 20% or greater African-American population. As to Asian-Americans, three counties contained 20% or more Asian-American population, two of which have Asian-American members on the county board of supervisors: San Francisco (30.7% Asian, 1 Asian board member); Santa Clara (25.4% Asian, 0 Asian board members); Alameda (20.3% Asian, 1 Asian board member). See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P8, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007). The Asian-American political representation percentage was obtained by visiting the county's website for each of the counties.

<sup>9</sup> As noted by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986), racially polarized voting occurs "where there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes,' . . . or to put it differently, where 'black voters and white voters vote differently.'"

<sup>10</sup> In California, there are four counties subject to the Section 5 preclearance requirements: Monterey, Kings, Yuba and Merced. See 28 C.F.R. 51 app. (2007).

<sup>11</sup> Redistricting is the placement of boundaries that define election districts, such as congressional districts. Such a boundary within the context of racially polarized voting can serve to fragment a politically cohesive minority community or can serve to over-concentrate minority strength in an attempt to minimize the impact of minority voting strength. In a district where the minority community is over-concentrated, the minority community is limited to the election of one candidate of choice when, in fact, there may be an opportunity to elect two candidates of choice in two separate election districts. See *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993); see also U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 39 (1981) [hereinafter UNFULFILLED GOALS]. On February 26, 1993, the Attorney General objected to a proposed redistricting of supervisor districts in Monterey County because the plan fragmented a politically cohesive Latina/o voting community. See Letter from James P. Turner, Acting Assistant Attorney General, Department of Justice, to Leroy W. Blankenship, Senior Deputy Counsel, Monterey County (Feb. 26, 1993) (on file with authors); see also *infra* notes 52-71 and accompanying text.

<sup>12</sup> Annexations, within the context of an at-large method of election where elections are characterized by racially polarized voting, have the potential to dilute minority voting strength by enlarging the number of non-minority voters within a city or other political jurisdiction. See *Perkins v. Matthews*, 400 U.S. 379, 388-89 (1971). The Attorney General objected to a series of annexations in the city of Hanford, Kings County, because of the dilutive effect on minority voting strength. Letter from James P. Turner, Acting Assistant Attorney General, Department of Justice, to Michael J. Noland (Apr. 5, 1993) (on file with authors); see *infra* notes 113-116 and accompanying text.

<sup>13</sup> The Attorney General objected to a change from election districts to an at-large method of election in the Chualar Union Elementary School District in Monterey County because the proposed change would diminish minority voting strength. See Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Department of Justice to William D. Barr, Superintendent of Schools, Monterey County Office of Education (Apr. 1, 2002) available at [http://www.usdoj.gov/crt/voting/sec\\_5/tr/1\\_040102.htm](http://www.usdoj.gov/crt/voting/sec_5/tr/1_040102.htm); see also *infra* notes 122-127 and accompanying text. In a fairly drawn election district plan, where

Section 5 coverage, these voting changes in California would have been implemented, resulting in a discriminatory effect on minority voting strength.

Voting discrimination has also occurred when governmental jurisdictions subject to the minority language provisions of the VRA fail to comply with the corresponding language assistance provisions.<sup>14</sup> This discrimination was often manifested in actions by election officials at polling sites that have adversely impacted the ability of limited-English proficient voters to cast an effective and meaningful vote. The extent of this non-compliance is well documented and evidenced by the filing of numerous actions by the Attorney General against the cities of Azusa, Paramount and Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda and San Francisco.<sup>15</sup>

These special provisions of the VRA continue to be effective tools in combating voting discrimination in California. The experiences in this state have demonstrated the continued need for the Section 5 preclearance and the Section 203 language assistance provisions. Without these special provisions, minorities will have insurmountable difficulties in challenging the adoption of voting changes that discriminate against minority voting strength. Moreover, without federal legislation to require political jurisdic-

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minority voters represent a significant part of the electorate, minorities have an opportunity to elect a candidate of their choice. By eliminating these election districts and converting to at-large elections, minority voting strength will be diluted. An at-large election system is a method of electing members to the governing board on a district-wide basis. Voters residing in the district can vote for the candidates of their choice. If there are racially polarized voting patterns and the minority community is a numerical minority, then the minority community's candidate of choice almost certainly will be defeated at the polls. An at-large election challenge seeks to divide the district into smaller election districts where the minority community can have a greater impact on the selection of an elected representative or to implement an alternative voting system, such as limited, cumulative or choice voting, that minimizes the discriminatory impact of at-large elections. *See generally* Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743 (1992). Federal courts have found that when racially polarized voting is present, at-large elections can discriminate against minority voting strength by denying minorities an equal opportunity to participate in the political process and elect candidates of their choice. *See, e.g.,* Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (racially polarized voting prevented the election of Latina/o candidates to the city council in a city containing a substantial Latina/o community).

<sup>14</sup> See 42 U.S.C. §§ 1973aa-1a(c), 1973b(f)(4) (2000). These provisions require a bilingual election process, which, for purposes of this report, includes elections where all public materials are translated in the language of an applicable language minority group, where bilingual oral assistance is provided at critical junctures of the election process and where outreach is conducted in communities consisting of limited-English proficiency speakers.

<sup>15</sup> A complete listing of these cases, along with their complaints and consent decrees can be found on the Department of Justice website. *See* Department of Justice, Recent Section 203 Activities, <http://www.usdoj.gov/crt/voting/litigation/recent203.htm> (last visited Nov. 13, 2007).

tions to provide language assistance during elections, eligible and registered voters with limited-English proficiency will be effectively excluded from the body politic. For these reasons, Congress should reauthorize and amend the expiring provisions of the VRA so that minority communities in California can continue their efforts to “ ‘banish the blight of racial discrimination in voting’ once and for all.”<sup>16</sup>

This report is divided into several parts. The first part will provide a brief overview of the VRA, focusing on key provisions that are due to expire in 2007. The second part will discuss the efforts of minority communities to utilize Section 5 to prevent the implementation of voting changes that discriminate against minority voting strength. The third part will focus on the language assistance provisions that permit limited-English proficiency voters to effectively participate in the political process. The fourth part will document the presence of racially polarized voting as demonstrated in cases and expert reports. Finally, the report’s conclusion will focus on the continued necessity for federal intervention to protect the rights of racial and ethnic minorities that still have yet to receive the full benefits of the Fifteenth Amendment to the U.S. Constitution, which provided in 1870 that states can no longer engage in voting discrimination on the basis of color, race or previous condition of servitude.<sup>17</sup>

## I. OVERVIEW OF THE VRA

Faced with the continued recalcitrance of states and local governments in the South to eliminate obstacles that prevented African-Americans from voting,<sup>18</sup> Congress enacted the VRA in 1965, targeting certain state and lo-

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<sup>16</sup> See *McCain v. Lybrand*, 465 U.S. 236, 244 (1984) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

<sup>17</sup> U.S. CONST., amend. XV. It is important to note that the enforcement of the protections provided by the Fifteenth Amendment did not become a matter of official state governmental policy until the Amendment was formally ratified by the California State Legislature. The California State Legislature formally *rejected* the Fifteenth Amendment on January 28, 1870 and did not officially ratify the amendment *until April 3, 1962*. See National Park Service, Amendments to the Constitution, <http://www.nps.gov/archive/malu/documents/amend15.htm> (last visited Nov. 13, 2007).

<sup>18</sup> From the end of the Civil War to the adoption of the VRA in 1965, the history of outright voter intimidation, lynchings and violence has been extensively documented. See *generally* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* (1988); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000); RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* (2004); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973). See also ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866–1876* (2005) (discussing aggressive enforcement of federal statutes designed to protect the right to vote during the early part of the 1870s); Avila, *supra* note 1, at 317–25 (providing a summary of the history of voting discrimination).

cal government entities in the South. This targeting was accomplished through a triggering formula that focused on voter registration or voter turnout levels in states and local governments that utilized tests or devices, such as literacy tests, as a prerequisite for voter registration.<sup>19</sup> These tests or devices prevented African-Americans from registering to vote. Accordingly, the use of these tests or devices was suspended in these jurisdictions for a five-year period.<sup>20</sup> As noted previously, another important provision, Section 5, sought to prevent the implementation of any change affecting the right to vote<sup>21</sup> unless federal approval was secured from the U.S. Attorney General in an administrative proceeding or in a judicial action from the U.S. District Court for the District of Columbia.<sup>22</sup> The most significant feature of Section 5 related to the burden placed upon the covered jurisdiction submitting the proposed voting change. The covered jurisdiction had the burden of demonstrating that the proposed voting change did not have a discriminatory effect on minority voting strength and that the change was not adopted for a discriminatory purpose.<sup>23</sup>

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<sup>19</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (1965) (codified as amended at 42 U.S.C. § 1973b(b) (2000)). The triggering formula consisted of two determinations. First, the United States Attorney General had to certify that a test or device was maintained on November 1, 1964. A test or device was defined as:

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

*Id.* at § 4(c). Second, the Director of the Bureau of the Census had to determine that less than 50% of persons of voting age were registered on November 1, 1964, or that less than 50% of persons of voting age voted in the presidential election of 1964. See *Briscoe v. Levi*, 535 F.2d 1259, 1270–76 (D.C. Cir. 1976) (noting that the legislative history supported the use of voting age population rather than registered voters for application in conjunction with the phrase “such persons”), *vacated on other grounds sub nom* *Briscoe v. Bell*, 432 U.S. 404 (1977).

<sup>20</sup> Voting Rights Act of 1965 § 4(a).

<sup>21</sup> *Id.* § 5. Section 5 applies to all voting changes. *Allen v. State Bd. of Elections*, 393 U.S. 544, 563 (1969). Such changes include redistrictings, annexations, conversions to at-large methods of election, voter re-registration requirements and polling place changes, among others. See 28 C.F.R. §§ 51.12–51.13 (2007) (federal regulations governing the implementation of Section 5).

<sup>22</sup> See 42 U.S.C. § 1973c (2000).

<sup>23</sup> Voting Rights Act of 1965 § 5. As a result of rulings by the Supreme Court, the substantive standard for evaluating whether a proposed voting change meets Section 5 approval or preclearance is retrogression. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (retrogression, such as the elimination of a majority minority district in a new redistricting plan, constitutes a prohibition against lessening the impact of minority voting strength). In a subsequent case, the Court rejected the incorporation of the VRA’s Section 2 standards in a Section 5 determination. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997). Section 2 prohibits any voting qualification, prerequisite to voting, standard, practice or procedure that denies racial and ethnic minorities an equal opportunity to participate in the political process and elect candidates of their choice. See 42 U.S.C. § 1973. In *Reno v. Bossier Parish School Board*, 528 U.S. 320, 333 (2000), the Court held that the discriminatory purpose prong of Section 5

The 1965 VRA was subsequently amended by Congress.<sup>24</sup> To further extend the temporary provisions of the VRA, Congress modified the applicable triggering formula found in Section 4.<sup>25</sup> In 1970, Congress extended the regional ban on tests or devices to the nation.<sup>26</sup> In addition, Congress extended the Section 5 preclearance requirement, as well as the national ban on tests or devices, for another five years.<sup>27</sup> In 1975, Congress made the ban on tests or devices a permanent feature of the VRA and extended the Section 5 preclearance requirement for an additional seven years.<sup>28</sup> Most significantly, Congress recognized that voting discrimination was not limited only to African-Americans, but also applied to other racial and ethnic groups as well. Specifically, Congress found “that voting discrimination against citizens of language minorities is pervasive and national in scope.”<sup>29</sup> Accordingly, Congress expanded the definition of a test or device to include English-only elections in those jurisdictions where more than 5% of the eligible voters were members of an applicable language minority group.<sup>30</sup> Thus, if a jurisdiction met the requirements relating to (1) either having less than a 50% voter registration rate or less than a 50% voter turnout rate; (2) having English-only elections in a state, county or jurisdiction that conducted voter registration; and (3) having more than 5% of the eligible voters as members of an applicable language group, the jurisdiction was subject to the Section 5 preclearance requirements. This expanded definition subjected Arizona and Texas, states having large Latina/o populations, to Section 5 review.<sup>31</sup>

The 1975 amendments also expanded the rights of limited-English proficiency voters to participate in the political process.<sup>32</sup> Language assis-

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prevented the implementation of a proposed voting change only if the covered jurisdiction did not meet its burden of demonstrating the absence of an intent to retrogress minority voting strength.

<sup>24</sup> See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

<sup>25</sup> See *id.* § 4.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* §§ 3, 4.

<sup>28</sup> See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101-102, 89 Stat. 400, 400 (1975).

<sup>29</sup> See *id.* §§ 203, 301.

<sup>30</sup> See *id.* § 203.

<sup>31</sup> See 28 C.F.R. 51 app. (2007). The four California counties were brought under different amendments to the Section 4 triggering formula. See *id.* The 1970 amendments subjected the Counties of Yuba and Monterey to Section 5 review. See *id.* The 1975 amendments subjected the Counties of Yuba, Kings and Merced to Section 5 review. Monterey County continued to be subject to Section 5 due to the 1970 amendments. See *id.*

<sup>32</sup> Congress first required language assistance during the election process in the 1965 VRA. The 1965 VRA included a provision, Section 4(e), that required political jurisdictions to institute a bilingual election process in order to permit persons who completed a sixth grade education in an American flag school where the predominant classroom language was a language other than English. See Voting



tance during elections<sup>33</sup> was mandated in jurisdictions subject to Section 5 that meet certain criteria<sup>34</sup> and was also mandated in jurisdictions subject to the newly-enacted Section 203 of the VRA.<sup>35</sup> Under the 1975 VRA amendments, a jurisdiction could simultaneously be subject to the language assistance provisions of Section 5 and Section 203. In California, there were more counties subject to the language assistance provisions of Section 203 than to the provisions of Section 5.<sup>36</sup>

Five years after the passage of the 1975 amendments, a plurality of the U.S. Supreme Court held that invalidating an at-large method of election on the basis of violating the Fourteenth and Fifteenth Amendments or Section 2 of the VRA required proof of a discriminatory intent.<sup>37</sup> In response, Congress amended Section 2 to eliminate the discriminatory intent requirement.<sup>38</sup> The newly-amended Section 2 required proof only of a discriminatory effect on minority voting strength.<sup>39</sup> The Senate Report accompanying the 1982 VRA amendments further defined the standard: Section 2 was violated when it was demonstrated that, under the totality of circumstances, minority voters did not have an equal opportunity to participate in the political process and elect candidates of their choice.<sup>40</sup> The Supreme Court further refined Section 2 in a case involving a challenge to multimember and single-member legislative districts in North Carolina.<sup>41</sup>

Congress also extended the preclearance requirement of Section 5 for a twenty-five-year period until 2007.<sup>42</sup> In addition, Congress established a

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Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973b(e) (2000)). This permanent provision of the VRA affected Puerto Ricans and other persons educated in territorial jurisdictions. *See id.*; *see also* Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 202-07 (2005) (discussing the history surrounding the adoption of Section 4(e) and its subsequent enforcement).

<sup>33</sup> *See* 42 U.S.C. §§ 1973aa-1a(c), 1973b(f)(4) (2000); *see also supra* note 14 and accompanying text.

<sup>34</sup> *See* Voting Rights Act Amendments of 1975 § 203.

<sup>35</sup> *Id.* § 301. According to Section 301 of the 1975 amendments, any state or political subdivision that met the following criteria had to provide language assistance during elections: more than 5% of the eligible voter population were members of a language minority group and the illiteracy rate for this language minority group had to be higher than the national illiteracy rate. *See id.* Illiteracy was defined as the failure to complete the fifth grade. *See id.* § 203(b)(ii). These language assistance provisions were to be in effect for a period of ten years—until August 6, 1985. *See id.* § 203(b).

<sup>36</sup> *Compare* 28 C.F.R. § 55 app., with Department of Justice, Section 5 Covered Jurisdictions, [http://www.usdoj.gov/crt/voting/sec\\_5/covered.htm](http://www.usdoj.gov/crt/voting/sec_5/covered.htm) (last visited Nov. 13, 2007).

<sup>37</sup> *See* *City of Mobile v. Bolden*, 446 U.S. 55, 60-62, 66-67 (1980).

<sup>38</sup> *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. §§ 1973, 1973b, 1973c, 1973aa-1a, 1973aa-6).

<sup>39</sup> *See id.* § 3.

<sup>40</sup> *See* S. REP. NO. 97-417, at 28 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 205.

<sup>41</sup> *See* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>42</sup> *See* 42 U.S.C. § 1973b(a)(8).

new mechanism to create an incentive for covered jurisdictions to comply with Section 5 of the VRA. In creating this incentive, Congress provided for an expanded “bail-out” mechanism that permitted Section 5-covered jurisdictions to be exempt from Section 5 preclearance upon meeting certain criteria.<sup>43</sup> Recently, ten jurisdictions in Virginia have been removed from Section 5 coverage through the bail-out procedures.<sup>44</sup> As to Section 203, the language assistance provisions were extended for a ten year period until 1992.<sup>45</sup>

In 1992, Congress extended the language assistance provisions to 2007.<sup>46</sup> As a result of these amendments, the triggering formula was modified.<sup>47</sup> Under the formula, a jurisdiction is subject to the language assis-

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<sup>43</sup> See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, § 2, 106 Stat. 921, 921 (1992) (codified as amended at 42 U.S.C. § 1973aa-1a(b)). The initial “bail-out” mechanism was linked to the use of a test or device. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (1965) (codified as amended at 42 U.S.C. § 1973b(a)). A Section 5 covered jurisdiction could initiate an action in the U.S. District Court for the District of Columbia seeking a “bail-out” from Section 5 compliance. See *id.* The jurisdiction would have to demonstrate that it did not use a test or device during a five-year period preceding the filing of the “bail-out” action and that the use of such test or device was not “for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . .” *Id.* If a political jurisdiction became subject to the Section 5 preclearance requirement as a result of maintaining a test or device on November 1, 1964, for all practical purposes the jurisdiction would have to wait for a five year period before filing such a “bail-out” action. In this respect, the Section 5 preclearance requirement would be in effect for a five-year period, since the jurisdiction seeking “bail-out” would be able to demonstrate compliance with the Section 4(a) prohibition of the use of such test or device for the relevant five year period. A similar “bail-out” mechanism was established during the 1970 and 1975 amendments to the VRA. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400 (1975). The five-year period for filing such a “bail-out” lawsuit was changed to ten years in the 1970 amendments and seventeen years in the 1975 amendments. Voting Rights Act Amendments of 1970 § 3; Voting Rights Act Amendments of 1975 § 101. Under the 1982 amendments, the district court can only issue a declaratory judgment if the jurisdiction demonstrates that, for a ten year period preceding the filing of the “bail-out” action, the political jurisdiction meets certain requirements related to compliance with the VRA, including no final judgments involving voting discrimination, full compliance with the preclearance requirement and no issuance of a letter of objection by the United States Attorney General. See Voting Rights Act Amendments of 1982 § 2. This mechanism was designed to encourage jurisdictions to comply with the VRA. In this manner, the jurisdiction’s likelihood of a successful “bail-out” lawsuit would be increased.

<sup>44</sup> See *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 109th Cong. 109–68 (2005) (statement of J. Gerald Hebert, Former Acting Chief, Civil Rights Division, Department of Justice).

<sup>45</sup> Voting Rights Act Amendments of 1982 § 4 (date extended to August 6, 1992). In addition, there was another qualification attached to the definition of a language minority group for purposes of applying the triggering formula: the members of the language minority group had to be persons who did “not speak or understand English adequately enough to participate in the electoral process . . .” *Id.*; see also 53 Fed Reg. 735, 735 (Jan. 12, 1988).

<sup>46</sup> See Voting Rights Language Assistance Act of 1992 § 2.

<sup>47</sup> See *id.*

tance provisions if the following criteria are met: (1) 5% of the voting-age population or 10,000 voting-age citizens must consist of members of a single language minority group; (2) the members of this single language minority group must be of limited English proficiency;<sup>48</sup> (3) for those political jurisdictions that contain all or part of an Indian reservation, more than 5% of the total number of eligible voters within the Indian reservation must be eligible voters of a single language minority group who are of limited-English proficiency; and (4) “the illiteracy rate of the citizens in the language minority as a group [must be] higher than the national illiteracy rate.”<sup>49</sup>

As further described in this report, the language assistance provisions have been instrumental in providing citizens who are not proficient in English with an opportunity to register to vote and to vote in elections, but only if there is effective compliance. Without effective compliance, in some instances, Asian-American and other language minority voters have been prevented from casting a ballot simply because of a misunderstanding or the failure of polling place officials to provide assistance. In other instances, racial hostility served to discourage Asian-American and other language minority voters who are limited-English proficient from voting. Indeed, effective compliance with and enforcement of these language assistance provisions provides physical access to the electoral process to persons who are of limited-English proficiency.

In a similar manner, the Section 5 preclearance requirement serves to provide access to the political process by preventing the implementation of potentially discriminatory voting changes. Moreover, the deterrent effect of the law cannot be underestimated; legislators and local officials who are aware that they will be expected to show that a new law or practice satisfies the Section 5 standards are far less likely to propose voting changes that would be prohibited in order to avoid unnecessary additional costs, disruption or litigation.

The next part of this report will provide documentation of specific examples demonstrating the use of Section 203 and Section 5 by minority communities to eliminate obstacles and barriers that prevented them from effective participation in the political process. These examples demon-

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<sup>48</sup> Limited-English proficiency voters are defined as those who are “unable to speak or understand English adequately enough to participate in the electoral process . . . .” 42 U.S.C. § 1973aa-1a(b)(3)(B).

<sup>49</sup> See Voting Rights Language Assistance Act of 1992 § 2; see also 42 U.S.C. § 1973aa-1a(b)(2)(A). Congress did create an exception for Section 203 coverage for those political jurisdictions containing less than the requisite 5% threshold if the state was designated a Section 203 jurisdiction. See 42 U.S.C. § 1973aa-1a(b)(2)(D).

strate that covered jurisdictions will continue to adopt new voting changes that have the potential for a discriminatory effect on minority voting strength. In addition, this documentation will provide examples of Section 5-covered jurisdictions that simply ignore the submission requirement. Such ongoing non-compliance presents a clear justification for extending the preclearance requirement for another period of time to permit full Section 5 compliance. Finally, the litigation involving Section 203 compliance provides clear evidence that many covered jurisdictions are resisting the efforts to fully integrate those with limited-English proficiency into the body politic.

## II. SECTION 5: AN EFFECTIVE DETERRENT AGAINST VOTING DISCRIMINATION IN CALIFORNIA

The U.S. Attorney General has issued six letters of objection in California, four of which were issued after 1982.<sup>50</sup> A review of these four letters of objections demonstrates that Section 5 has served as an important tool to eliminate discriminatory voting changes and had a dramatic and historic impact on local communities.<sup>51</sup> These experiences show that Section 5 is the most effective tool available to minority communities in California to prevent the implementation of potentially discriminatory voting changes. Unfortunately, these experiences are also evidence of the failure of effective Section 5 compliance and enforcement. In many instances, the covered jurisdiction simply does not submit the voting change to the Attorney General for Section 5 administrative approval and does not file an action in the U.S. District Court for the District of Columbia for judicial preclearance. On these grounds alone, Section 5 should be extended to permit minority communities to reap the benefits of full compliance with the preclearance requirement.

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<sup>50</sup> The two letters of objection issued prior to 1982 involved inadequate plans to comply with the language assistance requirements of 42 U.S.C. § 1973b(f)(4). *See* Letter from J. Stanley Pottinger, Assistant Attorney General, to James A. Reichie, Deputy County Counsel for Yuba County (May 26, 1976) (on file with authors) (failure to translate ballots and candidate qualification statement); Letter from Drew S. Days III, Acting Assistant Attorney General, to Kenneth D. Webb, Registrar of Voters, Monterey County (Mar. 4, 1977) (on file with authors) (failure to distribute translated ballots, inadequate use of bilingual oral assistants and failure to translate nominating petitions, among other concerns).

<sup>51</sup> For a list of the letters of objection issued in California, see Department of Justice, Section 5 Objection Determinations: California, [http://www.usdoj.gov/crt/voting/sec\\_5/ca\\_obj2.htm](http://www.usdoj.gov/crt/voting/sec_5/ca_obj2.htm) (last visited Nov. 13, 2007) [hereinafter California Section 5 Determinations] (providing a list of Section 5 objection letters issued in California).

## A. THE IMPACT OF SECTION 5 HAS BEEN DRAMATIC AND HISTORIC

As a result of Section 5 enforcement, the first Latino was elected to the Monterey County Board of Supervisors<sup>52</sup> in more than a hundred years.<sup>53</sup> The U.S. Attorney General issued a letter of objection to a county supervisor redistricting plan<sup>54</sup> which served as the catalyst for the adoption of a new redistricting plan. The implementation of this new, non-discriminatory redistricting plan resulted in a historic election, finally providing the Latina/o community in Monterey County with a voice in the community.<sup>55</sup>

A review of the circumstances surrounding the issuance of this letter of objection highlights the importance of having federal oversight of the election process in California, especially in areas where there are significant Latina/o communities. The 1990 Census showed that Latinas/os constituted 33.6% of Monterey County's population.<sup>56</sup> At the time of the 1991 county supervisor redistricting process, there had not been a single Latina/o serving on the Board of Supervisors since 1893.<sup>57</sup> After the completion of the county supervisor redistricting process, the plan was submitted for Section 5 review.<sup>58</sup> Shortly thereafter, Latinas/os filed an action based upon Section 5 and Section 2 of the Voting Rights Act of 1965.<sup>59</sup> Since the redistricting plan had not received Section 5 preclearance, the plaintiffs argued that the court should enjoin the implementation of the plan in the upcoming 1992 elections.<sup>60</sup> Alternatively, if the redistricting plan received Section 5 approval, the plan violated the Section 2 rights of Latinas/os by fragmenting a politically cohesive minority community.<sup>61</sup>

This Monterey County litigation was not a typical suit. After the lawsuit was filed, the U.S. Attorney General requested additional information

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<sup>52</sup> The Monterey County Board of Supervisors is the governing board for Monterey County. *See* CAL. GOV'T CODE §§ 23005, 25000, 25207 (Deering 1993).

<sup>53</sup> *See* County of Monterey, Monterey County 3rd District Supervisor Simon Salinas, [http://www.co.monterey.ca.us/d3\\_supervisor.htm](http://www.co.monterey.ca.us/d3_supervisor.htm) (last visited Nov. 13, 2007) [hereinafter Salinas].

<sup>54</sup> *See* California Section 5 Determinations, *supra* note 51.

<sup>55</sup> *See* Salinas, *supra* note 53.

<sup>56</sup> U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P008, *available at* <http://factfinder.census.gov> (last visited Nov. 13, 2007).

<sup>57</sup> J. MORGAN KOUSSER, TACKING, STACKING, AND CRACKING: RACE AND REAPPORTIONMENT IN MONTEREY COUNTY, 1981–1992, A REPORT FOR *GONZALES V. MONTEREY COUNTY BOARD OF SUPERVISORS* 25 (1992).

<sup>58</sup> *Gonzalez v. Monterey County*, 808 F. Supp. 727, 729 (N.D. Cal. 1992).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Approval of a voting change pursuant to Section 5 does not preclude an action challenging the same voting change filed pursuant to Section 2. *See id.*

from the County,<sup>62</sup> prompting the County to seek a settlement with the Latina/o plaintiffs. A settlement was reached that avoided the fragmentation of the Latina/o community. However, as a result of a referendum petition, voter approval of the county ordinance incorporating the redistricting plan was necessary.<sup>63</sup> The referendum was successful in invalidating the county ordinance.<sup>64</sup> Thereafter, the County was permitted another opportunity to adopt a new redistricting plan.<sup>65</sup> The County was given until February 26, 1993, to secure the adoption of a redistricting plan and Section 5 approval.<sup>66</sup> The new plan was adopted and submitted to the U.S. Attorney General for Section 5 approval. After receiving comments from the Latina/o community, the Attorney General issued a letter of objection.<sup>67</sup>

The Attorney General concluded that Monterey County had not met its Section 5 burden. Although the new redistricting plan incorporated two supervisor districts, each with a majority of Latina/o population, non-white Latinas/os comprised a plurality of the eligible voter population in each of the districts.<sup>68</sup> Such an eligible voter population distribution was accomplished by fragmenting politically cohesive Latina/o voting communities in the city of Salinas and the northern part of Monterey County.<sup>69</sup> As noted by the Attorney General:

Your submission fails to disclose a sufficient justification for rejection of available alternative plans with total population deviations below ten percent that would have avoided unnecessary Hispanic population fragmentation while keeping intact the identified black and Asian communities of interest in Seaside and Marina. The proposed redistricting plan

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<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 730.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.* After the invalidation of the previously agreed upon settlement plan, the County sought to have court approval of two alternative redistricting plans. *See id.* at 730–31. One alternative redistricting plan was developed on behalf of a group of interveners representing north County interests. *Id.* However, the County endorsed this plan, thereby raising a substantial question as to whether the proposed redistricting plan was subject to Section 5 approval and, thus, requiring the convening of a three judge court. *See id.* Since there was a substantial question presented, the proposed alternative was not valid as a legitimate proposal until the Section 5 question had been addressed. *Id.* at 33. Another proposal developed by the County's demographer with input by the County's special counsel was also deemed to have the County's endorsement. *See id.* As with the previous alternative plan, such endorsement raised a substantial question of whether this proposed alternative also was subject to Section 5 preclearance. *Id.* Since both of these plans were not legally valid, the only valid plan available was a plan presented on behalf of the Latina/o plaintiffs. *Id.* at 731, 736. However before any redistricting plan was to be adopted, the County was given another opportunity to formulate a new plan that met constitutional and statutory standards. *Id.* at 736.

<sup>66</sup> *Id.*

<sup>67</sup> *See* Letter from James P. Turner, *supra* note 11.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

appears deliberately to sacrifice federal redistricting requirements, including a fair recognition of Hispanic voting strength, in order to advance the political interests of the non-minority residents of northern Monterey County.<sup>70</sup>

As noted above, after the issuance of the letter of objection, the district court implemented the plaintiffs' plan in a special 1993 election, resulting in the historic election of the first Latino to the Monterey County Board of Supervisors in over a hundred years.<sup>71</sup> This event would not have occurred without Section 5 oversight.

Another example of the positive impact of Section 5 on a minority community involved a letter of objection issued against Merced County.<sup>72</sup> In 1990, Latinas/os constituted 32.6% of the county's population.<sup>73</sup> After the publication of the 1990 Census, the Board of Supervisors initiated a redistricting process.<sup>74</sup> The Board of Supervisors, as a result of presentations relating to the county's demographics, was aware of the substantial growth in the county's Latina/o community in the 1980s.<sup>75</sup> The Board of Supervisors disregarded this information and rejected a redistricting plan developed by its demographer that created a supervisor district consisting of a majority of Latinas/os.<sup>76</sup> The Attorney General objected to the proposed redistricting plan.<sup>77</sup> The proposed plan fragmented the Latina/o community in the city of Merced.<sup>78</sup> In addition, the plan did not place a city that was predominantly Latina/o into a supervisor district containing a significant portion of the county's Latina/o population.<sup>79</sup> The submitted redistricting did not have a single supervisor district that contained a majority Latina/o population.<sup>80</sup> After the letter of objection was issued, the county submitted for Section 5 approval a redistricting plan that avoided the fragmentation of the Latina/o community in the city of Merced and included significant Latina/o communities within a majority Latina/o supervisor dis-

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<sup>70</sup> *Id.* at 3.

<sup>71</sup> See Salinas, *supra* note 53; see also Katie Niekerk, *Perkins, Salinas Vie for Assembly Seat*, GILROY DISPATCH, Oct. 21, 2004, available at <http://www.gilroydispatch.com/news/contentview.asp?c=128571>.

<sup>72</sup> Letter from John R. Dunne, Assistant Attorney General, Department of Justice, to Kenneth L. Randol, Merced County Clerk (Apr. 3, 1992) (on file with authors).

<sup>73</sup> U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P001, P008, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007).

<sup>74</sup> See Letter from John R. Dunne, *supra* note 72, at 1.

<sup>75</sup> See *id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *id.* at 2.

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

trict. The new plan was approved and resulted in the election of a Latina supervisor.

Both of these examples illustrate the concrete results achieved by the enforcement of Section 5. Since there are only fifty-eight counties in California,<sup>81</sup> securing the rights of a minority community to have equal access to the political process and to elect a candidate of its choice to a county board of supervisors is a significant accomplishment. In the case of Monterey County, it took a hundred years and a federal statute to make the rights protected by the Fifteenth Amendment a reality. There can be no question that if Merced and Monterey counties had not been subject to Section 5 review, the Counties would have implemented the objectionable redistricting plans. After all, the Counties formally adopted the redistricting plans that were ultimately invalidated by the Section 5 preclearance proceeding. If there had been no Section 5 oversight, the only recourse would have been to file an action pursuant to Section 2 of the Voting Rights Act of 1965.<sup>82</sup> As previously noted, the Monterey County litigation included a Section 2 claim. However, the difficulties associated with Section 2 litigation, as discussed below, occurred after the case was filed. These difficulties with Section 2 would have, for all practical purposes, foreclosed any remedial action, due to the significant evidentiary burdens imposed upon minority plaintiffs and the substantial costs associated with these types of lawsuits. Section 2 litigation to challenge these county redistricting plans would not have been feasible.

#### B. SECTION 2 LITIGATION CANNOT SERVE AS A SUBSTITUTE FOR SECTION 5 PRECLEARANCE

The experience with Section 5 enforcement in California demonstrates the stark contrast between the protections offered by Section 2 and Section 5. It has been suggested that, by strengthening the protections provided by Section 2, there may be no need for Section 5 preclearance. However, the experiences in California demonstrate that Section 2 cannot serve as a substitute for Section 5 preclearance. Under Section 5, the advantages of “time and inertia” are shifted “from the perpetrators of the evil [of voting discrimination] to its victims.”<sup>83</sup> Unlike Section 5, which involves a sixty-day administrative process and places the burden of proof on the submitting jurisdiction, Section 2 involves a judicial process and places the burden of

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<sup>81</sup> See CAL. GOV'T CODE § 23012 (Deering 1993).

<sup>82</sup> 42 U.S.C. § 1973 (2000).

<sup>83</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).



proof on the minority plaintiffs.<sup>84</sup> Such a difference will often dictate whether an election feature or change will survive a legal challenge.

Section 2 presents the minority community with more formidable obstacles in successfully dismantling a method of election that has a discriminatory effect on minority voting strength. A short history is necessary to assess the limitations of litigation based upon Section 2 in California when compared to the Section 5 preclearance process.

Latinas/os in California have relied upon the federal courts to protect their voting rights and offset the lack of access to the political process caused by racially polarized voting. Initially, litigants relied upon a constitutional standard. In 1973, the Supreme Court held for the first time in *White v. Regester* at-large or multimember districts violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>85</sup> The *White* decision invalidated at-large or multimember legislative districts in Bexar County, Texas, on the grounds that these districts diluted the voting strength of Mexican Americans in the San Antonio greater metropolitan area.<sup>86</sup> After the *White* decision, at-large election challenges at the local governmental level were instituted across the Southwest. In California, the first at-large election challenge based upon the Fourteenth Amendment was filed against the city of San Fernando.<sup>87</sup> The action was unsuccessful and resulted in establishing difficult evidentiary standards for minority communities seeking to demonstrate that at-large methods of election were unconstitutional.<sup>88</sup> As a result of the district court's decision in *Aranda v. Van Sickle*, there were no at-large election challenges filed in California during the late 1970s.

The constitutional standard was made more difficult when the Supreme Court, in *City of Mobile v. Bolden*, ruled that litigants had to demonstrate a discriminatory intent in either the enactment of an at-large election system or its maintenance in order to prove that a given at-large election system was unconstitutional.<sup>89</sup> As a result of the *City of Mobile* decision, many at-large election challenges across the country were dismissed.<sup>90</sup> The impact of this decision prompted Congress to amend Section 2 of the Voting Rights Act of 1965 and eliminate the necessity of proving a discrimina-

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<sup>84</sup> See 42 U.S.C. § 1973c(a); 42 U.S.C. § 1973(b).

<sup>85</sup> 412 U.S. 755, 769–70 (1973).

<sup>86</sup> See *id.*

<sup>87</sup> *Aranda v. Van Sickle*, 600 F.2d 1267 (9th Cir. 1979).

<sup>88</sup> See *id.* at 1272–73.

<sup>89</sup> 446 U.S. 55, 66 (1980).

<sup>90</sup> Survey conducted by authors, on file with authors.

tory intent pursuant to a constitutional standard.<sup>91</sup> Instead, Section 2 was amended to incorporate a discriminatory effects standard as the basis for successfully challenging at-large methods of election that diluted minority voting strength.<sup>92</sup>

After Section 2 was amended, Latinas/os filed the first case in California against the city of Watsonville.<sup>93</sup> In *Gomez v. City of Watsonville*, the local Latina/o community had been unsuccessful in securing the election of its Latina/o preferred candidates to the city council.<sup>94</sup> This lack of success was due to the city's use of an at-large method of election within the context of racially polarized voting patterns that diluted the voting strength of the Latina/o community.<sup>95</sup> The case was ultimately successful on appeal to the U.S. Court of Appeals for the Ninth Circuit.<sup>96</sup> In California, the *Gomez* decision served to renew efforts at the community level to eliminate discriminatory at-large methods of elections.<sup>97</sup> After the success of the city of Watsonville case, at-large election challenges were filed in other parts of California.<sup>98</sup>

This period of Section 2 enforcement in California was short-lived. Two major unsuccessful at-large election challenges served to discourage

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<sup>91</sup> See *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986).

<sup>92</sup> See *id.*

<sup>93</sup> See *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988).

<sup>94</sup> *Id.* at 1409–10.

<sup>95</sup> See *id.* at 1410.

<sup>96</sup> See *id.* at 1419.

<sup>97</sup> While *Gomez* was pending on appeal, a challenge was filed to the conversion from district-based elections to a modified at-large election system for the city of Stockton. See *Badillo v. City of Stockton*, Civ. Act. No. CV-87-1726-EJG (E.D. Cal. 1987), *aff'd*, 956 F.2d 884 (9th Cir. 1992). The case was ultimately unsuccessful.

<sup>98</sup> This litigation encompassed the following areas: *City of Salinas, Armenta v. City of Salinas*, Civ. Act. No. C-88-20567 WAI (N.D. Cal. 1988) (successful); *Coalinga-Huron Unified School District, Valenzuela v. Coalinga-Huron Unified Sch. Dist.*, Civ. Act. No. CV-F-89 428 REC (E.D. Cal. 1988) (successful); *City of San Diego, Perez v. City of San Diego*, Civ. Act. No. 88-0103 RM (S.D. Cal. 1988) (successful); *City of Chula Vista, Skorepa v. City of Chula Vista*, 723 F. Supp. 1384 (S.D. Cal. 1989) (unsuccessful); *City of National City, Valladolid v. City of Nat'l City*, 976 F.2d 1293 (9th Cir. 1992) (unsuccessful); *Alta Hospital District, Reyes v. Alta Hosp. Dist.*, Civ. Act. No. CV-F-90-620-EDP (E.D. Cal. 1990) (successful); *City of Oxnard, Soria v. City of Oxnard*, Civ. Act. No. 90-5239 R (C.D. Cal. 1990) (voluntarily dismissed, no result); *City of Dinuba, Reyes v. City of Dinuba*, Civ. Act. No. CV-F-91-168-REC (E.D. Cal. 1991) (successful); *Cutler-Orosi Unified School District, Espino v. Cutler-Orosi Unified Sch. Dist.*, Civ. Act. No. CV-F-91-169-REC (E.D. Cal. 1991) (successful); *Dinuba Elementary School District, Reyes v. Dinuba Elementary Sch. Dist.*, Civ. Act. No. CV-F-91-170-REC (E.D. Cal. 1991) (successful); *Dinuba Joint Union High School District, Elizondo v. Dinuba Joint Union High Sch. Dist.*, Civ. Act. No. CV-F-91-171-REC (E.D. Cal. 1991) (successful); *Salinas Valley Memorial Hospital District, Mendoza v. Salinas Valley Mem'l Hosp. Dist.*, Civ. Act. No. C-92-20462 RMW (PVT) (N.D. Cal. 1992) (voluntarily dismissed, no result); *Monterey County Superior Court, Trujillo v. California*, Civ. Act. No. C-92-20465 RMW (EAI) (N.D. Cal. 1992) (voluntarily dismissed, no result).

any further litigation by private parties.<sup>99</sup> These two cases involved challenges to the at-large method of election in the El Centro School District<sup>100</sup> and the City of Santa Maria.<sup>101</sup> These cases consumed substantial resources, and, in the case of the Santa Maria litigation, a final decision was not rendered until ten years after the case had been filed.<sup>102</sup> Perhaps the most chilling aspect of these losses were the efforts by the defendants to collect on their Bill of Costs filed pursuant to federal law.<sup>103</sup> In the El Centro School District litigation, the ultimate Bill of Costs was pared down to \$19,462.01.<sup>104</sup> The district court denied the plaintiffs request to re-tax the costs, but did provide for a ten-day stay to permit the plaintiffs to seek a stay before the U.S. Court of Appeals for the Ninth Circuit.<sup>105</sup> The School District successfully applied pressure on the plaintiffs to dismiss their appeal in exchange for the School District to withdraw its Bill of Costs. A similar litigation strategy was pursued in the Santa Maria litigation.

As a result of the El Centro and Santa Maria litigation experiences, since 1992, no private litigants have filed at-large election challenges under the VRA.<sup>106</sup> The absence of private litigants is significant, since, as Table

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<sup>99</sup> The only other at-large election challenges filed in California were initiated by the Department of Justice. Since 1990, the Department of Justice has filed two cases challenging at-large methods of election. See *United States v. San Gabriel Valley Mun. Water Dist.*, Civ. Act. No. 007903 AHM BRX, 2000 WL 33254228 (C.D. Cal. Sept. 8, 2000); *United States v. City of Santa Paula*, Civ. Act. No. 00-03691 GKH (C.D. Cal. 2000).

<sup>100</sup> See *Aldasoro v. Kennerson*, 922 F. Supp. 339 (S.D. Cal. 1995).

<sup>101</sup> See *Ruiz v. City of Santa Maria*, Civ. Act. No. 92-4879 JMI (SHX) (C.D. Cal. 1992), *rev'd*, 160 F.3d 543 (9th Cir. 1988), *cert. denied*, 527 U.S. 1022 (1999).

<sup>102</sup> See *id.*

<sup>103</sup> See 28 U.S.C. § 1920 (2000).

<sup>104</sup> *Aldasoro v. Kennerson*, 915 F. Supp. 188, 189 (S.D. Cal. 1995).

<sup>105</sup> *Id.* at 189, 192–93.

<sup>106</sup> There have been a small number of jurisdictions that have voluntarily converted from an at-large method of election to a district-based election system. See, for example, the Hartnell Community College District in Monterey County, the San Jose/Evergreen Community College District, and the Salinas Union High School District in Monterey County. This number is miniscule when compared to the overwhelming number of jurisdictions which still retain an at-large method of election. In California, there are approximately 4352 governmental entities. See STATISTICAL ABSTRACT, *supra* note 7, at 272 tbl.416. As of April 2005, there were a total of 478 municipalities: 108 chartered cities and 370 general law cities. League of California Cities, *Facts at a Glance* (2007) <http://www.cacities.org/index.jsp?zone=locc&previewStory=53>. Out of the total number of cities, only twenty-seven, or 5.6%, conduct elections by districts. League of California Cities, *Council Elections* (2005), [http://www.cacities.org/resource\\_files/23513.DISTELEC.doc](http://www.cacities.org/resource_files/23513.DISTELEC.doc) (the City of Coachella is erroneously listed as conducting district elections). As of July 1, 2004, there were 979 elementary to high school public school districts. Based upon a 1995 survey, 65% of those districts conduct at-large elections, 20% have candidate residency districts and at-large voting and 15% have district elections. See Email from Susan Swigart, *supra* note 8. In a 1987 survey of school districts, it was estimated that over 95% of school districts conducted their elections on an at-large election basis. See Bob Johnson, *Watsonville's New Crop: A Court Decision is Changing the Way Local Elections Are Held*, GOLDEN STATE REPORT, Sept. 1987, at 27. Recently, the preliminary results of a survey conducted for a project spon-

1<sup>107</sup> demonstrates, the private bar has been largely responsible for enforcement of minority voting rights.<sup>108</sup>

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sored by the California Research Policy Center entitled, "Systems of Election, Latino Representation, and Student Outcomes in California Schools," showed that in fourteen California counties containing significant Latina/o populations (Tulare (50.8%), San Benito (47.9%), Monterey (46.8%), Merced (45.3%), Madera (44.3%), Fresno (44.0%), Kings (43.6%), Kern (38.4%), Santa Barbara (34.2%), Ventura (33.4%), Stanislaus (31.7%), San Joaquin (30.5%), Santa Cruz (26.8%) and San Luis Obispo (16.3%)), there were 170 school districts ranging from a 10% Latina/o population concentration to an 86% concentration which did not have a single Latina/o school board member in 2004. At-large elections were conducted in 168 of those school districts. It is also estimated that there are more than 1000 water districts and more than 500 special election districts. Although there are no exact numbers, most of these water districts and special election districts conduct their elections on an at-large basis.

<sup>107</sup> The data in Table 1 was compiled using the Annual Reports of the Director of the Administrative Office of the United States Courts, Judicial Business of the United States, years 1977 to 1996; Table C-2. The Annual Reports may be found at U.S. Courts, Judicial Business of the United States Courts, <http://www.uscourts.gov/judbususc/judbus.html> (follow hyperlinks for each Annual Report; then select "Table C-2: Cases Commenced, By Basis of Jurisdiction and Nature of Suit") (last visited Nov. 13, 2007).

<sup>108</sup> See also Gregory A. Caldeira, *Litigation, Lobbying, and the Voting Rights Bar, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 230, 241 (Bernard Grofman & Chandler Davidson eds., 1992) ("Members of the voting rights bar outside the federal government institute perhaps ninety-five percent of these [voting rights] cases in any particular year. Enforcement of voting rights is, therefore, very much an activity of the private sector.").

**Table 1.**  
**Voting Cases Commenced in United States District Courts**

Year	U.S.: Plaintiff	U.S.: Defendant	Private Cases	Totals
1977	15	9	179	203
1978	11	5	123	139
1979	13	7	125	145
1980	6	7	147	160
1981	8	9	135	152
1982	4	11	155	170
1983	1	6	168	175
1984	10	9	240	259
1985	17	5	259	281
1986	12	4	178	194
1987	12	7	195	214
1988	11	9	327	347
1989	11	5	167	183
1990	10	6	114	130
1991	10	7	180	197
1992	9	12	473	494
1993	14	11	188	213
1994	13	13	207	233
1995	9	11	215	235
1996	8	9	168	185
1997	2	10	129	141
1998	2	7	99	108

**Table 1. Continued**  
**Voting Cases Commenced in United States District Courts**

Year	U.S.: Plaintiff	U.S.: Defendant	Private Cases	Totals
1999	6	3	93	102
2000	16	10	141	167
2001	10	16	163	189
2002	6	15	181	202
2003	3	5	139	147
2004	12	9	152	173
Totals	261	237	5040	5538

Due to the difficulties associated with filing at-large election challenges under the federal Voting Rights Act of 1965, an effort was pursued to create a state voting rights act in California. The California Act was designed to permit the filing of legal actions in state court against at-large methods of election without having to demonstrate the costly and difficult evidentiary standards required under the federal VRA. This effort was successful. In 2002, the California Voting Rights Act of 2001 became law.<sup>109</sup> Although the California Voting Rights Act is a significant improvement over Section 2, it only applies to at-large elections and does not apply to other methods of elections, redistrictings or other voting changes. More-

<sup>109</sup> CAL. ELEC. CODE §§ 14025–14032 (West 2003). The California Voting Rights Act addresses the problem of racially polarized voting within the context of at-large elections. *See id.* § 14027. The Act applies to all levels of governments: cities, school districts, special election districts and judicial districts. *See id.* § 14026(c). There is no requirement of proving geographic compactness, and no necessity to create a hypothetical single-member district consisting of over a 50% Latino eligible voter population. In addition, there is no need to prove the other Senate Report factors as required under the Federal Voting Rights Act. These Senate Report factors are probative and can be introduced, but they are not necessary. The major requirement is that plaintiffs must prove racially polarized voting that prevents the ability of a protected class to elect candidates of their choice or to influence the outcome of an election. *See id.* § 14028. As with its federal counterpart, there is no requirement to prove an intent to discriminate against minority voting strength. Moreover, upon a successful outcome, prevailing party plaintiffs are entitled to an award of attorney's fees while prevailing government parties are not. *See id.* § 14030. Also, prevailing party plaintiffs are entitled to recover their expert witness fees and expenses. *Id.* In addition, the state court is authorized to grant upward adjustment or a fees multiplier. Finally, prevailing party defendants are not entitled to costs unless the court finds the action to be frivolous, unreasonable or without foundation. *Id.*

over, the Act was subsequently declared unconstitutional by a superior court.<sup>110</sup>

To summarize, Section 2 has been ineffective in eliminating discriminatory at-large methods of elections in California.<sup>111</sup> As discussed above, Section 2 cases consume a significant amount of financial resources. In addition, the evidentiary burdens established by federal courts to prove a Section 2 case are often insurmountable. Given these experiences with Section 2 litigation, there can be no dispute that, in California, Section 5 provides a more effective tool to challenge the adoption of potentially discriminatory voting changes. Two examples will illustrate this point.

As the result of the Voting Rights Act Amendments of 1975, the city of Hanford in Kings County became subject to the Section 5 preclearance requirement.<sup>112</sup> After an extended delay, the city of Hanford submitted a series of annexations for Section 5 preclearance.<sup>113</sup> The U.S. Attorney General issued a letter of objection.<sup>114</sup> The Attorney General concluded that the City had not met its burden of demonstrating that the proposed an-

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<sup>110</sup> Two cases were filed by the Lawyers' Committee for Civil Rights for the San Francisco Bay Area pursuant to the California Act. The first was filed against the Hanford Joint Union High School District. See *Gomez v. Hanford Joint Union High Sch. Dist.*, Civ. Act. No. 04-Co284 (Cal. Super. Ct. 2004). The firm of Farella, Braun & Martel assisted in this litigation. This case was successfully settled. The School District agreed to dismantle the at-large method of election and a districting plan was ultimately adopted. The second case involved an at-large election challenge against the city of Modesto. Recently, the superior court held that the California Voting Rights Act was unconstitutional and granted the City's motion for judgment on the pleadings. An appeal is under way. *Sanchez v. City of Modesto*, Case No. 347903 (Cal. Super. Ct. 2004), *appeal pending*, No. F048277 (Cal. Ct. App.). The firm of Heller, Ehrman, White & McAuliffe is assisting in this litigation.

<sup>111</sup> A recent notable exception to Section 2 litigation experiences in California occurred in Montana where the U.S. Court of Appeals for the Ninth Circuit in *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), upheld a district court's finding that an at-large method of electing county commissioners violated Section 2. The rare success of this case only serves to reinforce the tremendous financial costs associated with these cases. Finally, the difficulty of meeting the evidentiary standards of Section 2 is highlighted in an unsuccessful challenge to a voting qualification which permitted only property owners to vote in elections for selecting members of the governing board of an agricultural improvement district. *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997).

<sup>112</sup> See 28 C.F.R. § 51 app. (2007).

<sup>113</sup> Annexations affect the size of voting constituencies and are thus subject to Section 5 preclearance. See *supra* note 12 and accompanying text.

<sup>114</sup> See Letter from James P. Turner, *supra* note 12. The letter noted that this was the first instance that the City sought Section 5 approval of its annexations. See *id.* Some of the annexations were adopted shortly after the City became subject to the Section 5 preclearance requirements. The operative date for submitting annexations was November 1, 1972. However, the City did not submit all of its annexations for Section 5 approval until 1993—a lapse of *more than twenty years*. The letter also noted that other voting changes had not been submitted. See *id.* Accordingly, the Department of Justice encouraged the City to comply with the Section 5 preclearance requirements: "We encourage the city promptly to take all steps necessary to bring the city into full compliance with Section 5." *Id.*

nexations did not have a discriminatory effect on minority voting strength.<sup>115</sup> After an unsuccessful effort to seek a withdrawal of the letter of objection and an accompanying Section 5 lawsuit,<sup>116</sup> the City agreed to implement a district-based method of election. This districting plan ultimately resulted in the election of one Latina and one Latino to the City Council in a city containing a significant Latina/o population. If the protections afforded by Section 5 had been unavailable, then the only recourse would have been to file an at-large election challenge pursuant to Section 2. Given the results in the El Centro and Santa Maria litigation,<sup>117</sup> the prospect of a successful outcome would have been highly unlikely.

In Monterey County, election officials decided to reduce the number of polling places for the special gubernatorial recall election held on October 7, 2003. According to county officials, the number of polling places utilized in the November 2002 general election was reduced from 190 to 86 for the special recall election.<sup>118</sup> The Department of Justice ultimately approved the voting precinct consolidations only after Monterey County withdrew from Section 5 consideration five precinct and polling place consolidations.<sup>119</sup> Absent Section 5 coverage, there would not have been a withdrawal of these particular polling place consolidations. The only alternative would have been to file a Section 2 case and seek a preliminary injunction enjoining the consolidation of these polling places. Given the shortened time periods involved between the setting of the special election<sup>120</sup> and the actual date of the election, presenting a Section 2 case with all of the required expert-intensive evidence relating to a history of voting discrimination, racially polarized voting and racial appeals, among other factors, would not have been possible.<sup>121</sup> With respect to the Monterey

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<sup>115</sup> The annexations would have reduced the Latina/o population of the City from 35.9% to 29.4%.

<sup>116</sup> *Yrigollen v. City of Hanford*, Civ. Act. No. CV-F-93-5303 OWW (E.D. Cal. 1993).

<sup>117</sup> See *supra* notes 99–105 and accompanying text.

<sup>118</sup> Tony Anchundo, Monterey County Registrar of Voters, Expedited Request for Preclearance of Changes Affecting Voting in Monterey County California for the Special Statewide Election and the Special County-Wide Election Consolidated and Scheduled for October 7, 2003 2 (Aug. 14, 2003).

<sup>119</sup> Letter from Joseph D. Rich, Chief, Voting Section, Department of Justice, to Tony Anchundo, Monterey County Registrar of Voters (Sept. 4, 2003) (on file with authors). In the second letter issued on September 4, 2003, the Attorney General noted that Monterey County had withdrawn the following consolidations:

Salinas 504, 601, 604 and 605 (Regency Court Seniors Apartment Recreation Room); Salinas 501 and 502 (Lamplighter Club Room); Natividad 1 and 2 and Santa Rita 4 and 5 (Sheriff's Posse Club House); Elkhorn and Lake 1 and 2 (Echo Valley School Library); and Pajaro 3, 4, 6, 7 and 8 (Full Gospel Church of Las Lomas).

*Id.* at 2.

<sup>120</sup> Complaint at 2, *Oliverez v. California*, Civ. Act. No. 03-03658 JF (N.D. Cal. 2003) (On July 24, 2004, the Secretary of State set the gubernatorial recall election for October 7, 2003.).

<sup>121</sup> See generally *Thornburg v. Gingles*, 478 U.S. 30 (1986).



County polling place consolidations, there was no realistic opportunity to even utilize Section 2.

Based upon these case studies, Section 2 cannot be viewed as a substitute for Section 5 protection. The difficulties presented by a Section 2 case, with its extensive use of expert testimony and with the burden on minority plaintiffs to demonstrate that a method of election or voting change results in a denial of an equal opportunity to elect a candidate of their choice, highlight the importance of a Section 5 administrative proceeding, where the burden of proof is reversed. Even if Section 2 cases were feasible, the shifting of the burden of proof to the covered jurisdiction in a Section 5 proceeding is far superior to having to expend substantial time and resources to meet the evidentiary burden imposed by Section 2.

#### C. WITHOUT SECTION 5 COVERAGE, JURISDICTIONS WILL REVERT TO DISCRIMINATORY METHODS OF ELECTION

Any doubt as to whether covered jurisdictions would revert to discriminatory methods of election if Section 5 preclearance was no longer required was laid to rest with the attempted conversion from a district election system<sup>122</sup> to an at-large method of election for the Chualar Union Elementary School District in Monterey County. The Department of Justice issued a letter of objection which prevented this conversion from occurring.<sup>123</sup> The School District at one time had elected its board members pursuant to an at-large method of election.<sup>124</sup> In 1995, when the board membership consisted of a Latina/o majority, the method of election was changed to a district-based election system.<sup>125</sup>

After a period of time, however, a dispute arose between the Latina/o board members and members of the white community. As a result of this dispute, members of the white community sought to change the method of election by circulating a petition that would ultimately result in the conversion back to an at-large method of election.<sup>126</sup> In evaluating the proposed voting change, the Department of Justice found that the cover letter accompanying the petition contained language that was expressed in a tone that “raises the implication that the petition drive and resulting change was mo-

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<sup>122</sup> The district election scheme consisted of at least one district containing three school board members. This multimember district was predominantly Latina/o.

<sup>123</sup> Letter from Ralph F. Boyd, *supra* note 13.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See id.*

tivated, at least in part, by a discriminatory animus.”<sup>127</sup> Moreover, the letter of objection stated that under the previous at-large method of election, the Latina/o board members were susceptible to recall petitions, whereas under the district-based election system, Latina/o board members had not been subject to recall elections.<sup>128</sup> In Chualar, the absence of the protective Section 5 features would have resulted in a reversion to the former discriminatory at-large method of election.<sup>129</sup>

D. SECTION 5 SERVES AS A DETERRENT TO THE ENACTMENT OF VOTING  
CHANGES THAT HAVE THE POTENTIAL TO DISCRIMINATE AGAINST  
MINORITY VOTING STRENGTH

In California, Section 5 has deterred the adoption of potentially discriminatory voting changes. A recent example serves to illustrate this deterrence. As noted previously, in Monterey County, county officials withdrew from consideration a series of voting precinct consolidations only after the U.S. Attorney General voiced concerns regarding problems related to minority voter access to the county’s polling places.<sup>130</sup> The County intended to reduce the number of its polling places by close to one half. Such a dramatic reduction in a county that has 3322 square miles<sup>131</sup> would have clearly made it difficult for minorities to travel to their local polling site and cast their ballots. However, upon receiving the Attorney General’s written concerns, Monterey County withdrew the objectionable precinct consolidations from Section 5 review. Since no letter of objection was issued, there was no readily available public document serving as a record of this event. This instance of deterrence can be documented only because the withdrawal occurred within the context of Section 5 litigation.

Apart from this deterrent effect, Section 5 enforcement has produced gains in minority electoral representation as a result of increased community involvement in campaigns, even when a questionable voting change has received Section 5 approval.<sup>132</sup> Given these beneficial effects, the record for reauthorizing and amending Section 5 becomes more compelling.

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<sup>127</sup> *Id.* at 2.

<sup>128</sup> *See id.*

<sup>129</sup> *See id.*

<sup>130</sup> *See supra* notes 119–120 and accompanying text.

<sup>131</sup> U.S. Census Bureau, Monterey County Quickfacts, <http://quickfacts.census.gov/qfd/states/06/06053.html> (last visited Sept. 26, 2007).

<sup>132</sup> After protracted litigation lasting about nine years in Monterey County, both the State and Monterey County were required to submit a series of judicial district consolidation ordinances for Section 5 approval. *See Lopez v. Monterey County (Lopez I)*, 519 U.S. 9 (1996); *Lopez v. Monterey County (Lopez II)*, 525 U.S. 266 (1999). During the course of the litigation, the district court ordered a special election based upon an election district plan. *Lopez v. Monterey County*, 871 F. Supp. 1254

There is also an additional reason for continuing Section 5 coverage in the four California counties: non-compliance. Not all of the political entities located within the four counties have complied with the Section 5 preclearance requirement. As discussed in the next part of this report, the issue of non-compliance has resurfaced repeatedly during the VRA's forty-one year history. On this basis alone, Section 5 should be reauthorized.

E. SECTION 5 SHOULD NOT BE PERMITTED TO EXPIRE IN THE FACE OF CONTINUING INSTANCES OF NON-COMPLIANCE

One could simply conclude that four letters of objection since 1982 in the four California counties covered under Section 5 indicates that Section 5 is not needed. However, such a conclusion would be unwarranted for two reasons. First, as discussed above, the letters of objection have served to discourage governmental entities from adopting plans which discriminated against Latina/o voting strength. Second, the conclusion assumes that there has been compliance with the Section 5 preclearance requirement.

There is a significant problem relating to the enforcement of Section 5. To achieve the purpose of eliminating voting discrimination, the VRA relies upon the voluntary compliance of Section 5-covered jurisdictions with the submission requirements. Based upon a long series of cases culminating in *Lopez v. Monterey County*,<sup>133</sup> Section 5-covered jurisdictions are under a legal mandate to submit their voting changes prior to implementation in any elections. In reality, many Section 5-covered jurisdictions are delinquent in the timely submission of their voting changes. But for litigation, some jurisdictions would not have submitted any voting changes.

This sordid record of non-compliance is documented in letters of objection and litigation. For example, in the *Lopez* litigation, the Supreme Court referred to voting changes adopted by California and implemented by Monterey County in the late 1960s, which as of 1999 had still not received the necessary Section 5 preclearance.<sup>134</sup> Also, in litigation involving a special election to recall Governor Gray Davis, Monterey County disclosed that voting precinct consolidations had not been submitted since the

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(N.D. Cal. 1994). As a result of this election and gubernatorial appointments, minorities for the first time in Monterey County served on the County's Municipal Court District. When the ordinances were submitted for Section 5 review, the Department of Justice approved the voting changes over the objections of the local minority community. The effect of the Section 5 approval was to permit the County to conduct county-wide or at-large elections for judicial offices. In subsequent elections, the minority judges have been able to withstand challenges and are still on the bench.

<sup>133</sup> *Lopez I*, 519 U.S. at 9.

<sup>134</sup> *Lopez II*, 525 U.S. at 266.

mid 1990s.<sup>135</sup> This record of non-compliance has been cited numerous times by the United States Commission on Civil Rights,<sup>136</sup> by congressional representatives and witnesses providing testimony when the Act was reauthorized in 1970,<sup>137</sup> 1975<sup>138</sup> and 1982,<sup>139</sup> by the Government Accounting Office<sup>140</sup> and by Supreme Court precedent.<sup>141</sup> Finally, as a result of in-

<sup>135</sup> See *supra* notes 119, 120 and accompanying text.

<sup>136</sup> See U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION: A STUDY OF THE PARTICIPATION BY NEGROES IN THE ELECTORAL AND POLITICAL PROCESSES IN 10 SOUTHERN STATES SINCE PASSAGE OF THE VOTING RIGHTS ACT OF 1965 84 (1968) (recommending that the Attorney General "should promptly and fully enforce Section 5 . . ."); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 28 (1975) ("Non-compliance with the Voting Rights Act through failure to submit changes remains a problem in enforcement of the act."); UNFULFILLED GOALS, *supra* note 11, at 70-75 (1981) (chronicling extent of failure to submit voting changes for Section 5 preclearance).

<sup>137</sup> *Voting Rights Act Extension: Hearing Before Subcomm. No. 5 of the H. Comm. on the Judiciary on H.R. 4249, H.R. 5538 and Similar Proposals, to Extend the Voting Rights Act of 1965 with Respect to the Discriminatory Use of Tests and Devices*, 91st Cong. 4 (1969) (statement of William McCulloch, Member, House Committee on the Judiciary) ("Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement."); see also *id.* at 18 (statement of Howard A. Glickstein, General Counsel and Acting Staff Director, U.S. Commission on Civil Rights) ("Despite the requirements of section 5, the State of Mississippi made no submission to the Attorney General, and the new laws were enforced."); *Amendments to the Voting Rights Act of 1965: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary on S. 818, S. 2456, S. 2507, and Title IV of S. 2029, Bills to Amend the Voting Rights Act of 1965*, 91st Cong. 51-53 (1969) (statement of Frankie Freeman, Member, U.S. Commission on Civil Rights) (Commissioner Freeman acknowledged that most states complied with Section 5, but did recognize that there were instances of non-compliance which could be addressed through litigation by the United States Attorney General).

<sup>138</sup> *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501*, 94th Cong. 281 (1975) (statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice). As J. Stanley Pottinger testified,

In summary, the protections of section 5, should be expanded because: first, it has been effective in preventing discrimination; second, it has never been completely complied with by the covered jurisdiction; and third, the guarantees it provides are more significant to the country than the slight interference to the Federal system which this powerful provision would incur.

*Id.*

<sup>139</sup> *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary on Extension of the Voting Rights Act*, 97th Cong. 2117 (1982) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice). As Drew S. Days testified,

I will not sit before you today and assert that even during what I think was a period of vigorous enforcement of the Act that the Department was able to ensure that every, or indeed most, electoral changes by covered jurisdictions were subjected to the Section 5 process. There was neither time nor adequate resources to canvas systematically changes since 1965 that had not been precleared, to obtain compliance with such procedures or even, in a few cases, to ascertain whether submitting jurisdictions had complied with objections to proposed changes. It was not uncommon for us to find out about changes made several years earlier from a submission made by a covered jurisdiction seeking preclearance of a more recent enactment.

*Id.*

<sup>140</sup> GAO Report on the Voting Rights Act: Hearings Before the H. Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on GAO Report on the Voting Rights Act, 95th Cong. 84 (1978) (noting that the Department of Justice did not systematically identify and secure the submission of voting changes enacted by covered jurisdictions and that the Department's efforts were at best "spo-

dependent reviews of voting changes in selected jurisdictions, the record demonstrates that non-compliance is still a significant problem. For example, in Merced County, California, there are special election districts that have not submitted their annexations for Section 5 approval.<sup>142</sup>

Despite this record of non-compliance, there were efforts underway to either amend the VRA “bail-out” provisions to facilitate the process of securing an exemption from Section 5 review or to explore the feasibility of securing a “bail-out” from Section 5 compliance. As previously noted, under the “bail-out” provisions, covered jurisdictions can institute an action in the U.S. District Court for the District of Columbia seeking a judicial declaration that the covered jurisdictions are no longer subject to Section 5 preclearance.<sup>143</sup> Before such a declaratory judgment can be issued, the covered jurisdiction must meet several requirements.<sup>144</sup> For a ten year period prior to the filing of the declaratory judgment action, the covered jurisdiction must demonstrate, among other requirements, that all changes affecting voting have been submitted for Section 5 preclearance prior to implementation in the electoral process,<sup>145</sup> that the covered jurisdiction or its political subunits<sup>146</sup> must not have been the subject of a letter of objection or the denial of a declaratory judgment pursuant to Section 5,<sup>147</sup> that no judgments or consent decrees have been entered in any litigation affecting the right to vote<sup>148</sup> and that the covered jurisdiction should “have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process . . . .”<sup>149</sup>

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radic” and fell “far short of formal systematic procedures to make sure that changes affecting voting are submitted”).

<sup>141</sup> See, e.g., *Perkins v. Matthews*, 400 U.S. 379, 393 n.11 (1971). In reviewing a table of submissions prepared by the Attorney General which demonstrated “that only South Carolina has complied rigorously with § 5,” the *Perkins* Court stated, “The only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5’s requirement.”

<sup>142</sup> Author review of on-site records in the 1990s.

<sup>143</sup> 42 U.S.C. § 1973(b)(a) (2000).

<sup>144</sup> See generally S. REP. NO. 97-417, at 46–62, as reprinted in 1982 U.S.C.C.A.N. 177, 224–41; 42 U.S.C. § 1973b(a).

<sup>145</sup> 42 U.S.C. § 1973(b)(a)(1)(D).

<sup>146</sup> 28 C.F.R. § 51.6 (2007).

<sup>147</sup> 42 U.S.C. § 1973(b)(a)(1)(E).

<sup>148</sup> *Id.* § 1973(b)(a)(1)(B).

<sup>149</sup> *Id.* § 1973(b)(a)(1)(F)(i); see also S. REP. NO. 97-417, at 54 n.184, as reprinted in 1982 U.S.C.C.A.N. 177, 232 n.184. As stated in the Senate Report,

The testimony before the House Subcommittee on Civil and Constitutional Rights in hearings last year and the Senate Subcommittee on the Constitution this year showed that in covered jurisdictions today there still exist many ‘grandfathered’ voting procedures and methods of election which pre-date 1965 and which tend to discriminatory [sic] in the particular circumstances. These include unduly restrictive registration, multi-member and at-large districts with majority vote-runoff requirements, prohibitions on single-shot voting, and others.

Three of California's Section 5-covered jurisdictions, Monterey, Merced and Kings Counties, have sought to amend the bail-out provisions or seek changes in the triggering formulas that determine Section 5 coverage in order to facilitate an exemption from federal preclearance.<sup>150</sup> Their efforts to seek a legislative amendment are not surprising, since none of the three counties could qualify for a bail-out under the statute's current criteria. Merced County would have difficulty demonstrating that there are no discriminatory methods of elections within the County that deny minorities equal access to the political process.<sup>151</sup> For example, the city of Los Banos has a total population of 25,869, based upon the 2000 Census, of which 13,048, or 50.4%, are Latina/o.<sup>152</sup> The at-large method of election is implemented to select members to the City Council.<sup>153</sup> Despite this large concentration of Latinas/os within the City, there is not a single Latina/o serving on the City Council.<sup>154</sup> Such an absence clearly suggests that the at-large method of election utilized by the city of Los Banos may have a dilutive effect on Latina/o voting strength and, thus, would impede efforts of Merced County to seek a Section 5 bail-out. In addition, based upon an on-site study of annexations for special election districts by one of the authors, there appeared to be many annexations that had not been submitted for Section 5 approval. This factor, if true, would also prevent Merced County from successfully securing a Section 5 bail-out.

The remaining two counties also would not be successful in securing a Section 5 bail-out. In Kings County, a recent settlement involving the Hanford Joint Union High School District, which resulted in the abandonment of the at-large method of election and the implementation of district elections, would prevent Kings County from bailing out from Section 5 cover-

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S. REP. NO. 97-417, at 54 n.184.

<sup>150</sup> Michael Doyle, *Voting Rights Rules Irk Counties: With a 1965 Law Coming up for Renewal, Merced is Leading the Charge to Escape Federal Controls*, SACRAMENTO BEE, Jan. 22, 2006, at A3 (describing the efforts of Merced County and Kings County to hire lobbyists to amend the bail-out provisions); see also Action Minutes of the Monterey County Board of Supervisors, Monterey County Water Resource Agency, and Monterey County Redevelopment Agency (Oct. 18, 2005), available at [http://www.co.monterey.ca.us/cttb/minutes/2005/m\\_121305.htm](http://www.co.monterey.ca.us/cttb/minutes/2005/m_121305.htm) (showing that where County voted to further study the issue of whether it should support an effort to amend the bail-out provisions, the County responded to Latina/o community concerns that their voting rights would be adversely affected).

<sup>151</sup> 42 U.S.C. § 1973(b)(a)(1)(F)(i).

<sup>152</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P8, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007).

<sup>153</sup> Action Minutes of the City Council of the City of Los Banos (Nov. 17, 2004), available at <http://www.losbanos.org/pdf/ccmin11172004.pdf> (accepting results of municipal elections showing that candidates are elected on an at-large election plurality basis).

<sup>154</sup> City of Los Banos, City Council, <http://www.losbanos.org/council.php> (last visited Sept. 26, 2007).

age.<sup>155</sup> In Monterey County, the recent letter of objection issued against the Chualar Union Elementary School District on March 29, 2002, would result in the same outcome.<sup>156</sup>

These efforts by Monterey, Kings and Merced Counties to secure legislative amendments to facilitate a Section 5 bail-out further reinforce the need to have Section 5 coverage in California. These efforts demonstrate that these counties and their political subunits would have no hesitation in reverting back to redistricting plans or methods of elections that had a discriminatory effect on minority voting strength.

In summary, based upon this review of Section 5 letters of objection and non-compliance efforts, there continues to be a need for Section 5 pre-clearance. At a minimum, efforts should be undertaken to ensure that jurisdictions have fully complied with Section 5. In California, Section 5 has been effective in preventing the implementation of discriminatory voting changes and has discouraged jurisdictions from reverting back to previous election methods that denied Latinas/os access to the political process.

### III. THE LANGUAGE ASSISTANCE PROVISIONS PROVIDE LIMITED ENGLISH PROFICIENCY ELIGIBLE VOTERS AND OTHER VOTERS WITH AN EFFECTIVE OPPORTUNITY TO PARTICIPATE IN THE POLITICAL PROCESS<sup>157</sup>

#### A. LANGUAGE ASSISTANCE PROVISIONS: SECTIONS 203 AND 4(F)(4)

As previously noted, the language assistance provisions of the VRA, Sections 203 and 4(f)(4), were enacted in 1975 and reauthorized in 1982 because Congress found that discrimination against language minorities limited the ability of limited-English proficient (LEP) members of those communities to participate effectively in the electoral process.<sup>158</sup> The language assistance provisions require language assistance for language mi-

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<sup>155</sup> 42 U.S.C. § 1973(b)(a)(1)(B); *see also supra* note 148 and accompanying text.

<sup>156</sup> 42 U.S.C. § 1973(b)(a)(1)(E); *see also supra* notes 123–129 and accompanying text.

<sup>157</sup> Substantial portions of Part III of this report originally appeared in a prepared statement by Stewart Kwoh, Executive Director of the Asian Pacific American Legal Center of Southern California, and Eugene Lee, Staff Attorney with the Voting Rights Project of the Asian Pacific American Legal Center of Southern California, submitted to the Chairman of the House Judiciary Subcommittee on the Constitution. *See The Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1346–71 (2005) [hereinafter *Bilingual Election I*] (Prepared statement of Stewart Kwoh, President and Executive Director, Asian Pacific American Legal Center of Southern California, and Eugene Lee, Staff Attorney, Voting Rights Project, Asian Pacific American Legal Center of Southern California).

<sup>158</sup> *See supra* Part I.

nority communities in certain jurisdictions during the election process<sup>159</sup> and apply to four language minority groups: American Indians, Asian-Americans, Alaska Natives and persons of Spanish heritage.<sup>160</sup> Congress has continually found that these covered groups have faced and continue to face significant voting discrimination due to “unequal educational opportunities afforded them resulting in high illiteracy and low voting participation.”<sup>161</sup> Other language groups have not been included because Congress did not find evidence showing that they experienced similar sustained difficulties in voting. By providing language assistance, Congress intended to break down the language barriers that effectively prevented limited-English-speaking citizens from exercising their constitutional right to vote.

The adoption of these language assistance provisions are derived from a very basic principle: an eligible voter should not be penalized for his or her lack of English proficiency, especially when this inability to understand the English language reflects the failure of educational institutions to ensure that young students, as well as adult students, meet a certain minimal level of English proficiency.<sup>162</sup> The congressional testimony in support of the language assistance provisions has documented the need for the implementation and the continued need for these provisions.<sup>163</sup>

The language assistance provisions require that any election materials provided in English must also be provided in the language of the covered minority group.<sup>164</sup> Election information includes registration or voting notices, forms, instructions, ballots and any other materials or information relating to the electoral process.<sup>165</sup> Where the language of a covered minority group has no written form, the state or locality is only required to provide oral instructions, information and assistance.<sup>166</sup>

In 1992, after determining that the type of discrimination previously encountered by covered language minority populations still existed and that the need for language assistance continued, Congress passed the Voting Rights Language Assistance Amendments, which reauthorized the lan-

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<sup>159</sup> See 42 U.S.C. §§ 1973aa-1a, 1973b(f)(4).

<sup>160</sup> See *id.* § 1973aa-1a(e).

<sup>161</sup> *Id.* § 1973aa-1a(a); see also *id.* § 1973b(f)(1).

<sup>162</sup> See S. REP. NO. 94-295, at 29-30 (1975) as reprinted in 1975 U.S.C.C.A.N. 775, 775-77.

<sup>163</sup> See, e.g., *id.* at 24-30, 37-39; S. REP. NO. 97-417, at 64-66 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 242-45; see also H.R. REP. NO. 102-655, at 3 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 767 (report accompanying passage of the Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992)).

<sup>164</sup> See 42 U.S.C. § 1973aa-1a(c).

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*; see also 28 C.F.R. § 55.12(c) (2007).



guage assistance provisions until August 2007.<sup>167</sup> In addition to reauthorization, Congress determined that an expanded formula for determining coverage was necessary.

The pre-1992 formula required coverage only if an Asian, Native American, Alaska Native or Latina/o language minority community had LEP voting age citizens equal to 5% of the jurisdiction's citizen voting-age population.<sup>168</sup> This resulted in dense urban jurisdictions with large LEP voting populations not being covered, while jurisdictions with smaller populations were being covered. Thus, it required an excessively large LEP language minority citizen voting-age population for urban jurisdictions to meet the 5% threshold. For example, the number of LEP voting age citizens from a single language minority community needed to meet the 5% threshold in 1990 for Los Angeles County was 443,158, as compared to Napa County, which required only 5538 to meet the threshold.<sup>169</sup> Similarly, San Francisco would have also had to reach a much higher threshold—36,198—than Napa County.<sup>170</sup> Congress determined that a 10,000 person benchmark served as an appropriate threshold.<sup>171</sup> The numerical benchmark has been extremely important to Asian-Americans because the majority of Asian-Americans live in densely-populated urban areas.<sup>172</sup>

A community of one of these language minority groups will qualify for language assistance under Section 203 of the Act if more than 5%, or 10,000, of the voting-age citizens in a jurisdiction belong to a single language minority community, have limited-English proficiency and the illiteracy rate of voting-age citizens in the language minority group is higher than the national illiteracy rate.<sup>173</sup> A community of one of these language minority groups will qualify for language assistance under Section 4(f)(4) if (1) more than 5% of the voting-age citizens in a jurisdiction belong to a single language minority community, (2) registration and election materials were provided only in English on November 1, 1972 and (3) fewer than 50% of the voting-age citizens in such a jurisdiction were registered to vote

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<sup>167</sup> See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992).

<sup>168</sup> See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 207(3), 203, 89 Stat. 400, 402-03 (1975).

<sup>169</sup> See U.S. Census Bureau, 1990 Census Summary File 1, at tbls.P007, P012H, P012D, P012E, P012G, P012J, P012C, P012F, P012I, P013A, P013B, available at <http://factfinder.census.gov> (last visited Nov. 13, 2007).

<sup>170</sup> See *id.*

<sup>171</sup> See 42 U.S.C. § 1973aa-1a.

<sup>172</sup> See U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2000 4, 7 (2002), <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>.

<sup>173</sup> 42 U.S.C. § 1973aa-1a(b).

or voted in the 1972 presidential election. Jurisdictions covered under Section 4(f)(4) are covered under Section 5.<sup>174</sup>

Currently, Sections 203 and 4(f)(4) apply in California.<sup>175</sup> Presently there are twenty-five counties in California subject to Section 203 that are required to provide an election process in a language other than English.<sup>176</sup> Of the Section 5-covered jurisdictions, there are only three counties subject to the language assistance requirements.<sup>177</sup>

## B. CONTINUING NEED

Language minority voters face discrimination on the basis of their limited English proficiency. Even though language minority voters are citizens and have the legal right to vote, poll workers and other election officials single them out as persons who should not be voting because they are not completely fluent or literate in English. This discrimination creates barriers to voting. Most obviously, discrimination can result in outright denials of the right to vote. Discrimination also creates an unwelcoming atmosphere in poll sites that deters language minority voters from exercising their right to vote. Section 203 addresses both of these barriers in a manner that is more fully described in the part of this report addressing discrimination against language minority voters.

Language minority voters face another barrier to voting: language. Because of their limited-English proficiency, language is the largest barrier that language minority voters face in becoming full participants in the democratic process. Some language minority voters, even though they were born in the United States or came to the United States at an early age, are limited-English proficient because they attended substandard schools that did not afford them an adequate chance to learn English. Other language minority voters are limited-English proficient because they immigrated to

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<sup>174</sup> *Id.* § 1973b(b).

<sup>175</sup> *See* Voting Rights Act Amendments of 1992, Determination Under Section 203, 67 Fed. Reg. 48,871, 48,873 (July 26, 2002).

<sup>176</sup> *See id.* These counties and the minority language groups include: Alameda (Chinese, Latina/o), Colusa (Latina/o), Contra Costa (Latina/o), Fresno (Latina/o), Imperial (Latina/o, American Indian), Kern (Latina/o), Kings (Latina/o), Los Angeles (Chinese, Filipino, Japanese, Korean, Vietnamese, Latina/o), Madera (Latina/o), Merced (Latina/o), Monterey (Latina/o), Orange (Chinese, Korean, Vietnamese, Latina/o), Riverside (Latina/o, American Indian), Sacramento (Latina/o), San Benito (Latina/o), San Bernardino (Latina/o), San Diego (Latina/o, Filipino), San Francisco (Chinese, Latina/o), San Joaquin (Latina/o), San Mateo (Chinese, Latina/o), Santa Barbara (Latina/o), Santa Clara (Latina/o, Chinese, Filipino, Vietnamese), Stanislaus (Latina/o), Tulare (Latina/o) and Ventura (Latina/o). *Id.*

<sup>177</sup> These counties and the languages other than English include: Kings (Spanish), Merced (Spanish) and Yuba (Spanish). *See* 28 C.F.R. 55 app. (2007).

this country and have lacked adequate opportunities to fully learn English. In either case, Section 203 language assistance lowers the single largest hurdle that these voters face in the voting process.

Many Asian-American and Latina/o groups in California have high rates of limited-English proficiency, which means they are unable to speak or understand English adequately enough to participate in the electoral process. For many language minority voters in California, the language barrier would be insurmountable without the language assistance that they receive pursuant to Section 203 because California voters must contend with extremely complicated ballots. For example, the ballot used in the October 2003 gubernatorial recall election listed 135 candidates.<sup>178</sup> The ballot used in the November 2004 general election contained a total of sixteen statewide ballot propositions,<sup>179</sup> and the ballot used in the November 2005 statewide special election contained ballot propositions addressing such arcane topics as redistricting reform, prescription drug discounts and electricity regulation.<sup>180</sup> Many voters who speak English as their first language have difficulty understanding these types of ballots. For language minority voters, the language barrier doubles or triples this difficulty.

Voter information guides are also full of complexity. These guides contain not only the text of proposed laws, but also analyses by the State Legislative Analyst, arguments for and against proposed laws and rebuttal arguments.<sup>181</sup> Adding to the complexity is the length of these guides. The voter information guide used in the November 2005 statewide special election was more than seventy-five pages long.<sup>182</sup> For voters who do not read English at a high level, reading these types of guides would take weeks.

In short, language minority voters need Section 203 to help them climb the language hurdle. Several indicators show that this need is particularly compelling for voters in California.

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<sup>178</sup> A sample ballot can be found online at Wikipedia, Sample Ballot for CA Recall, [http://upload.wikimedia.org/wikipedia/en/c/c6/Sample\\_ballot\\_for\\_CA\\_recall.png](http://upload.wikimedia.org/wikipedia/en/c/c6/Sample_ballot_for_CA_recall.png) (last visited Oct. 7, 2007).

<sup>179</sup> See California Secretary of State, California Statewide November 2, 2004 General Election (2004), <http://vote2004.sos.ca.gov/voterguide/> (follow “English/Principal” and “English/Supplemental” hyperlinks).

<sup>180</sup> See California Secretary of State, Statewide Special – State Ballot Measures, <http://vote2005.sos.ca.gov>Returns/prop/00.htm> (last visited Oct. 7, 2007).

<sup>181</sup> See, e.g., California Secretary of State, *supra* note 179.

<sup>182</sup> See California Secretary of State, Elections & Voter Information, [http://www.sos.ca.gov/elections/vig\\_2005.htm](http://www.sos.ca.gov/elections/vig_2005.htm) (follow “zipped PDF file” hyperlink) (last visited Oct. 7, 2007).

### 1. Demographic Indicators of Need

Disaggregated Census 2000 data<sup>183</sup> show that the language minority population in California does indeed have a high rate of limited-English proficiency. Disaggregated Census 2000 data also show that a significant portion of the Asian-American population, including significant portions of specific Asian-American ethnic groups and the Latina/o population in California, lives in what are referred to as “linguistically isolated households.”<sup>184</sup> A household is considered linguistically isolated if all members of the household fourteen years and older are limited-English proficient.<sup>185</sup> Voters who live in linguistically isolated households are in particular need of language assistance because they do not have family members who can assist them in the voting process.

The Asian-American population in California is nearly 40% limited-English proficient,<sup>186</sup> and over one-quarter of Asian-American households are linguistically isolated.<sup>187</sup> A number of Asian-American groups are majority or near-majority limited-English proficient, including Vietnamese (62%), Korean (52%) and Chinese (48%).<sup>188</sup> These groups also have high rates of linguistic isolation, including 44% of Vietnamese American households, 41% of Korean American households and 34% of Chinese American households.<sup>189</sup> The Latina/o population in California is 43% limited-

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<sup>183</sup> Asian Pacific Legal Center of Southern California was the principal researcher in a recently released demographic profile entitled, *The Diverse Face of Asians and Pacific Islanders in California*, which it co-sponsored with the Asian Law Caucus and the National Asian Pacific American Legal Consortium. The profile disaggregated Census 2000 data on the California APIA population by racial/ethnic group. See generally ASIAN PAC. AM. LEGAL CTR. OF S. CAL., *THE DIVERSE FACE OF ASIANS AND PACIFIC ISLANDERS IN CALIFORNIA* (2005), <http://apalc.org/demographics/wp-content/uploads/2006/11/caapalc0905.pdf> [hereinafter *THE DIVERSE FACE*]. The disaggregated data cited in this report is derived from Census 2000 data that was compiled in the preparation of this profile. When citing data, this report uses the term “APIA” to refer to Asian and Pacific Islander Americans and the term “Asian-American” to refer to Asian, but not Pacific Islander, Americans.

<sup>184</sup> *Id.* at 11.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 10.

<sup>187</sup> *Bilingual Election I*, *supra* note 157, at 1346–71 (2005). When the data for individual groups are examined, the percentages increase. For example, Vietnamese are 62% limited English proficient and 44% are in linguistically isolated households. *Id.* at 1349–50 (table showing degrees of limited English proficiency and percent of linguistically isolated households for separate Asian and Pacific Islander American groups). When the focus shifts to individual counties, the percentages remain high as well. *Id.* at 1350–51. The same percentages are also present when Asian and Pacific Islander American voters are examined.

<sup>188</sup> *THE DIVERSE FACE*, *supra* note 183, at 10.

<sup>189</sup> *Bilingual Election I*, *supra* note 157, at 1349–50.

English proficient, and 26% of Latina/o households are linguistically isolated.<sup>190</sup>

Table 2 provides additional data on rates of limited-English proficiency and linguistic isolation for various racial and ethnic groups in California:

**Table 2.**  
**California LEP and LIH Rates**

Group	Percentage of Population That Is Limited-English Proficient (LEP)	Percentage of Households That Are Linguistically Isolated (LIH)
California	20%	10%
White	3%	2%
Latina/o	43%	26%
American Indian/Alaska Native	16%	8%
Asian overall	39%	26%
Vietnamese	62%	44%
Cambodian	56%	32%
Korean	52%	41%
Chinese	48%	34%
Filipino	23%	11%
Japanese	22%	18%

## 2. Requests for Language Assistance

Another indication that language minority voters are in need of language assistance is the number of voters who request language assistance. According to data gathered by the Los Angeles County Registrar of Voters, the total number of voters in Los Angeles County requesting language as-

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<sup>190</sup> *Id.*

sistance increased by 38% from December 1999 to August 2005.<sup>191</sup> This increase reflects increased outreach by Los Angeles County and illustrates language minority voters' reliance on language assistance. Table 3 shows these increases for specific language minority groups<sup>192</sup>:

**Table 3.**  
**Los Angeles County: Voter Requests for Language Assistance**

Language	Increase in Number of Requests for Language Assistance: December 1999 to August 2005
Chinese	49%
Japanese	25%
Korean	26%
Tagalog	63%
Vietnamese	40%
Spanish	37%

These data indicate that, because of voter outreach and education by Los Angeles County and community advocates, many limited-English proficient Asian-Americans and Latina/o voters are using the language assistance provided under Section 203. The data also indicate that as the number of requests for language assistance increases, language minority voters have a continuing need for Section 203 assistance.

### 3. Exit Poll Indicators of Need

During major elections, the Asian Pacific American Legal Center of Southern California (APALC) conducts large-scale exit polls at poll sites throughout Southern California.<sup>193</sup> These poll results show that the limited-English proficiency rate of APIA voters mirrors the limited-English proficiency rate of the general APIA population. For example, in November 2004, 40% of APIA voters surveyed in APALC's exit poll indicated

<sup>191</sup> *Id.* at 1434–37 (Prepared Statement of Conny B. McCormack, Registrar-Recorder/County Clerk, Los Angeles County).

<sup>192</sup> *See id.* at 1353.

<sup>193</sup> *See* ASIAN PAC. AM. LEGAL CTR. OF S. CAL., ASIAN AMERICANS AT THE BALLOT BOX: THE 2004 GENERAL ELECTION: GROWING VOTER PARTICIPATION IN SOUTHERN CALIFORNIA (2004), <http://apalc.org/demographics/wp-content/uploads/2006/09/ballot-box-060916.pdf> [hereinafter THE 2004 GENERAL ELECTION].

that they are limited-English proficient.<sup>194</sup> Table 4 shows similar exit poll data for other elections.

**Table 4.**  
**Southern California Exit Poll Data: LEP Rates**

Election	Percentage of APIA Voters Who Are Limited-English Proficient
November 2004*	40%
November 2002	32%
November 2000	46%
March 2000	47%
November 1998	35%

\*Represents preliminary finding (subject to adjustment based on statistical weighting)

In addition to illustrating that language minority voters have a need for language assistance, these exit poll results show that many APIA and Latina/o voters in Los Angeles and Orange Counties would benefit from language assistance during the voting process. For example, in November 2000, 54% of APIA voters and 46% of Latina/o voters indicated that they would be more likely to vote if they received language assistance.<sup>195</sup> Table 5 provides similar data for other elections.

<sup>194</sup> See *id.* at 17.

<sup>195</sup> ASIAN PAC. AM. LEGAL CTR. OF S. CAL., FINDINGS FROM THE NOVEMBER 2000 SOUTHERN CALIFORNIA VOTER SURVEY 3 (2000), [http://www.apalc.org/pdf/2000\\_voter\\_survey.pdf](http://www.apalc.org/pdf/2000_voter_survey.pdf).

**Table 5.**  
**Southern California: More Likely to Vote If Assistance Received**<sup>196</sup>

Election	Percentage of APIA Voters More Likely to Vote If Assistance Received	Percentage of Latina/o Voters More Likely to Vote If Assistance Received
November 2000	54%	46%
March 2000	53%	42%
November 1998	43%	38%

Data from the November 2004 general election<sup>197</sup> indicate that over one-third of APIA voters used language assistance to cast their votes.<sup>198</sup> Several APIA groups had particularly high rates of using language assistance, including 38% of Chinese-American voters, 48% of Korean-American voters and 42% of Vietnamese-American voters in Los Angeles County.<sup>199</sup>

#### C. UNEQUAL EDUCATIONAL OPPORTUNITIES FOR LANGUAGE MINORITIES

Congress enacted Section 203 after concluding that English-only elections and voting practices effectively denied the right to vote to a substantial segment of the nation's language minority population.<sup>200</sup> Congress made findings that language minorities suffer from unequal educational opportunities, high illiteracy and low voting participation.<sup>201</sup> Language minorities still face unequal educational opportunities, and the continuing existence of these inequalities constitutes a sufficient basis for Congress to renew Section 203 for an additional twenty-five years.

<sup>196</sup> See *id.*; ASIAN PAC. AM. LEGAL CTR. OF S. CAL., SURVEY SAYS . . . A REPORT OF THE ASIAN PACIFIC LEGAL CENTER'S EXIT POLL PROJECT 1 (2000), [http://www.apalc.org/pdf/Exit\\_Poll\\_Newsletter.pdf](http://www.apalc.org/pdf/Exit_Poll_Newsletter.pdf); ASIAN PAC. AM. LEGAL CTR. OF S. CAL., NOVEMBER 1998 SOUTHERN CALIFORNIA VOTER SURVEY REPORT 28 (1999), [http://www.apalc.org/pdf/Nov\\_1998\\_Voter\\_Survey.pdf](http://www.apalc.org/pdf/Nov_1998_Voter_Survey.pdf).

<sup>197</sup> These data represent preliminary findings and are subject to adjustment based on statistical weighting.

<sup>198</sup> See THE 2004 GENERAL ELECTION, *supra* note 193, at 17.

<sup>199</sup> *Id.* at 18.

<sup>200</sup> See S. REP. NO. 94-295, at 28, as reprinted in 1975 U.S.C.A.N. 774.

<sup>201</sup> See *id.* at 28-30.



### 1. Demographic Indicators of Unequal Educational Opportunities

Current demographic data indicate that educational inequalities still exist. Using high school completion as a measure, disaggregated Census 2000 data show that Asian-Americans and Latinas/os have lower rates of educational attainment than white Americans. In California, 19% of Asian-Americans have less than a high school degree, compared with 10% of the white population. These differences are even more dramatic when looking at specific Asian-American ethnic groups. For example, 36% of Vietnamese Americans have less than a high school degree. Latinas/os have even lower rates of educational attainment, with 53% having less than a high school degree. The following table shows rates of high school non-completion in California:

**Table 6.**  
**California: High School Non-Completion**

Group	Population With Less Than a High School Degree
California	23%
White	10%
Latina/o	53%
Asian overall	19%
Hmong	66%
Laotian	58%
Cambodian	56%
Vietnamese	36%
Chinese	22%
Filipino	12%
Korean	12%

These low rates of high school completion are a contributing factor to continuing high rates of limited-English proficiency among Asian-American and Latina/o children, defined as children of age seventeen years and younger. According to disaggregated Census 2000 data, over one-fifth of Asian-American children in California are limited-English proficient. In

the majority of counties covered by Section 203 for an Asian-American language minority group, these rates are higher. For example, 30% of Asian-American children in San Francisco County and 24% of Asian-American children in Los Angeles County are limited-English proficient. Almost one-third of Latina/o children in California are limited-English proficient. Los Angeles, Orange, and San Diego are the three counties in California with the largest numbers of limited-English proficient voting-age citizens covered under Section 203 for persons of Spanish heritage. Over 30% of Latina/o children in these counties are limited-English proficient.

## 2. Other Indicators of Unequal Educational Opportunities

There are other indications that language minorities suffer from unequal educational opportunities in California. K-12 students in California designated as “English learners” suffer from a number of educational inequities. English learners are students who speak a language other than English at home and who are not proficient in English.<sup>202</sup> Students who speak a language other than English at home must take a test to assess their level of English proficiency.<sup>203</sup> Students who are considered not proficient in English are classified as English learners, and most are placed into English language development programs.<sup>204</sup>

According to a 2005 study, there are more than 1.6 million English learners in California, representing over one-fourth of California’s elementary and secondary students.<sup>205</sup> Over 90% of these students are from language minority groups specified in Section 203 (Latinas/os comprise 85% of English learners, and APIAs make up 9% of English learners).<sup>206</sup> Con-

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<sup>202</sup> See California Department of Education, Glossary – English Learners, [http://data1.cde.ca.gov/dataquest/gls\\_learners.asp](http://data1.cde.ca.gov/dataquest/gls_learners.asp) (last visited Oct. 7, 2007).

<sup>203</sup> CAL. EDUC. CODE § 313(a) (Deering 2007).

<sup>204</sup> Proposition 227 was passed by California voters in 1998. Proposition 227 dramatically reduced the number of bilingual education classes in California and required that English learner students be taught in English through structured English immersion programs for a transition period and then transferred to a mainstream English language classroom. See California Secretary of State, Primary 98 – Proposition 227, <http://primary98.sos.ca.gov/VoterGuide/Propositions/227.htm> (last visited on Oct. 7, 2007). The law allows alternatives to English immersion, such as bilingual education, but only through parental waivers. *Id.* Today only a reported 6.5% of English learner students receive bilingual education. Some educational policy advocates believe that bilingual education is a more effective method of teaching English to English learners than English immersion programs. This report does not examine this question and only addresses the educational inequities that English learner students face, regardless of the method of instruction.

<sup>205</sup> CHRISTOPHER JEPSEN & SHELLEY DE ALTH, ENGLISH LEARNERS IN CALIFORNIA SCHOOLS iii–iv (2005) available at [http://www.ppic.org/content/pubs/report/R\\_405CJR.pdf](http://www.ppic.org/content/pubs/report/R_405CJR.pdf).

<sup>206</sup> See *id.* at 9.

trary to common perception, approximately 85% of California's English learners are born in the United States.<sup>207</sup>

### 3. Achievement Gap for English Learners

According to a 2003 study of English learners in California schools, the academic achievement of English learners lags significantly behind the achievement levels of English-only students.<sup>208</sup> The Study found that the achievement gap puts English learners further and further behind English-only students as the students progress through school grades.<sup>209</sup> For example, in grade 5, current and former English learners read at the same level as English-only students who are between grades 3 and 4, a gap of approximately 1.5 years.<sup>210</sup> By grade 11, current and former English learners read at the same level as English-only students who are between grades 6 and 7, a gap of approximately 4.5 years.<sup>211</sup>

The Study also found that English learners have significantly lower rates of passing the California High School Exit Exam, a standards-based test that all students in California must pass in order to graduate from high school.<sup>212</sup> In the graduating class of 2004, only 19% of English learners had passed the test after two attempts, compared with 48% of all students.<sup>213</sup> The Study attributed this achievement gap to a number of educational inequalities faced by English learners.<sup>214</sup> As set forth below, the Study found that English learners face seven categories of unequal educational opportunities.

#### a. California Lacks a Sufficient Number of Appropriately Trained Teachers to Teach English Learners

English learners are more likely than any other students to be taught by teachers who are not fully credentialed. The Study noted that 14% of teachers statewide were not fully credentialed in 2001–2002.<sup>215</sup> In contrast, 25% of teachers of English learners were not fully certified.<sup>216</sup> The

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<sup>207</sup> *Id.* at 10.

<sup>208</sup> Patricia Gándara et al., *English Learners in California Schools: Unequal Resources, Unequal Outcomes*, 11 EDUC. POL'Y ANALYSIS ARCHIVES 1, 3 (2003), available at <http://epaa.asu.edu/epaa/v11n36/v11n36.pdf>.

<sup>209</sup> *See id.* at 4.

<sup>210</sup> *See id.* at 5–6.

<sup>211</sup> *See id.*

<sup>212</sup> *See id.* at 7.

<sup>213</sup> *Id.* The State Board of Education has delayed the implementation of this requirement, and the requirement now applies to students beginning with the class of 2006.

<sup>214</sup> *See id.* at 8.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

Study also found that as the concentration of English learners in a school increases, the percentage of teachers without full credentials also increases.<sup>217</sup>

The Study observed further that only 53% of English learners who were enrolled in grades 1 to 4 during the 1999–2000 school year were taught by a teacher with any specialized training to teach them.<sup>218</sup> In addition, many newly-certified teachers reported that they did not have sufficient training to work with English learners and their families.<sup>219</sup> Of the teachers graduating from teacher credential programs in the California State University system in 1999–2000, one-fourth reported that they felt they were only somewhat prepared or not at all prepared to teach English learners.<sup>220</sup>

b. Teachers of English Learners Lack Adequate Professional Development Opportunities to Gain Skills Necessary to Address the Instructional Needs of English Learners

The Study noted the intense instructional demands that teachers of English learner students face.<sup>221</sup> Teachers must provide instruction in English language development while simultaneously attempting to ensure that English learners have access to core curriculum subjects.<sup>222</sup> Despite these demands, teachers devoted inadequate amounts of time to their professional development in the area of teaching English learners.<sup>223</sup> For example, in 1999–2000, the percentage of professional development time that teachers reported spending on the instruction of English learners was about 7%.<sup>224</sup> Even for teachers whose students were more than 50% English learners, this percentage was only 10%.<sup>225</sup>

As reported in the Study, one cause of this is the lack of funding devoted to making professional development available to teachers so that they can enhance their skills in teaching English learners.<sup>226</sup> For example, in 2000–2001, the state provided \$50.9 million to the University of California to provide professional development to teachers.<sup>227</sup> However, only \$8.6

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 14.

<sup>219</sup> *Id.* at 17.

<sup>220</sup> *Id.*

<sup>221</sup> *See id.* at 19.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See id.* at 20 tbl.7.

<sup>226</sup> *See id.* at 20.

<sup>227</sup> *Id.*

million was allotted for professional development in the area of English language development.<sup>228</sup> This amount was only 16% of the professional development budget, even though English learners make up more than 25% of the student population in California and are arguably the most educationally disadvantaged of all students.<sup>229</sup>

c. English Learners Are Forced to Use Inappropriate Assessment Tools to Measure Their Achievement, Gauge Their Learning Needs and Hold the System Accountable for Their Progress

The Study described the impact that inappropriate testing has on English learners.<sup>230</sup> California schools administer English-only tests to measure achievement for English learners.<sup>231</sup> These tests fail to provide accurate data for purposes of gauging whether their educational needs are being met.<sup>232</sup> They also fail to help teachers in monitoring the progress of English learners and enhancing the instruction of English learners.<sup>233</sup>

The Study observed that such tests can also have negative effects on English learners in at least two ways. First, increases in test scores can “give the inaccurate impression that [English learners] have gained subject matter knowledge when, in fact, they may have simply gained proficiency in English. This misperception . . . can lead schools to continue providing a curriculum that fails to emphasize subject matter that is substantively appropriate.”<sup>234</sup> Second and conversely, consistently low test scores can lead educators to mistakenly believe that English learners need remedial or even special education, “when in fact they may have mastered the curriculum in another language, but are unable to” show their learning gains when taking an English language test.<sup>235</sup>

d. English Learners Fail to Receive Sufficient Instructional Time to Accomplish Learning Goals

The Study noted that a significant body of research shows a clear relationship between increased time devoted to academic instruction and increased levels of achievement, but that English learners fail to spend as much time receiving academic instruction time as other students.<sup>236</sup> This

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *See id.* at 21.

<sup>231</sup> *See id.* at 21–22.

<sup>232</sup> *See id.*

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* at 21.

<sup>235</sup> *Id.*

<sup>236</sup> *See id.* at 25.

happens in a number of ways. For example, elementary schools commonly take English learners out of their regular classes in order to put them in English language development classes.<sup>237</sup> These “pulled out” students miss regular classroom instruction, and there is generally no opportunity for students to later acquire the instruction they missed during the pull-out period.<sup>238</sup>

The Study also observed that English learners in secondary schools are frequently “assigned to multiple periods of English as a Second Language (ESL) classes while other students are taking a full complement of academic courses.”<sup>239</sup> When schools do not have enough courses available for English learners, the English learners are often given shortened day schedules, leading to the students receiving significantly less amount of academic instruction.<sup>240</sup>

e. English Learners Lack Access to Appropriate Instructional Materials and Curriculum

The Study noted that English learners need additional materials beyond what is provided to all students.<sup>241</sup> This need exists in two areas. First, English learners need developmentally appropriate texts and curriculum to learn English and to meet standards for their development of English skills.<sup>242</sup> Second, English learners who receive instruction in their primary language need texts and curriculum written in their primary language.<sup>243</sup>

However, the Study found that many English learners lack access to such materials.<sup>244</sup> For example, the Study cited a 1998–2001 survey that reported that 75% of teachers use the same textbooks for both English learners and English-only students, and that only 46% of teachers use any supplementary materials for English learners.<sup>245</sup> Not surprisingly, only 41% of teachers reported being able to cover as much material with English learners as with English-only students.<sup>246</sup>

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 27.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> *Id.*

f. English Learners Lack Access to Adequate School Facilities

The Study reported that teachers of English learners are more likely than teachers of English-only students “to respond that they do not have facilities that are conducive to teaching and learning.”<sup>247</sup> For example, the Study cited a 2002 survey finding that “close to half of teachers in schools with higher percentages of English learners reported that the physical facilities at their schools were only fair or poor, compared with [26] percent of teachers in schools with low percentages of English learners.”<sup>248</sup> Also, teachers in schools with high percentages of English learners were 50% more likely to report unsanitary school conditions.<sup>249</sup> Lastly, roughly “a third of principals in schools with higher concentrations of English learners reported that their classrooms were never or often not adequate, compared with [8] percent of principals in schools with low concentrations of English learners.”<sup>250</sup>

g. English Learners Are Segregated into Schools and Classrooms that Place Them at Particularly High Risk for Educational Failure

The Study found that English learners are highly segregated among California’s schools and classrooms.<sup>251</sup> In 1999–2000, 25% of all students in California attended elementary schools in which a majority of the students were English learners.<sup>252</sup> In contrast, 55% of all English learners were enrolled in majority-English learner schools.<sup>253</sup> The Study argued that this segregation weakens the quality of education that English learners receive compared with their English-only peers.<sup>254</sup> The Study noted several ways in which this happens.

First, English learners lack sufficient interaction with English-speaking student models, limiting their development of English.<sup>255</sup> Second, English learners do not interact with enough students who are achieving at high or even moderate levels, inhibiting their academic achievement.<sup>256</sup> Third, English learners are segregated into classrooms that frequently suffer from poor conditions, creating a poor learning environ-

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<sup>247</sup> *Id.* at 32.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *See id.* at 34.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

ment.<sup>257</sup> Fourth, English learners are segregated into classrooms that typically have inadequately trained teachers, hindering their learning.<sup>258</sup>

h. Litigation Against the State of California

Public schools and teachers are the responsibility of government, and California's failures to provide adequate education to language minorities have contributed to the educational inequalities described above. In a number of instances, these failures have even led to direct litigation against the State. These legal actions both highlight and indicate the severity of the State's educational failures.

For example, in 1970, the State entered into a consent decree that settled the *Diana v. California State Board of Education*<sup>259</sup> class action lawsuit. The lawsuit was filed on behalf of Chinese and Mexican-American English learners who were inappropriately placed in special education classes. The Study described above reported that although the State agreed to address this problem in the *Diana* consent decree, the State has failed to fully implement the consent decree in the thirty years following its issuance.<sup>260</sup> The result is that English learners are still over-represented in special education classes.<sup>261</sup> Because schools continue to fail to offer support services in the primary language of English learners, English learners are misdiagnosed as needing special education and misplaced into special education programs at higher rates than other students.<sup>262</sup> When students are placed in special education programs, especially when the placement is not warranted, the placement has devastating effects on students' access to opportunities later in life, leading to high rates of high school non-completion, underemployment, poverty and marginalization during their adult lives.<sup>263</sup>

In 1974, the Supreme Court, in *Lau v. Nichols*,<sup>264</sup> ordered California public schools to provide education for all students, regardless of their English-speaking ability. The lawsuit was filed on behalf of 1800 Chinese-American students who were segregated by the San Francisco school system into separate "Oriental" English-only schools.<sup>265</sup>

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<sup>257</sup> *Id.* at 33.

<sup>258</sup> *See id.* at 12.

<sup>259</sup> Civ. Act. No. C-70-37 (N.D. Cal. 1970).

<sup>260</sup> *See* Gándara et al., *supra* note 208, at 31.

<sup>261</sup> *See id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 32.

<sup>264</sup> 414 U.S. 563 (1974).

<sup>265</sup> *Id.* at 564-65.



In 2000, a class action lawsuit entitled *Williams v. State*<sup>266</sup> was filed on behalf of students in low-income communities and communities of color. APALC served as co-counsel in this litigation. The lawsuit challenged substandard conditions rampant in schools located in low-income and primarily minority communities.<sup>267</sup> It alleged that the State's failure to provide minimum educational necessities violated the state constitution and state and federal laws.<sup>268</sup> In 2004, the State entered into a settlement agreement pursuant to which the State is required to provide all students with books, keep schools clean and safe and ensure that students have qualified teachers.<sup>269</sup> It remains to be seen whether the State's compliance efforts will succeed, or whether they will fail as they did in the implementation of the *Diana* consent decree. Either way, the devastating impact on language minority students who suffered through substandard conditions has the potential to persist for the remainder of the students' lives.

Most recently, ten school districts filed a lawsuit against the State of California.<sup>270</sup> As part of a statewide coalition, APALC is an organizational plaintiff in the lawsuit, which demands that schools test English learners in their primary language and/or provide reasonable testing accommodations as mandated by the federal No Child Left Behind Act.<sup>271</sup> The lawsuit alleges that the State's failure to provide assessments to English learners that yield accurate and reliable results has resulted in numerous harms to English learners, including the stigmatization of English learners who are not afforded the opportunity to demonstrate their academic learning, the curtailing of basic educational programs in school districts deemed "education failures" compared to other districts and the diminished opportunities for English learners to advance to higher grades and graduate.<sup>272</sup>

i. Lack of Opportunities for Adult Language Minorities to Learn English

Adult language minorities also suffer from a lack of opportunities to learn English. According to the 2004 Annual Report of the Commission on Asian and Pacific Islander American Affairs, current federal and state funding for English acquisition classes in California consistently fails to meet

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<sup>266</sup> Case No. 312236 (Cal. Super. Ct. 2000).

<sup>267</sup> *See id.*

<sup>268</sup> *See id.*

<sup>269</sup> *See* DECENT SCHS. FOR CAL., WILLIAMS SETTLEMENT HIGHLIGHTS 1 (2005), [http://www.decentschools.org/settlement/Williams\\_Highlights\\_April\\_2005.pdf](http://www.decentschools.org/settlement/Williams_Highlights_April_2005.pdf).

<sup>270</sup> *See* Complaint, Coachella Valley Unified Sch. Dist. v. California, Case No. CPF-05-505334 (Cal. Super. Ct. 2005), *available at* [http://www.californianstogether.org/press/complaint\\_final.doc](http://www.californianstogether.org/press/complaint_final.doc).

<sup>271</sup> *Id.* at 37, 44–45.

<sup>272</sup> *Id.* at 40–41.

the demand of California's growing limited-English proficient population.<sup>273</sup> The Report found that ESL courses are often oversubscribed and overcrowded. For example, from 2001 to 2002, individuals enrolled in ESL courses made up 43% of the total number of people in California who participated in an adult school program and 20% of people who participated in non-credit courses offered by California's community colleges.<sup>274</sup> The Report also found that ESL courses are rarely offered outside of work hours when working language minorities can take advantage of the courses.<sup>275</sup>

#### D. IMPACT OF SECTION 203

In the forty years since the Voting Rights Act was enacted, and in the thirty years since Section 203 was added to the Act, there have been substantial gains in APIA electoral representation and levels of APIA voter registration and voting participation. Many of these gains have occurred since Section 203 was amended in 1992 to add a numerical threshold for triggering coverage.<sup>276</sup>

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<sup>273</sup> COMM'N ON ASIAN & PAC. ISLANDER AM. AFFAIRS, BUILDING OUR COMMUNITY: RECOMMENDATIONS FOR SUPPORTING ASIAN PACIFIC ISLANDER AMERICANS IN CALIFORNIA (2004), available at <http://democrats.assembly.ca.gov/apilegcaucus/pdf/guts.pdf>. Established by state legislation in 2002, the Commission on Asian & Pacific Islander American Affairs is a thirteen-member citizens' commission appointed by the Governor and the California State Legislature. The Commission's members include community leaders from different backgrounds, vocations and regions of the State who provide an impartial assessment of the APIA community's needs.

<sup>274</sup> *Id.* at 13.

<sup>275</sup> *Id.*

<sup>276</sup> APIA representation in the California State Legislature has increased greatly since the 1992 amendment to Section 203 and the addition in 2002 of new jurisdictions providing assistance to voters in Asian languages. Based on a study conducted by the authors and on file with the authors, there are now nine APIA members of the California State Legislature. This stands in marked contrast with 1990 when that number was zero. Prior to 1990, there was a small number of APIA elected officials who served in the Legislature, but they were the rare exception to the rule that APIA politicians were absent from state legislative ranks. After the 1992 amendment to Section 203 and the addition in 2002 of new jurisdictions providing assistance to voters in Asian languages, APIA representation in the Legislature has increased greatly. One factor in this electoral success has been Section 203 language assistance allowing limited English proficient voters to fully exercise their right to vote. Of California's nine APIA state legislators, eight represent legislative districts located in counties that are covered under Section 203 for at least one Asian-American language minority group. Every county in California that is covered under Section 203 for an Asian-American language minority group has at least one APIA legislator from such county. Although APIA Californians have enjoyed gains in electoral representation, APIA elected officials are still underrepresented in government. There are currently no APIA members in the forty-member California State Senate, and because of term limits, the number of APIA legislators in the California State Assembly is likely to drop. On the local level, only one Asian-American has ever served on the city council of the city of Los Angeles.

## 1. Increases in Voter Registration and Participation

In California, there have been significant increases in APIA registration and turnout levels over the past several years. According to Census data,<sup>277</sup> the number of APIA registered voters increased by 61% from the November 1998 election to the November 2004 election. In the same period, the number of APIA voters who turned out to vote increased by 98%.<sup>278</sup> Both of these increases outpaced increases in both the overall APIA voting age population and the overall APIA citizen voting age population. Table 7 shows the total APIA voting age population in California, the total APIA citizen voting age population, the total number of registered APIA voters and the total number of registered APIA voters who voted in the relevant election.

**Table 7.****California: Increase in Voter Registration and Turnout, 1998 to 2004\***

Election	Total APIA Voting Age Population	Total APIA Citizen Voting Age Population	Total Registered APIA Voters	Total Turnout Among Registered APIA Voters
November 1998	2706	1657	854	587
November 2000	3027	1908	1007	848
November 2002	3306	2172	1122	727
November 2004	3636	2620	1379	1162
Increase 1998 to 2004	34%	58%	61%	98%

\* Figures are in thousands except for percentages.

During the same time period, the Latina/o registration and turnout levels in California have also increased. According to Census data,<sup>279</sup> the number of Latina/o registered voters increased by 40% from the November

<sup>277</sup> U.S. Census Bureau, Voting and Registration, <http://www.census.gov/population/www/socdemo/voting.html> (last visited Sept. 27, 2007).

<sup>278</sup> See *id.*

<sup>279</sup> *Id.*

1998 election to the November 2004 election. In the same period, the number of Latina/o voters who turned out to vote increased by 56%. Both of these increases outpaced the increase in the overall Latina/o voting age population and the turnout outpaced the increase in the total Latina/o citizen voting age population. Table 8 shows the total Latina/o voting age population in California, the total Latina/o citizen voting age population, the total number of registered Latina/o voters, and the total number of registered Latina/o voters who voted in the relevant election.

**Table 8.**  
**Total Latina/o Voting Age Population, Citizen Voting Age Population, Registered Voters, and Turnout Among Registered Voters**

Election	Total Latina/o Voting Age Population	Latina/o Citizen Voting Age Population	Regis- tered Latina/o Voters	Registered Latina/o Vot- er Turnout
November 1998	6264	3154	1749	1338
November 2000	6514	3489	1919	1597
November 2002	6964	3974	2017	1206
November 2004	8127	4433	2455	2081
Percent Increase	30%	41%	40%	56%

Moreover, according to the U.S. Department of Justice, levels of voter registration in San Diego County have increased dramatically since the Department of Justice brought enforcement action to bring San Diego County into compliance with Section 203. Specifically, Latina/o and Filipino American voter registration has increased by 21% and Vietnamese American registration has increased by 37% since the Department of Justice's action.<sup>280</sup>

However, although APIA and Latina/o voters have seen gains in voter registration and turnout, their turnout levels still lag behind the overall population, as well as the white and African-American communities in

<sup>280</sup> Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, Department of Justice (Nov. 8, 2005), available at <http://judiciary.house.gov/media/pdfs/schlozman110805.pdf>.

California.<sup>281</sup> For example, in the November 2004 elections, almost 73% of white voters registered and 67% turned out to vote. African-Americans in California exhibit similar rates, with 68% registering and 61% turning out to vote. In contrast, Latina/os registered at a rate of 55% and APIAs registered at a rate of 53%, while they turned out at rates of 47% and 44% respectively.<sup>282</sup> Continued compliance with Section 203 and an effective language assistance program can help to continue the increases in voter registration and turnout for the Latina/o and APIA communities.

## 2. Discrimination against Language Minorities

Despite the protections of the Voting Rights Act, discrimination against language minority voters still occurs in the voting process. Evidence of this discrimination can be seen in the anecdotes from poll monitoring efforts by APALC and other organizations and schemes of discrimination that are described below. Before describing these anecdotes and schemes, it is important to illustrate, in general, the nature of discrimination against language minority voters and how Section 203 addresses this discrimination in a unique and successful manner.

### a. Nature of Discrimination Against Language Minority Voters and Uniqueness of Section 203 Remedy

Poll worker comments, such as, “Why can’t these people speak English,” create a pernicious atmosphere in polling sites that non-English speaking voters are unwelcome. In turn, this unwelcoming atmosphere acts as a deterrent to language minority voters exercising their right to vote. In other cases, discrimination against language minority voters serves as an outright denial of their right to vote. For example, language minority voters are disenfranchised by poll workers who, exasperated with their inability to find “foreign-sounding” names in the voter roster, send language mi-

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<sup>281</sup> See U.S. Census Bureau, Voting and Registration in the Elections of November 2004, Table 4a, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004, <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>; U.S. Census Bureau, Voting and Registration in the Election of November 2002, Table 4a, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2002, <http://www.census.gov/population/socdemo/voting/p20-552/tab04a.xls>; U.S. Census Bureau, Voting and Registration in the Election of November 2000, Table 4a, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2000, <http://www.census.gov/population/socdemo/voting/p20-542/tab04a.xls>; U.S. Census Bureau, Voting and Registration in the Election of November 1998, Table 4, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 1998, <http://www.census.gov/population/socdemo/voting/cps1998/tab04.txt>.

<sup>282</sup> See *supra* note 281. These figures are compiled based upon the citizen voting-age population.

nority voters to the back of the line. In both respects, the Section 203 remedy addresses discrimination against language minority voters in a unique and successful manner.

With regard to the deterrent barrier, language minority voters feel welcome as they interact with poll workers who hail them with familiar greetings and show them how to use complicated voting machines. Language minority voters also feel confident that they can make informed voting choices by using translated election materials. During the weeks leading up to election day, language minority voters feel included in the process as they see translated notices informing them of polling place changes and deadlines to request absentee ballots.

With regard to outright denials of the right to vote, language minority voters are able to get recourse that they would otherwise lack. For example, when faced with problems, voters can read translated signs that list telephone hotline numbers for the voters to call and report problems. Also, translated voter bill of rights signs give language minority voters awareness of their voting rights, which empowers them to protest voting discrimination. Naturally, like many people who have been historically disenfranchised, language minority voters are often hesitant to speak up for themselves. In such cases, enforcement of Section 203 by the Department of Justice and poll monitoring by advocacy organizations deter and prevent discrimination against language minority voters and also ensure that jurisdictions fully comply with Section 203.

b. Non-Compliance and Poll Worker Ignorance Leading to Voting Problems

Poll monitors have seen recurring problems at poll sites, including problems in Section 203 implementation.<sup>283</sup> Section 203 implementation problems include: poll sites lacking a sufficient number of bilingual poll workers and interpreters; translated materials not being supplied to poll sites; translated materials being supplied but poorly displayed at poll sites; and poll sites lacking adequate translated signage or lacking signage altogether directing voters where to go and explaining their rights.<sup>284</sup>

Recurring problems in Section 203 implementation reflect the failure of county registrars to properly educate their poll workers about language assistance. Many of these problems are the result of poor poll worker train-

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<sup>283</sup> NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, SOUND BARRIERS: ASIAN AMERICANS AND LANGUAGE ACCESS IN ELECTION 2004 (2005), [http://www.advancingequality.org/files/sound\\_barriers.pdf](http://www.advancingequality.org/files/sound_barriers.pdf).

<sup>284</sup> *Id.* at 10–12.

ing or poll workers not attending training sessions at all. Poll monitors are at times able to resolve problems of non-compliance, thereby preserving the right of language minority voters to vote. On other occasions, poll workers' ignorance of voting rights laws has led to language minority voters being turned away and denied the right to vote.

Poll monitors have observed several instances of this disenfranchisement in California. For example, in the November 2000 general election, poll monitors in San Francisco witnessed a poll worker yelling at several elderly Chinese-American women.<sup>285</sup> After telling the women to "[g]et out," the poll worker explained that he was angry at an elderly Chinese-American voter who brought a friend to help her vote.<sup>286</sup> The poll worker incorrectly believed that voters could not legally use the assistance of anyone other than poll workers to cast a ballot, and the woman was turned away before she could vote.<sup>287</sup>

Similarly, in the November 2002 general election, a poll worker reported that communication problems led to frustration among some voters and led others to leave the polling place altogether.<sup>288</sup> Apparently, the poll worker was not aware that he could have dialed the language assistance phone line operated by San Francisco's Department of Elections and received language assistance for the voter.<sup>289</sup> At another poll site with a significant number of elderly Chinese-American voters in need of language assistance, poll monitors noted that a number of votes were not being counted due to insufficient staffing of bilingual poll workers by the Department of Elections.<sup>290</sup> Because many voters were not able to correctly complete their ballots without proper assistance, many ballots were rejected by the polling site's optical scanning machine.<sup>291</sup>

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<sup>285</sup> CHINESE FOR AFFIRMATIVE ACTION, INCREASING ACCESS TO THE BALLOT FOR NEW CITIZENS 5 (2000), <http://www.caasf.org/PDFs/pollreport110700.pdf> [hereinafter INCREASING ACCESS].

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* This would appear to constitute a violation of 42 U.S.C. § 1973aa-6 (2000), which states, "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."

<sup>288</sup> See Letter from Diane T. Chin, Chinese for Affirmative Action, Gordon Mar, Chinese Progressive Association, Eva Peterson, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Phil Ting, Asian Law Caucus, to John Arntz, Department of Elections (Nov. 22, 2002), available at <http://www.caasf.org/PDFs/pollletter112202.pdf>.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

c. Hostile Poll Workers Create an Unwelcoming Atmosphere and Cause Denials of Votes by Language Minorities

Despite improvements in poll worker training, discrimination against Asian-American and other language minority voters still occurs in the polling place. Even the most comprehensive poll worker training program will not completely eliminate the discriminatory attitudes retained by some poll workers. Such poll workers display a cavalier attitude about language assistance or even an attitude that language assistance should not be provided to voters. This ambivalence about providing language assistance reflects a view of society that excludes non-mainstream voters from the political process. This view not only contributes to the recurring non-compliance problems described above, but it also creates an unwelcoming atmosphere that acts as a deterrent to language minority voters exercising their right to vote.

Poll monitors deployed by APALC and other organizations in California have observed poll workers expressing these attitudes either verbally or in their obvious refusal to provide language assistance. A few illustrative examples that span from the 2000 election cycle to the 2004 election cycle include the following:

*March 2000 primary election, Monterey Park, Los Angeles County:* A poll inspector stated that “bilingual materials are a waste of time and money” and removed the bilingual materials temporarily.<sup>292</sup> Ultimately, the poll monitor did assist in laying out the bilingual materials at the polling site.<sup>293</sup>

*November 2000 general election, San Francisco County:* A poll inspector complained that it was difficult to assist Chinese-American voters, stating his belief that they generally are ignorant about the voting process.<sup>294</sup> The poll inspector told the poll monitor, “I guess they don’t have free elections in their countries. We don’t always have all this time to explain everything about free elections to them.”<sup>295</sup>

*November 2002 general election, San Francisco County:* A poll monitor remarked to a poll worker that the poll site lacked Spanish language voter information pamphlets.<sup>296</sup> The poll worker responded, “If they

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<sup>292</sup> Letter from the Asian Pacific Legal Center of Southern California, to Conny B. McCormack, Registrar-Recorder/County Clerk of Los Angeles County (Apr. 12, 2000), available at <http://www.apalc.org/pdf/files/laco0300.pdf>.

<sup>293</sup> *Id.*

<sup>294</sup> INCREASING ACCESS, *supra* note 285, at 6.

<sup>295</sup> *Id.*

<sup>296</sup> Letter from Diane T. Chin, *supra* note 288.



don't speak English, then they shouldn't be voting in the United States of America."<sup>297</sup>

*March 2004 primary election, Artesia, Los Angeles County:* After the poll monitor discussed sample ballots with the poll inspector, the inspector said, while motioning to the sample ballots, "One day I wish we can have all English."<sup>298</sup>

*November 2004 general election, Monterey Park, Los Angeles County:* When the APALC poll monitor surveyed the poll workers to ascertain which poll workers were bilingual, one of the poll workers responded, "I speak English; this is America."<sup>299</sup>

Over the years, monitors have observed poll workers being outright hostile towards language minority voters. A few illustrative examples include the following:

*March 2000 primary election, Santa Ana, Orange County:* A poll inspector was rude to voters, particularly young voters, and was also reluctant to help limited-English proficient voters.<sup>300</sup> Although California state law did not at the time, and does not now, require voters to show identification, the poll inspector asked some young Asian-American voters for identification.<sup>301</sup> The APALC poll monitor heard the inspector comment, "Everybody wants to come to America and take what is ours—our land."<sup>302</sup>

*November 2004 general election, Rowland Heights, Los Angeles County:* The poll inspector talked slowly and loudly to elderly Asian-American voters.<sup>303</sup> When two elderly Asian-American women made a mistake on their ballots and wanted assistance to get new ones, the inspector told them very loudly, "Just stay there, just stay."<sup>304</sup> When asked about translated voter registration forms, the inspector replied that the forms were available in the "American language."<sup>305</sup> When asked about hot-

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<sup>297</sup> *Id.*

<sup>298</sup> Letter from the Asian Pacific American Legal Center of Southern California, to Conny B. McCormack, Registrar-Recorder/County Clerk of Los Angeles County (May 12, 2004), *available at* <http://www.apalc.org/pdffiles/laco0304.pdf>.

<sup>299</sup> Letter from the Asian Pacific American Legal Center of Southern California, to Conny B. McCormack, Registrar-Recorder/County Clerk of Los Angeles County (Jan. 18, 2005), *available at* <http://www.apalc.org/pdffiles/laco1104.pdf> [hereinafter 2005 APALC Letter].

<sup>300</sup> Letter from the Asian Pacific American Legal Center of Southern California, to Rosalyn Lever, Registrar of Voters, Don Taylor, Assistant Registrar of Voters (Apr. 18, 2000), *available at* <http://www.apalc.org/pdffiles/oc0300.pdf>.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> 2005 APALC Letter, *supra* note 299.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

line numbers for language assistance, the inspector replied, “They’re around here somewhere,” and walked away.<sup>306</sup>

*November 2000 general election, San Francisco County:* A poll monitor observed a poll worker yell at a Chinese-American voter and take the voter’s ballot away.<sup>307</sup> The poll worker was frustrated that the voter, who was limited-English proficient, was not following his instructions.<sup>308</sup> The voter left the polling site without casting a ballot.<sup>309</sup>

*November 2004 general election, San Diego County:* In the words of the poll monitor at one poll site, a poll worker talked to minority voters “as if they were children.”<sup>310</sup>

*November 2004 general election, San Mateo County:* A poll worker questioned the competency of a voter to vote because of the voter’s limited-English proficiency.<sup>311</sup>

*Other:* Latina/o voters also encountered difficulties in securing bilingual oral assistance and did not find written voter information that would have enabled them to vote.<sup>312</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> INCREASING ACCESS, *supra* note 285, at 5.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> See Letter from Robert Jon Z. Lansang, Jr., Program Director, Language Access and Voting Rights, Council of Philippine-American Organizations, Inc., to Sally McPherson, Registrar of Voters of San Diego County (Mar. 22, 2005), available at <http://www.advancingequality.org/files/appendix.pdf>.

<sup>311</sup> Letter from Philip Ting and Jacqueline Pon, Asian Law Caucus, to David Tom, Deputy Assessor-County Clerk-Recorder of San Mateo County (Dec. 14, 2004), available at <http://www.advancingequality.org/files/appendix.pdf>.

<sup>312</sup> In some instances, election personnel simply hung up on the person requesting bilingual assistance. In other instances, the callers were placed on hold for a long period of time until bilingual personnel could be located. *Why the Federal Voting Rights Act is Important to California Voters: Informational Hearings Before the Cal. Senate Elections, Reapportionment and Constitutional Amendments Comm.*, 2005 Leg. 46 (Cal. 2005) [hereinafter Gold] (testimony of Rosalind Gold, Senior Director of Policy, Research and Advocacy, National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund). Most significantly, there were reports of an insufficient number or complete absence of bilingual poll workers. Also, in some polling places, important election materials were not translated. With respect to language accessibility of educational and informational signage at the polling place in the Los Angeles Mayoral Run-Off Election of 2005, a third of the polling places did not have a Voter Bill of Rights translated into Spanish or other Asian language. NALEO EDUC. FUND, LOW-TURNOUT PRECINCTS IN THE CITY OF LOS ANGELES MAYORAL RUN-OFF ELECTION: A REPORT ON THE ACCESSIBILITY OF POLLING PLACES 10 tbl.2 (2005) (on file with authors). More importantly, half of the sampled polling places did not have any signage relating to information regarding provisional ballots translated into Spanish or an Asian language. The same level of non-compliance was found in providing hotline numbers. And only about a third of the sampled polling places provided information on voter fraud in Spanish. *Id.*

d. Intentional Discriminatory Schemes

In addition to individual instances of discrimination in polling sites, there have also been instances of schemes of voter discrimination. Section 6253.6 of the California Government Code is a reminder of such instances. Enacted in 1982, this section requires government officials to maintain the confidentiality of information in voter files that identifies voters who have requested bilingual voting materials.<sup>313</sup> The section was enacted to protect language minority voters from being targeted with allegations of voter fraud.

The enactment of Section 6253.6 was precipitated by an investigation conducted by the U.S. Attorney's office in nine Northern Californian counties.<sup>314</sup> The U.S. Attorney's office randomly investigated voters who had requested Spanish and Chinese language voting materials and arranged for the Immigration and Naturalization Service (INS) to cross-check the voters' records with citizenship records.<sup>315</sup>

This investigation followed on the footsteps of INS raids on factories and businesses and was part of a larger scheme to scapegoat language minority and immigrant communities for economic woes. The investigation also occurred during voter registration drives among minority language communities in Northern California. Amidst concerns that the investigation would intimidate language minority voters, the American Civil Liberties Union and the Mexican American Legal Defense and Educational Fund filed suit under the Voting Rights Act.<sup>316</sup> There was also a large amount of public outcry against the investigation, including censures by a number of city councils. The U.S. Attorney's office abated its investigation, and Section 6253.6 was passed overwhelmingly in the legislature by a 54–7 Assembly vote and a 38–0 Senate vote.<sup>317</sup>

E. ENFORCEMENT OF SECTION 203

As with other provisions of the Voting Rights Act of 1965, litigation is often the only effective avenue available for language minority groups to enforce these language assistance provisions and secure access to the political process. Recently, the U.S. Attorney General has been enforcing these provisions in California. The Attorney General has filed Section 203

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<sup>313</sup> CAL. GOV'T CODE § 6253.6(a) (Deering 2007).

<sup>314</sup> See *Olagues v. Russoniello*, 797 F.2d 1511, 1513–14 (9th Cir. 1986), *cert. granted*, 481 U.S. 1012 (1987), *vacated as moot*, 484 U.S. 806 (1987).

<sup>315</sup> *Id.* at 1514.

<sup>316</sup> *Id.* at 1514–15.

<sup>317</sup> The legislative history for Section 6352.6 is on file with the authors.

actions against the cities of Azusa, Paramount and Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda and San Francisco.<sup>318</sup> Generally, all of these actions are directed at the failure of the cities and counties to effectively implement the language assistance provisions. The complaints cover such topics as the failure to provide ballots and other election materials in the required language, failure to provide an adequate number of bilingual election personnel on election day and the woefully inadequate outreach conducted by these Section 203-covered jurisdictions to reach relevant non-English speaking communities.<sup>319</sup> The consent decrees have provided provisions for the translation of election materials and public notices, for the distribution of translated election materials to language minority communities, for the establishment of a language minority advisory committee that oversees the terms of the consent decree, for the creation of a coordinator position responsible for assuring that the terms of the consent decree are followed and for periodic oversight and reporting on the efforts of these covered jurisdictions to meet their statutory obligations.<sup>320</sup>

Nonetheless, the federal enforcement has been very limited. Recent testimony before Congress and before the National Commission on the Voting Rights Act highlighted the continued need for enforcement of the language assistance provisions.<sup>321</sup> As previously discussed, Latina/o and Asian-Americans are still characterized by significant numbers of persons who are limited-English proficient and experience outright hostility at the polls.<sup>322</sup>

The necessity of Section 203 can also be measured by the geographic distribution of the litigation that has been filed by the Attorney General. Cases have been filed in Northern California (counties of Alameda, San Francisco and San Benito), the central coast area (Ventura County) and Southern California (San Diego County, and the cities of Rosemead, Paramount and Azusa (located within Los Angeles County)). An examination of the complaints and consent decrees indicate that there are common issues of non-compliance.<sup>323</sup> The geographic breadth indicates that the issue of Section 203 non-compliance is widespread. Instead of seeking to eliminate the language assistance requirements, greater enforcement efforts need

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<sup>318</sup> See Department of Justice, *supra* note 15 (complete listing of these cases, along with their complaints and consent decrees).

<sup>319</sup> See *id.*

<sup>320</sup> See *id.* (San Benito County and City of Azusa Consent Decrees).

<sup>321</sup> *Bilingual Election I*, *supra* note 187.

<sup>322</sup> See *supra* notes 183, 187, and Part III.D.2.c.

<sup>323</sup> Consent decrees have been collected by the authors and are on file with the authors.

to be undertaken by the U.S. Department of Justice. Moreover, given their increasing use and necessity within communities of limited-English proficiency, the language assistance provisions should be expanded to include more communities.<sup>324</sup>

In summary, there is both a demonstrated and documented need for assistance in the electoral process in California. Access to the political process can be denied by elections that voters who are of limited-English proficiency cannot understand. Voters from language minority groups can only be successfully integrated into the body politic by providing an election process that is language accessible. The litigation filed by the Attorney General to enforce Section 203 reinforces the application of a very fundamental principle: a democracy cannot tolerate excluding a well defined ethnic, racial or language minority group from the body politic. This litigation also demonstrates that there is widespread non-compliance with Section 203. At a minimum, a further extension should be provided so that the Attorney General and private parties can finally secure complete compliance with this important provision of the Voting Rights Act of 1965.

#### IV. ELECTIONS IN CALIFORNIA ARE CHARACTERIZED BY RACIALLY POLARIZED VOTING

There is racially polarized voting in California.<sup>325</sup> Such patterns of voting have been documented in numerous cases and expert reports. After the enactment of the 1982 amendments to the VRA, the first case to document such voting patterns involved a challenge to an at-large method electing members to the Watsonville City Council.<sup>326</sup> In the Watsonville case, the Ninth Circuit noted that “the plaintiffs have shown that Watsonville Hispanics overwhelmingly and consistently have voting preferences that are distinct from those of white voters . . . [and] that white voters have consistently voted as a racial bloc against such candidates.”<sup>327</sup>

The next major finding of racially polarized voting occurred in the successful redistricting challenge against the Los Angeles County Board of Supervisors.<sup>328</sup> The redistricting plan fragmented the predominantly

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<sup>324</sup> One suggestion that has been advanced is to lower the population threshold from 10,000 to 7500 for purposes of initiating the triggering formula. *See, e.g.*, Gold, *supra* note 312, at 9; *Bilingual Election I, supra*, note 187, at 1369.

<sup>325</sup> *See supra* note 9 for a definition of racially polarized voting.

<sup>326</sup> *See* Gomez v. City of Watsonville, 863 F.2d 1407 (9th Cir. 1988).

<sup>327</sup> *Id.* at 1419.

<sup>328</sup> Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990).

Latina/o community located in East Los Angeles.<sup>329</sup> The district court found that elections in Los Angeles County were characterized by racially polarized voting and that the Board of Supervisors had intentionally fragmented a politically cohesive Latina/o community in order to maintain their incumbencies.<sup>330</sup>

In addition, in a series of at-large election challenges in the California Central Valley, expert reports demonstrated that racially polarized voting existed.<sup>331</sup> Finally, a recent study of thirteen elections during the time period from 1994 to 2003 in the San Gabriel area of Los Angeles County shows that elections are characterized by racially polarized voting.<sup>332</sup> The report concluded:

Our analysis of the votes taken across these thirteen elections provides convincing evidence that racially polarized voting has occurred in every election. The degree to which the polarization occurs may vary slightly between elections, and with the number of Latino candidates who are involved in a contest. Nonetheless, there can be no doubt that in each of these elections non-Latinos voted substantially against the Latino preferred candidate or issue.<sup>333</sup>

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<sup>329</sup> See *id.* at 1304.

<sup>330</sup> *Id.* at 1304–05, 1312–18, 1328–39. As a result of a new redistricting plan, the first Latina was elected to the Board of Supervisors. See *Garza v. County of Los Angeles*, 918 F.2d 763, 768 (9th Cir. 1990); J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, 7 J.L. & POL. 591 (1991). This was also the first time since 1875 that any Latina/o candidate had been elected as a supervisor. *Id.* at 615. In addition, as part of the remedial phase of this litigation, the County was required to submit for Section 5 preclearance any future redistricting plan until 2002. See Los Angeles County, 2001 Redistricting Plan Preclearance Submission Under Section 5 of the Voting Rights Act, at 1, available at [http://lacounty.info/redistricting/data/DOJ\\_Submittal.pdf](http://lacounty.info/redistricting/data/DOJ_Submittal.pdf). Accordingly, the County submitted both the 1991 and 2001 supervisor redistricting plans for Section 5 review. Both plans received Section 5 approval. *Id.*; Letter from Joseph D. Rich, Acting Chief, Voting Section, Department of Justice, to Nancy M. Takade, Senior Deputy County Counsel, Special Services Division (Sept. 13, 2001), available at <http://lacounty.info/redistricting/DOJPreClearLetter.pdf>.

<sup>331</sup> See *supra* note 98 (Alta Hospital District, City of Dinuba, Cutler-Orosi Unified School District, Dinuba Elementary School District, Dinuba Joint Union High School District) (expert reports on file with authors).

<sup>332</sup> YISHAIYA ABSOCH ET AL., AN ASSESSMENT OF RACIALLY POLARIZED VOTING FOR AND AGAINST LATINO CANDIDATES, REPORT 30 (2006), available at [http://www.ucdc.edu/faculty/Voting\\_Rights/Papers/1%20-%20Barreto%20et%20al..pdf](http://www.ucdc.edu/faculty/Voting_Rights/Papers/1%20-%20Barreto%20et%20al..pdf) (pages not numbered, excludes title page). The findings of this report are not offset or contradicted by the unsuccessful redistricting challenge in *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002). The congressional districts challenged involved Congressional District 28, located in the San Fernando Valley, which is west of the central Los Angeles area, and Congressional District 51, located in the southern part of the State near the border between California and Mexico. Senate District 27 was also challenged. Senate District 27 is located in the southern part of Los Angeles County. The Absoch, Barreto and Woods Report covers those areas located east of the central Los Angeles area.

<sup>333</sup> ABSOCH ET AL., *supra* note 332, at 30.

In summary, there is significant evidence demonstrating that racially polarized voting still plays a substantial role in determining the outcome of elections. To effectively minimize the impact of racial bloc voting, minority communities need to have federal oversight of the electoral process in California. Both Section 5 and Section 203 of the VRA have provided that federal oversight and should be reauthorized.

## V. CONCLUSION

This report has presented a brief description of the obstacles faced by racial and ethnic minorities in California. Although minority voters are not physically prevented from registering to vote and participating in elections, many limited-English proficient voters have experienced an equivalent exclusion from the political process. In addition, minority voters are often subject to the effects of racially polarized voting that prevent them from effectively participating in the political process and electing a candidate of their choice. Apart from the presence of at-large methods of election that can discriminate against minority voting strength, minority voters in Section 5-covered jurisdictions continue to experience voting discrimination that is directly caused by the jurisdiction's failure to comply with the Section 5 preclearance requirements on a timely basis. Waiting twenty-two years, as the City of Hanford did in submitting its annexations for Section 5 review, cannot be construed as timely. All of these acts of non-compliance with Section 203 and Section 5 only serve to further alienate a growing community that is a non-participant in those important governmental and decision-making processes that serve to solidify the body politic and that are important to the future social cohesiveness of our society. In view of this compelling record of non-compliance, voting discrimination and political exclusion, the conclusion is inescapable that continued federal oversight of the elections continues to be necessary.

Since the founding of this nation to the culmination of the Second Reconstruction<sup>334</sup> and the passage of the 1965 Voting Rights Act of 1965, minorities were effectively excluded from the political process and body politic. For close to two centuries, there was a struggle to expand the franchise and provide that most fundamental of all rights. As documented in this report, the problems associated with voting discrimination continue to this day, especially as evidenced in both the 2000 and 2004 presidential elec-

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<sup>334</sup> The Second Reconstruction refers to the time period after World War II when the civil rights movement resulted in the passage of landmark civil rights legislation, including the Voting Rights Act of 1965. See Avila, *supra* note 1, at 321–25.

tions.<sup>335</sup> Unfortunately, the well-documented history of voting discrimination in this country has clearly demonstrated that there is still much work to be done. Without the protection provided by the special provisions of the Voting Rights Act of 1965, we will simply retrogress in our efforts to expand the right to vote. As a society, we cannot continue to have in our midst political outcasts who have no vested interest in the well-being of our communities. Only by instilling a sense of ownership through participation in the political process can we begin to meaningfully politically integrate these communities. Access to the ballot provides a powerful tool for the development of politically vested stakeholders who will not only protect their community, but will also serve as role models for our next generation of political leaders. This is why renewal of the special provisions of the Voting Rights Act of 1965 is needed.

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<sup>335</sup> See generally U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (Mary Francis Berry ed., 2001) (for the 2000 presidential elections); STAFF OF H. JUDICIARY COMM., 109TH CONG., PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO (2005) (discussing the 2004 presidential election); see also CARTER-BAKER COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS (2005) (presenting eighty-seven recommendations for election reform).