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**Towards Full Participation:  
Solutions for Improvements to the Federal Language  
Assistance Laws**

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## **Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws**

**Jocelyn Friedrichs Benson\***

During the extensive deliberations that surrounded the 2006 debate in Congress over the renewal of expiring provisions of the Voting Rights Act, the issue of federally-mandated language accommodations took center-stage.<sup>1</sup> The policies at issue, sections 203 and 4(f)4 of the Voting Rights Act,<sup>2</sup> together provide the federal government's most significant attempt to ensure that citizens facing barriers to educational opportunities that result in limited English proficiency are able to equally participate in the electoral process. And while these important provisions nearly fell victim to an unrelated controversy over immigration reform and anti-immigration sentiments,<sup>3</sup> after much debate and consideration of related amendments Congress, ultimately voted to renew the provisions for an additional 25 years.<sup>4</sup>

This issue brief builds on the presumption that, so long as educational opportunities to learn English are limited for certain historically disadvantaged citizen groups, and so long as these citizen groups collectively face continued discriminatory barriers to electoral participation, language accommodations are necessary and vital to ensuring that voters in our democracy are able to cast educated and engaged votes.<sup>5</sup> I maintain that existing federal and state protections for language minority citizens, though important and beneficial, are incomplete. In particular, I offer a detailed critique of current federal and state policies that seek to assist language minority voters and propose a flexible legal infrastructure to address existing inadequacies in government protections. My suggested additions to existing state and federal policies, which include a call for federally trained and certified translators, the increased involvement of community organizations in determining the type and breadth of protections, and better enforcement of court orders that mandate protections, would fill existing gaps in accommodations and improve the accuracy and coverage of this assistance.

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<sup>1</sup> For a thorough discussion of Congress' extensive deliberation and debate surrounding the reauthorization of certain sections of the Voting Rights Act, including Sections 4(f)4 and 203, see James Tucker, *The Politics Of Persuasion: Passage Of The Voting Rights Act Reauthorization Act Of 2006*, 33 NOTRE DAME J. LEGIS. 205 (2007).

<sup>2</sup> 42 U.S.C. § 1971 (2006).

<sup>3</sup> For a discussion of this "misguided" use of language accommodations to inflame anti-immigration sentiments during the reauthorization debate, see Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification Of Section 203*, 58 ALA. L. REV. 377 (2006).

<sup>4</sup> See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246 (2006).

<sup>5</sup> For more discussion on the arguments leading to this presumption, see, e.g., Jocelyn Friedrichs Benson, *!Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy* 48 B.C. L. REV. 251 (2007).

## I. Shortcomings of Existing Language Assistance for Voters

In 1975, Congress found that certain limited English proficiency voters (LEP) were effectively excluded from participation in the electoral process as a result of poor educational opportunities, high illiteracy rates, and low voting participation.<sup>6</sup> To remedy this, Congress added Sections 203 and 4(f)4 to the Voting Rights Act, requiring that certain jurisdictions provide translated election materials or bilingual pollworkers if a significant number of Latino, Asian American, Native American, or Alaskan Native citizens living in those jurisdictions suffered from high rates of illiteracy.<sup>7</sup>

The coverage formula for Section (4)(f)4 applies only to jurisdictions that, on November 1, 1972, failed to provide translated election materials to any language minority groups that comprised over five percent of the voting age citizen population on that date.<sup>8</sup> Jurisdictions covered under Section 4(f)4 must also comply with the preclearance requirements of Section 5 of the VRA.<sup>9</sup> Section 203 provides similar protections but incorporates a flexible coverage formula, linked to the U.S. Census' American Community Survey, and set to evolve with and remain tailored to the size and literacy levels of certain covered language minority communities.<sup>10</sup>

Section 203 jurisdictions are required to fund and provide election materials and assistance in the language of the applicable minority group<sup>11</sup> and are expected to take reasonable steps to provide assistance in a way that allows members of the applicable language group to be informed of and participate in election activities.<sup>12</sup> Coverage is re-examined and altered every 5 years, under the

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<sup>6</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (1975). *See also* H.R. Rep. No. 94-196, at 17 (1975).

<sup>7</sup> Section 203 as amended states in part that “no covered State or political subdivision shall provide voting materials only in the English language,” and defines covered jurisdictions as districts where “more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.”

<sup>8</sup> 28 CFR § 55.5 (“Section 4(f)(4) applies to any State or political subdivision in which (1) Over five percent of the voting age citizens were, on November 1, 1972, members of a single language minority group, (2) Registration and election materials were provided only in English on November 1, 1972, and (3) Fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.”) Jurisdictions covered under Section 4(f)4 are also required to submit any changes to their accommodations for language minorities to the Attorney General for preclearance. *See also* 28 CFR § 55.2(d).

<sup>9</sup> These requirements mandate that jurisdictions covered under Section 4(f)4 submit all changes to their election laws and procedures to the federal government for preclearance prior to or immediately following their enactment. The federal government, via either the Civil Rights Division of the Justice Department or the District Court for the District of Columbia, evaluates whether the changes will have a “retrogressive” effect on minority electoral power within the jurisdiction. *See* 42 U.S.C. § 1973c (2006).

<sup>10</sup> Specifically, a jurisdiction is covered under Section 203 if the Director of the Census determines that two criteria are met. First, the limited-English proficient citizens, or citizens who speak English “less than very well,” who are of voting age in a single language group must: (a) number more than 10,000; (b) comprise more than five percent of all citizens of voting age; or (c) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation. Second, the illiteracy rate of the language minority citizens must exceed the national illiteracy rate. Voting Rights Act § 203, 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006).

<sup>11</sup> *See generally*, 28 CFR §§55.18–55.20 (2006).

<sup>12</sup> 28 C.F.R. § 55.2 (b)(1),(2)(2006). If the predominant language in the covered area is historically unwritten, as in the

direction of the U.S. Census Bureau.<sup>13</sup> Compliance with Section 203 is monitored by the U.S. Department of Justice, and typically includes translated written materials (such as ballots, voter registration forms, and voting instructions),<sup>14</sup> oral assistance (such as interpreters and bilingual poll workers),<sup>15</sup> and publicity regarding the elections and availability of bilingual assistance.<sup>16</sup> Section 203 jurisdictions are also encouraged, though not required, to work with local community groups to ensure the accommodations are tailored to the needs of the community.<sup>17</sup>

Problems resulting from these flexible and frequently under-enforced guidelines include noncompliance,<sup>18</sup> poorly or incorrectly translated materials,<sup>19</sup> and nonexistent oral language assistance.<sup>20</sup> The coverage formula is also limited to only four language minority groups; federal assistance in this form is not afforded to individuals of Haitian, Arab, or Russian descent, or any other non-English speaking community.<sup>21</sup> And the fact that Section 203 only applies to areas with a certain number of language minority citizens speaking a *single* language leads to limited coverage for Asian Americans, who may collectively comprise over 5% or 10,000 voting age citizens in a

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case of many Alaskan native or American Indian tribal jurisdictions, the State or political subdivision only need furnish oral instructions, assistance, or other information relating to registration and voting. 42 USCS § 1973aa-1a(c) (2005) (“[W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”) Jurisdictions may opt, though are not required, to use trained interpreters at poll sites 28 C.F.R. §§ 55.18, 55.20 (2006), and may opt to “target” their assistance to certain areas or precincts for coverage 28 C.F.R. § 55.17 (2006). They are also encouraged to take appropriate steps to publicize the availability of translated materials, including the display of notices in the minority language, announcements over minority language radio or television stations, publication of notices in minority language newspapers, and direct contact with language minority group organizations. 28 C.F.R. § 55.18(e) (2006).

<sup>13</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246 (2006).

<sup>14</sup> §§ 55.15, 55.19.

<sup>15</sup> §§ 55.18, 55.20. Sometimes assistance must be provided in more than one dialect of the language. For instance, although there is one written form of Chinese, there are several spoken dialects, like Cantonese, Mandarin, Toisan, and others. *Id.*

<sup>16</sup> § 55.20.

<sup>17</sup> 28 C.F.R. § 55.20.

<sup>18</sup> See, e.g., Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31 (May 2004) (providing a detailed description of the lack of compliance among covered jurisdictions).

<sup>19</sup> One infamous incident of mistranslated materials occurred in Queens, NY during the general election of 2000, when Chinese-language ballots were translated incorrectly at six voting sites, so that Democratic candidates were labeled as Republican, and Republican candidates were labeled as Democrats, while simultaneously translated ballots in Chinatown in Lower Manhattan asked voters to select five candidates for State Supreme Court justices when they were only permitted to select three. See Editorial, *Bungled Ballots in Chinatown*, N.Y. TIMES, Jan. 1, 2001, at A12 (noting that “The mistakes were corrected, but not before uncorrected absentee ballots were sent out.”)

<sup>20</sup> See, e.g., Kathy Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: APIAs, Latinas/os, and Post-2000 Redistricting in California*, 81 OR. L. REV. 849, 867 (Winter 2002) (“A recurrent problem has been English-speaking and reading ability and the availability of multilingual voting materials and multilingual pollworkers to answer questions.”).

<sup>21</sup> Recent research has suggested that some of these other groups face similar educational and electoral barriers and should be included in the federal protections. See Jocelyn Benson, *Language Protections for All? VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER*, (Ana Henderson ed., 2007); Brenda Fathy Abdelall, Note, *Not Enough of a Minority? Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J. L. REFORM 911, 932-38 (2005).

particular jurisdiction, but will not trigger coverage unless they all speak the same language.<sup>22</sup> As a result, following the 2000 census coverage determinations there were several localities with large Asian American populations that were not covered under Section 203's "individual language" calculation.<sup>23</sup> These issues highlight significant concerns about the efficacy of Sections 203 and 4(f)4 as the primary accommodation for LEP citizens in electoral politics.<sup>24</sup>

Section 208 of the Voting Rights Act<sup>25</sup> and the Help America Vote Act of 2002 (HAVA),<sup>26</sup> are other sources of assistance for LEP voters. Section 208 permits any voter in need of any type of aid or accommodation to be accompanied by another individual who is able to provide such assistance.<sup>27</sup> The provision is frequently either ignored or misapplied by local election officials,<sup>28</sup> or blatantly violated.<sup>29</sup> It also does not require localities to provide poll workers to offer assistance, thus assuming that the voter needing assistance can access family members or friends who can aid them in the voting process, and is comfortable with any extra attention they receive by asserting their rights for extra assistance.<sup>30</sup> HAVA provides federal funds to assist states in improving their systems of election administration, and specifically lists the provision of language assistance as one of a handful of changes the state can make with the funds.<sup>31</sup> HAVA makes no specific

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<sup>22</sup> Su Sun Bai, Comment, *Affirmative Pursuit of Political Equity for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 761 (1991) (Section 203 inadequacies "are exacerbated in the case of Asian Pacific Americans because of the diverse languages spoken by the 'generic' Asian Pacific American group. Thus, although Asian Pacific Americans as a group may form more than five percent of the voting age population in a jurisdiction, it is extremely difficult for one language minority (i.e., Chinese, Japanese, or Korean) to constitute five percent of the relevant population.").

<sup>23</sup> Localities not covered under Section 203 with large Asian American populations post 2000: California: Los Angeles: Khmer, Thai, Samoan; Hawai'i: Honolulu: Korean and Filipino; New Jersey: Bergen: Korean Middlesex: Chinese; Massachusetts: City of Boston: Chinese Dorchester: Vietnamese Lowell: Khmer; Pennsylvania Philadelphia: Chinese.

<sup>24</sup> Sandra Guerra argues that there is a right to such accommodations for LEP voters.

<sup>25</sup> 42 U.S.C. §1973aa-6 reads:

"Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."

<sup>26</sup> Pub. L. No. 107-252, 107th Cong., 42 USCS § 15301(b)(2)(G) (stating that states must use federal funding provided under HAVA to, among other things, "[improve] the accessibility and quantity of polling places, including providing ... assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.")

<sup>27</sup> 42 U.S.C. §1973aa-6.

<sup>28</sup> James T. Tucker & Rodolfo Espino, *Minority Language Assistance Study* (2005) (noting a finding of their study that surveyed election officials claimed that voters in their jurisdictions do not receive assistance as required by Section 208, with only 1.9 percent of responding clerks able to correctly state the federal standard).

<sup>29</sup> See, e.g., *United States v. Berks County, PA*, 277 F. Supp.2d 570, 580 (E.D. Pa. 2003) (noting that election officials violated Section 208 when they denied Spanish-speaking voters the statutory right to bring their assistor of choice into the voting booth); Ernie Garcia, *Abuse of Interpreters is Alleged at Clifton Board Election*, North Jersey Herald & News, Apr. 20, 2000, at A1 (reporting an incident where, in violation of Section 208, white poll workers in Clifton, New Jersey yelled at two Spanish translators offering assistance to Latino voters and forced them to leave the polling site).

<sup>30</sup> Thomas H. Earle & Kristi M. Bushner, *Effective Participation or Exclusion: The Voting Rights of People with Disabilities*, 11 TEMP. POL. & CIV. RTS. L. REV. 327, 328 (2002) (noting that while "[e]lection officials, poll workers, relatives and friends are often present to help [disabled voters] cast their vote. The bad news is that ... there is a loss of anonymity, independence, dignity and acute embarrassment associated with the extra attention assistance from others often brings.")

<sup>31</sup> *Id.* But see Glenn Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 UCLA ASIAN PAC. AM. L.J. 31, 40 (2005) (while "[s]tates have broad discretion to use the

improvements to Sections 203 or 208, but it is significant that it explicitly encourages states to voluntarily provide and expand their language assistance provisions, while providing federal funds to support that effort.

The final avenue for federal protections for LEP voters comes from the courts in the form of consent decrees that, typically following an instance of discrimination against language minority voters, mandate various forms of accommodation. The cases typically require a great deal of time, resources, and funds,<sup>32</sup> which are in limited supply for many LEP citizens and communities. And significantly, because the filing of a lawsuit is inherently remedial, seeking protection in the courts is only available as a strategy once a wrong is committed, and once an election is over. A resulting consent decree will typically mandate that the offending jurisdiction be required to provide bilingual poll workers,<sup>33</sup> translated election materials,<sup>34</sup> or procedures for the education and registration of LEP voters.<sup>35</sup>

As detailed as they may be, and as much as they may involve jurisdiction leaders in constructing a remedy, court orders and consent decrees are also an imperfect remedy. Voters must not only endure discriminatory treatment before a case can even be brought, court orders are difficult to enforce and require a great deal of commitment and oversight from the federal government if they are going to result in changed actions on the grassroots level. Ultimately, policy responses from the state government, via supporting legislation that codifies an order or otherwise responds to findings that emerge through litigation, often are needed to ensure that a court order or consent decree is effective.<sup>36</sup>

In addition to these federal efforts, a handful of states, most notably California, Colorado, and Florida, have enacted laws to provide assistance to LEP voters.<sup>37</sup> Under California law,<sup>38</sup>

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money for language assistance or to use these funds for other purposes ... the federal government will pay for translated voting materials and interpreters at the polls, if states and localities seek funding for these purposes.”)

<sup>32</sup> See Glenn Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 UCLA ASIAN PAC. AM. L.J. 31, 41 (2005) (noting that “litigating under the [language provisions of the Voting Rights] Act can sometimes be prohibitively expensive” because they require detailed evidence of electoral barriers reported by location and election).

<sup>33</sup> U.S. Court Order, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000).

<sup>34</sup> U.S. Court Order, *United States v. City of Boston*, MA (D. Mass. 2005).

<sup>35</sup> See, e.g., *U.S. v. Socorro County*, No. 93-1244 (D.N.M. filed Apr. 13, 1994); *U.S. v. Sandoval County*, No. 88-1457 (D.N.M. filed June 10, 1993); *U.S. v. San Juan County*, No. C-83-1287, First Amended Settlement and Order (D. Utah filed Aug. 24, 1990); *U.S. v. McKinley County*, No. 86-0028-M, First Amended Consent Decree and Order (D.N.M. Jul. 20, 1990).

<sup>36</sup> For example, the California Supreme Court issued a court order in *Castro v. State*, 466 P.2d 244 (Cal. 1970) (overturning a state literacy requirement) the California state legislature enacted a law mandating that counties provide translated election materials where 3 percent or more of the citizens in a county qualify as a language minority.

<sup>37</sup> According to a 2004 study by the ACLU, 30 states have enacted some form of accommodation mechanism for LEP voters. See AM. CIVIL LIBERTIES UNION, WASH. LEGISLATIVE OFFICE, *STATE LAWS PROVIDE AVENUE FOR LANGUAGE ASSISTANCE* (2004), available at <http://www.votingrights.org/resources/?resourceID=18>. These states include: Alabama, Alaska, Arizona, Colorado, Connecticut, California, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming. See also Benson *!Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy* 48 B.C. L. REV 251 n290-n291 (2007).

<sup>38</sup> Ann Cal Elec Code §14201(a)(1)-(2).

language minority voters who do not live in a county that is covered under Section 203 have the right to access a copy of the ballot if local election officials find a “significant and substantial need.”<sup>39</sup> California and Colorado both mandate that local jurisdictions provide translated election materials wherever at least three percent of the voting age citizens are limited-English proficient, or when citizens or organizations provide information supporting a need for assistance.<sup>40</sup> Local clerks in California are required to recruit poll workers who are fluent in Spanish and other languages,<sup>41</sup> and the Secretary of State’s office provides voter information in six languages other than English.<sup>42</sup> Florida law requires the Secretary of State to provide, upon request from any election official, a written translation of a statewide ballot issue in any of the languages included under Section 203 of the Voting Rights Act,<sup>43</sup> and Miami-Dade county provides materials translated into Haitian-Creole for its citizens of Haitian descent.<sup>44</sup>

## II. Proposals for Supplementing Existing Accommodations

Various community organizations and academics have suggested methods of improving upon existing language accommodations, particularly Section 203,<sup>45</sup> with most suggestions focusing on reducing the numerical cutoff for the coverage formula from 10,000 to anywhere from 7,500<sup>46</sup> to 1,000.<sup>47</sup> Some studies and reports have also suggested expanding Section 203 to include additional language minority groups, or eliminating the provision’s illiteracy requirement.<sup>48</sup>

But these suggestions, while significant, do not address gaps in the existing legal infrastructure involving non compliance, ineffective court orders, and inaccurately translated materials or ineffectual interpreters. In that regard, I propose three suggested reforms for the federal government to adopt in order to fill some of the gaps in current accommodations.<sup>49</sup> First, Congress

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<sup>39</sup> *Id.*

<sup>40</sup> Ann.Cal.Elec. Code §14201. Colorado also requires that county clerks recruit full time staff members fluent in the relevant language where more than 3 percent of eligible voters are limited-English proficient. *See* CRS §1-2-202(4).

<sup>41</sup> *Id.*

<sup>42</sup> California Secretary of State Debra Bowen, Multilingual Voting Services, [www.ss.ca.gov/elections/elections\\_multi.htm](http://www.ss.ca.gov/elections/elections_multi.htm) (last visited Aug. 27, 2007).

<sup>43</sup> *See* F.S.A. §101.2515. Requests must be filed within 60 days of the Election. *Id.*

<sup>44</sup> MIAMI-DADE COUNTY, FLA., CODE § 12-16 (Supp. Ord. No. 99-160, 1999), available at <http://www.municode.com/resources/gateway.asp?pid=10620&sid=9> (mandating the availability of ballots translated into Creole in areas of Miami-Dade County where a significant portion of the electorate is Haitian American).

<sup>45</sup> American Bar Association, Report from the House of Delegates, *Standing Committee on Election Law Section of State and Local Government Law Section of Individual Rights and Responsibilities Government and Public Sector Lawyers Division* (declaring that the ABA urges Congress to lower numerical trigger from 10,000 to 5,000 and to require new coverage determination to every 5 years, instead of every 10 years).

<sup>46</sup> Testimony of Margaret Fung, Executive Director of the Asian American Legal Defense Fund, “Oversight Hearing on the Voting Rights Act: Section 203--Bilingual Election Requirements (Part I),” (November 8, 2005) available at <http://judiciary.house.gov/oversight.aspx?ID=204>.

<sup>47</sup> Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1436 (1988) (recommending that “instead of requiring multilingual elections in areas that meet the five percent requirement, the Act should be triggered in areas with ... 1,000 non-English speakers”).

<sup>48</sup> Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 55 (2004) (noting that because “Section 203 does not require a local jurisdiction to provide language assistance unless the illiteracy rate of the relevant language minority community is less than that of the national average” many Asian American communities do not receive necessary bilingual assistance).

<sup>49</sup> These reforms were first proposed and detailed in my corresponding law review article, Benson *!Su Voto Es Su Voz!*

should consider empowering the Election Assistance Commission (EAC) or U.S. Department of Justice (DOJ) to provide avenues for periodic expansions of the narrowly tailored coverage formula for Section 203 in order to better include all language minority communities who face linguistic, educational, and political barriers to participation. Second, Congress should also consider supporting the development of federally certified language translators to assist voters on Election Day. This program could be administered by the Justice Department, similar to how the DOJ currently hires and trains federal observers to oversee local enforcement of the Voting Rights Act.<sup>50</sup> Third, federal courts should actively provide better enforcement of court orders, including the levying of financial sanctions against states and local jurisdictions that refuse to comply or only loosely comply with legal agreements to accommodate language minority voters. Each of these changes could move beyond small adjustments to better address the deficiencies in existing federal language assistance for voters with limited access to opportunities to learn English.

A. Empower the EAC or DoJ to Improve Coverage by Continuously Involving Community Groups

Since its inception in 1975, Congress has listened to voices from national community organizations for advice in crafting Sections 4(f)4 and 203 of the Voting Rights Act. In testimony during deliberations in 1975, 1982, 1992, and 2006, nationally organized constituency-based non profit organizations such as the Mexican American Legal Defense Fund (MALDEF), the Native American Rights Fund (NARF) and the Asian American Legal Defense and Education Fund (AALDEF) presented Congress with overwhelming evidence of educational disparities, low turnout rates, and discriminatory barriers to voting that members of their communities faced.<sup>51</sup> Their testimony and the evidence provided to Congress led to the provisions' focus on the groups – Latinos, Asian Americans, American Indians, and Alaskan Natives – whose representatives provided substantial evidence to Congress of severe language barriers and other disparities that limited equal access to the political process.<sup>52</sup> Some language minority groups that were not represented were considered,<sup>53</sup> but ultimately Congress on each occasion chose not to expand coverage to these, unrepresented, language groups.

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<sup>50</sup> See 42 U.S.C §1973f (2006) (authorizing the appointment of federal observers to investigate “meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color.”)

<sup>51</sup> Rodolfo O. de la Garza & Louis De Sipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1482-84 (1993) (recounting testimony describing methods employed to exclude minority language voters from the voting booth); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 U MONTANA L REV 269 (2004) at 279 (describing similar efforts on behalf of American Indians).

<sup>52</sup> Mark Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 874 (Fall 1995): (explaining that the definition of language minority under Section 203 was limited to citizens of American Indian, Asian American, Alaskan Native, or Spanish heritage because “Congress found that ‘persons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation [of discriminatory practices] concerning Asian Americans ... [is] substantial.’”).

<sup>53</sup> Both of the 1975 House and Senate Judiciary Committee reports acknowledge that other ethnic groups – such as German or Polish citizens – could likely suffer from racial and ethnic discrimination. S. Rep. No. 295, 94th Cong., 1st Sess. 24 (1975) (“As noted earlier, the hearing record did not disclose any evidence of voting discrimination against other language minority groups. ...[This] signifies only that we had no such evidence at the time this bill was drafted. It is not the intention of Congress to preclude other language minority groups from presenting their evidence of voting



One structural solution that could address these above concerns is for Congress, under its general constitutional authority to enforce the Fourteenth and Fifteenth amendments to the U.S. Constitution, to amend the current coverage formula of Section 203 to allow for jurisdictions to be added to the current list when community groups and local organizations produce evidence that their geographic area meets the same qualifications that led to existing jurisdictions and groups receiving coverage. Specifically, Congress can amend Section 203 to grant rulemaking authority to either the Justice Department or the Election Assistance Commission to expand the existing coverage formula and promulgate additional federal accommodations for LEP voters.<sup>54</sup> A process where groups apply for extended coverage or coverage exceptions can be based upon whether, among other things, the language minority citizen group petitioning for coverage can provide evidence of the presence of educational disparities, high levels of illiteracy, or low turnout and registration rates in their particular area or region.

Through this infrastructure, any voters or local constituency groups with a demonstrated need for translated materials could apply to the agency for an expansion of Section 203 coverage to include their jurisdiction where they can show evidence that they comprise a significant portion of the population or otherwise require language assistance. Similarly, any group could also submit data on a lack of need for coverage where, perhaps, states or local jurisdictions have proactively provided such accommodation or accommodation is no longer needed.<sup>55</sup>

Such a solution recognizes the inherently local and complex nature of determining which LEP communities face language barriers while empowering community groups to gain protections if they can show that their members endure high illiteracy rates, barriers to educational opportunities to learn English, low turnout rates, and instances of electoral discrimination. The agency charged with adjudicating these claims could also have authority to formally address any allegations of inadequate compliance, including poor translations or other problems relating to language accommodations, which would save community groups the expense and time of seeking remedies for such violations in federal courts.<sup>56</sup>

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discrimination to the courts or to the Attorney General for appropriate relief.”) *See also id.* at 22 (noting that “[n]o evidence was received concerning the voting difficulties of other language groups.”)

<sup>54</sup> There is already some support for this in existing legislation; HAVA requires the Election Assistance Commission to study means of improving accommodations for LEP voters, and provides federal funds which may, at the state’s discretion, supplement costs incurred in providing translated election materials. *See* 42 U.S.C. 15301(b)(1)(G) (2002), and 42 U.S.C 15322 (2002).

<sup>55</sup> This system would also preserve the ability of local and state governments to provide accommodations where not required under federal law. Voters who seek additional accommodations via the agency process will only have the incentive to do so where the local and state authorities have failed to act. For details on local and state governments that have voluntarily complied with requests for local LEP voters unprotected by Section 203, *see generally id.* at 51-54 (detailing instances in which, after great prodding from advocacy groups, the state governments of Georgia, and election officials in New York City, Los Angeles, San Jose, created accommodations for Asian communities that fell just under the numerical trigger for Section 203 coverage)

<sup>56</sup> *See* Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CALIF. L. REV. 579, 602 (March 2003) (discussing the general hesitancy among non-English speaking citizens to engage in litigation: “Unfamiliar with the legal system and overwhelmed by the situation in which they find themselves because of their language barriers, many racial-language minorities may prefer privately absorbing the damages rather than losing more money on a legal action brought before an unsympathetic audience.”)

Professor Heather Gerken, a leading authority in Election Law, has suggested an analogous bottom-up approach to actively involve grassroots constituency groups in the enforcement of Section 5 of the Voting Rights Act.<sup>57</sup> Several existing federal agencies, including the Environmental Protection Agency and the Federal Trade Commission, offer a similar infrastructure providing for bottom-up policy making strategies.

This is not to minimize the existing efforts of community groups to structure the coverage formula and other requirements for Section 203 – indeed, the existing benefits of federally mandated language assistance are a result of the effective advocacy of several national constituency groups. What is evident from history, however, is that the groups with the most resources and influence nationally are the groups who received the most response from Congress, leaving less organized or smaller groups to have less influence.<sup>58</sup> The creation of a regulatory process to continually consider the scope of the language assistance requirements and tweak their effectiveness will provide an ongoing avenue for more regional and local language minority citizen groups to petition the federal government for language accommodations.

#### B. Improve Accuracy of Translations with Federally Certified Translators

One of the most frequent problems with language assistance is that translated materials are often inaccurate and reliable translators are difficult to recruit.<sup>59</sup> While federal observers and volunteers from constituency organizations can be on hand to record problems that can form the basis for subsequent litigation, there is very little that these individuals are able to do once Election Day has begun. To this end, it is imperative that translators or translated election materials are not only available, but accurate.

Some of these problems could be solved if the federal government were to become more directly involved, in a limited fashion, in the actual translation process. Through training and certifying translators to develop translated materials or to travel to states and localities who seek to provide accurate oral translations,<sup>60</sup> the federal government could play a significant yet cost-effective role in reducing inaccuracy problems on the ground. Federally certified interpreters could serve at the polls on Election Day, ensuring accurate language assistance is available during the election, and could accurately translate ballots and other materials before an election takes place. Congress can act to establish and fund such a program, while delegating the administration to the Voting Rights Section in the Department of Justice or the Election Assistance Commission. In doing so, the federal government can bolster its existing accommodations by ensuring the

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<sup>57</sup> See Heather Gerken, *Race (Optional)*, THE NEW REPUBLIC, Sept. 2005 (proposing a change to the preclearance structure of Section 5 to allow civil rights groups to “have a chance to negotiate with local officials over any change they found objectionable” before the federal court or Justice Department steps in to evaluate preclearance.)

<sup>58</sup> For example, while a representative from the Arab American Discrimination Committee testified before the National Commission on Voting Rights in 2006, calling for greater inclusion of Arab Americans in the Voting Rights Act, no representatives from any Arab American community groups testified to Congress during the reauthorization hearings.

<sup>59</sup> See, e.g., Second Amended Hamtramck Court Order (finding Hamtramck did not provide translators on Election Day, even though that was a significant requirement under the first court order. Hamtramck officials claimed they were unable to find or recruit any willing translators.)

<sup>60</sup> The interpreters and translation services could first be available to areas covered by Section 203, and secondly available to any areas where community groups or state or local election officials demonstrate a sufficient need for such assistance.

translation methods employed by the states or local jurisdictions are accurate and helpful, while covering the most significant administrative costs entailed in providing accommodations for LEP voters.

The federal court system provides an existing model for a national certified translation program that could be easily replicated. The Administrative Office of the United States Courts, through the National Center for State Courts (NCSC), administers a “Federal Court Interpreter Certification Examination” that certifies court interpreters to serve in federal courts across the country.<sup>61</sup> The NCSC specifically administers written and oral English/Spanish certification examinations to interested applicants, preparing them to serve as reliable court interpreters for Latino individuals involved in judicial actions.<sup>62</sup> NCSC also administers a “Consortium for State Court Interpreter Certification” that assists thirty member states in developing a standardized interpreter certification program.<sup>63</sup> Several states – including Arkansas, California, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Utah, and Washington – work with the NCSC to provide a test and certification program to ensure that individuals who serve as interpreters in state courts are providing accurate translations for LEP individuals.<sup>64</sup> This unified effort also ensures that states with small LEP populations are able to minimize administrative and overhead costs associated with court interpreter programs.<sup>65</sup>

### C. Better Enforcement of Court Orders

Finally, as previously discussed, another way to obtain language accommodations is via consent decrees or court orders mandating that a jurisdiction provide written or oral language assistance for its language minority citizens. While the mandates in these court orders often go unmet,<sup>66</sup> scholars have noted that where court orders offer more detailed requirements for compliance, they can be successful.<sup>67</sup>

One solution is for litigants to seek financial sanctions against states and localities that are being sued because they do not provide language accommodations. In the example of the court order in *U.S. v. Hamtramck*, the Justice Department could seek financial sanctions against the city

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<sup>61</sup> NCSC, *NCSC Receives Federal Contract for Court Interpreter Services*, available at: [http://www.ncsconline.org/D\\_Comm/PressRelease/2006/Interpreter06.HTML](http://www.ncsconline.org/D_Comm/PressRelease/2006/Interpreter06.HTML) (June 22, 2006).

<sup>62</sup> *Id.* See generally, Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 599 (1999) (arguing generally for the importance of state-sponsored interpreters in the court system).

<sup>63</sup> National Center for State Courts, Court Interpretation, [http://www.ncsconline.org/D\\_Research/CourtInterp.html](http://www.ncsconline.org/D_Research/CourtInterp.html) (last visited Aug. 27, 2007).

<sup>64</sup> For a current and complete lists of states involved in this effort see [http://www.ncsconline.org/D\\_Research/CourtInterp/Res\\_CtInte\\_ConsortMemberStatesPubJune2006.pdf](http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortMemberStatesPubJune2006.pdf) See also 39 HARV. C.R.-C.L. L. REV. 543, 574 (providing a description of the court interpreter programs).

<sup>65</sup> Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 575 (2004).

<sup>66</sup> See *U.S. v. Hamtramck*, No. 0073541 (ED Mich. 2000) (first consent decree); *U.S. v. Hamtramck*, No. 0073541 (ED Mich. 2004) (second amended consent decree).

<sup>67</sup> Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 423 (Spring 2002): (describing an “alternative approach ... taken in a consent decree between DOJ and Bernalillo County, New Mexico, where the court order was accompanied by, but did not incorporate, a manual containing procedures to be followed in order to comply” with the required language accommodations).

when it is found to be out of compliance with the court's mandates. A significant problem with this strategy, however, is that financial sanctions may have little effect on encouraging compliance from a city like Hamtramck, Michigan, which was bankrupt and in receivership in the initial years the court order was in effect.<sup>68</sup> Were a court to levy a fine against a city like Hamtramck for not complying with a court order when the jurisdiction may not be able to afford to comply with the court order in the first place, it would only be making a dire situation even more problematic by adding to the debt of a city already sinking under a deficit. But for the jurisdictions that have been subject to similar lawsuits that are not facing financial distress, the threat of sanctions may promote compliance.

An alternative solution is for courts or Congress to threaten a loss or reduction in the federal funding that states receive under the Help America Vote Act (HAVA) if a county does not comply with a court order or consent decree. States receiving federal funds through HAVA are required to use the funds towards various election activities, including "providing assistance to...individuals with limited proficiency in the English language"<sup>69</sup> and requiring that any "voting system used in an election for Federal office" must "provide alternative language accessibility pursuant to the requirements of Section 203 of the Voting Rights Act of 1965."<sup>70</sup> Thus in cases where the Justice Department or voters bring a lawsuit, particularly to force compliance with Section 203, courts may consider adding teeth to a court order or consent decree by taking away any federal funding received under HAVA.

### III. Conclusion

As our country becomes increasingly diverse, it is imperative that our democracy continue to embrace and respond to the needs of the electorate. Specifically, for accurate election outcomes, it is necessary for our system of election administration to be one that encourages the full and equal participation of educated and engaged voters. This includes our nation's population of citizens who have limited English proficiency levels. It is not meant to minimize in any way the importance of learning English to function in American society. Indeed, it is the responsibility of our educational system to fully prepare its students to participate as active citizens in the United States and English proficiency is crucial to functioning as such in our current economic and political structure.

The argument for language accommodations in voting stems more from a respect of the fundamental importance of the right to vote in our democracy, coupled with the view that the government has a responsibility for ensuring that the right to vote is accessible to all, regardless of one's English speaking ability. In addition, while many language minority voters are proficient in English, they may not know enough to accurately decipher complex ballot initiatives, or understand written directions explaining the ballot and how to vote. It is for that reason that language assistance is essential to ensuring accuracy in our electoral outcomes.

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<sup>68</sup> Christopher M. Singer, *Hamtramck's New Budget Is Balanced; Emergency Financial Manager Conforms City To State Guidelines*, THE DETROIT NEWS, at 9D (June 26, 2001) (detailing Hamtramck's budget deficit in 2000 and 2001, the first years of the consent decree).

<sup>69</sup> 42 USC 15301(b)(1)(G) (2002).

<sup>70</sup> 42 USC 15481(a)(4) (2002).

Local election administrators and poll workers can and do intervene on the local level to fill existing gaps in the language assistance infrastructure, but the federal government must continue to work to construct a relevant and useful role in the process. Where existing federal assistance requirements fall short or are ineffective, new proposals must be considered. As federal, state, and local authorities work together to ensure that language assistance is effective, they stand to build a political infrastructure that ensures the inclusion of all American citizens in our diverse and robust democracy.