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.[4] In assessing whether such discrimination exists, the report will chronicle the efforts of minority communities in California to secure access to the political process utilizing the Voting Rights Act of 1965[5] ("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,[6] to secure greater access to the political process and, in some instances, to increase minority electoral representation - Section 5[7] and Section 203.[8] However, the continued effectiveness of these provisions is in jeopardy since both

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[4] 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, which, in part, have subsequently been incorporated in an article published by the Law Review for the Seattle University School of Law. Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 Seattle Univ. 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. Section III of this report involving Section 203 of the VRA 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.

[5] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 *et seq.*).

[6] 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. 42 U.S.C. § 1973b(f)(2) & (4). The term refers to individuals who are American Indian, Asian American, Alaskan Natives, and Spanish heritage. 42 U.S.C. § 1973l(c)(3). 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 participate in the political process because of their limited-English proficiency. 42 U.S.C. § 1973b(f)(4); 42 U.S.C. § 1973aa-1a(c); 42 U.S.C. § 1973aa-1a(e).

[7] 42 U.S.C. §1973. A political jurisdiction subject to Section 5 must submit a change affecting voting to the United States Attorney General for administrative approval or preclearance. If the Attorney General does not approve the voting change, the Attorney General issues a letter of objection. 28 C.F.R. §§ 51.44(a) & 51.52(c). 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. 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. Section 5 has been very effective. During the time period from June 19, 1968 to June 25, 2004, the Attorney General issued 1027 letters of objection. 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 groups. *Supra* note 3, 42 U.S.C. § 1973b(f)(4) & 42 U.S.C. § 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. 42 U.S.C. § 1973b(f)(4). *See also* 28 C.F.R. §§ 55.5, 55.14 – 55.20.

[8] 42 U.S.C. § 1973aa-1a. As with the Section 5 covered jurisdictions subject to the language assistance provisions, *supra* note 4, 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. This accessibility is accomplished by meeting the same requirements of translated written materials, bilingual oral assistance, and

of these provisions are due to expire in 2007.[9] 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[10] despite electoral gains by minority communities.[11]

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community outreach as specified for Section 5 covered jurisdiction. 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.

[9] Section 5 is due to expire in 2007. 42 U.S.C. § 1973b(a)(8). Section 203 is also due to expire in 2007. 42 U.S.C. § 1973aa-1a(b)(1).

[10] A denial of minority access to the political process is particularly noteworthy since based upon 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 percent (2000) - 34.7 percent (2004); Black or African American alone - 6.7 percent (2000) - 6.8 percent (2004); Asian alone or Native Hawaiian and other Pacific Islander alone - 11.2 percent (2000) - 12.5 percent (2004); American Indian and Alaska Native alone - 1.0 percent (2000) - 1.2 percent (2004); White alone, not Hispanic or Latina/o - 46.7 percent (2000) - 44.5 percent (2004). U.S. Bureau of the Census, Data Set: Census 2000 Summary File 1 (SF-1) 100-Percent Data, Table GCT-P6 Race or Hispanic or Latino: 2000. http://www.census.gov/prod/2005pubs/06statab/pop.pdf. U.S. Bureau of Census, Statistical Abstract of the United States 2006, Table 23 (Resident Population by Race, Hispanic or Latino Origin, and State: 2004), at Population 27. http://www.census.gov/prod/2005pubs/06statab/pop.pdf. California in 2004 had a total population of 35,894,000 million persons of which 12,443,000 million were Latino origin – the non-Latino White population was 15,982,000. The Asian one race category plus the Native Hawaiian and Other Pacific islander one category was 4,475,000, while the African American one race category was 2,437,000. Finally, the minority concentrations at the kindergarten level for 2004-05 provide a compelling portrait of racial and ethnic concentrations in California in the not too distant future: Latina/o - 51.5 percent; African American alone - 6.8 percent; Asian alone or Native Hawaiian and other Pacific Islander alone - 10.2 percent; American Indian and Alaska Native alone - 0.7 percent; White alone, not Hispanic or Latina/o - 27.8 percent. Table: California Public Schools – Statewide Report, School Year 2004-05, Enrollment by Gender, Grade and Ethnic Designation. http://dq.cde.ca.gov/dataquest/StEnrAll.asp?cChoice=StEnrAll&cYear=2004-05&cLevel=State&cTopic=Enrollment&myTimeFrame=S. Based upon this census data and school enrollment data, Latinas/os and Asian Pacific Islander Americans ("APIAs") will continue to be the fastest growing minority groups within California. Such an observation is 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 percent; Latina/o - 42.6 percent; White (Non-Latina/o) - negative 7.1 percent; African American (Non-Latina/o) - 4.3 percent; Asian or Native Hawaiian and other Pacific Islanders (both Non-Latina/o) - 38.5 percent; American Indian and Alaska Native (Non-Latina/o) – negative 51.7 percent . U.S. Bureau of Census, 2000 Census, Table P4 – Hispanic or Latino, and Not Hispanic or Latino by Race [73] – Universe: Total Population; Data Set: Census 2000 Summary File 1 (SF1) 100 – Percent Data. U.S. census Bureau, 1990 Census, Data Set: 1990 Summary Tape File 1 (STF-1) – 100 – Percent Data: Table P001 – Persons – Universe: Persons; Table P008 – Persons of Hispanic Origin – Universe: Persons by Hispanic Origin; Table P010 – Hispanic Origin by Race – Universe: Persons. 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.

[11] The substantial demographic growth has not translated into significant electoral representation. For example, in California, the house congressional delegation consists of 53 members of which at least seven or about 13 percent are Latina/o. 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 (three judge court) (C.D.Cal. 2002), judgment *affirmed*, 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, National Association of Latin Elected Officials Education Fund, 2004 National Directory of Latino Elected Officials, at 22 (2004), or 11 percent out of 4,850 elected local school board members, California School Board Association, Susan Swigart, Director of Member Services – e-mail dated May 17, 2005, to Joaquin G. Avila (total number of school board members), and

In California, this voting discrimination often occurs within the context of racially polarized voting.[12] When a Section 5-covered jurisdiction[13] 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,[14] a conversion from election districts to an at-large method of election,[15] and

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there were 357 Latinas/os or 14.2 percent out of 2,507 elected officials serving on city councils, California Secretary of State – 2005 Cal. Roster, http://www.ss.ca.gov/executive/ca_roster/. Even lower levels of representation are evident for Asian & Pacific Americans for the year 2003 – 2004 at the levels of mayor (only 18 in California) and members of city councils (only 38 in California). UCLA Asian American Studies Center, National Asian Pacific American Political Almanac 2003 – 2004 (11th Edition) at 52. For African Americans, the representation levels are also at very low levels. Statistical Abstract, *supra* note 7, Table 405 – Black Elected Officials by Office, 1970 to 2001, and State, 2001, at Elections 255 (for the year 2001, Blacks had only 70 county and city elected officials in the state). When focusing on elected county supervisors there are only a small number of Latina/o supervisors in counties containing more than a 20 percent Latina/o population – 14. 2000 Census, *supra* note 7, Table P4. The Latina/o political representation percentage 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 percent or greater African American population. As to Asian Americans, three counties contained 20 percent or more Asian American population, two of which have Asian-American members on the county board of supervisors: San Francisco (30.7 percent - Asian) (Asian board members - 1); Santa Clara (25.4 percent - Asian) (Asian board members – 0); Alameda (20.3 percent) (Asian board members – 1). 2000 Census, *supra* note 7, Table P8. The Asian American political representation percentage was obtained by visiting the county's website for each of the counties.

[12] As noted by the U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 53 at 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." ' "

[13] In California, there are four counties subject to the Section 5 preclearance requirements: Monterey, Kings, Yuba, and Merced. 28 C.F.R. Part 51, Appendix.

[14] 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. *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). *See also* U.S. Comm'n on Civ. Rights, The Voting Rights Act: Unfulfilled Goals 39 (1981). In Monterey County, the Attorney General objected to a proposed redistricting of supervisor districts because the plan fragmented a politically cohesive Latina/o voting community. U.S. Attorney General, Letter of Objection, February 26, 1993 (Monterey County). *See infra* notes 45-54 and accompanying text.

[15] 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. U.S. Attorney General, Letter of Objection, March 29, 2002 (Chualar Union Elementary School District – Monterey County). *See infra* notes 84-85 and accompanying text. In a fairly drawn election district plan, where 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 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

annexations.[16] Without 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.[17] This discrimination is often manifested in actions by election officials at polling sites that have adversely impacted the ability of limited-English proficiency 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, Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda, and San Francisco.[18]

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 strength. Moreover, without federal legislation to require political jurisdictions to provide language assistance during the election process, limited-English proficiency eligible voters and registered voters will be effectively excluded from the body politic. For these reasons, Congress should reauthorize and amend these provisions so that minority communities in California can continue their efforts to "'banish the blight of racial discrimination in voting' once and for all."[19]

This report is divided into several sections. The first section will provide a brief overview of the VRA focusing on key provisions that are due to expire in 2007. The second section 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 section will focus on the language assistance provisions that permit limited-English proficiency voters to effectively participate in the political process. The fourth section will document the presence of racially

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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), *reversing*, Civ. Act. No. WAI C-85-20319 (N.D. Cal. 1985, *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).

[16] 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. U.S. Attorney General, Letter of Objection, April 5, 1993 (City of Hanford). *See infra* notes 75-78 and accompanying text.

[17] 42 U.S.C. § 1973aa-1a(c) & 42 U.S.C. § 1973b(f)(4). These provisions require a bilingual election process. A bilingual election process 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.

[18] A complete listing of these cases, along with their complaints and consent decrees are found on the U.S. Department of Justice, Civil Rights Division, Voting Section website. http://www.usdoj.gov/crt/voting/litigation/recent203.htm#azusa.

[19] *McCain v. Lybrand*, 465 U.S. 236, 244 (1984), *citing*, *State of South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

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.[20]

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,[21] Congress enacted the VRA in 1965. The 1965 VRA targeted states and local governmental 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.[22] These tests or devices prevented African Americans from registering to vote. Accordingly, the use of these tests or devices were suspended in these covered jurisdictions for a five-year period.[23] As noted previously, another important provision, Section 5, sought to prevent the implementation of any change affecting the right to vote[24] 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. 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

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[20] 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*.

[21] 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) (discussion of aggressive enforcement of federal statutes designed to protect the right to vote during the early part of the 1870s); Avila, *The Washington 2004 Gubernatorial Election Crisis*, *supra* note 1, at 317-325 (summary of history of voting discrimination).

[22] Pub. L. No. 89-110, *supra* note 2, at Sec. 4(b). 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*., Sec. 4(c). Second, the director of the Bureau of the Census had to determine that less than fifty percent of persons of voting age were registered on November 1, 1964, or that less than fifty percent of persons of voting age voted in the presidential election of 1964. *Briscoe v. Levi*, 535 F.2d 1259, 1270-1276 (C.A.D.C. 1976) (legislative history supported the use of voting age population rather than registered voters for application in conjunction with the phrase "such persons"), *appeal dismissed on other grounds*, *Briscoe v. Bell*, 432 U.S. 404 (1977).

[23] Pub. L. No. 89-110, *supra* note 2, at Sec. 4(a).

[24] *Id.*, at Sec. 5, 79 Stat. 439. Section 5 applies to all voting changes. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). Such changes include redistrictings, annexations, conversions to at-large methods of election, voter re-registration requirements, polling place changes, among others. *See* 28 C.F.R. §§ 51.12 & 51.13 (federal regulations governing the implementation of Section 5).

demonstrating that the proposed voting change did not have a discriminatory effect on minority voting strength and that the change was not adopted pursuant to a discriminatory purpose.[25]

The 1965 VRA was subsequently amended. To further extend the temporary provisions of the VRA, Congress modified the applicable triggering formula found in Section 4. In 1970, Congress extended the regional ban on tests or devices to the nation. In addition, Congress extended the Section 5 preclearance requirement, as well as the national ban on tests or devices, for another five years.[26] 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.[27] Most significantly, Congress recognized that voting discrimination was not limited only to African Americans, but 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."[28] Accordingly Congress expanded the definition of a test or device to include English-only elections in those jurisdictions where more than five percent of the eligible voters were members of an applicable language minority group.[29] Thus, if a jurisdiction met the requirements relating to either having less than a 50 percent voter registration rate or less than a 50 percent voter turnout rate; and having English-only elections in a state, county, or jurisdiction that conducted voter registration; and more than 5 percent of the eligible voters were members of an applicable language group, the jurisdiction was subject to the Section 5 preclearance requirements. This expanded definition subjected the states of Arizona and Texas, states having large Latina/o populations, to Section 5 review.[30]

The 1975 amendments also expanded the rights of limited-English proficiency eligible voters and voters to participate in the political process.[31] Language assistance during elections[32] was

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[25] Pub. L. No. 89-110, *supra* note 2, at Sec. 5. As a result of rulings by the U.S. 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 (1976) (retrogression standard constitutes a prohibition against lessening the impact of minority voting strength – for example the elimination of a majority minority district in a new redistricting plan would constitute retrogression). In a subsequent case, the Court rejected the incorporation of the VRA's Section 2 standards in a Section 5 determination. *Reno v. Bossier Parish School Board*, 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. 42 U.S.C. § 1973. Finally the Court held that the discriminatory purpose prong of Section 5 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. *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).

[26] Pub. L. No. 91-285, Secs. 3 & 4, 84 Stat. 314, 315.

[27] Pub. L. No. 94-73, Secs. 101, 102, 89 Stat. 400.

[28] *Id.*, Secs. 203, 301, 89 Stat. 401, 402.

[29] *Id.*, Secs. 203, 89 Stat. 401.

[30] 28 C.F.R. Part 51, Appendix. The four California counties were brought under different amendments to the Section 4 triggering formula. The 1970 amendments subjected the Counties of Yuba and Monterey to Section 5 review. 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.

[31] 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. This provision affected Puerto Ricans and other persons educated in territorial jurisdictions. This is a permanent provision of the 1965 VRA. Pub. L. No. 89-110, Sec. 4(e), 79 Stat. 439 (codified at 42 U.S.C. § 1973b(e)). *See* Juan Cartagena, *Latinos and Section 5 of the Voting Rights*

mandated in those jurisdictions subject to Section 5 meeting certain criteria,[33] and were also mandated in those jurisdictions subject to the newly enacted Section 203 of the VRA.[34] 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.

After the passage of the 1975 amendments, a plurality of the U.S. Supreme Court in a 1980 case 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.[35] In response, Congress amended Section 2 to eliminate the requirement of a discriminatory intent.[36] The newly amended Section 2 required proof only of a discriminatory effect on minority voting strength.[37] The Senate Report accompanying the 1982 VRA amendments further defined the standard. According to the Senate Report, 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.[38] The Supreme Court further refined Section 2 in a case involving a challenge to multimember and single-member legislative districts in North Carolina.[39]

With respect to Section 5, Congress extended the preclearance requirement for a 25-year period until 2007.[40] In addition, Congress established a 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.[41] Recently, eleven

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Act: Beyond Black and White, 18 National Black L. J. 201, 202-207 (2005) (discussion of the history surrounding the adoption of Section 4(e) and its subsequent enforcement).

[32] *See supra* note 14.

[33] Pub. L. No. 94-73, Sec. 203, 89 Stat. 401.

[34] *Id*., Sec. 301, 89 Stat. 402. 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 five percent 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. Illiteracy was defined as the failure to complete the fifth grade. These language assistance provisions were to be in effect for a period of ten years – until August 6, 1985.

[35] *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

[36] *See* Pub.L. No. 97-205, 96 Stat. 131.

[37] *Id.*, at Sec. 3 (codified at 42 U.S.C. § 1973).

[38] S.Rep. No. 97-417, 97 Cong.2nd Sess. 28 (1982).

[39] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

[40] 42 U.S.C. § 1973b(a)(8).

[41] The initial "bail-out" mechanism was linked to the use of a test or device. Pub. L. No. 89-110, *supra* note 2, at Sec. 4(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. 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. The five-year

jurisdictions in Virginia have been removed from Section 5 coverage via the bailout procedures.[42] As to Section 203, the language assistance provisions were extended for a ten year period until 1992.[43]

In 1992, Congress extended the language assistance provisions to 2007.[44] As a result of these amendments, the triggering formula was modified. Under the formula, a jurisdiction is subject to the language assistance provisions if the following criteria are met: 1) of the total number of eligible voters, more than five percent or 10,000 must consist of members of a single language minority group; 2) the members of this single language minority group must be limited-English proficient;[45] 3) for those political jurisdictions that contain all or part of an Indian reservation, more than five percent 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."[46]

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.

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period for filing such a "bail-out" lawsuit was changed to ten years in the 1970 amendments and 17 years in the 1975 amendments. Pub. L. No. 91-285, *supra* note 23, at Sec. 3; Pub. L. No. 94-73, *supra* note 24, at Sec. 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 – *e.g.*, no final judgments involving voting discrimination, full compliance with the preclearance requirement, no issuance of a letter of objection by the United States Attorney General, *etc.* Pub. L. No. 97-205, *supra* note 33, at Sec. 2 (codified at 42 U.S.C. § 1973b(a)). 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.

[42] *See* J. Gerald Hebert, Former Acting Chief, Civil Rights Division, Department of Justice, Testimony on the Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act, submitted to the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution, Washington, D.C., October 20, 2005, at Appendix A.

[43] Pub. L. No. 97-205, *supra* note 33, at Sec. 4 (date extended to August 6, 1992). In addition, there was another qualification attached to the definition of 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 . . . ." *See* also 53 Fed Reg. 736, January 12, 1988.

[44] P.L. No. 102-344, Sec. 2, 106 Stat. 921 (codified at 42 U.S.C. § 1973aa-1a, *et seq.*).

[45] Limited-English proficiency is defined as "unable to speak or understand English adequately enough to participate in the electoral process . . . ." 42 U.S.C. § 1973aa-1a(b)(3)(B).

[46] 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 five percent threshold if the state was designated a Section 203 jurisdiction. *Id*., § 1973aa-1a(b)(2)(D).

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 or 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 section 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 demonstrate 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 simply ignoring 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 limited-English proficiency speakers 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.[47] A review of these four letters of objections demonstrates that Section 5 has served as an important tool to eliminate discriminatory voting changes. The impact on local communities has been dramatic and historic. 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.

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[48] in more than a hundred years. The U.S. Attorney General issued a letter of objection to a county supervisor redistricting plan that served as the catalyst for the adoption of a new redistricting plan. The implementation of the new non-discriminatory redistricting plan

[47] 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). U.S. Attorney General, Letter of Objection, May 26, 1976 (Yuba County)(failure to translate ballots and candidate qualification statement); U.S. Attorney General, Letter of Objection, March 4, 1977 (failure to distribute translated ballots, inadequate use of bilingual oral assistants, and failure to translate nominating petitions, among other concerns).

[48] The Monterey County Board of Supervisors is the governing board for Monterey County. *See* Cal. Gov. Code §§ 23005, 25000 & 25207.

resulted in a historic election that provided the Latina/o community in Monterey County with a Latino county supervisor for the first time in over a hundred years.

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 percent of Monterey County's population.[49] 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.[50] After the completion of the county supervisor redistricting process, the plan was submitted for Section 5 review.[51] Shortly thereafter Latinas/os filed an action based upon Section 5 and Section 2 of the Voting Rights Act of 1965. 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. 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.[52]

This Monterey County litigation was not a typical suit. After the lawsuit was filed, the U.S. Attorney General requested additional information from the county. This request prompted 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. The referendum was successful in invalidating the county ordinance. Thereafter, the county was permitted another opportunity to adopt a new redistricting plan.[53] The county was given until February 26, 1993, to secure the adoption of a redistricting plan and Section 5 approval.[54] 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.[55]

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[49] 1990 Census, *supra* note 7, 1990 Summary Tape File 1 (STF 1), Tables P001 (Persons) & P0008 (Persons of Hispanic Origin).

[50] 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*, Revised Version, September 9, 1992, at 25.

[51] *Gonzalez v. Monterey County*, 808 F.Supp. 727, 729 (N.D.Cal. 1992).

[52] *Gonzalez*, 808 F. Supp. at 729. Approval of a voting change pursuant to Section 5 does not preclude an action challenging the same voting change filed pursuant to Section 2. 42 U.S.C. § 1973c.

[53] After the invalidation of the previously agreed upon settlement plan, the county sought to have court approval of two alternative redistricting plans. One alternative redistricting plan was developed on behalf of a group of intervenors representing north county interests. However, the county endorsed this plan thereby raising a substantial question as to whether the proposed redistricting plan was subject to Section 5 approval thereby requiring the convening of a three judge court. 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. 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. As with the previous alternative plan, such endorsement raised a substantial question of whether this proposed alternative also was subject to Section 5 preclearance. 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*., 808 F.Supp. at 729 – 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.

[54] *Id.*, 808 F.Supp. at 729 – 736.

[55] Letter of Objection, Monterey County (1993), *supra* note 11.

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. 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 the county. 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 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.[56]

After the issuance of the letter of objection, the district court implemented the plaintiffs' plan in a special 1993 election. As the result of the letter of objection and the implementation of the court-ordered redistricting plan, a Latino was elected to the Board of Supervisors for the first time in over a hundred years.[57] This historic event would not have occurred without Section 5 oversight.

Another example of Section 5's positive impact on a minority community involved a letter of objection issued against Merced County.[58] In 1990, Latinas/os constituted 32.6 percent of the county's population.[59] After the publication of the 1990 Census, the Board of Supervisors initiated a redistricting process. 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. The Board of Supervisors disregarded this information, as well as rejected a redistricting plan developed by its demographer that created a supervisor district consisting of a majority of Latinas/os. The Attorney General objected to the proposed redistricting plan. The proposed plan fragmented the Latina/o community in the city of Merced. 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. The submitted redistricting did not have a single supervisor district that contained a majority Latina/o population. 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 district. The new plan was approved and resulted in the election of a Latina supervisor.

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[56] *Id.*, at 3.
[57] Katie Niekerk, *Perkins, Salinas vie for Assembly seat*," Gilroy Dispatch, Oct. 21, 2004. http://www.gilroydispatch.com/news/contentview.asp?c=128571.
[58] U.S. Attorney General, Letter of Objection, April 3, 1992.
[59] 1990 Census, *supra* note 7, 1990 Summary Tape File 1 (STF 1), Tables P001 (Persons) & P0008 (Persons of Hispanic Origin).

Both of these examples illustrate the concrete results achieved by the enforcement of Section 5. Since there are only 58 counties in California,[60] securing the right 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.[61] 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 both 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."[62] An administrative process of 60 days, where the burden of proof is upon the submitting jurisdiction, is substituted for a judicial process, where the burden of proof is upon the minority plaintiffs. Such a difference will often dictate whether an election feature or change will survive a legal challenge.

Section 2, on the other hand, 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 U.S. Supreme Court held for the first time in *White v. Regester* that at-large or multimember districts violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[63] 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. After the *White* decision, at-large election challenges at the local

[60] Cal. Gov. Code § 23012.
[61] 42 U.S.C. § 1973.
[62] *State of South Carolina v. Katzenbach, supra* note 16, 383 U.S. at 327..
[63] 412 U.S. 755 (1973).

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.[64] 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. As a result of the district court's *Aranda* decision, 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.[65] As a result of the *City of Mobile* decision, many at-large election challenges across the country were dismissed. The impact of this decision prompted Congress to amend Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and eliminate the necessity of proving a discriminatory intent pursuant to a constitutional standard. 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.

After Section 2 was amended, Latinas/os filed the first case in California against the city of Watsonville.[66] 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. 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. The case was ultimately successful on appeal to the U.S. Court of Appeals for the Ninth Circuit. In California, the *Gomez* decision served to renew efforts at the community level to eliminate discriminatory at-large methods of elections.[67] After the success of the city of Watsonville case, at large election challenges were filed in other parts of California.[68]

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[64] *Aranda v. Van Sickle*, 600 F.2d 1267 (9th Cir. 1979).
[65] *City of Mobile*, *supra* note 32.
[66] *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *reversing*, Civ. Act. No. WAI C-85-20319 (N.D.Cal. 1985), *cert. den.*, 489 U.S. 1080 (1989).
[67] While the city of Watsonville case 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. The case was ultimately unsuccessful. *Badillo v. City of Stockton*, Civ. Act. No. CV-87-1726-EJG (E.D.Cal. 1987), *affirmed*, 956 F.2d 884 (9th Cir. 1992).
[68] 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 School District*, 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 National City*, 976 F.2d 1293 (9th Cir. 1992) (unsuccessful); Alta Hospital District, *Reyes v. Alta Hospital District*, 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 School District*, Civ. Act. No. CV-F-91-169-REC (E.D.Cal. 1991) (successful); Dinuba Elementary School District, *Reyes v. Dinuba Elementary School District*, Act. No. CV-F-91-170-REC (E.D.Cal. 1991) (successful); Dinuba Joint Union High School District, *Elizondo v. Dinuba Joint Union High School District*, Civ. Act. No. CV-F-91-171-REC (E.D.Cal. 1991) (successful); Salinas Valley Memorial Hospital District, *Mendoza v. Salinas Valley Memorial Hospital District*, Civ. Act. No. C-92-20462 RMW (PVT) (N.D.Cal. 1992) (voluntarily dismissed, no

However, this period of Section 2 enforcement in California was short-lived. Two major unsuccessful at-large election challenges served to discourage any further litigation by private parties.[69] These two cases involved challenges to the at-large method of election in the El Centro School District and the city of Santa Maria.[70] 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. Perhaps the most chilling aspect of these losses were the efforts by the defendants to collect on their Bill of Costs filed pursuant to 28 U.S.C. § 1920. In the El Centro School District litigation, the ultimate Bill of Costs was pared down to $ 19,462.01. The district court denied the plaintiffs request to retax the costs and 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.[71] The school district successfully applied pressure on the plaintiffs to dismiss their appeal in exchange for the school district to withdraw their 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 federal Voting Rights Act of 1965.[72]

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result); Monterey County Superior Court, *Trujillo v. State of California*, Civ. Act. No. C-92-20465 RMW (EAI) (N.D.Cal. 1992) (voluntarily dismissed, no result).

[69] The only other at-large election challenges filed in California were initiated by the U. S. Department of Justice. Since 1990, the U.S, Department of Justice has filed two cases challenging at-large methods of election. *U.S. v. San Gabriel Valley Mun. Water District*, Civ. Act. No. 007903 AHM BRX, 2000 WL 33254228 (denial of preliminary injunction, filed Sept. 8, 2000) (C.D.Cal.) & *U.S. v. City of Santa Paula*, (cited in Voting Section website, http://www.usdoj.gov/crt/voting/sec_2/recent.htm).

[70] *Aldasoro v. El Centro School District*, 922 F.Supp. 339 (S.D.Cal. 1995) & *Ruiz v. City of Santa Maria*, Civ. Act. No. 92-4879 JMI(SHX) (C.D.Cal. 1992), *reversed*, 160 F.3rd 543 (9th Cir. 1988), *cert. denied*, 527 U.S. 1022 (1999), *trial on the merits*, Findings of Fact and Conclusions of Law – Granting Judgment to City (filed August 16, 2002).

[71] *Aldasoro v. Kennerson*, 915 F.Supp. 188 (S.D.Cal. 1995).

[72] 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 e.g.*, 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 4,352 governmental entities. Statistical Abstract, *supra* note 7, Table 416 – Number of Local Governments by Type- States: 2002, at State and Local Government Finances and Employment 272. As of April 2005, there were a total of 478 municipalities: 108 chartered cities, and 370 general law cities. http://www.cacities.org/index.jsp?zone=locc&previewStory=53. Out of the total number of cities, only 27 or 5.6 percent conduct elections by districts. 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 percent of these districts conduct at-large elections, 20 percent have candidate residency districts and at-large voting, and 15 percent have district elections. California School Board Association, Susan Swigart, Director of Member Services – e-mail dated May 17, 2005, to Joaquin G. Avila. In a 1987 survey of school districts, it was estimated that over 95 percent of school districts conducted their elections on an at-large election basis. *See* "Watsonville's new crop," Golden State Report, at 27 (September 1987). Recently, the preliminary results of a survey conducted for a project sponsored by the California Research Policy Center entitled, "Systems of Election, Latino Representation, and Student Outcomes in California Schools," shows that in 14 California counties containing significant Latina/o populations (Tulare (50.8 percent), San Benito (47.9 percent), Monterey (46.8 percent), Merced (45.3 percent), Madera (44.3 percent), Fresno (44.0 percent), Kings (43.6 percent), Kern (38.4 percent), Santa Barbara (34.2 percent), Ventura (33.4 percent), Stanislaus (31.7 percent), San Joaquin (305 percent), Santa Cruz (26.8 percent) and San Luis Obispo (16.3 percent), there are 170 school districts ranging from a 10 percent Latina/o population concentration to an 86 percent concentration which did not have a single

The absence of private litigants is significant, since as the following table[73] demonstrates, the private bar has been largely responsible for enforcement of minority voting rights.[74]

Voting Cases Commenced in United States District Courts				
Year	U.S. Cases - Plaintiff	U.S. Cases - 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

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 1,000 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.

[73] Source: Annual Report of the Director of the Administrative Office of the United States Courts, Reports of the Proceedings of the Judicial Conference of the United States, Years 1977 - 1996, Tables C 2.
Judicial Business of the United States, 1997 - 2004 Annual Reports of the Director, Administrative Office of the U.S. Courts. http://www.uscourts.gov/judbus2004/appendices/c2.pdf
(September 30, 2004, Table C-2, at p. 133);
http://www.uscourts.gov/judbus2003/appendices/c2.pdf
(September 30, 2004, Table C-2, at p. 127);
http://www.uscourts.gov/judbus2002/appendices/c02sep02.pdf
(March 31, 2002, Table C-2, at p. 45) (includes within private cases category, two cases listed under "Diversity of Citizenship" sub-category);
http://www.uscourts.gov/judbus2001/appendices/c02sep01.pdf
(March 31, 2001, Table C-2, at p. 45);
http://www.uscourts.gov/judbus2000/appendices/c02sep00.pdf
(September 30, 2000, Table C-2, at p. 136);
http://www.uscourts.gov/judbus1999/c02sep99.pdf
(September 30, 1999, Table C-2, at p. 137);
http://www.uscourts.gov/dirrpt98/c02sep98.pdf
(September 30, 1998, Table C-2, at p. 143);
http://www.uscourts.gov/judicial_business/c02sep97.pdf
(September 30, 1997, Table C-2, at p. 129).

[74] *See also* B. Grofman and C. Davidson, eds., Controversies in Minority Voting, The Brookings Institute (1992), at 241 (Gregory A. Caldeira, "Litigation, Lobbying, and the Voting Rights Bar") ("Members of the voting rights bar outside the federal government institute perhaps 95 percent of these [voting rights] cases in any particular year. Enforcement of voting rights is, therefore, very much an activity of the private sector.").

Voting Cases Commenced in United States District Courts				
Year	U.S. Cases - Plaintiff	U.S. Cases - Defendant	Private Cases	Totals
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
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	5,040	5,538

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 state 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 State Voting Rights Act became law.[75] Although the California State Voting Rights Act is a significant improvement

[75] Calif. Elections Code §§ 14025 – 14032. The state Voting Rights Act addresses the problem of racially polarized voting within the context of at-large elections. The Act applies to all levels of governments: cities, school districts,

over Section 2, it only applies to at-large elections and does not apply to other methods of elections, such as redistrictings, and other voting changes. Moreover, the state Act was declared to be unconstitutional by a Superior Court.[76]

To summarize, Section 2 has been ineffective in eliminating discriminatory at-large methods of elections in California.[77] 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 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 1975 amendments to the Voting Rights Act of 1965, the city of Hanford in Kings County became subject to the Section 5 preclearance requirement. Subsequently, after an extended delay, the city of Hanford submitted a series of annexations for Section 5 preclearance.[78] The U.S. Attorney General issued a letter of objection.[79] The Attorney General

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special election districts, and judicial districts. There is no requirement of proving geographic compactness. There is no necessity to create a hypothetical single-member district consisting of over a 50 percent 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. The burden is to demonstrate that racially polarized voting prevents the ability of a protected class to elect candidates of their choice or to influence the outcome of an election. As with the federal Act, 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. Also,
prevailing party plaintiffs' are entitled to recover their expert witness fees and expenses. 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.

[76] Two cases were filed by the Lawyers' Committee for Civil Rights for the San Francisco Bay Area pursuant to the state act. The first was filed against the Hanford Joint Union High School District. *Gomez v. Hanford Joint Union High School District*, Civ. Act. No. 04-Co284 (Kings County Superior Court, Cal. 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 State 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 (Stanislaus County Superior Court, Cal. 2004), *appeal pending*, No. F048277 (Court of Appeal of the State of California, Fifth Appellate District). The firm of Heller, Ehrman, White & McAuliffe is assisting in this litigation.

[77] 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 *U.S. 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 Agricultural Improvement and Power District*, 109 F.3d 586 (9th Cir. 1997).

[78] Annexations affect the size of voting constituencies and are thus subject to Section 5 preclearance. *See supra* note 13.

[79] Letter of Objection, City of Hanford (1993), *supra* note 13. The letter noted that this was the first instance that the city sought Section 5 approval of its annexations. 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.

concluded that the city of Hanford had not met its burden of demonstrating that the proposed annexations did not have a discriminatory effect on minority voting strength.[80] After an unsuccessful effort to seek a withdrawal of the letter of objection and an accompanying Section 5 lawsuit,[81] 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,[82] 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.[83] 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.[84] 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[85] 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.[86] With respect to the Monterey 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 is outweighed by a Section 5 administrative proceeding where the burden of proof is reversed.

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." Letter at p. 1.

[80] The annexations would have reduced the Latina/o population of the City from 35.9 percent to 29.4 percent.

[81] *Yrigollen v. City of Hanford*, Civ. Act. No. CV-F-93-5303 OWW (E.D.Cal. 1993).

[82] *See supra* notes 66, 67 & 68 and accompanying text.

[83] Monterey County Elections, Tony Anchundo, 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," at p. 2, August 14, 2003.

[84] U.S. Department of Justice, Second Letter of Approval, dated September 4, 2003. 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)." Letter at p. 2.

[85] The Secretary of State on July 24, 2003, set the gubernatorial recall election for October 7, 2003. *Oliverez v. State of California*, Civil Action No. 03-03658 JF, Complaint for Declaratory and Injunctive Relief, ¶ 2 (Filed August 6, 2003).

[86] *See generally*, *Thornburg*, *supra* note 36.

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 were no longer required was laid to rest with the attempted conversion from a district election system[87] 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.[88] The school district at one time had elected its board members pursuant to an at-large method of election. In 1995, when the Latina/o board membership consisted of a majority of the board, the method of election was changed to a district-based election system.

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. In evaluating the proposed voting change, the Department of Justice found that the cover letter accompanying the petition to change the method of election contained language that was expressed in a tone that "raises the implication that the petition drive and resulting change was motivated, at least in part, by a discriminatory animus." 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. In Chualar, the absence of the protective features of Section 5 would have resulted in a reversion to the former discriminatory at-large method of election.

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 served as a deterrent to 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.[89] 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 3,322 square miles[90] would have clearly made it difficult for minorities to travel to their local polling site and cast their ballot. However, upon receiving the Attorney General's concerns, Monterey County withdrew the objectionable precinct consolidations from Section 5 review.

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[87] The district election scheme consisted of at least one district containing three school board members. This multimember district was predominantly Latina/o.
[88] Letter of Objection, Chualar (2002), *supra* note 12.
[89] *See supra* notes 80 & 81 and accompanying text.
[90] U.S. Census Bureau, State & County Quickfacts, http://quickfacts.census.gov/qfd/states/06/06053.html.

Since no letter of objection was issued, there was no readily available public document serving as a record of this event. Only because the withdrawal occurred within the context of Section 5 litigation, can this instance of deterrence be documented. 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.[91] Given these beneficial effects, the record for reauthorizing and amending Section 5 becomes more compelling.

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 section of this Report, the issue of non-compliance has resurfaced repeatedly during the VRA's 41-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 counties covered under Section 5 in California 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. Such an assumption is unwarranted.

There is a significant problem relating to the enforcement of the 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 I*,[92] 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.[93] Also, in litigation involving a special election to

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[91] After protracted litigation lasting about nine years in Monterey County, the state of California and Monterey County were required to submit a series of judicial district consolidation ordinances for Section 5 approval. *Lopez v. Monterey County (I)*, 519 U.S. 9 (1996) & *Lopez v. Monterey County (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 (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.

[92] *Lopez (I)*, *supra* note 88.

[93] *Lopez (II)*, *supra* note 88.

recall Governor Gray Davis, Monterey County disclosed that voting precinct consolidations had not been submitted since the mid 1990s.[94] This record of non-compliance has been cited numerous times by the United States Commission on Civil Rights,[95] by congressmen and witnesses in testimony when the Act was reauthorized in 1970,[96] 1975,[97] and 1982,[98] by the Government Accounting Office,[99] and by Supreme Court precedent.[100] Finally, as a result of independent reviews of voting changes in selected jurisdictions, the record demonstrates that

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[94] *See supra* notes 80 and 81 and accompanying text.

[95] United States Commission 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, at 184 (1968) (Commission recommended 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, at 28 ("Non-compliance with the Voting Rights Act through failure to submit changes remains a problem in enforcement of the act.") (January 1975); U.S. Comm'n on Civil Rights, The Voting Rights Act: Unfullfilled Goals (September, 1981), at 70–75 (chronicling extent of failure to submit voting changes for Section 5 preclearance).

[96] *Voting Rights Act Extension: Hearings 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 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 4 (statement of William McCulloch, Member, House Comm. 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."), 18 (statement of Howard A. Glickstein, General Counsel and Acting Staff Director, U.S. Comm'n 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.") (1969). *See also Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029, Bills to Amend the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 91st Cong. 51–53 (statement of Frankie Freeman, Member, U.S. Comm'n 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) (1969).

[97] *Extension of the Voting Rights Act, Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501, Extension of the Voting Rights Act, Before the Subcommittee on Civil and Constitutional Rights of the Committee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives*, 94th Cong. 281 (statement of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division) ("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.") (1975).

[98] *Extension of the Voting Rights Act: Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 2117 (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division) ("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.") (1982).

[99] *GAO Report on the Voting Rights Act: Hearings on GAO Report on the Voting Rights Act Before the House Subcommittee on Civil and Constitutional Rights, of the Committee on the Judiciary*, 95th Cong. 84 (report noted that the Department of Justice did not systematically identify and secure the submission of voting changes enacted by covered jurisdictions and that Department's efforts were at best "sporadic" and fell "far short of formal systematic procedures to make sure that changes affecting voting are submitted.") (1978).

[100] *See, e.g., Perkins v. Matthews*, *supra* note 13, at 393, note 11 (in reviewing a table of submissions prepared by the Attorney General which demonstrated "… that only South Carolina has complied rigorously with § 5 . . . ," the Court stated: "The only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5's requirement.").

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.[101]

Despite this record of non-compliance, there were efforts underway to either amend the VRA "bailout" provisions to facilitate the process of securing an exemption from Section 5 review, or to explore the feasibility of securing a "bailout" from Section 5 compliance. As previously noted, under the "bailout" 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.[102] Before such a declaratory judgment can issue the covered jurisdiction must meet several requirements.[103] 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,[104] that the covered jurisdiction or its political subunits[105] must not have been the subject of a letter of objection or the denial of a declaratory judgment pursuant to Section 5,[106] that no judgments or consent decrees have been entered in any litigation affecting the right to vote,[107] and that the covered jurisdiction should "have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process . . . ."[108]

Three of California's Section 5-covered jurisdictions, Monterey, Merced, and Kings counties, have sought to amend the bailout provisions or seek changes in the triggering formulas that determine Section 5 coverage in order to facilitate an exemption from this federal preclearance.[109] Their efforts to seek a legislative amendment is not surprising, since none of the three counties could qualify for a bailout 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 with equal access to the political process.[110] For example, the city of Los Banos has a total population of 25,869, based upon the 2000 Census, of which 13,048

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[101] Author review of on site records in the 1990s.
[102] 42 U.S.C. § 1973(b)(a).
[103] *See generally* S.Rept. 97-417, *supra* note 35, at 46-62 & 42 U.S.C. § 1973b(a).
[104] 42 U.S.C. § 1973(b)(a)(1)(D).
[105] 28 C.F.R. § 51.6 (7-1-03 Edition).
[106] 42 U.S.C. § 1973(b)(a)(1)(E).
[107] 42 U.S.C. § 1973(b)(a)(1)(B).
[108] 42 U.S.C. § 1973(b)(a)(1)(F)(i). *See also* S.Rept. 97-417, *supra* note 35, at 54, note 184 and accompanying text:

> "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." Note 184.

[109] Michael Doyle, Bee Washington Bureau, "Voting rights rules irk counties – With a 1965 law coming up for renewal, Merced is leading the charge to escape federal controls," January 22, 2006 (describes the efforts of Merced County and Kings County to hire lobbyists to amend the bailout provisions). *See* Monterey County, Board of Supervisors Minutes, October 18, 2005 (where county voted to further study the issue of whether the county should support an effort to amend the bailout provisions – county responded to Latina/o community concerns that their voting rights would be adversely affected).
[110] 42 U.S.C. § 1973(b)(a)(1)(F)(i).

or 50.4 percent are Latina/o.[111] The at-large method of election is implemented to select members to the City Council.[112] Despite this large concentration of Latinas/os within the city there is not a single Latina/o serving on the City Council.[113] 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 bailout. 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 bailout.

The remaining two counties also would not be successful in securing a Section 5 bailout. In Kings County, the 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 also prevent Kings County from bailing out from Section 5 coverage.[114] 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.[115]

This effort by Monterey, Kings, and Merced counties to secure legislative amendments to facilitate a Section 5 bailout further reinforces 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 objections and non-compliance efforts, there continues to be a need for Section 5 preclearance. At a minimum, efforts should be undertaken to insure that jurisdictions have fully complied with Section 5. In California, Section 5 has been very effective in preventing the implementation of discriminatory voting changes and has discouraged jurisdictions from reverting back to previous election methods that denied Latinas/os with access to the political process.

III. The Language Assistance Provisions Provide Limited English Proficiency Eligible Voters and Voters with an Effective Opportunity to Participate in the Political Process

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. The language assistance provisions require language assistance for language minority communities in certain jurisdictions

[111] *See supra* note 7, 2000 Census, Table P8, Hispanic or Latino by Race, Universe – Total Population.
[112] City of Los Banos, City Council Meeting Minutes, November 17, 2004 (accepting results of municipal elections showing that candidates are elected on an at-large election plurality basis).
[113] http://www.losbanos.org/council.php.
[114] 42 U.S.C. § 1973(b)(a)(1)(B). *See also*, *supra* note 73 and accompanying text.
[115] 42 U.S.C. § 1973(b)(a)(1)(E). *See also*, *supra* notes 84 & 85, and accompanying text.

during the election process and apply to four language minority groups: American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage. 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."[116] Other language groups have not been included because Congress did not find evidence that shows 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 insure that its young students, as well as, adult students, meet a certain minimal level of English proficiency. The congressional testimony in support of the language assistance provisions has documented the need for the implementation and the continued need for these provisions.[117]

The language assistance provisions require that any election materials provided in English must also be provided in the language of the covered minority group. Election information includes registration or voting notices, forms, instructions, ballots, and any other materials or information relating to the electoral process. 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.[118]

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 language assistance provisions until August 2007. 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, Alaskan Native or Latina/o language minority community had LEP voting age citizens equal to five percent of the jurisdiction's citizen voting-age population. This resulted in dense urban jurisdictions with large LEP voting populations not being covered while jurisdictions with smaller populations were being covered, and required an excessively large LEP language minority citizen voting-age population for urban jurisdictions to meet the five percent threshold. For example, the number of LEP voting age citizens from a single language minority community needed to meet the five percent threshold in 1990 for Los Angeles County was 443,158, as compared to Napa County, which required only 5,538 to meet the threshold. Similarly, San Francisco County would have also had to reach a much higher threshold than Napa County at 36,198. Congress determined that a 10,000 person benchmark served as an appropriate threshold that would solve that

[116] 42 U.S.C. § 1973aa-1a(a). *See also* 42 U.S.C. § 1973b(f)(1).
[117] *See, e.g.*, S.Rept. 94-295, 94th Cong. 1st Sess. 24-30, 37-39 (1975); S.Rept. 97-417, *supra* note 35, at 64-66. *See also* H.Rept. 102-655, 102nd Cong., 2nd Sess. (report accompanying passage of the Voting Rights Language Assistance Act of 1992, P.L. 102-344).
[118] *See generally* 28 C.F.R. Part 55.

problem. The numerical benchmark has been extremely important to Asian Americans because 97 percent of Asian Americans live in densely populated urban areas.

A community of one of these language minority groups will qualify for language assistance under Section 203 of the Act if more than five percent or 10,000 of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited-English proficiency; and the illiteracy rate of voting-age citizens in the language minority group is higher than the national illiteracy rate. A community of one of these language minority groups will qualify for language assistance under Section 4(f)(4) if (i) more than five percent of the voting-age citizens in a jurisdiction belong to a single language minority community, (ii) registration and election materials were provided only in English on November 1, 1972, and (iii) fewer than 50 percent of the voting-age citizens in such jurisdiction were registered to vote or voted in the 1972 presidential election. Jurisdictions covered under Section 4(f)(4) are covered under Section 5.

Currently, Sections 203 and 4(f)(4) apply in California. Presently there are 25 counties in California subject to Section 203 that are required to provide an election process in a language other than English.[119] Of the Section 5-covered jurisdictions, there are only three counties subject to the language assistance requirements.[120]

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 serves as a deterrent to language minority voters exercising their right to vote. Section 203 addresses both of these barriers in a manner that is more fully described in the section 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 our democracy. 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

[119] 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, and 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). Federal Register, Vol. 67, No. 144, Friday, July 26, 2002, at 48871.

[120] These counties and the languages other than English include: Kings (Spanish), Merced (Spanish), and Yuba (Spanish). 28 C.F.R. Part 55, Appendix.

to learn English. Other language minority voters are limited-English proficient because they immigrated to 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 voters 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. California voters must contend with extremely complicated ballots. For example, the ballot used in the October 2003 gubernatorial recall election listed 135 candidates. The ballot used in the November 2004 general election contained a total of 16 statewide ballot propositions, 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. 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. Adding to the complexity is the length of these guides. The voter information guide used in the November 2005 statewide special election is more than 75 pages long. 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.

1. Demographic Indicators of Need

Disaggregated Census 2000 data[121] 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 live in what are referred to as "linguistically isolated households." A household is considered linguistically isolated if all members of the household 14 years and older are limited- English proficient. 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 even if they wanted the assistance.

[121] APALC 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 Asian Law Caucus and the Asian American Justice Center. The profile disaggregates Census 2000 data on the California APIA population by racial/ethnic group and is available at http://www.apalc.org/brochures.htm (last visited November 12, 2005). 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.

The Asian-American population in California is nearly 40 percent limited-English proficient, and over one-quarter of Asian American households are linguistically isolated.[122] A number of Asian-American groups are majority or near-majority limited-English proficient, including Vietnamese at 62 percent, Korean at 52 percent, and Chinese at 48 percent. These groups also have high rates of linguistic isolation, with 44 percent of Vietnamese American households isolated, 41 percent of Korean American households isolated, and 34 percent of Chinese American households isolated. The Latina/o population in California is 43 percent limited-English proficient, and 26 percent of Latina/o households are linguistically isolated.

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

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 assistance increased by 38 percent from December 1999 to August 2005.[123] This increase reflects increased outreach by Los Angeles County and illustrates language

[122]Stewart Kwoh, President and Executive Director, Eugene Lee, Staff Attorney, Voting Rights Project, Asian Pacific American Legal Center of Southern California, Submission of Materials for Oversight Hearing Entitled "The Voting Rights Act: Section 203 – Bilingual Election Requirements, Part I" and "The Voting Rights Act: 203 – Bilingual Election Requirements, Part II," U.S. House of Representatives, Judiciary Subcommittee on the Constitution, Oversight Hearings on the Voting Rights Act of 1965, November 16, 2005, at 4. When the data for individual groups are examined, the percentages increase. For example, Vietnamese are 62 percent limited English proficient and 44 percent are in linguistically isolated households. *Id*. & at 5 (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 5-6. The same percentages are also present when Asian and Pacific Islander American voters are examined.

[123] Conny B. Mccormack, Registrar-Recorder/County Clerk, Los Angeles County, Testimony, submitted to the National Commission on the Voting Rights Act, Los Angeles, California, September 27, 2005, at Exhibit 22.

minority voters' reliance on language assistance. The following table shows these increases for specific language minority groups:[124]

Los Angeles County – Voter Requests for Language Assistance

Language	Percentage Increase in Number of Voter Requests for Language Assistance From 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, APALC conducts large-scale exit polls at poll sites throughout Southern California.[125] 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 percent of APIA voters surveyed in APALC's exit poll indicated that they are limited-English proficient. The following table shows similar exit poll data for other elections:

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 findings. 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

[124] *Id.*

[125] APALC publishes exit poll data in voter survey reports that are available at http://www.apalc.org/brochures.htm (last visited November 12, 2005).

counties would benefit from language assistance during the voting process. For example, in November 2000, 54 percent of APIA voters and 46 percent of Latina/o voters indicated that they would be more likely to vote if they received language assistance. The following table provides similar data for other elections:

Southern California Exit Poll Data – More Likely to Vote If Assistance Received

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%

In APALC's most recent exit poll, data from the November 2004 general election[126] indicate that over one-third of APIA voters used language assistance to cast their vote. Several APIA groups had particularly high rates of using language assistance, including 37 percent of Chinese-American voters, 48 percent of Korean-American voters and 52 percent of Vietnamese-American voters.

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. Congress made findings that language minorities suffer from unequal educational opportunities, high illiteracy, and low voting participation. 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 25 years.

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 percent of Asian Americans have less than a high school degree, compared with 10 percent of the white population. These differences are even more dramatic when looking at specific Asian American ethnic groups. For example, 36 percent of Vietnamese Americans have less than a high school degree. Latinas/os have even lower rates of educational attainment, with 53 percent having less than a high school degree. The following table shows rates of high school non-completion in California:

California – High School Non-Completion

Group	Percentage of Population With Less Than a High School Degree

[126] These data represent preliminary findings and are subject to adjustment based on statistical weighting.

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 age 17 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 percent of Asian American children in San Francisco County and 24 percent 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 percent 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. Students who speak a language other than English at home must take a test to assess their level of English proficiency. Students who are considered not proficient in English are classified as English learners, and most are placed into English language development programs.[127]

According to a recent 2005 study, there are more than 1.6 million English learners in California, representing over one-fourth of California's elementary and secondary students.[128] Over 90 percent of these students are from language minority groups specified in Section 203 (Latinas/os

[127] In 1998, Proposition 227 was passed by California's voters. 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. The law allows alternatives to English immersion such as bilingual education, but only through parental waivers. Today only a reported 6.5 percent 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.

[128] Jepsen, C., and de Alth, S. (2005). English Learners in California Schools. Public Policy Institute of California. Retrieved October 30, 2005 from http://www.ppic.org/content/pubs/R_405CJR.pdf.

comprise 85 percent of English learners, and APIAs make up 9 percent of English learners). Contrary to common perception, approximately 85 percent of California's English learners are born in the United States.

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.[129] The study finds that the achievement gap puts English learners further and further behind English-only students as the students progress through school grades. 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. 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.

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. In the graduating class of 2004, only 19 percent of English learners had passed the test after two attempts, compared with 48 percent of all students.[130] The study attributes this achievement gap to a number of educational inequalities that English learners face. The study finds 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 notes that 14 percent of teachers statewide were not fully credentialed in 2001-2002. In contrast, 25 percent of teachers of English learners were not fully certified. The study also finds that as the concentration of English learners in a school increases, the percentage of teachers without full credentials also increases.

The study observes further that only 53 percent 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. In addition, many newly certified teachers report that they do not have sufficient training to work with English learners and their families. Of the teachers graduating from teacher credential programs in the California State University system[131] in 1999-2000, one-fourth reported that they felt they were only somewhat prepared or not at all prepared to teach English learners.

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[129] Gándara, P., Rumberger, R., Maxwell-Jolly, J., and Callahan, R., English Learners in California Schools: Unequal resources, unequal outcomes, *Education Policy Analysis Archives*, 11(36) (October 7, 2003). Retrieved November 6, 2005 from http://epaa.asu.edu/epaa/v11n36.

[130] 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.

[131] The California State University system has been the largest preparer of teachers since 1857.

b) Teachers of English learners lack adequate professional development opportunities to gain skills necessary to address the instructional needs of English learners.

The study notes the intense instructional demands that teachers of English learner students face. Teachers must provide instruction in English language development while simultaneously attempting to ensure that English learners have access to core curriculum subjects. Despite these demands, teachers devote inadequate amounts of time to their professional development in the area of teaching English learners. For example, in 1999-2000, the percentage of professional development time that teachers reported spending on the instruction of English learners was about seven percent. Even for teachers whose students are more than 50 percent English learners, this percentage was only ten percent.

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. For example, in 2000-2001, the state provided $50.9 million to the University of California to provide professional development to teachers. However, only $8.6 million was allotted for professional development in the area of English language development. This amount was only 16 percent of the professional development budget even though English learners make up more than 25 percent of the student population in California and are arguably the most educationally disadvantaged of all students.

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 describes the impact that inappropriate testing has on English learners. California schools administer English-only tests to measure achievement for English learners. These tests fail to provide accurate data for purposes of gauging whether their educational needs are being met. They also fail to help teachers in monitoring the progress of English learners and enhancing the instruction of English learners.

The study observes that such tests can also have serious 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. 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.

d) English learners fail to receive sufficient instructional time to accomplish learning goals.

The study notes 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. This 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. 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.

The study also observes 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. 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.

e) English learners lack access to appropriate instructional materials and curriculum.

The study notes that English learners need additional materials beyond what is provided to all students. 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. Second, English learners who receive instruction in their primary language need texts and curriculum that are in their primary language.

However, the study finds that many English learners lack access to such materials. For example, the study cites a 1998-2001 survey that reports 75 percent of teachers use the same textbooks for both English learners and English-only students and that only 46 percent of teachers use any supplementary materials for English learners. Not surprisingly, only 41 percent of teachers reported that they were able to cover as much material with English learners as with English-only students.

f) English learners lack access to adequate school facilities.

The study reports that teachers of English learners are more apt than teachers of English-only students to respond that they do not have facilities that are conducive to teaching and learning. For example, the study cites 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. Also, teachers in schools with high percentages of English learners were 50 percent more likely to report bathrooms that were not clean and open throughout the day and to have seen evidence of cockroaches, rats, or mice. Lastly, more than a third of principals in schools with higher concentrations of English learners reported that their classrooms were never adequate or often not adequate, compared with eight percent of principals in schools with low concentrations of English learners.

g) English learners are segregated into schools and classrooms that place them at particularly high risk for educational failure.

The study finds that English learners are highly segregated among California's schools and classrooms. In 1999-2000, 25 percent of all students in California attended elementary schools

in which a majority of the students are English learners. In contrast, 55 percent of all English learners were enrolled in majority-English learner schools. The study argues that this segregation weakens the quality of education that English learners receive compared with their English-only peers. The study notes several ways in which this happens.

First, English learners lack sufficient interaction with English-speaking student models, limiting their development of English. Second, English learners do not interact with enough students who are achieving at high or even moderate levels, inhibiting their academic achievement. Third, English learners are segregated into classrooms that frequently suffer from poor conditions, creating a poor learning environment. Fourth, English learners are segregated into classrooms that typically have inadequately trained teachers, depressing their learning.

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 highlight the state's educational failures and indicate the severity of these failures.

For example, in 1970, the state entered into a consent decree that settled the *Diana v. California State Board of Education*[132] 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 2003 study described above reports 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 30 years following the consent decree. The result is that English learners are still over-represented in special education classes. 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. 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 massive rates of high school non-completion, underemployment, poverty, and marginalization during their adult lives.

In 1974, the U.S. Supreme Court, in the *Lau v. Nichols* litigation,[133] ordered California public schools to provide education for all students, regardless of their English-speaking ability. The litigation was filed on behalf of 1,800 Chinese-American students who were segregated by the San Francisco school system into separate "Oriental" English-only schools.

In 2000, a class action lawsuit entitled *Williams v. State of California*[134] 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 and alleged that the state's failure to provide

[132] Civil Action No. C-70-37 (N.D. Cal. (1970).
[133] 414 U.S. 563 (1974).
[134] San Francisco County Superior Court, Case No. 312236 (May 17, 2000).

minimum educational necessities violated the state constitution and state and federal laws. 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. 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.[135] 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. 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 diminished opportunities for English learners to advance to higher grades and to graduate.

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 & Pacific Islander American Affairs, current federal and state funding for English acquisition classes in California consistently fails to meet the demand of California's growing limited-English proficient population.[136] 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 percent of the total number of people in California who participated in an adult school program and 20 percent of people who participated in non-credit courses offered by California's community colleges. The report also found that ESL courses are rarely offered outside of work hours when working language minorities can take advantage of the courses.

D. Impact of Section 203

In the 40 years since the Voting Rights Act was enacted, and in the 30 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

[135] *Coachella Valley Unified School District, et al., v. State of California, et al.*, San Francisco County Superior Court, Case No. CPF-05-505334 (June 1, 2005).

[136] Established by state legislation in 2002, the Commission on Asian & Pacific Islander American Affairs is a 13-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. The 2004 Annual Report of the Commission is available at http://democrats.assembly.ca.gov/apilegcaucus/pdf/guts.pdf (last visited November 12, 2005).

gains have occurred since Section 203 was amended in 1992 to add a numerical threshold for triggering coverage.[137]

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,[138] the number of APIA registered voters increased by 61 percent 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 percent. Both of these increases outpaced increases in both the overall APIA voting age population and the overall APIA citizen voting age population. The second table below 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.

California – Increase in Voter Registration and Turnout From 1998 to 2004 [139]

Election	Total APIA Voting Age Population	Total APIA Citizen Voting Age Population	Total Registered APIA Voters	Total Turnout Among Registered APIA Voters
November 1998	2,706	1,657	854	587
November 2000	3,027	1,908	1,007	848
November 2002	3,306	2,172	1,122	727
November 2004	3,636	2,620	1,379	1,162
Increase 1998 – 2004	34%	58%	61%	98%

During the same time period, the Latina/o registration and turnout levels in California have also increased. According to census data,[140] the number of Latina/o registered voters increased by 40 percent from the November 1998 election to the November 2004 election. In the same period,

[137] APIA representation in the 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. 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 state 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 state 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 of the 40-member state Senate, and because of term limits, the number of APIA legislators in the 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.

[138] Data on reported voting and registration is collected by the U.S. Census Bureau in the Current Population Survey and is available at http://www.census.gov/population/www/socdemo/voting.html (last visited September 25, 2005).

[139] Figures are in thousands except for percentages.

[140] Data on reported voting and registration is collected by the U.S. Census Bureau in the Current Population Survey and is available at http://www.census.gov/population/www/socdemo/voting.html (last visited September 25, 2005).

the number of Latina/o voters who turned out to vote increased by 56 percent. 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. The table on the next page 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.

Election	Total Latina/o Voting Age Population	Total Latina/o Citizen Voting Age Population	Total Registered Latina/o Voters	Total Turnout Among Registered Latina/o Voters
November 1998	6,264	3,154	1,749	1,338
November 2000	6,514	3,489	1,919	1,597
November 2002	6,964	3,974	2,017	1,206
November 2004	8,127	4,433	2,455	2,081
Increase 1998 – 2004	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 Justice Department 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 percent and Vietnamese American registration has increased by 37 percent since the Justice Department's action.[141]

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 California.[142] For example, in the November 2004 elections, almost 73 percent of white voters registered and 67 percent turned out to vote. African Americans in California exhibit similar rates, with 68 percent registering and 61 percent turning out to vote. In contrast, Latina/os registered at a rate of 55 percent and APIAs 53 percent while they turned out at rates of 47 percent and 44 percent respectively.[143] Continued compliance with Section 203

[141] Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, United States Department of Justice, before the House Judiciary Subcommittee on the Constitution, November 8, 2005. Available at http://judiciary.house.gov/media/pdfs/schlozman110805.pdf (last visited November 15, 2005).

[142] 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, available at 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, available at 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, available at 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, available at http://www.census.gov/population/socdemo/voting/p20-552/tab04a.xls.

[143] *Id.* These figures are complied based upon the citizen voting-age population.

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 minority 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 Justice Department 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.[144] 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
- Poll sites lacking adequate translated signage or lacking signage altogether directing voters where to go and explaining what their rights are

Recurring problems in Section 203 implementation reflects 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 training 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 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:

- November 2000 general election, San Francisco County – Poll monitors witnessed a poll worker yelling at several elderly Chinese-American women, telling them, "Get out!" The poll worker later explained that he was angry at an elderly Chinese-American voter who had brought a friend to help her vote. The poll worker mistakenly believed that it was "illegal" to have someone other than a poll worker provide voting assistance. The elderly voter was turned away before she could vote.[145]

- November 2002 general election, San Francisco County – A poll worker reported to the poll monitor that one voter left the polling place without voting because the voter was unable to communicate with the poll worker. The poll worker did not know that he could have called the language assistance line operated by the city of San Francisco's Department of Elections and obtained language assistance for the voter.

[144] These organizations include Asian Law Alliance (Santa Clara County), Asian Law Caucus (San Mateo County), CAA | Center for Asian American Advocacy (San Francisco County), Council of Philippine American Organizations (San Diego County), and Orange County Asian and Pacific Islander Community Alliance (Orange County). APALC and the Asian American Justice Center work with and provide technical assistance to these organizations. In 2005, the Asian American Justice Center published an election poll monitoring report for the November 2004 general election that contains the poll monitoring findings of these organizations and organizations in other parts of the country. This report is entitled "Sound Barriers: Asian Americans and Language Access in Election 2004" and is available at http://www.advancingequality.org/files/sound_barriers.pdf (last visited November 12, 2005).

[145] This would appear to constitute a violation of 42 U.S.C. § 1973aa-6 ("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.").

- November 2002 general election, San Francisco County – At a poll site with a large number of elderly Chinese-American voters who needed language assistance, the poll monitor observed a number of voters whose votes were not counted. These problems resulted from the Department of Elections failing to staff the poll site with a sufficient number of bilingual poll workers. Many of the voters at the poll site struggled with the voting process, and the bilingual poll workers were overwhelmed and unable to help everyone who needed voting assistance. The poll inspector showed the poll monitor spoiled ballots on which voters had voted for the wrong number of candidates or checked the write-in box without entering a candidate's name. The poll inspector expressed frustration that some of these voters left the poll site before the poll inspector could ask them to complete new ballots, or left despite being asked because they could not understand his request. The poll monitor observed the poll site's optical scan machine rejecting many completed ballots.

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 – The inspector stated, "The bilingual materials are a waste of time and money." She pulled the bilingual materials out, but then put them back in the envelope. Ultimately, the poll monitor had to assist in laying them out.

- 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. 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."

- November 2002 general election, San Francisco County – The poll monitor noted to a poll worker that the poll site lacked Spanish language voter information pamphlets.

The poll worker responded, "If they don't speak English, then they shouldn't be voting in the United States of America."

- March 2004 primary election, Artesia, Los Angeles County – After the poll monitor discussed sample ballots with the poll inspector, the inspector said, "One day I wish we can have all English," motioning to the sample ballots with his hand.

- 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."

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 – The poll inspector was rude and curt to voters, particularly young voters, and was also reluctant to help limited-English proficient voters. She inappropriately asked some young APIA voters for identification (California state law did not at the time and does not now require voters to show identification). The APALC poll monitor heard the inspector comment, "Everybody wants to come to America and take what is ours – our land."

- November 2004 general election, Rowland Heights, Los Angeles County – The poll inspector talked slowly and loudly to elderly APIA voters. When two elderly APIA 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." When asked about translated voter registration forms, the inspector replied that the forms were available in the "American language." When asked about hotline numbers for language assistance, the inspector replied, "They're around here somewhere" and walked away.

- 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. The poll worker was frustrated that the voter, who was limited-English proficient, was not following his instructions. The voter left without casting a ballot.

- 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."

- 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.

- 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.[146]

[146] 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.

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. The section was enacted to protect language minority voters from being targeted with allegations of voter fraud.

As detailed in the legislative history of Section 6253.6, the section's enactment was precipitated by an investigation conducted by the U.S. Attorney's office in nine Northern Californian counties. 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.

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.[147] 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.

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 actions

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Rosalind Gold, Senior Director of Policy, Research and Advocacy, National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, Testimony on the Importance of the Federal Voting Rights Act to California Voters, submitted to the California State Senate Committee on Elections, Reapportionment and Constitutional Amendments, Los Angeles, California, December 5, 2005, at 5, 6. 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 Educational Fund, Low-Turnout Precincts in the City of Los Angeles Mayoral Run-Off Election: A Report on the Accessibility of Polling Places, July 26, 2005, at 10, Table 2. 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*.

[147] *See Olagues v. Russoniello*, 797 F.2d 1511 (1986), *cert. granted*, 481 U.S. 1012, *vacated on mootness grounds*, 484 U.S. 806 (1987).

against the cities of Azusa, Paramount, Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda, and San Francisco.[148] Generally, all of these actions are directed to 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. 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.[149]

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 necessity for enforcement of the language assistance provisions.[150] As previously discussed, Latina/o and Asian Americans are still characterized by significant numbers of persons who are limited-English proficient and experience out-right hostilities at the polls.[151]

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. 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 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.[152]

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

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[148] A complete listing of these cases, along with their complaints and consent decrees are found on the U.S. Department of Justice, Civil Rights Division, Voting Section website. http://www.usdoj.gov/crt/voting/litigation/recent203.htm#azusa.

[149] *See, e.g.*, San Benito County and City of Azusa Consent Decrees. *Id.*

[150] Stewart Kwoh, *supra* note 119; Eugene Lee, Statement before National Commission on the Voting Rights Act, Western Regional Hearing, Los Angeles, California, September 27, 2005.

[151] *See supra* notes 118, 119 and accompanying text & Part III, D, 2, c) ("Hostile Poll Workers Create an Unwelcoming Atmosphere and Cause Denials of Votes by Language Minorities."

[152] One suggestion that has been advanced is to lower the population threshold from 10,000 to 7,500 for purposes of initiating the triggering formula. *See, e.g.*, Rosalind Gold, *supra* note 143, at 9; Stewart Kwoh and Eugene Lee, *supra*, note 119, at 24.

language accessible. The litigation filed by the Attorney General to enforce Section 203 reinforces the application of a very fundamental principle: a democracy can not 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.[153] 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 city council members to the Watsonville City Council.[154] In the Watsonville case, the U.S. Court of Appeals 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 candidates . . . ."[155]

The next major finding of racially polarized voting occurred in the successful redistricting challenge against the Los Angeles County Board of Supervisors.[156] The redistricting plan fragmented the predominantly Latina/o community located in East Los Angeles. 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.[157]

In addition, in a series of at-large election challenges in the central California valley, expert reports demonstrated that racially polarized voting existed.[158] 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.[159] The report concluded:

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[153] *See supra* note 9 for definition.
[154] *Gomez*, *supra* note 63.
[155] *Id.*, at 1419.
[156] *Garza v. County of Los Angeles*, 756 F.Supp. 1298 (C.D.Cal. 1990), *affirmed*, 918 F.2d 763 (9th Cir. 1990), *cert. den.*, 498 U.S. 1028, 111 S.Ct. 681 (1991).
[157] *Garza*, *supra* note 153, 756 F.Supp. at 1304 – 1305, 1312 – 1318, 1328 – 1339. As a result of a new redistricting plan, *Garza*, *supra* note 153, 918 F.2d at 768, the first Latina was elected to the Board of Supervisors. J. Morgan Kousser, *How to Determine Intent: Lessons from L.A.*, VII J. L. & Pol. 591, 732 (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. Los Angeles County 2001 Redistricting Plan Preclearance Submission Under Section 5 of the Voting Rights Act, at 1. 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.* & http://lacounty.info/redistricting/DOJPreClearLetter.pdf.
[158] *See supra* note 65 (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 author.
[159] Yishaiya Absoch, Matt A. Barreto and Nathan D. Woods, An Assessment of Racially Polarized Voting For and Against Latino Candidates, Report prepared for presentation at: Voting Rights Act Research Roundtable, Earl Warren Institute on Race, Ethnicity and Diversity, February 9, 2006, at 30 (pages not numbered – excludes title

> 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.[160]

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.

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 their 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[161] 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

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page). The findings of this report are not offset or contradicted by the unsuccessful redistricting challenge in *Cano v. Davis*, *supra* note 8. 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, Woods Report covers those areas located east of the central Los Angeles area.

[160] Absoch, Barreto, Woods, *supra* note 156, at 30.

[161] 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 1965 VRA. *See* Avila, *supra* note 1, at 321-325.

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 elections.[162] 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.

[162] For the 2000 presidential elections, *see generally* U.S. Comm'n on Civ. Rts., Voting Irregularities in Florida During the 2000 Presidential Election (June 2001). For the 2004 presidential elections, *see generally* U.S. House of Representatives, Status Report of the House Judiciary Committee Democratic Staff, Preserving Democracy: What Went Wrong in Ohio (January 5, 2005). *See also* Carter-Baker Commission on Federal Election Reform, Building Confidence in U.S. Elections (September 2005) (Commission presented 87 recommendations for election reform).