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Glenn D. Magpantay

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# Sound Barriers Ver. 2.0

## THE SECOND GENERATION OF ENFORCEMENT OF THE LANGUAGE ASSISTANCE PROVISIONS (SECTION 203) OF THE VOTING RIGHTS ACT

*Glenn D. Magpantay*<sup>†</sup>

### INTRODUCTION

According to the U.S. Census Bureau, nearly 10% of all Americans speak English less than “very well.” In some states, such as California, the number is as high as 20%.<sup>1</sup> Asian Americans are one of the fastest-growing minority groups in the nation, estimated to number almost 15.5 million.<sup>2</sup> More and more are becoming citizens and registering to vote. They are an emerging segment of the electorate. At the same time, Asian Americans have often been overlooked in the political process and subordinated to the dominant racial and ethnic minority groups.

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<sup>†</sup> Democracy Program Director at the Asian American Legal Defense and Education Fund (AALDEF), Adjunct Associate Professor of Law at Brooklyn Law School, New England School of Law, J.D., *cum laude*, 1998; State University of New York at Stony Brook, B.A. 1992. I would like to thank the following Professors for their support, advice, and comments in developing my scholarship: Heather Gerken at Yale Law School; Pam Karlan at Stanford Law School; Nate Persily at Columbia Law School; Rose Cuison Villazor and Bill Ong Hing at UC Davis School of Law; Mari Masuda and Eric Yamamoto at University of Hawai‘i School of Law; Dean Okianer Dark at Howard University School of Law; Vice Dean Dana Brakman Reiser and Bennett Capers at Brooklyn Law School; Elaine Chiu and Janai Nelson at St. John’s School of Law; Angelo Ancheta at Santa Clara School of Law. I also thank Dale Ho, the National Voting Rights Director at the ACLU as well as Chi-Ser Tran for her excellent legal research.

<sup>1</sup> See ASIAN AM. CTR FOR ADVANCING JUSTICE, A COMMUNITY OF CONTRASTS: ASIAN AMERICANS, NATIVE HAWAIIANS AND PACIFIC ISLANDERS IN CALIFORNIA 17 (2013), available at [http://www.interpreteraction.org/wp-content/uploads/2013/02/Communities\\_of\\_Contrast\\_California\\_2013.pdf](http://www.interpreteraction.org/wp-content/uploads/2013/02/Communities_of_Contrast_California_2013.pdf).

<sup>2</sup> Karen R. Humes et al., *Overview of Race and Hispanic Origin: 2010*, in 2010 CENSUS BRIEFS 4-5 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>; Padmananda Ran, *U.S. Census Show Asians are Fastest Growing Racial Group*, NPR (Mar. 23, 2012, 4:43 PM), <http://www.npr.org/blogs/thetwo-way/2012/03/23/149244806/u-s-census-show-asians-are-fastest-growing-racial-group>; U.S. Dep’t of Commerce, *Asian/Pacific American Heritage Month: May 2010*, in U.S. CENSUS BUREAU NEWS (Mar. 2, 2010), available at <http://www.census.gov/newsroom/releases/pdf/cb10-ff07.pdf>.

Like other minority voters, Asian Americans also encounter a range of discriminatory barriers in exercising their right to vote.<sup>3</sup> They face hostile poll workers, ballots presented only in English, and confusing voting instructions or other election administration snafus. Even though Asian Americans may be citizens, the right to vote is futile when ballots and voting instructions cannot be understood.<sup>4</sup> Special efforts are needed to prepare Asian American voters to fully participate in elections. This is why the Language Assistance Provisions, codified at Section 203 of the federal Voting Rights Act, were designed to prevent the potential disenfranchisement of limited English proficient (LEP) voters and expand access to the fundamental right to vote for racial and ethnic minorities.

I have been litigating voting rights cases and advocating for expanded access to the electoral franchise at the Asian American Legal Defense and Education Fund (AALDEF) for 16 years. As the Director of the Democracy Program, I have represented Asian American voters in lawsuits brought under Section 203 in New York, Massachusetts, and Hawai'i and have investigated Section 203 violations in Washington, Texas, and California. These experiences have given me unparalleled insight into legal theories to address structural democracy through the lens of language.

Nearly a decade ago, I authored one of the first articles addressing language access to voting for Asian Americans in *Asian American Access to the Vote: Implementation of the Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*.<sup>5</sup> That article focused on local

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<sup>3</sup> See, e.g., PAMELA S. KARLAN, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, CONGRESSIONAL POWER TO EXTEND PRECLEARANCE UNDER THE VOTING RIGHTS ACT 1-2 n.9 (June 2006), available at [https://www.acslaw.org/sites/default/files/Karlan\\_Preclearance\\_paper\\_6-14-06.pdf](https://www.acslaw.org/sites/default/files/Karlan_Preclearance_paper_6-14-06.pdf) (stating that “[l]anguage barriers still prevent many citizens from effectively casting their ballots”); see also ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2012 ELECTIONS (2013) [hereinafter AALDEF].

<sup>4</sup> THE PRESIDENTIAL COMM'N ON ELECTION ADMIN. THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 53 (2014), available at <https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [hereinafter AMERICAN VOTING EXPERIENCE] (recommending that “[j]urisdictions should provide bilingual poll workers to any polling place with a significant number of voters who do not speak English”).

<sup>5</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 AM. L.J. 31 (2004). Many scholars who have written about Section 203 have cited my article. See, e.g., Angelo N. Ancheta, *Language Assistance and Local Voting Rights Law*, 44 IND. L. REV. 161, 168 n.138 (2010); Jocelyn Friedrichs Benson, *iSu Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy*, 48 B.C. L. REV. 251, 253 n.11 (2007).

implementation and compliance with Section 203. It reviewed what I call the “first generation” of compliance problems. For example, ballots have been mistranslated, one time listing Republican candidates as Democrats and Democrats as Republicans.<sup>6</sup> Translated voting materials have been hidden from voters. Poll workers have been cavalier in providing language assistance or even disparaged the language assistance provided. Interpreter shortages led to voters being turned away, or they spoke the wrong language or dialect to assist voters.<sup>7</sup> Indeed, some of these issues emanate from a place of general anti-immigrant sentiment, if not hysteria, that pervades much of middle America and many policy-makers.<sup>8</sup> These issues also contribute to the myth of Asian Americans being a “model minority” population and therefore not in need of any “assistance.”<sup>9</sup>

There have been significant developments in Section 203 practice. Besides my own cases developing this body of law, the United States Department of Justice, private attorneys, and other civil rights organizations have filed numerous lawsuits compelling compliance with Section 203. In 2006, Congress reauthorized the Language Assistance Provisions for another 25 years. Some scholars have taken notice and have contributed to the legal theories underpinning this often overlooked area of law.<sup>10</sup>

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<sup>6</sup> *Bungled Ballots in Chinatown*, N.Y. TIMES, Jan. 1, 2001, at A12, available at <http://www.nytimes.com/2001/01/01/opinion/bungled-ballots-in-chinatown.html>; William Murphy et al., *Spirit Willing, System Weak*, NEWSDAY, Nov. 8, 2000, at A10.

<sup>7</sup> See *infra* notes 97-100 and accompanying text.

<sup>8</sup> See generally IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997); see also Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1413-15 (1997) (discussing historical anti-immigrant sentiment towards Asians in the United States with regards to Asian Americans); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 202-03 n.121 (2007) (discussing bias against minority voters and the need for language assistance).

<sup>9</sup> Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1251 (1993); see also Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 226-27 (1995) (discussing historical instances of Asians being viewed as a model minority and how it is used to attack affirmative action for minorities).

<sup>10</sup> See, e.g., Ancheta, *supra* note 5; Benson, *supra* note 5; Cristina M. Rodríguez, *From Litigation, Legislation: A review of Brian Landsberg's Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*, 117 YALE L.J. 1132, 1134 (2008); Brian J. Sutherland, *The Patchwork of State and Federal Language Assistance for Minority Voters and a Proposal for Model State Legislation*, 65 N.Y.U. ANN. SURV. AM. L. 323 (2009); James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195 (2006).

In 2015, the next assessment of jurisdictions and languages to be covered under Section 203 from the 2010 Census will come out.<sup>11</sup> In 2016, the presidential election will likely invigorate a surge of new people coming out to vote. Judges, lawyers, and election officials must be prepared to accommodate the linguistic diversity of the American polity.<sup>12</sup>

The first generation in Section 203 compliance could be seen as efforts to mechanically comply with the law.<sup>13</sup> Most of these deficiencies occurred before 2004. The second generation, after 2004 to today, I believe seeks full compliance with the spirit and objectives of the law.<sup>14</sup> This article will review the second generation of current issues facing election officials and voting rights lawyers in Section 203 enforcement, or what I term “Electoral Sound Barriers 2.0.” I also hope to build upon other scholars’ works<sup>15</sup> since my first article 10 years ago, and provide some clarity in light of the more recent pieces that examine Section 203 compliance in general but neglect to examine fully the issues confronting Asian Americans.<sup>16</sup>

Part I will provide background, including a review of the need for Asian language assistance and a brief synopsis of the legislative history, statutory scheme, legal requirements, and implementation of Section 203. Part II will survey current issues in Section 203 enforcement for Asian languages, namely:

- new questions about the desirability of multilingual ballots in light of other federal requirements for ballots;

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<sup>11</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, 109th Cong. § 8 (2006).

<sup>12</sup> One scholar on language rights, Cristina Rodríguez, argues that accommodations are the only solution to “enable multiple communities with vastly different . . . forms of ethnic identity to interact with one another within common community.” See Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 136 (2001).

<sup>13</sup> See Juan Cartagena, *Voting Rights in New York City: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 501, 507-08 (2008) (discussing the U.S. Department of Justice’s denial of preclearance to New York’s Section 203 implementation program).

<sup>14</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-182, BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS’ STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE (2008), available at <http://www.gao.gov/new.items/d08182.pdf> [hereinafter GAO-08-182]. Another future course in Section 203 practice could be defending the constitutionality of the provisions from attack. For a general discussion, see James Thomas Tucker, *The Battle over “Bilingual Ballots” Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507 (2008).

<sup>15</sup> See, e.g., Ancheta, *supra* note 5; Benson, *supra* note 5.

<sup>16</sup> See, e.g., Sutherland, *supra* note 10; Tucker, *supra* note 10.

- the requirement and common legal practices in transliterating candidate names on ballots;
- methodologies to target language assistance at specific poll sites/ precincts, when the law only covers counties and cities;
- obstacles in translating voting information that are available on the internet and websites; and
- legal tensions in the affirmative hiring of racially diverse bilingual poll workers.

The conclusion will review why these problems manifest and locate them in a legal theory of electoral justice. Part III will then look forward and offer concrete policy recommendations, including best practices such as community advisory groups. It will also discuss a growing concern about Section 203 out-of-court settlements when law typically develops through judicial opinions. As I will argue, settlement plans should be regarded as controlling authority in the absence of controlling judicial opinions. I hope this article will be a useful tool for election lawyers, community advocates, local election officials and administrators, and judges who are considering these cases.<sup>17</sup>

## I. BACKGROUND

In the early 1970s, Congress found that limited English proficiency was a serious barrier to political participation of Asian Americans, Latinos, and Native Americans.<sup>18</sup> Asian Americans and Latino citizens were registered to vote at much lower rates than non-Hispanic whites.<sup>19</sup> As a result, Congress enacted the language assistance provisions of the Voting Rights Act, codified as Section 203 in 1975.<sup>20</sup> Congress expanded the

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<sup>17</sup> Transcript of Oral Argument at 8, *United States v. City of Bos.*, No. 05-11598-WGY (D. Mass. July 25, 2007) (stating that U.S. District Judge Patti Saris could not find any case in the United States with respect to Chinese language assistance under the Voting Rights Act).

<sup>18</sup> Voting Rights Act, Section 203, 52 U.S.C. § 10503 (2014).

<sup>19</sup> See COMM ON THE JUDICIARY, THE VOTING RIGHTS ACT LANGUAGE ASSISTANCE AMENDMENTS OF 1992, S. REP. NO. 102-315, at 11-12 (1992).

<sup>20</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 401 (1975); but see Sandra Guerra, *Voting Rights and the Constitution: The*

provisions to include more jurisdictions and languages in 1992 and reauthorized and extended the provisions for another 25 years in 2006.<sup>21</sup>

Section 203 mandates that bilingual ballots, translated voting materials, and oral language assistance are made available at voting booths and polling sites in jurisdictions with a significant LEP population. Since it came into effect, Section 203 has helped ensure that countless more Asian Americans, Latinos, and Native Americans have access to the ballot.

A. *The Language Assistance Provisions of the Voting Rights Act (Section 203)*

Congress adopted the Language Assistance Provisions of the Voting Rights Act in 1975 and reauthorized it in 1982, 1992, and 2006.<sup>22</sup> In enacting the provisions, Congress found that:

[T]hrough the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.<sup>23</sup>

One scholar observed that the Language Assistance Provisions of the Voting Rights Act embody “three . . . models of anti-discrimination enforcement”: “a structural remediation model,” “a traditional anti-discrimination model,” and “an accommodation model.”<sup>24</sup> “Together, these provisions form a network of language rights [in the voting context].”<sup>25</sup>

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*Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1420 (1988) (arguing that there is such a right to language assistance).

<sup>21</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, 109th Cong. § 8 (2006). Reauthorization did not come about easily. Many members of Congresses opposed bilingual ballots with nativists and anti-immigrant arguments. See generally Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377 (2006).

<sup>22</sup> For a historical account of the legislative fight to reauthorize Section 203, see generally James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007).

<sup>23</sup> 52 U.S.C. § 10503(a) (2014).

<sup>24</sup> Ancheta, *supra* note 5, at 165.

<sup>25</sup> *Id.*

In 1992, Congress recognized the strong link between limited English proficiency and low voter participation.<sup>26</sup> The Section mandated the availability of translated ballots and voting materials and oral language assistance in certain jurisdictions with large numbers of Asian American, Latino, and Native American populations. A trigger formula determines if the jurisdiction will be covered under Section 203, and for what language.<sup>27</sup>

The Voting Rights Act mandates language assistance when the census reports that a jurisdiction has five percent or more than 10,000<sup>28</sup> voting-age citizens who speak the same Asian, Hispanic, or Native American language,<sup>29</sup> have limited English proficiency,<sup>30</sup> and, as a group, have a higher illiteracy rate than the national illiteracy rate.<sup>31</sup> The current determination of “national illiteracy” is attaining less than a

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<sup>26</sup> See S. COMM ON THE JUDICIARY, THE VOTING RIGHTS ACT LANGUAGE ASSISTANCE AMENDMENTS OF 1992, S. REP. NO. 102-315, at 4 (1992). Congress found that “the four language minority groups covered by section 203—Hispanics, Asian Americans, American Indians and Alaska Natives—continue[d] to experience educational inequities, high [English] illiteracy rates and low voting participation.” *Id.*

<sup>27</sup> The statute reads that “no covered State or political subdivision shall provide voting materials only in the English language.” 52 U.S.C. § 10503(b)(1).

<sup>28</sup> Guerra, *supra* note 20, at 1436 (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>29</sup> See Brenda Fathy Abdelall, *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 (2005), for a discussion of how the VRA should include Arab Americans and other language minorities.

<sup>30</sup> The Census has determined that limited English proficiency is measured through responses to a Census question “inquiring how well they speak English by checking one of the four answers provided—‘very well,’ ‘well,’ ‘not well,’ or ‘not at all.’ The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than ‘very well’ are deemed LEP.” H.R. REP. NO. 102-655, at 8 (1992).

<sup>31</sup> 52 U.S.C. § 10503(b)(2)(A). Section 203 was amended in 1992 to include the numeric approach. See *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the H. Subcomm. on the Constitution*, 109 Cong. 2 (2005) [hereinafter AALDEF VRA Testimony before Congress, 2005] (statement of Margaret Fung) (on file with author). Before 1992, under the five-percent approach, no political subdivision, except for San Francisco and counties in Hawai‘i, provided materials in any Asian language. See S. REP. NO. 102-315, at 17; *Voting Rights Act: Bilingual Education, Expert Witness Fees, and Presley: Hearings Before the H. Subcomm. on Civil and Constitutional Rights*, 102d Cong. 5 (1992) (statement of Margaret Fung, Exec. Dir., AALDEF) [hereinafter Fung, Testimony on Language Assistance Provisions]. After the 1992 amendment, under the numeric approach, 10 counties in New York, California, and Hawai‘i were mandated to provide ballots, voting materials, and language assistance in Asian languages. See *Jurisdictions Covered Under Sections 4(f)(4) and 203(c) of the Voting Rights Act of 1965, as Amended*, 28 C.F.R. § 55 app. at 105-07 (2013).



fifth grade education.<sup>32</sup> This test has little to do with English proficiency. Indeed, limited English proficiency is already an element of Section 203's test for coverage.

Section 203 was amended in 1992 to include the numeric approach of "more than 10,000."<sup>33</sup> Before 1992, under the percentage approach, no political subdivision, except for San Francisco and some counties in Hawai'i, broached five-percent and thus none provided materials in any Asian language.<sup>34</sup> This spurred a grassroots movement to change the coverage formula. After the 1992 amendment, under the numeric approach, 10 counties in New York, California, and Hawai'i broached 10,000 and were mandated to provide ballots, voting materials, and language assistance in Asian languages and four language groups. Chinese, Japanese, Filipino, Vietnamese were all covered.<sup>35</sup>

After the 2000 census, 16 counties in seven states were required to provide assistance in one or more Asian languages. Korean was covered for the first time. New York remained as the only state on the East Coast to require language assistance in any Asian language, notwithstanding large populations of Asian Americans in other parts of the East Coast.<sup>36</sup>

After the 2010 census, commensurate with the growth of the Asian American population, up to 22 counties in 11 states were required to provide assistance in one or more Asian languages.<sup>37</sup> South Asian languages were covered for the first time in three jurisdictions. Four new states were covered. Languages covered were Chinese, Korean, Filipino, Vietnamese, Japanese, Asian Indian, Bangladeshi, and "Asian Other." The languages of Asian Indians were locally determined to be Hindi in Los Angeles and Chicago, whereas it was Bengali in New York. "Asian Other" in Los Angeles was determined to be Khmer for

<sup>32</sup> H.R. REP. NO. 94-196 (1975); 52 U.S.C. § 10503(b)(3)(E) ("[T]he term 'illiteracy' means the failure to complete the 5th primary grade.").

<sup>33</sup> Voting Rights Language Assistance Act of 1992, H.R. 4312, 102<sup>nd</sup> Cong (1992).

<sup>34</sup> S. REP. NO. 102-315, at 17; Fung, Testimony on Language Assistance Provisions, *supra* note 31, at 5.

<sup>35</sup> 28 C.F.R. § 55 app. at 105-107. The counties and languages include Alameda County, CA (Chinese); Los Angeles County, CA (Chinese, Filipino, Japanese, Vietnamese); Orange County, CA (Vietnamese); San Francisco County, CA (Chinese); Honolulu County, HI (Filipino, Japanese); Kauai County, HI (Filipino); Maui County, HI (Filipino); Kings County, NY (Chinese); New York County, NY (Chinese); Queens County, NY (Chinese). *Id.*

<sup>36</sup> Magpantay, *supra* note 5, at 49.

<sup>37</sup> See James Thomas Tucker, *The Census Bureau's 2011 Determinations of Coverage Under Section 203 of the Voting Rights Act Mandating Bilingual Voting Assistance*, 19 ASIAN AM. L.J. 171, 176-82 (2012) (discussing the scope of the 2011 determinations and the impact on Asian Americas).

Cambodian American and Thai for Thai Americans.<sup>38</sup> The following counties and languages were covered under Section 203:

Asian Language Coverage under VRA Section 203 after  
Census 2010<sup>39</sup>

(New languages since the 2010 Census are identified  
below in **bold**).<sup>40</sup>

<b>ALASKA</b>		
	<b>Aleutians East Borough</b>	<b>Filipino</b>
	<b>Aleutians West Census Area</b>	<b>Filipino</b>
<b>CALIFORNIA</b>		
	Alameda	Chinese, <b>Filipino</b> , <b>Vietnamese</b>
	Los Angeles	Chinese, Japanese, Korean, <b>Filipino</b> , Vietnamese, <b>Indian</b> , <b>Other (not specified)</b>
	Orange	Chinese, Korean, Vietnamese
	<b>Sacramento</b>	<b>Chinese</b>
	San Diego	<b>Filipino</b> , <b>Chinese</b> , <b>Vietnamese</b>
	San Francisco	Chinese
	San Mateo	Chinese
	Santa Clara	Chinese, <b>Filipino</b> , Vietnamese
<b>HAWAII</b>		
	Honolulu	Chinese, <b>Filipino</b> ,

<sup>38</sup> See Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602, 63,603 (Oct. 13, 2011) (to be codified at 28 C.F.R. pt. 55); CITY OF L.A. OFFICE OF THE CITY CLERK ELECTION DIV., MULTILINGUAL SERVICE PROGRAM, available at [http://www.lavote.net/VOTER/MULTILINGUAL/PDFS/Multilingual\\_Service\\_Program.pdf](http://www.lavote.net/VOTER/MULTILINGUAL/PDFS/Multilingual_Service_Program.pdf) (last visited Sept. 11, 2014); LANCE GOUGH, EXEC. DIR., CHI. BD. OF ELECTION COMM'RS, LANGUAGE ASSISTANCE IN THE CITY OF CHICAGO, available at <http://www.eac.gov/assets/1/Documents/language%20assistance%20in%20Chicago-%20Lance%20Gough.pdf> (last visited Oct. 15, 2014); Winnie Hu, *South Asians in Queens to get Ballots in Bengali*, N.Y. TIMES (July 2, 2013), [http://www.nytimes.com/2013/07/03/nyregion/south-asians-in-queens-to-get-ballots-in-bengali.html?\\_r=0](http://www.nytimes.com/2013/07/03/nyregion/south-asians-in-queens-to-get-ballots-in-bengali.html?_r=0).

<sup>39</sup> 76 Fed. Reg. No. 198, 63603-07 (Oct. 13, 2011).

<sup>40</sup> 67 Fed. Reg. No. 144, 48871-77 (July 26, 2002).

		Japanese
	Maui	Filipino
<b>ILLINOIS</b>		
	Cook	Chinese, <b>Indian</b>
<b>MASSACHUSETTS</b>		
	<b>Quincy city</b>	<b>Chinese</b>
<b>MICHIGAN</b>		
	<b>Hamtramck city</b>	<b>Bangladeshi</b>
<b>NEVADA</b>		
	<b>Clark</b>	<b>Filipino</b>
<b>NEW JERSEY</b>		
	<b>Bergen</b>	<b>Korean</b>
<b>NEW YORK</b>		
	Kings (Brooklyn)	Chinese
	New York (Manhattan)	Chinese
	Queens	Chinese, Korean, <b>Indian</b>
<b>TEXAS</b>		
	Harris	Vietnamese, <b>Chinese</b>
<b>WASHINGTON</b>		
	King	Chinese, <b>Vietnamese</b>

Once covered, the jurisdictions must provide bilingual assistance to voters.<sup>41</sup> The types of assistance include:

- (1) translated written materials, including ballots,<sup>42</sup> voter registration forms,<sup>43</sup> voting instructions, notifications, and announcements;
- (2) oral assistance such as interpreters, bilingual poll workers, and bilingual/multilingual voter hotlines;<sup>44</sup> and
- (3) publicity regarding the elections and the availability of bilingual assistance,<sup>45</sup> such as signs at polling sites, announcements in language minority radio, advertisements in television and newspapers

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<sup>41</sup> 28 C.F.R § 55.3.

<sup>42</sup> *See id.* § 55.15.

<sup>43</sup> *Id.* § 55.18(c).

<sup>44</sup> *Id.* §§ 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.* § 55.20.

<sup>45</sup> *Id.*

advertisements,<sup>46</sup> and direct contact with language minority community organizations.

The covered jurisdiction can devise a system to “target” certain areas to receive translated materials or language assistance.<sup>47</sup>

The goal is to ensure that covered language minority groups can effectively vote in elections.<sup>48</sup> In determining whether a jurisdiction’s language assistance is sufficiently effective to comply with Section 203, the Attorney General considers: (1) whether the “materials and assistance are provided in a way designed to allow members of the applicable language minority group to be effectively informed of and participate effectively in voting connected activities; and (2) [whether the] affected jurisdiction [has taken] all reasonable steps to achieve that goal.”<sup>49</sup>

In addition, the Voting Rights Act’s bilingual requirements also include Section 208, which gives voters who are unable to read English the right to be assisted by persons of their choice.<sup>50</sup> Congress added Section 208 of the VRA in 1982 after determining that existing law, including the Act’s permanent ban on literacy tests, did not adequately protect language minority citizens who needed assistance at the polls.<sup>51</sup> Assistors can be anyone, including the voters’ relatives or friends, but not their employers or union representatives.<sup>52</sup> The assistors may accompany the voters inside the voting booth to translate the ballots for the voters. Unlike

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<sup>46</sup> In 2004, AALDEF found that more than 51% of Asian American voters got their news about politics and community issues from the ethnic press. *See* THE ASIAN AM. LEGAL DEF. & EDUC. FUND, THE ASIAN AMERICAN VOTE: A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION 12 (2005), available at <http://www.aaldef.org/docs/AALDEF-Exit-Poll-2004.pdf>.

<sup>47</sup> *See* 28 C.F.R. § 55.17.

<sup>48</sup> *Id.* at §§ 55.2, 55.15, 55.19, 55.20.

<sup>49</sup> *Id.* at § 55.2 (b)(1)-(2).

<sup>50</sup> 52 U.S.C. § 10508 (2014).

<sup>51</sup> Specifically, Congress made the following findings in enacting section 208:

Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.

S. REP. NO. 97-417, at 62 (1982), reprinted in 1982 U.S.C.A.N. 177, 240.

<sup>52</sup> *Id.*

Section 203, Section 208 applies nationwide including all jurisdictions not covered under Section 203.<sup>53</sup>

### B. *Need for Language Assistance*

Asian Americans are one of the fastest-growing minority groups in the nation, estimated to number almost 15.5 million.<sup>54</sup> More and more are becoming US citizens through naturalizations and, consequently, are registering to vote. Asian citizens of voting age numbered 3.9 million in 1996, and rose from 4.7 million in 2000 to 6.7 million in 2004. Asian American voter turnout is also steadily increasing, from 1.7 million in 1996, to nearly 3 million in 2004,<sup>55</sup> 3.4 million in 2008,<sup>56</sup> and nearly 4 million in 2012.<sup>57</sup>

Asian Americans aim to participate in the electoral franchise, but they are often unfamiliar with the American electoral process.<sup>58</sup> Many come from Asian countries with very different political systems or which may even lack a tradition of voting.<sup>59</sup> Seventy percent of Asian Americans are citizens and almost half (47%) acquired citizenship through naturalization.<sup>60</sup> They do not understand “basic political procedures” such as the need to register to vote by a certain date or to enroll in a political party to vote in a primary, or how to operate voting machines.<sup>61</sup>

Nationally, almost half (48%) of Asian and Pacific Islander Americans over 18 are LEP.<sup>62</sup> Limited English proficiency is determined by one’s ability to read English less than “very well.”<sup>63</sup> Though many Asian Americans do speak some

<sup>53</sup> See 52 U.S.C. § 10503.

<sup>54</sup> *Asian/Pacific American Heritage Month: May 2010*, *supra* note 2. For a fuller discussion on the need for language assistance for Latino and Native American voters, in addition to Asian American voters, see Tucker, *supra* note 10.

<sup>55</sup> AALDEF VRA Testimony before Congress, 2005, *supra* note 31, at 3.

<sup>56</sup> *Current Population Survey, Table 2. Voter Turnout, by Race and Hispanic Origin: 1996 to 2012*, U.S. CENSUS BUREAU 1-2 (May 2013), available at <http://www.census.gov/prod/2013pubs/p20-568.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> See Fung, Testimony on Language Assistance Provisions, *supra* note 31, at 8.

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

<sup>60</sup> ASIAN AM. CTR. FOR ADVANCING JUSTICE, A COMMUNITY OF CONTRASTS 13 (2011), available at [http://www.advancingjustice-aaajc.org/sites/aaajc/files/Community\\_of\\_Contrast.pdf](http://www.advancingjustice-aaajc.org/sites/aaajc/files/Community_of_Contrast.pdf).

<sup>61</sup> Fung, Testimony on Language Assistance Provisions, *supra* note 31, at 8-9.

<sup>62</sup> *Language Spoken at Home: 2005-2009 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_09\\_5YR\\_S1601&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_09_5YR_S1601&prodType=table) (last visited Oct. 1, 2014) [hereinafter *2005-2009 American Community Survey*].

<sup>63</sup> See Letter from Robert Kominski, U.S. Census Bureau, Population Div., to Paul Siegel, Chief Educ. & Soc. Stratification Branch, U.S. Census Bureau, Population Div. (Feb. 4, 1985) (on file with author).

English and English proficiency is needed to naturalize, the level of reading proficiency is often far lower than the proficiency needed to comprehend a ballot, especially complicated voting instructions and complex legal ballot propositions. Seventy-one percent speak a language other than English in their homes.<sup>64</sup>

In 2012, the Asian American Legal Defense and Education Fund (AALDEF) conducted nonpartisan multilingual exit polling of 9,096 Asian American voters and monitored elections to document instances of Asian voter disenfranchisement in several states.<sup>65</sup> It was the largest survey of its kind. AALDEF found that 37% of Asian American voters were LEP and 79% were foreign born naturalized citizens.<sup>66</sup> 24% had no formal education in the United States,<sup>67</sup> which is notable because U.S. schools teach American civics. Only 18% identified English as their native language.<sup>68</sup> Moreover, 27% of all respondents stated that the November 2012 elections were the first U.S. elections in which they had voted.<sup>69</sup>

Language assistance is needed to preserve access to the vote.<sup>70</sup> In the 2012 elections, 22% responded that they preferred to use some form of language assistance to vote.<sup>71</sup> Korean Americans exhibited the greatest rates of limited English proficiency at 67%, followed by Vietnamese Americans at 59%, then Chinese at 55%.<sup>72</sup> Twenty-six percent of Chinese and Southeast Asian voters and 24% of Korean voters stated that they preferred to vote with some form of language assistance.<sup>73</sup>

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<sup>64</sup> ASIAN AM. CTR. FOR ADVANCING JUSTICE, *supra* note 60, at 24.

<sup>65</sup> The exit poll covered 81 poll sites in 38 cities in 14 states and Washington, D.C. AALDEF, *supra* note 3, at 4. For a full review of AALDEF's exit poll and election monitoring activities, see Glenn D. Magpantay, *Ensuring Asian American Access to Democracy in New York City*, 2 AAPI NEXUS: ASIAN AM. & PAC. ISLANDERS POL'Y, PRAC. & COMMUNITY 87 (2004).

<sup>66</sup> AALDEF, *supra* note 3, at 3.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.* at 2.

<sup>70</sup> AMERICAN VOTING EXPERIENCE, *supra* note 4, at 16 (stating that "Limited English proficiency voters should expect support at the polling place that is not defined by the 'floor' set by law. From signage to ballots to the availability of assistance from bilingual poll workers, the administration of the polling place should reflect the understanding that limited English proficiency should not be experienced as a limited or second-class citizenship").

<sup>71</sup> AALDEF, *supra* note 3, at 4-5.

<sup>72</sup> *Id.* Most South Asians and Filipinos voters, however, were fully English proficient, with only 20% of Tagalog speakers and 6% of Gujarati speakers identifying themselves as LEP. *Id.*

<sup>73</sup> *Id.* For a review of the need for language assistance in California, see Joaquin G. Avila et al., *Voting Rights in California: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 164-70 (2007).

Even though Asian Americans may be citizens, their right to vote is futile when ballots and voting instructions cannot be understood.<sup>74</sup> Special efforts are needed to allow Asian American voters to fully participate in elections.

Characteristics of Respondents to AALDEF's  
Multilingual Exit Poll, Nov. 2012

ALL	First Time Voter	Foreign Born	No Formal U.S. Education	English as Native Language	LEP	Largest Ethnic Groups
TOTAL: 9,096	27%	79%	24%	18%	37%	31% Chinese 30% South Asian 12% Vietnamese 11% Korean 9% Filipino
BY ETHNIC GROUP						
Chinese	23%	75%	26%	16%	55%	N/A
Korean	20%	84%	37%	18%	67%	N/A
Filipino	23%	74%	12%	26%	7%	N/A
South Asian	34%	88%	26%	*	25%	45% Indian 40% Bangladeshi 10% Pakistani
Vietnamese	26%	83%	20%	9%	59%	N/A

### C. *Implementation and Effectiveness*

The Voting Rights Act legal test for Asian language coverage applies when the census finds a large number of voting-age LEP citizens who speak the same Asian language,

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<sup>74</sup> AMERICAN VOTING EXPERIENCE, *supra* note 4, at 52-53 (recommending that “[j]urisdictions should provide bilingual poll workers to any polling place with a significant number of voters who do not speak English”).

with a higher illiteracy rate than the national illiteracy rate.<sup>75</sup> The Language Assistance Provisions have been one of the most effective means of expanding the franchise to language minority, Asian American voters. The following charts apply the Section 203 legal test to the covered jurisdictions. The chart shows counties covered by Section 203 and the share of LEP population to the general population in those counties. Taken together, 672,750 Asian Americans are assisted because of Section 203.

Table: Existing Coverage for Asian Language Minority Groups<sup>76</sup>

	Group	Citizen Voting Age Population	CVAP & LEP	Illiteracy Rate
<b>ALASKA</b>				
Kodiak Island Borough	FILIPINO	870	470	12.77
<b>CALIFORNIA</b>				
Alameda County	CHINESE	62,155	28,280	10.98
Los Angeles County	CHINESE	189,820	95,700	10.71
Los Angeles County	KOREAN	79,740	42,390	2.67
Los Angeles County	FILIPINO	156,320	34,985	4.46
Los Angeles County	VIETNAMESE	48,070	30,340	10.42
Los Angeles County	JAPANESE	85,765	12,510	2.88
Orange County	VIETNAMESE	71,075	45,730	6.90
Orange County	CHINESE	39,565	14,805	4.36
Orange County	KOREAN	25,235	12,240	2.37

<sup>75</sup> 52 U.S.C. § 10503(b)(2)(A) (2014).

<sup>76</sup> Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT'L BLACK L. J. 1, 17 tbl. 2 (2005-2006) (table reprinted).



San Diego County	FILIPINO	78,195	17,155	4.58
San Francisco County	CHINESE	102,815	58,735	16.89
San Mateo County	CHINESE	32,570	11,780	6.24
Santa Clara County	VIETNAMESE	48,375	31,265	5.76
Santa Clara County	CHINESE	61,620	24,895	5.12
Santa Clara County	FILIPINO	44,950	11,245	3.65
<b>HAWAII</b>				
Honolulu County	FILIPINO	111,270	24,815	10.44
Honolulu County	JAPANESE	169,865	13,865	5.27
Honolulu County	CHINESE	88,600	12,640	13.49
Maui County	FILIPINO	18,620	5,350	13.08
<b>ILLINOIS</b>				
Cook County	CHINESE	26,200	11,645	9.36
<b>NEW YORK</b>				
Kings County	CHINESE	51,290	33,635	13.32
New York County	CHINESE	41,770	21,070	21.33
Queens County	CHINESE	66,715	37,865	8.05
Queens County	KOREAN	18,525	11,835	6.46
<b>TEXAS</b>				
Harris County	VIETNAMESE	28,405	16,970	7.81
<b>WASHINGTON</b>				
King County	CHINESE	28,430	10,535	9.35

The Language Assistance Provisions promote integration by encouraging LEP citizens to participate in the American political process.<sup>77</sup> Translated ballots have enabled Asian American voters to exercise their right to vote independently and privately inside the voting booth.

In jurisdictions covered for bilingual ballots, AALDEF's exit poll found that more than half of the covered language minority groups were LEP, including for example: 56% of Chinese voters in both Manhattan and Brooklyn, and 45% of Chinese voters in Queens NY; 71% of Korean voters in Queens, NY; 72% of Korean voters in Bergen County, NJ and 62% of each Chinese and Vietnamese voters in Houston, TX. For each group, about a quarter to a third of all voters required the assistance of interpreters or translated voting materials in order to cast their votes.<sup>78</sup>

Section 203 has also aided grassroots efforts to increase Asian American voter registration.<sup>79</sup> In New York, from 2001 to 2004, multilingual voter registration forms required under Section 203 have helped increase Asian American voter registration by 40%.<sup>80</sup> In California, from 1998 to 2004, Asian American voter registration increased 61%.<sup>81</sup> In both states, the increases greatly outpaced the overall growth of the Asian American population.<sup>82</sup>

Most importantly, Section 203 has contributed to Asian American electoral success.<sup>83</sup> In 1992, and up until 2001, no

<sup>77</sup> Tucker, *supra* note 10, at 247.

<sup>78</sup> AALDEF, *supra* note 3, at 20.

<sup>79</sup> *But see* Daniel J. Rearick, Note, *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, 549-50, n.35 (2004) (noting the decrease in Latino voting despite language assistance).

<sup>80</sup> Sandra Endo, *Asian-American Voters Could Swing Mayoral Election*, TIME WARNER CABLE NY1 NEWS (Feb. 9, 2005), <http://www.ny1.com/content/48061/Asian-american-voters-could-swing-mayoral-election/>.

<sup>81</sup> Avila et al., *supra* note 73, at 181.

<sup>82</sup> *Id.*

<sup>83</sup> *See* AALDEF VRA Testimony before Congress, 2005, *supra* note 31, at 3. It is important to note that, notwithstanding these successes, today as well as in 1975, "language minority citizens for the most part have not successfully challenged white political domination." Sen. John V. Tunney, Comm. on the Judiciary, Voting Rights Act Extension, S. REP. 94-295, *reprinted in* 1975 U.S.C.A. 774, 793 (July 22, 1975); *see also* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 at 157 (1993) (discussing Asian-American voting patterns and how their political participation is generally limited to voting, limiting change in their favor); Troy M. Yoshino, *Still Keeping the Faith?: Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking*, 6 ASIAN L. J. 1 (1999) (discussing the obstacles Asian Pacific Americans face in obtaining proportionate electoral power in the United States).

Asian American had ever been elected to the New York City Council, State Legislature, or Congress, notwithstanding a population of over 800,000 Asian Americans. As late as 1996, elected representatives of Asian American neighborhoods held the community in disdain.<sup>84</sup> More Asian Americans ran for political office and in 2001, the first Asian American was elected to the New York City Council.<sup>85</sup> In 2004, the first Asian American was elected to the New York State Assembly.<sup>86</sup> In the same year, the first ever Vietnamese American was elected to the state legislature from Harris County, TX, after it became covered for Vietnamese under Section 203.<sup>87</sup> In 2012, the first Asian American on the East Coast was elected to Congress from New York.<sup>88</sup>

Although Section 203 has made voting more accessible for language minorities, covered jurisdictions have had several problems in implementation.<sup>89</sup> “Ever since the [1992] strengthening of Section 203, [Asian American civil rights groups] have monitored local compliance of Section 203.”<sup>90</sup> Poll

<sup>84</sup> Celia W. Dugger, *Queens Old-Timers Uneasy As Asian Influence Grows*, N.Y. TIMES, Mar. 31, 1996, at A1, available at <http://www.nytimes.com/1996/03/31/nyregion/queens-old-timers-uneasy-as-asian-influence-grows.html> (quoting City Councilwoman Julia Harrison, who represents Flushing, as describing Asian immigrants as “colonizers” instead of immigrants and mistakenly describing Chinese broccoli as dandelion).

<sup>85</sup> AALDEF VRA Testimony before Congress, 2005, *supra* note 31, at 3. It is important to note that, notwithstanding these successes, today as well as in 1975, “language minority citizens for the most part have not successfully challenged white political domination.” S. REP. 94-295.

<sup>86</sup> AALDEF VRA Testimony before Congress, 2005, *supra* note 31, at 3.

<sup>87</sup> Tucker, *supra* note 10, at 248.

<sup>88</sup> *Grace Meng Elected As New York’s First Asian-American Congresswoman*, HUFFINGTON POST N.Y. 2012, available at [http://www.huffingtonpost.com/2012/11/08/grace-meng-new-yorks-first-asian-american-congresswoman\\_n\\_2092781.html](http://www.huffingtonpost.com/2012/11/08/grace-meng-new-yorks-first-asian-american-congresswoman_n_2092781.html).

<sup>89</sup> See generally GAO-08-182, *supra* note 14; Cartagena, *supra* note 13, at 501, 507-08 (discussing the U.S. Department of Justice’s denial of preclearance to New York’s Section 203 implementation program); James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163 (2007).

<sup>90</sup> See, e.g., NAT’L ASIAN PAC. AM. LEGAL CONSORTIUM, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT 7 (2000); see also AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2008 ELECTIONS (2009) [hereinafter AALDEF 2008], available at <http://www.aaldef.org/docs/AALDEF-AA-Access-to-Democracy-2008.pdf>; ASIAN LAW ALLIANCE & ASIAN LAW CAUCUS, OBSTACLES TO FULL AND EQUAL ACCESS TO THE BALLOT FOR LIMITED ENGLISH PROFICIENT VOTERS (2010), available at <http://www.docstoc.com/docs/61178417/equal-access-to-the-ballot> (click “DOWNLOAD”); ASIAN PAC. AM. LEGAL CTR. OF S. CAL. & CHINESE FOR AFFIRMATIVE ACTION, LANGUAGE BARRIERS TO VOTING: FINDINGS FROM APALC AND CAA’S NOVEMBER 2006 POLL MONITORING IN LOS ANGELES, ORANGE AND SAN FRANCISCO COUNTIES 4 (2006), available at <http://www.caasf.org/publications/reports-and-resources/> [hereinafter OBSTACLES TO FULL AND EQUAL ACCESS] (click “Full Report” hyperlink below report title); CHINESE FOR AFFIRMATIVE ACTION, 2006 POLL MONITORING IN SAN FRANCISCO COUNTY 1 (2006), available at <http://www.caasf.org>

monitoring uncovered numerous violations.<sup>91</sup> In New York City, during the 2000 Presidential Elections, ballots flipped the translated party headings so that Republican candidates were listed as Democrats and Democrats as Republicans.<sup>92</sup> Repeatedly, in New York City,<sup>93</sup> and Los Angeles,<sup>94</sup> Orange,<sup>95</sup> San Francisco,<sup>96</sup> and San Jose, CA<sup>97</sup> poll workers kept translated materials hidden and unavailable to voters. On a number of occasions, poll workers never even bothered to open supply kits containing translated election materials.<sup>98</sup> Translated voting signs were posted in obscure locations or not posted at all. Voters have also complained about too few interpreters or interpreters who spoke languages or dialects different from the voter.<sup>99</sup> All too often, “Chinese American voter[s] who asked for language assistance [were] directed to . . . Korean interpreter[s], who could not help.”<sup>100</sup> Poll workers have disparaged translated materials, one time describing them as simply “clutter.”<sup>101</sup>

The Department of Justice has dispatched federal observers to monitor Section 203 compliance.<sup>102</sup> Before 2000, the Department filed only a few lawsuits to remedy these deficiencies and all concerned Spanish-speakers or Native

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publications/reports-and-resources/ (click “Poll Monitoring Results in San Francisco County” hyperlink); PUB. INTEREST LAW FIRM, A REPORT ON THE LAW FOUNDATION OF SILICON VALLEY POLL MONITORING PROJECT FOR THE NOVEMBER 4, 2008, PRESIDENTIAL GENERAL ELECTION (2009) [hereinafter SILICON VALLEY POLL MONITORING PROJECT], available at <http://www.lawfoundation.org/repository/PollMonitorReport.Comprehensive.FINAL.pdf>.

<sup>91</sup> Magpantay, *supra* note 5, at 40-42.

<sup>92</sup> *Bungled Ballots in Chinatown*, *supra* note 6; Murphy et al, *supra* note 6.

<sup>93</sup> Complaint at 9, *Chinatown Voter Educ. Alliance v. Ravitz*, No. 06-CV-913 (S.D.N.Y. Feb. 6, 2006); AALDEF 2008, *supra* note 90, at 13.

<sup>94</sup> ASIAN PAC. AM. LEGAL CTR. OF S. CAL. AND CHINESE FOR AFFIRMATIVE ACTION, *supra* note 90, at 4.

<sup>95</sup> *Id.*

<sup>96</sup> ASIAN LAW ALLIANCE & ASIAN LAW CAUCUS, *supra* note 90, at 5-6; CHINESE FOR AFFIRMATIVE ACTION, *supra* note 90, at 2.

<sup>97</sup> SILICON VALLEY POLL MONITORING PROJECT, *supra* note 90.

<sup>98</sup> AALDEF, *supra* note 3, at 4.

<sup>99</sup> *Id.* at 10.

<sup>100</sup> ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2004 ELECTION 10 (2005) [hereinafter AALDEF 2004].

<sup>101</sup> Asian Am. Legal Def. & Educ. Fund, *Asian American Voter Disenfranchisement Persists in 2004 Elections*, OUTLOOK, Winter 2005, at 8, available at <http://www.aaldef.org/docs/Outlook-2005-winter.pdf>. In one election, when a poll monitor “asked about translated materials, [the poll worker] sarcastically replied, ‘What, are we in China? It’s ridiculous.’” Glenn D. Magpantay, *Asian Americans and Barriers to Voting*, in THE BATTLE OVER BILINGUAL BALLOTS 309, 313 (James Thomas Tucker, ed. 2009).

<sup>102</sup> See 52 U.S.C. § 10305 (2014); Cartagena, *supra* note 13, at 516-51 (describing federal observers in New York).

Americans.<sup>103</sup> After 2000, the Department filed several lawsuits to remedy these deficiencies by jurisdictions for not providing adequate language assistance to LEP voters.<sup>104</sup> AALDEF has also filed its own cases on behalf of Asian American community groups and voters.<sup>105</sup> These combined enforcement efforts helped ensure that jurisdictions fully complied with Section 203.

Since its original implementation, all jurisdictions have made substantial efforts to fully comply with Section 203 and provide bilingual assistance and translations of voting materials at polling sites. This author's first article on Section 203 reviewed the first generation of problems. This article now reviews the second generation in compliance.

## II. CURRENT ISSUES IN SECTION 203 ENFORCEMENT FOR ASIAN LANGUAGES

Though these first generation problems have not yet been fully resolved,<sup>106</sup> local compliance has still improved.<sup>107</sup> Advocacy groups advocated for poll worker trainings to cover

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<sup>103</sup> The Department of Justice is responsible for enforcement of Section 203 of the Voting Rights Act. 28 C.F.R. § 55.2 (b) (2012). The Department has already used three jurisdictions for Section 203 compliance for Spanish language assistance. *See* Consent Decree, *United States of America v. Passaic County*, No. 99-2544 (D.N.J. June 1999); Settlement Agreement and Order, *United States v. City of Lawrence*, No. 98-12256 (D. Mass. 1999); Consent Decree, *United States of America v. Bernalillo County*, No. 98-156 (D. N.M. Apr. 27, 1998).

<sup>104</sup> *See, e.g.*, Complaint at 3-4, *United States v. City of Walnut*, No. 07-2437 (C.D. Cal. Apr. 12, 2007) (for Chinese and Korean voters); *United States v. City of Bos.*, No. 05-11598 (D. Mass. July 29, 2005) (for Chinese and Vietnamese voters); Complaint at 4, *United States v. City of Rosemead*, No. 05-5131 (C.D. Cal. July 14, 2005) (for Chinese and Vietnamese voters); Complaint at 4, *United States v. San Diego County*, No. 04-1273 (S.D. Cal. June 23, 2004) (for Filipino voters). For a full listing of cases filed by the U.S. Department of Justice, Voting Section, see *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., <http://www.justice.gov/crt/about/vot/litigation/caselist.php> (last visited Oct. 2, 2014).

<sup>105</sup> Complaint, *supra* note 93.

<sup>106</sup> Of course, there continues to be minor problems at various times. During the 2006 elections in Seattle, WA, legally required translated voter pamphlets were not available at poll sites. The voter pamphlets described for voters four state ballot measures, two countywide measures, and 14 Seattle Charter Amendments on the General Election ballot. In the International District, which houses Seattle's Chinatown, a bilingual poll worker complained that translated copies of Chinese voting pamphlets were missing altogether. As a result, several Chinese voters were not able to vote or even understand the voting process. *See* Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to James J. Buck, Interim Director, Records, Elections & Licensing Services Division, (on file with author) (May 4, 2007) (discussing "Observations of the General Election in Washington on November 7, 2006"); *see also* Complaint, *supra* note 93 (providing an example of an action against the New York City Board of Elections for noncompliance with Sections 203 and 208 of the Voting Rights Act for Chinese and Korean language assistance).

<sup>107</sup> *See generally* GAO-08-182, *supra* note 14.

language assistance in more detail.<sup>108</sup> Trainers now go over the importance of posting translated signs, voters' rights to assistance, and allowing voters their federal right to choose who can assist them.<sup>109</sup>

A second generation of Section 203 compliance deficiencies have arisen within the past 10 years. Section 203 implementation in several jurisdictions, most notably in Washington, Hawai'i, California, New York, Illinois, and Texas has uncovered a new set of problems. Current issues in Section 203 enforcement for Asian languages include: new questions about the desirability of multilingual ballots, the transliteration of candidate names on ballots, targeting methodologies, complications in translating websites, and challenges in the hiring of bilingual poll workers.

#### A. *Multilingual Ballots*

Translated ballots are the cornerstones to making the vote accessible to Asian Americans. The first generation of Section 203 compliance focused on faulty translations.<sup>110</sup> In 2000, ballots in New York flipped the Chinese translations of the party headings so Democratic candidates were listed as Republicans and vice versa.<sup>111</sup> Such problems have become increasingly rare and internal quality controls, like bipartisan proofreading, have safeguarded LEP voters from disenfranchisement.

In jurisdictions covered under Section 203 for more than one language, advocates pressed for multilingual ballots. After initial resistance, election administrators eventually relented. Then in 2002, the Help America Vote Act (HAVA) required a

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<sup>108</sup> PUB. INTEREST LAW FIRM, *supra* note 90, at 9, 20 (discussing model training in Orange County); *see also* ADVANCEMENT PROJECT, PLIGHT OF THE POLL WORKER: EFFORTS TO IMPROVE TRAINING AND SUPPORT FOR POLL WORKERS IN OHIO, PENNSYLVANIA, MARYLAND, FLORIDA, AND MICHIGAN 8-10, *available at* [https://www.supportthevoter.gov/files/2013/08/Advancement\\_Project-Plight-of-the-Poll-Worker.pdf](https://www.supportthevoter.gov/files/2013/08/Advancement_Project-Plight-of-the-Poll-Worker.pdf); AALDEF, *supra* note 3, at 28-29.

<sup>109</sup> *See generally* BD. OF ELECTIONS IN THE CITY OF N.Y.: POLL WORKER'S MANUAL (2012), *available at* <http://vote.nyc.ny.us/pdf/documents/boe/pollworkers/pollworkersmanual.pdf> [hereinafter POLL WORKER'S MANUAL].

<sup>110</sup> *See* Murphy et al, *supra* note 6; *Bungled Ballots in Chinatown*, *supra* note 6; Letter from Margaret Fung, Exec. Dir., & Glenn D. Magpantay, Democracy Project Dir., AALDEF, to Danny DeFrancesco, Exec. Dir., N.Y.C. Bd. of Elections 1 (Dec. 1, 2000) (on file with the author). There are also some jurisdictions that still have not fully translated all ballots. *See* First Amended Complaint at 11-12, Chen et al., v. State of Hawai'i et al., No. 10-00245 (D. Haw. July 28, 2010).

<sup>111</sup> Murphy et al, *supra* note 6; *Bungled Ballots in Chinatown*, *supra* note 6; Letter from Margaret Fung & Glenn D. Magpantay to Danny DeFrancesco, *supra* note 110, at 1-2.

new set of voting system standards.<sup>112</sup> Ballots were redesigned, voting systems overhauled, and old voting machines discarded. Elections administrators maintained multilingual ballots but because the ballots were smaller, the text of translations became much more difficult to read.

In the mid-1990s, advocates pressed for multilingual ballots that simultaneously displayed all the covered languages. In New York City and San Francisco, this required ballots to be in at least three languages, English, Spanish, and Chinese. After 2000, in Queens County, NY, text on ballots needed to be displayed in four languages, because Korean was added. Space on ballots was especially cramped with the addition of Asian Indian (specifically Bengali) in 2010 to the ballots in Queens.<sup>113</sup>

The argument in favor of multilingual ballots was principled. Multilingual ballots deterred potential discrimination, helped voters learn English, and assured voters that they were voting correctly. When New York City was originally covered for Chinese language assistance, in addition to Spanish, elections officials initially suggested designating one voting machine per poll site that would have a ballot displayed in Chinese, with the rest in English and Spanish. Civil rights lawyers bristled at assigning voting machines by language because it would have the effect of segregating voters by race/ethnicity. In addition, many Asian American voters who are LEP can still read at least some English. They use the translation to identify their voting choices, but also use the English to confirm that they are voting correctly. Indeed, the English and Chinese translations on ballots help Asian American voters learn English.

After Congress passed HAVA, LEP voters gained new safeguards in the voting process. HAVA required that voting systems allow voters to verify their candidate selections, correct any voting errors, and be notified before they cast their ballots if they accidentally voted for more than one candidate for a single office.<sup>114</sup>

Election officials had to select new voting systems that met with both HAVA and Section 203 mandates. Many

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<sup>112</sup> Help America Vote Act § 301, 52 U.S.C. § 21081(a)(1) (2014).

<sup>113</sup> Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602, 63,605 (Oct. 13, 2011) (to be codified at 28 C.F.R. pt. 55); *New York City Ballots' Tiny Print Is Criticized*, N.Y. TIMES, Oct. 15, 2013, at A24, available at <http://www.nytimes.com/2013/10/16/nyregion/new-york-city-ballots-tiny-print-is-criticized.html>.

<sup>114</sup> 52 U.S.C. § 21081(a)(1).

jurisdictions moved to electronic voting machines<sup>115</sup> or paper-based voting systems with optical scanners.<sup>116</sup> Voters could mark their ballots by darkening ovals for their preferred candidate.<sup>117</sup> Those ballots were then inserted into optical scanning devices to read the ballot and tally the votes.<sup>118</sup> The scanners rejected ballots or gave warnings when voters made correctable mistakes, such as selecting too many candidates in one race, incorrectly marking a ballot, or forgetting to vote in all the races.<sup>119</sup> Because machines reviewed the ballots, confidentiality was assured. Poll workers no longer had to review ballots to determine if they were completed correctly, and in doing, also saw the voters' choices. Paper ballots also allowed a paper trail to document any machine tabulation error.

Section 203 complicated HAVA reforms because multilingual ballots constrained space on ballots. New York moved from large voting machines that displayed 3-foot by 4-foot posters of the ballot to new voting systems with scannable paper ballots.<sup>120</sup> The full ballot needed to fit on an 8.5" x 14" piece of paper. Everything had become much smaller.<sup>121</sup>

Voters had already complained that the Chinese characters on the ballot were too small to read.<sup>122</sup> This has been a particular problem for the elderly, often with impaired vision, who relied heavily on translated ballots to cast their votes.<sup>123</sup> HAVA only aggravated this problem.<sup>124</sup>

The second generation of Section 203 compliance is forcing advocates to reconsider the desirability for multilingual

<sup>115</sup> Proposed Consent Decree, Order, and Judgment at 8, *United States v. City of Rosemead* (C.D. Cal. Sept. 8, 2005) (No. 05-5131).

<sup>116</sup> See POLL WORKER'S MANUAL, *supra* note 109, at 6.

<sup>117</sup> *Id.* at 7, 38.

<sup>118</sup> *Id.* at 7.

<sup>119</sup> *Id.* at 128, 162.

<sup>120</sup> *Id.* at 7-8.

<sup>121</sup> *Id.*; see also Official Ballot for the General Election, City of New York, County of Queens (Nov. 2, 2004) (on file with author).

<sup>122</sup> AALDEF 2008, *supra* note 90, at 14.

<sup>123</sup> *Id.*

<sup>124</sup> Sheila Anne Feeney, *No 'screw-up' at Polls . . . This Time*, AM N.Y., Nov. 3, 2010 at 6, available at <http://files.meetup.com/1414748/AmNYPage17.pdf>; Diana Hubert, *New York Voter Survey Reveals Ballot Insufficiencies*, THE EPOCH TIMES (Nov. 10, 2010), <http://www.theepochtimes.com/n2/content/view/45714/>; Letter from Glenn D. Magpantay, Staff Attorney & Irene Jeon, Voting Rights Coordinator, AALDEF, to George Gonzalez, Exec. Dir., N.Y.C. Bd. of Elections at 2-3 (Oct. 7, 2010) (on file with author) (reviewing observations from the 2010 Primary Election where voters complained that the font size of translations on new paper ballots was too small to read); Press Release, New York City Council, *City Council's Online Voter Survey Shows Ballot Design as Prevailing Complaint at the Polls* (Nov. 9, 2010), available at [http://council.nyc.gov/html/releases/eday\\_voter\\_survey\\_11\\_9\\_10.shtml](http://council.nyc.gov/html/releases/eday_voter_survey_11_9_10.shtml).



ballots, in light of HAVA's new requirements. Compliance with HAVA resulted in limited space on ballots. Moreover, Chinese characters are more intricate than English letters. It may be that Chinese characters need to be even larger than English letters on ballots, not simply equal in size.

Hawai'i had similar problems to New York. Hawai'i purchased a new voting system pursuant to HAVA. Most voters voted on machines with electronic ballot displays but a limited number of voters still had to vote using paper ballots that were read into optical scanners.<sup>125</sup> These included absentee voters. Litigation was brought before the 2010 gubernatorial election for lack of compliance with Section 203.<sup>126</sup> The State Attorney General did not deny the state's requirement to provide translated ballots but noted that the optical voting machines might not be able to accommodate multilingual ballots displaying all the ballot text in English, Chinese, Japanese, and Filipino.<sup>127</sup>

So litigants pressed for bilingual paper ballots, simultaneously displaying only two languages: Chinese-English, Japanese-English, or Filipino-English. Similarly, the Department of Justice Section 203 litigation has also pressed for multilingual ballots. In the event that multilingual ballots are not "mechanically feasible" with electronic voting machines, ballots should "at least be bilingual."<sup>128</sup> This allowed for more space on the ballot. It also prevented the segregation of ballots by race based on language, since there would be no need for English-only ballots.<sup>129</sup> Voters who primarily read English would still have to complete a ballot bearing translations, even though the translation would not be needed.

Despite the increasing linguistic diversity of American society, the second generation of 203 compliance has forced advocates to support bilingual, rather than multilingual, ballots. But space limitations resulting from voting system changes required under new federal mandates resulted in ballots that were translated but hard to discern because the text on the ballots was too small to read. The new voting

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<sup>125</sup> See, e.g., *Voter Info: How to Vote*, CITY & COUNTY OF HONOLULU ELECTIONS DIVISION VOTER INFO, [http://54.193.42.83/voter\\_info](http://54.193.42.83/voter_info) (last visited Oct. 28, 2014).

<sup>126</sup> First Amended Complaint, *supra* note 110 at 13.

<sup>127</sup> The State agreed to "investigate" the "feasibility" of providing translated paper ballots. Settlement and Release Agreement, *Chen et al., v. State of Hawai'i*, No. 10-00245 (D. Haw. Dec. 2, 2010).

<sup>128</sup> Agreement and Order at 6, *United States v. City of Walnut, Cal.*, No. 05-5131 (C.D. Cal. Nov. 9, 2007); Proposed Consent Decree, Order, and Judgment, *supra* note 115, at 7.

<sup>129</sup> See Agreement and Order at 6, *supra* note 128, at 6.

system could not reasonably accommodate all the languages required to appear on ballots as required under Section 203. To make sure that voters could fully read the ballots, the second generation reverted to bilingual ballots even in jurisdictions with multilingual voters.

### B. *Transliteration of Candidate Names on Ballots*

Concomitant with translated ballots, Section 203 requires fully translated ballots where everything on the ballot face—including voting instructions, party labels, office titles, and candidate names—appears in the alternate language. But fulfilling this obligation is more complicated when the alternate language does not use the English alphabet, but rather characters such as Chinese, or a symbolic alphabet, like Korean, or a combination of the two such as Japanese.<sup>130</sup> In converting writings from English to Chinese, for example, some words are translated and others, where there is no direct translation, are “transliterated.”

Local elections were initially resistant to having candidate names on ballots appear in the Asian language’s characters or letters, in a process known as “transliteration.” The Department of Justice eventually ruled that transliterating candidate names was required under Section 203.<sup>131</sup> But a renewed opposition emerged which brought about the second generation of Section 203 compliance that looked to standardizing accepted methodologies in the transliteration of candidate names.

#### 1. Background

Translations and transliterations go hand in hand.<sup>132</sup> In translations, a Chinese character with the same meaning is used in place of the English word. In transliteration, Chinese characters, that when spoken aloud approximate the same sounds as the English word, are used in place of the English

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<sup>130</sup> Japanese use Kanji and Katakana for translations and Hiragana for grammar. Kanji are Japanese symbols that are ideographs where the whole character conveys a meaning or idea. Hiragana are often used to write the grammatical parts of words and sentences when Kanji cannot be used. Katakana symbols are used for writing non-Japanese words, such as loan words from western culture and foreign names. See Namiko Abe, *Japanese Writing Systems*, <http://japanese.about.com/od/kanji/a/blank4.htm> (last visited Nov. 5, 2014); *Japanese Writing System*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Japanese\\_writing\\_system](http://en.wikipedia.org/wiki/Japanese_writing_system) (last visited Oct. 14, 2014).

<sup>131</sup> See *supra* note 142.

<sup>132</sup> I use Chinese transliteration as an example, but these are applicable to other languages that do not use English letters, such as Korean, Japanese, Hindi, and Bengali.

word. Typically, English first names are *translated* and surnames are *transliterated*.<sup>133</sup> The Chinese-language newspaper *World Journal*, for example, includes names of public officials and candidates in English next to the transliterations of their names.<sup>134</sup>

The transliteration of candidate names on ballots is essential because “LEP Chinese American voters typically know the candidates by their . . . transliterated names, . . . not [necessarily] by their English names.<sup>135</sup> These names appear in [Asian]-language media outlets, advertising, public notices, and campaign literature.”<sup>136</sup> Sometimes, Asian candidates also have specific Asian ethnic names that are different from their English names.

AALDEF’s exit poll in 2004 found that more than a third (35%) of Asian American voters turned to ethnic media outlets in Asian languages, rather than mainstream media outlets, for their main source of news about politics and community issues.<sup>137</sup> “Because of the manner in which Asian Americans receive political and candidate information, the . . . transliterations of candidate names on ballots . . . ensure[s] [that] LEP Chinese American voters can identify . . . the candidates for whom they wish to vote.”<sup>138</sup>

In places where ballots were translated, but did not have the transliterations of candidate names, community groups had to station bilingual volunteers outside of poll sites to inform Chinese American voters about the English names of candidates, so that voters could identify their candidates of choice.<sup>139</sup> Otherwise the voters would have to identify the candidate by particular letters from an alphabet in which they lacked proficiency.

The first generation of 203 compliance required persuading covered jurisdictions to fully translate ballots. In 1994 in New York and 1999 in San Francisco and Hawai’i,

<sup>133</sup> Declaration of Joe Wei, *United States v. City of Bos.* at 2-3, 497 F. Supp. 2d 263 (D. Mass. 2005) (No. 05-11598).

<sup>134</sup> *Id.* at 2.

<sup>135</sup> Amicus Brief of Chinese Progressive Association et al. at 6-7, *United States v. City of Bos.*, 497 F. Supp. 2d 263 (D. Mass. July 25, 2007) (No. 05-11598).

<sup>136</sup> *Id.* at 6.

<sup>137</sup> “Indeed, Congress recognized the significance of Asian-language media outlets in requiring language assistance to the vote through the Voting Right Act. S. REP. NO. 94-295, at 33 (1975); 28 C.F.R. § 55.18 (e) (2006).” *Id.* at 7.

<sup>138</sup> *Id.*

<sup>139</sup> See Memorandum of Law in Support of Asian American and Latinos’ Motion to Intervene as Plaintiffs at 6, *United States v. City of Bos.*, No. 05-11598WGY (D. Mass. Sept. 9, 2005).

election officials refused to transliterate candidates' names on the ballots. *The New York Times* delivered an editorial rebuke of the New York City Board of Elections' resistance, saying "That sounds like the foot-dragging bureaucratic arguments that have been raised all over America at one time or another against giving minorities their rights. It is no excuse for not obeying the law."<sup>140</sup> Similarly, in San Francisco, the Department of Elections deemed the transliteration of Chinese names to be voluntary and too much of a burden.<sup>141</sup>

The Department of Justice finally unambiguously ruled that that the transliteration of candidates' names is required under Section 203.<sup>142</sup> New York City and San Francisco have provided fully translated ballots with transliterated candidate names in Chinese in every election since then, without significant controversy. The transliteration of candidate names has become the practice in almost all other jurisdictions covered under Section 203, namely:<sup>143</sup>

Alameda County, CA,  
 Los Angeles County, CA,  
 Orange County, CA,  
 San Francisco County, CA,  
 Santa Clara County, CA,  
 New York County, New York,  
 Kings County, New York, and  
 Queens County, New York.<sup>144</sup>

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<sup>140</sup> *Minority Rights in the Voting Booth*, N.Y. TIMES, Aug. 19, 1994, at A26, available at <http://www.nytimes.com/1994/08/19/opinion/minority-rights-in-the-voting-booth.html>.

<sup>141</sup> See CHINESE FOR AFFIRMATIVE ACTION, ASIAN LAW CAUCUS, EMPLOYMENT LAW CENTER, INCREASING ACCESS TO THE BALLOT FOR NEW CITIZENS 2 (Nov. 27, 2000); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, *supra* note 90, at 17-18.

<sup>142</sup> See Letter from Deval L. Patrick, Assistant Attorney Gen., U.S. Dep't of Justice Civil Rights Div., Bd. of Elections, to Kathy King, Gen. Counsel, Bd. of Elections (May 13, 1994), available at [http://www.justice.gov/crt/records/vot/obj\\_letters/state\\_letters.php?state=ny](http://www.justice.gov/crt/records/vot/obj_letters/state_letters.php?state=ny) (discussing a Section 5 Objection).

<sup>143</sup> See 52 U.S.C. § 10304 (2014); Voting Rights Act Amendments of 1992, 67 Fed. Reg. 48871-77 (July 26, 2002) (Notices).

<sup>144</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 8. AALDEF interviewed election officials in the following jurisdiction and found that they all provide translation/transliteration of candidate names. See Letter from Glenn D. Magpantay, Staff Attorney, AALDEF to Hon. William F. Galvin, Sec'y of the Commonwealth of Mass. (July 23, 2007) (on file with author) (discussing "Translation/Transliteration of Candidate Names on Election Ballots"); see also Agreement and Order, *supra* note 128, at 5.

But then renewed opposition to transliteration developed new efforts to standardize the manner in which candidates' names are transliterated as part of second generation Section 203 compliance.

## 2. Renewed Opposition

After several years of neglected complaints from Asian American voters, in 2005 the U.S. Department of Justice sued the City of Boston for discrimination against Chinese and Vietnamese voters.<sup>145</sup> The case settled and the City of Boston was required to provide 203-like remedies, namely the provision of language assistance.<sup>146</sup> In 2005 elections, Boston translated the ballot into Chinese and Vietnamese, which in part resulted in the election of the first Asian American to the City Council.<sup>147</sup> But the City did not fully translate ballots as the names of candidates still appeared in English.

In 2007, the Department of Justice brought a motion to clarify that, in the settlement agreement, the term "translated ballots" included the transliteration of candidate names.<sup>148</sup> Asian American voters and community-based organizations admitted an amicus brief in support of the Department of Justice.<sup>149</sup>

The Massachusetts Secretary of State William F. Galvin opposed ballots with transliterated names because transliteration of names was imprecise and could be misleading.<sup>150</sup> A well placed article in *USA Today* featured Secretary Galvin in a news story showing that names of candidates, after being transliterated into Chinese characters, had characters that not only made sounds approximating the candidates' names but also unusual

<sup>145</sup> *United States v. City of Bos.*, 497 F. Supp. 2d 263 (D. Mass. 2007). One AALDEF observer noted racially segregated voting lines wherein white voters had the opportunity to vote first and minority voters had to wait. Community groups suffered a history of frustration in that they long complained of voting problems but election officials did little, if anything, to remedy the problems. See AALDEF 2004, *supra* note 100.

<sup>146</sup> Memorandum of Agreement and Settlement, at 1-4, *United States v. City of Bos.*, No. 1:05-cv-11598 (D. Mass. Oct. 18, 2005), ECF No. 60-2.

<sup>147</sup> Peter Kiang & Shirley Tang, *Transnational Dimensions of Community Empowerment: The Victories of Chanrithy and Sam Yoon*, in *THE TRANSNATIONAL POLITICS OF ASIAN AMERICANS* 84 (Christian Collet & Pei-Te Lien eds., 2009).

<sup>148</sup> *United States' Unopposed Motion to Clarify Memorandum of Agreement and Settlement* at 2, *City of Bos.*, 497 F. Supp. 2d 263 (May 24, 2007) (No. 05-11598).

<sup>149</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 2.

<sup>150</sup> See Maria Sacchetti, *Fresh Fight Over Bilingual Ballots Council to Pursue State Law Ordering Names in Chinese*, *BOS. GLOBE*, May 14, 2008, at B.1. In 1994, the Department of Justice found the opposite, that not transliterating candidates' names caused voter confusion. Letter from Deval L. Patrick to Kathy King, *supra* note 142.

meanings.<sup>151</sup> On the 2008 presidential primary ballot, the Chinese characters making up the transliteration for Mitt Romney’s name would mean “Sticky Rice,” for Fred Thompson “Virtue Soup,” and for Hillary Rodham Clinton “Upset Stomach.”<sup>152</sup> Galvin was quoted in the article as saying, “Elections have to be precise,” and that transliterating candidate names into Chinese would have “unintended negative inferences” because the characters making up the sounds have several meanings.<sup>153</sup> He also argued that transliterating candidate names “would cost Massachusetts ‘thousands of dollars but, worse than that, litigation and time’ if candidates sued over how their names are translated.”<sup>154</sup> He concluded that only names appearing in English were the most definite and liability free.

Secretary Galvin’s negative spin not only increased awareness of the issue of transliterating ballots but also resistance to transliterating ballots.<sup>155</sup> As late as 2010, the Hawai’i Office of Elections maintained that names on ballots could not be transliterated because many candidates were native Hawaiian with more complex, multisyllabic names.<sup>156</sup>

The concerns about imprecision and liability are unfounded. True, each Chinese character used to develop a transliterated name individually has a meaning. But the characters of a transliterated name are not meant to convey meanings and Native Chinese speakers do not understand them as such.<sup>157</sup> “[I]f a candidate’s name was ‘Mr. Green,’ and the name was translated to the Chinese character for ‘green,’ . . . Chinese American voters would not believe the candidate to be a green man.”<sup>158</sup> Chinese, like all languages, “is read contextually and each character is read in light of other characters surrounding it.”<sup>159</sup> A transliterated name, to Chinese-speakers, would be “just that—a name.”<sup>160</sup> In the same

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<sup>151</sup> Andrea Stone, *Candidates lost in Chinese translation*, USA TODAY (July 11, 2007, 9:54 AM), [http://usatoday30.usatoday.com/news/nation/2007-07-10-chinese\\_N.htm](http://usatoday30.usatoday.com/news/nation/2007-07-10-chinese_N.htm).

<sup>152</sup> *See id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Secretary Galvin’s opposition was consistent with the views of many nativist arguments in opposition to bilingual ballots. *Ao, supra* note 21 at 386.

<sup>156</sup> Interview with Dwayne D. Yoshina, Chief Elections Officer, State Office of Elections, Pearl City, Haw., Nov. 20, 2003 (notes on file with author).

<sup>157</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 6.

<sup>158</sup> *See* Letter from Glenn D. Magpantay to Hon. William F. Galvin, *supra* note 144.

<sup>159</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 7.

<sup>160</sup> *Id.* at 7-8.

way, people who read English do not assume that George Bush was a shrub running for President.

Secretary Galvin harbored an unfounded fear of candidate litigation if names were transliterated. There has been no attempted case brought by candidates disputing the fairness of ballots in the way their names were transliterated. In fact, the only cases regarding transliteration involved improper methodologies. Until 2006, the New York City Board of Elections used a poor process that resulted in awkward sets of Chinese characters to identify candidates.<sup>161</sup> Sometimes these were so unusual that voters could not identify their candidates of choice.<sup>162</sup> The methodology totally deviated from common methods for transliterating candidates' names. As a result, the second generation of Section 203 compliance resulted in standardized procedures in the process of transliterating candidate names. These are drawn from typical procedures used across Section 203-covered jurisdictions. Local elections officials, oftentimes "Boards of Elections," promulgate these procedures.

### 3. Standard Methodology for Transliteration of Names

Candidates' names are arguably the single most important category of information on ballots.<sup>163</sup> Well-accepted methods for transliterating candidate names on ballots are as follows:<sup>164</sup>

- First, standard translations of candidates' first names and common last names are applied.<sup>[165]</sup> Many common English names (such as John, George, William, Mary, and Christine), common last names (such as Smith, Clinton, Doe), and last names

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<sup>161</sup> See Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, to Stephen Kitzinger & Carlos Cruz-Abrams, Assistant Corp. Counsels, City of N.Y. Law Dep't (Dec. 4, 2006) (on file with author) (discussing "Procedures for Translating/Transliterating Candidate's Names on Ballots"); Chinatown Voter Educ. Alliance, et al. v. Ravitz, No. 06 Civ. 913 (NRB) (Dec. 4, 2006).

<sup>162</sup> Magpantay, *supra* note 5, at 40.

<sup>163</sup> See Letter from Deval L. Patrick to Kathy King, *supra* note 142.

<sup>164</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 8-9 ("AALDEF recommended this methodology to the Boston Election Department in a letter on January 12, 2007, and the City used this methodology for its Special Preliminary Election on April 17, 2007. A similar methodology is also employed by the New York City Board of Elections for its compliance with Section 203 of the Voting Rights Act for Chinese language assistance. The New York City Board of Elections translates/transliterates names once candidates qualify to appear on a ballot."); see also Letter from Glenn D. Magpantay to Hon. William F. Galvin, *supra* note 144.

<sup>165</sup> Declaration of Joe Wei, *supra* note 133, at 2; Amicus Brief of Chinese Progressive Association, *supra* note 135, at 2, 8. I will use the example of Chinese transliteration standards to show, generally, what best practices are in the area of ballot transliteration.

that are derivatives of common first names (such as Johnson, Jones, and Williams) already have widely accepted translations.<sup>[166]</sup> These can be found in many English-to-Chinese dictionaries.<sup>[167]</sup> These first names are not transliterated.

- Second, uncommon surnames, such as “Obama,” “McCain” or “Dukakis,” are transliterated.<sup>[168]</sup> Standard phonetic transliterations of vowels and consonants are used to devise the Chinese characters.<sup>[169]</sup> The sets of characters approximate the sounds of the names. Proposed transliterations are occasionally developed in consultation with independent Chinese-language newspapers<sup>[170]</sup> and/or nonpartisan members in the community through Advisory Groups.<sup>[171]</sup> This ensures consistency so that names that have already been transliterated and are in the public are selected for use. Additionally, it guards against the possibility of awkward transliterations.<sup>[172]</sup>
- Third, candidates have the right to select or alter the transliterations of their names.<sup>[173]</sup> Candidates are notified of the proposed transliterations of their names that will appear on ballots alongside their names in English letters.<sup>[174]</sup> Asian candidates with Chinese names, and candidates with particular names that they use in their own campaign literature, typically offer their own names or change the names recommended for them. Candidates are given a limited amount of time<sup>[175]</sup> in which to affirmatively respond to the notice of their names in Chinese character with alternatives. If candidates do not respond, then the transliterated names assigned to them are used.
- Fourth, the final list of all candidates’ transliterated names is publicized to Chinese-language newspapers, community groups developing voter guides, and other interested parties. This publicity also resolves any remaining inconsistencies among

<sup>166</sup> OXFORD ADVANCED LEARNER’S ENGLISH-CHINESE DICTIONARY, app. 6, at 2086-90 (6th ed. 2004) (listing “Common First Names”).

<sup>167</sup> See, e.g., *id.*; A DICTIONARY OF ENGLISH SURNAMES AND CHRISTIAN NAMES (Foreign Language & Research Press 2001); XINHUA AGENCY, ENGLISH NAMES TRANSLATION HANDBOOK (4th ed. 2004).

<sup>168</sup> Declaration of Joe Wei, *supra* note 133; Amicus Brief of Chinese Progressive Association, *supra* note 135, at 8-9.

<sup>169</sup> Declaration of Joe Wei, *supra* note 133, at 2; Amicus Brief of Chinese Progressive Association, *supra* note 135, at 9.

<sup>170</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 9. Advocates have always tried to persuade election officials to also consult with Advisory Group members, but election officials have been resistant to third-party review.

<sup>171</sup> Agreement and Order, City of Walnut, *supra* note 128, at 5.

<sup>172</sup> Declaration of Joe Wei, *supra* note 133, at 3.

<sup>173</sup> See BD. OF ELECTIONS IN THE CITY OF N.Y., CHINESE AND KOREAN LANGUAGE VOTING ASSISTANCE PLAN PROGRAM 15 (Dec. 18, 2007) [hereinafter Chinese-Korean Language Assistance Plan] (on file with author).

<sup>174</sup> *Id.*

<sup>175</sup> In New York, candidates are given seven days to respond to the Board of Elections’ notice. Letter from George Gonzales, Deputy Exec. Dir., Bd. of Elections in the City of N.Y. to Plaintiffs in *Chinatown Voter Education Alliance v. Ravitz* (Dec. 19, 2007) (on file with author).



Chinese-language media outlets that may have been using different transliterations of the same name.<sup>[176]</sup>

These are the common procedures in the transliteration of candidate names on ballots.<sup>177</sup> The most important aspect of any ballot is the display of candidates for whom voters can vote. The transliteration of names gives voters the fullest ability to identify their candidates of choice. While the first generation of Section 203 compliance concerned whether names needed to be transliterated on ballots, the second generation involves developing standardized procedures to transliterate in response to renewed opposition.

### C. *Targeting Methodology*

The Section 203 test captures jurisdictions at the county level, but those jurisdictions can take steps to target certain areas within the county for language assistance. These “targeting systems” place translated ballots and interpreters at specific poll sites or election precincts where they are needed by voters.<sup>178</sup> The regulations enforcing Section 203 apply the standard that targeting systems should ensure that “language minority groups who need minority language materials and assistance receive them.”<sup>179</sup> Elections officials usually employ targeted assistance in an effort to conserve resources.<sup>180</sup> In the second generation of Section 203 compliance, jurisdictions have either abandoned targeting altogether or refined the methodology. New York did both, depending on the particular type of language assistance provided.<sup>181</sup>

<sup>176</sup> Amicus Brief of Chinese Progressive Association, *supra* note 135, at 8-9.

<sup>177</sup> Admittedly, there have been instances in which these procedures were not fully and correctly followed. In 1998, for example, the San Francisco Department of Elections “mistranslated the Chinese names of two Chinese American candidates for office, using a transliteration of their English names despite the fact that both candidates submitted their Chinese name in their registration of candidacy forms.” Magpantay, *supra* note 5, at 39-40; *see also* Justin Levitt, “*Fixing That*: Lines at the Polling Place,” 28 J.L. & POL. 465, 480-81 (2013) (discussing how “attention to the allocation of poll workers among polling places is also important; particularly in communities with large numbers of eligible voters of limited English proficiency, attention to the recruitment and deployment of poll workers with appropriate language skills will increase the effective points of service for the relevant population”).

<sup>178</sup> *See* 28 C.F.R. § 55.17 (2013).

<sup>179</sup> *Id.*; *see also* Tucker, *supra* note 10, at 252-56 (discussing targeting language assistance).

<sup>180</sup> *See* Tucker, *supra* note 10, at 252, 256-59.

<sup>181</sup> *See* Chinese-Korean Language Assistance Plan, *supra* note 173, at 10-14.

## 1. Multilingual Materials Without Targeting

The initial response to first generation Section 203 compliance questioned why translated materials needed to be available countywide when only voters in particular neighborhoods, such as Chinatown, needed them. Accordingly, the first generation of Section 203 compliance involved “target systems” for language assistance.<sup>182</sup> In New York, under a system designed in the mid-1990s, language assistance was assigned to election districts and poll sites that had a large, Chinese voting-age population based on the census.<sup>183</sup>

Election officials then overlaid election district boundary lines over census blocks to identify qualifying election districts to be targeted for language assistance, namely translated ballots, interpreters, translated voting signs and voting materials. Poll sites often had multiple election districts, and if each of the election districts had too small of a population, but in the aggregate a large number of Chinese Americans voted at the poll site, the site was targeted for interpreters and translated signs and voting materials.<sup>184</sup>

Poll sites received supply kits with all the necessary voting materials, forms, writing instruments, tally sheets, and particular envelopes for use on Election Day. Poll sites or election districts targeted by Section 203 were sent supplemental language supply kits and poll workers were supposed to display all the additional materials in targeted language as well.<sup>185</sup> Voting instructions, directional arrows, and “Vote Here” signs were provided in English and supplemental language supply kits had additional signs that needed to be posted in the relevant Asian language.

But this frequently did not occur.<sup>186</sup> Poll workers disregarded translated materials. Poll sites did not get the language supply kits, or when they were received, the kits were unopened.<sup>187</sup> Sometimes poll workers intentionally decided

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<sup>182</sup> See, e.g., Complaint, *supra* note 93, at 10.

<sup>183</sup> *Id.* I use the example of targeting Chinese assistance to illustrate, generally, examples and best practices, but these can certainly apply to any and all languages covered under Section 203.

<sup>184</sup> See *id.* (complaining about an ineffective targeting system).

<sup>185</sup> Magpantay, *supra* note 5, at 40-42.

<sup>186</sup> See, e.g., Complaint, *supra* note 93, at 8-10.

<sup>187</sup> Magpantay, *supra* note 5, at 41. During both the 2000 NYC Primary Elections, 29 Election Districts at 19 sites, and in the General Elections, 40 Election Districts at 18 sites were missing specific Chinese language materials. Letter from Glenn D. Magpantay, Staff Attorney, Asian Am. Legal Def. & Educ. Fund, to Daniel

against providing translated materials since voters “should learn to speak English” or because the multitude of multilingual materials was simply “clutter[.]”<sup>188</sup> Lack of space resulted in translated signs being posted in obscure locations, if at all. Because the voting materials from the main supply kit were already out and displayed, poll workers did not see any need to provide additional materials.

After many years of complaints, the New York City Board of Elections decided against the targeting of particular items and provided all voting materials and signs in multilingual fashion.<sup>189</sup> I found that this aspect of the second generation of Section 203 compliance was more cost effective and shielded elections officials from liability.<sup>190</sup>

New York City developed multilingual signs that included the English translations in all the Section 203 covered languages: Spanish, Chinese, and Korean.<sup>191</sup> Almost all voting signs posted at poll sites, such as directional arrows, “Voter Here,” and statements of Voters’ Bill of Rights,<sup>192</sup> appeared simultaneously in four languages.<sup>193</sup> Voting materials were printed on multiple pages beginning with English and subsequent pages bearing the translation. Poll workers were unable to post only English signs because few, if any, voting materials existed only in English. This resolved most of the problems in making translated materials and signs available to voters.

This was also more cost effective because instead of printing several different translated signs (in English/Chinese, English/Spanish, English/Korean) and assigning staff to allocate the correct sign to the correct poll site, the Board of Elections simply printed all signs in English/ Chinese/ Spanish/ Korean and forwent the additional expense of assigning the signs to specific poll sites.

Multilingual signage and materials may have been possible because of the greater acceptance by election officials and the public of the increasing diversity of the polity. This second

DeFrancesco, Exec. Dir., N.Y.C. Bd. of Elections (Feb. 5, 2002) (on file with author) (reviewing missing materials during the New York 2001 elections).

<sup>188</sup> ASIAN AM. LEGAL DEF. & EDUC. FUND ET AL., ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC 7 (May 2004).

<sup>189</sup> See Chinese-Korean Language Assistance Plan, *supra* note 173, at 1-2.

<sup>190</sup> A sign that was only available in English and not the covered language was a simple and clear example of noncompliance and a violation of federal law. These were often bright-line measures to demonstrate that the jurisdiction has not complied with Section 203.

<sup>191</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 2.

<sup>192</sup> See *id.* These items are required under HAVA. 52 U.S.C. § 21082(b) (2014).

<sup>193</sup> POLL WORKER’S MANUAL, *supra* note 109, at 38.

generation of enforcement shows the willingness of election officials to truly understand the need to comply fully with Section 203. The first generation could be seen as efforts to mechanically comply with the law. The second generation involves efforts to comply with the spirit and objectives of the law, which is made easier by greater acceptance of diverse populations.

## 2. More Refined Targeting

While ensuring that language assistance would reach all language minority voters by targeting certain voting materials and signs that were used throughout the jurisdiction, other aspects of the voting process still needed to be targeted in the second generation of compliance efforts. It would have been unduly burdensome, costly, and unnecessary to place translated ballots and interpreters throughout all poll sites and precincts in the City even where they were not needed. Therefore, a combination of blanket distribution of multilingual signs and targeted assignment of Chinese or Korean interpreters was needed.

### *a. Targeting Methodology Background*

Targeting was still needed with regard to the placement of bilingual ballots and interpreters.<sup>194</sup> Change, however, was necessary to refine the targeting methodology.<sup>195</sup>

New York City targeted language assistance at poll sites and/or election precincts with large numbers of Chinese or Korean ethnic minority voters. But Section 203 covers *language* minority voters, such as Chinese-or Korean-speakers. Unfortunately, only race and ethnic data, not language data, is available from the Census at the block level, the smallest geographic unit, which is usually congruent with a typical street block. This small level of geography was needed because census blocks could comport with election districts. In the targeting systems, ethnicity was used as a proxy for language.

This system adequately covered the minority groups at the beginning, largely because it was significantly over-inclusive. While it likely covered areas where many Chinese voters resided who were LEP, such as Chinatown, it also likely covered areas where Chinese Americans lived but were not LEP or even

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<sup>194</sup> See GAO-08-182, *supra* note 14, at 22-23, 27.

<sup>195</sup> Tucker, *supra* note 10, at 252-53 (describing different forms of targeting).

registered to vote.<sup>196</sup> Possible examples were the dormitories of Columbia University and New York University. These housing units were within election districts and the likely large number of Asian American students, who were all over 18 years of age, resulted in the placement of interpreters and bilingual ballots at polling sites. But English was most likely the primary language of the vast majority of these Asian American college students. I suspect that many also were not registered to vote in New York City but voted absentee in their home cities and states. The Asian American students who were LEP were likely not even eligible to vote in U.S. elections, as I have found many to be international students. Bilingual ballots and interpreters were not needed at the poll sites catering to these students.

I observed that this became a heightened problem after the 2000 census, when hundreds of additional poll sites were covered under the targeting formula due to the tremendous growth of the Asian American population in New York. The Board of Elections had to recruit and hire significantly more interpreters to cover the increased number of poll sites.<sup>197</sup>

In addition, under the ethnic-based targeting formula, poll sites with a higher Chinese voting age population—irrespective of citizenship, registration, or English proficiency—were entitled to more Chinese interpreters. Poll sites with a lower Chinese voting age population, but high rates of naturalization, voter registration, and limited English proficiency, would still receive fewer interpreters. The targeting formula did not contemplate need or eligibility.<sup>198</sup>

Everyone agreed that a new targeting methodology was needed. The goal shared by advocates and election officials was to design a system so that the language minority group members who needed language assistance could receive such assistance. The second generation of Section 203 implementation looked to develop a more refined targeting methodology.

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<sup>196</sup> Complaint, *supra* note 93, at 10 (complaining about an ineffective targeting system).

<sup>197</sup> See James Thomas Tucker, *The Census Bureau's 2011 Determinations of Coverage Under Section 203 of the Voting Rights Act Mandating Bilingual Voting Assistance*, 19 ASIAN AM. L.J. 171, 176-182 (2012) (discussing the scope of the 2011 determinations and the impact on Asian Americans).

<sup>198</sup> GAO-08-182, *supra* note 14, at 27 (noting that election officials commented that census data were “not accurate or detailed enough to enable them to effectively target language minority voters”).

### b. *New Targeting Methodology*

Obviously the best methodology would be to identify census blocks with large numbers of limited English, voting-age citizens by language. This methodology tracks the statutory Section 203 test for coverage. But detailed Census data at the block-level never became available. Census data for limited English proficiency, U.S. citizenship, and language group was only available at the census tract level, which often encompassed several blocks and thereby several elections districts and several poll sites.<sup>199</sup> So the second generation of Section 203 targeting methodology looked to combine voter registration with the statistical manipulation of census data.

#### i. Asian Surnames in Voter Registration Records

The U.S. Department of Justice's Section 203 enforcement since 2004 has looked almost exclusively at the numbers of minority registered voters for targeting.<sup>200</sup> But because citizens generally did not identify their race when they registered to vote, the Department used ethnic surnames matched against voter registration lists to determine the number of minority registered voters.<sup>201</sup> Though imperfect, it is a generally accepted methodology amongst political campaigners in their targeted messages and campaign literature and has satisfied courts.<sup>202</sup> The Department used the Lauderdale-Kestenbaum surname directory.<sup>203</sup> This system was implemented in the Department's Section 203 litigation against San Diego, CA; Boston, MA;<sup>204</sup> and others.<sup>205</sup> According to former Assistant

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<sup>199</sup> See, e.g., U.S. CENSUS BUREAU, 2010 CENSUS REDISTRICTING DATA (PUBLIC LAW 94-171) SUMMARY FILE, app. A at 10, 12 (2010), available at [https://www.census.gov/geo/reference/pdfs/GTC\\_10.pdf](https://www.census.gov/geo/reference/pdfs/GTC_10.pdf) (defining census blocks and tracts).

<sup>200</sup> See, e.g., Complaint, *United States v. City of Walnut*, *supra* note 104 (for Chinese and Korean voters); Complaint, *United States v. City of Bos.*, No. 05-11598 (D. Mass. July 29, 2005) (for Chinese and Vietnamese voters); Complaint, *United States v. City of Rosemead*, No. 05-5131 (C.D. Cal. July 14, 2005) (for Chinese and Vietnamese voters); Complaint, *United States v. San Diego Cnty.*, No. 04-1273 (S.D. Cal. June 23, 2004) (for Filipino and Vietnamese voters).

<sup>201</sup> See *supra* note 200 and accompanying text.

<sup>202</sup> Tucker, *supra* note 10, at 253 n.246.

<sup>203</sup> Diane S. Lauderdale & Bert Kestenbaum, *Asian American Ethnic Identification by Surname*, 19 POPULATION RES. & POL'Y REV. 283, 297-99 (2000); see also Complaint, *United States v. City of Walnut*, *supra* note 104; *United States v. City of Bos.*, *supra* note 200; Complaint, *United States v. City of Rosemead*, *supra* note 200; Complaint, *United States v. San Diego Cnty.*, *supra* note 200.

<sup>204</sup> Memorandum of Agreement and Settlement, *supra* note 146, at 7-8.

<sup>205</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 10-14; GAO-08-182, *supra* note 14, at 22.

Attorney General for Civil Rights Wan Kim, surname analysis is “a convenient starting point” in determining which voters need language assistance and how best to provide it to them. That is why many jurisdictions covered by section 203 voluntarily use surname analysis under their own state language assistance statutes.<sup>206</sup>

In 2000, Professor Diane Lauderdale and Bert Kestenbaum developed comprehensive surname lists for the six largest Asian American subgroups—Chinese, Filipino, Indian, Japanese, Korean, and Vietnamese—based on data from Social Security Administration records that included names and countries of birth. Using surname lists has obvious flaws. Irish names like “O’Hara” could be construed to be the Japanese name “Ohara.” Many non-Asians have the surname “Lee,” and have names that may not seem typically Asian, especially among Asian American women who marry and take their husband’s names and Asian children adopted by white parents or with mixed race parents. Additionally, the list is not comprehensive and only includes the most common Asian names, not Asian names that are typical but infrequent. Though they may lack precision, surnames lists, and the Lauderdale-Kestenbaum directory in particular, have become the industry standard in identifying voters by race/ ethnicity.

In this methodology the names that Lauderdale-Kestenbaum identify as Chinese (or Korean or Vietnamese, etc.) are run against voter registration lists and those election districts with large numbers of voters with Chinese surnames are targeted for language assistance. There was no longer any need to determine citizenship or voting-age since they were already registered voters.

Consistent with Department of Justice settlements and consent decrees, New York City first applied the Lauderdale-Kestenbaum surname lists against its own voter registration list to determine the number of Chinese and Korean voters.<sup>207</sup> But this methodology could still be somewhat overinclusive in that it did not consider English proficiency.<sup>208</sup> New York allows college students to register from their dormitories, reasoning that students spend the majority of the year at wherever they go to college. The dormitories of Columbia University and New York University, for instance,

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<sup>206</sup> *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55, 59 (2006) (statement of Wan J. Kim, Assistant Attorney General, Civil Rights Div.).

<sup>207</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 10-14.

<sup>208</sup> GAO-08-182, *supra* note 14, at 27.

were still targeted for language assistance using the Lauderdale-Kestenbaum directory. As a result, New York City had to refine its targeting methodology even more.

## ii. Census Data

New York City then analyzed census data to identify poll sites with LEP citizens of voting age who are Chinese or Korean.<sup>209</sup> Other covered jurisdictions such as Harris County, Texas, also analyzed demographic data from the census to target language assistance.<sup>210</sup> But these combined data are not available from the census at the block level. So the analysis first examines census tracts with large numbers of Chinese or Korean voting age populations.<sup>211</sup> It also determines the number of LEP citizens by census tract.<sup>212</sup> Using these two numbers, analysts then calculate the proportion of LEP citizens to all Chinese or Korean individuals.<sup>213</sup>

So, for example, if the Korean voting age population is 200 persons in a particular election district, and the percentage of LEP citizens (of any ethnic group) in the census tract is 25%, the Board of Elections then determines that 25% of the Korean voting age population is LEP. Admittedly the inference flaw here is that the 25% might encompass a large number of Chinese, Latino, or other language minority groups. So some LEP language minorities will not receive assistance. Nevertheless it is the second step in making this calculation. This formula also only calculates the proportion of LEP Chinese or Korean citizens for the entire census tract. There are many poll sites, which encompass even more election districts, within census tracts.

To determine the number of LEP citizens by poll site and election districts, the Board then uses statistical allocation.<sup>214</sup> Here, the LEP Chinese or Korean citizen population at the census tract level is apportioned down to the census block level, distributing it by proportion of Chinese or Korean surnamed registered voters for each census block.<sup>215</sup> In the end, poll sites having at least 35 Chinese or Korean

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<sup>209</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 10-14.

<sup>210</sup> GAO-08-182, *supra* note 14, at 22.

<sup>211</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 10-14.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 11.

<sup>214</sup> *Id.* at 11-12.

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



surname voters and 50 Chinese or LEP citizens will be targeted for language assistance.<sup>216</sup> In settlement discussions, Board of Election officials picked the number 35 saying that 35 was the average number of voters a typical poll worker assists during the entire day of elections.<sup>217</sup>

One might be concerned with the imperfect and imprecise nature of the use of census data, and assumptions and inferences being made in the allocation, but demographers often adhere to such methodologies. They are generally accurate, if not exact, in identifying LEP citizens who speak the same foreign language in a small geographical area.

### iii. Other Criteria

In addition to this statistical methodology, there are soft targeting standards that allow poll sites to be targeted for language assistance based on community feedback,<sup>218</sup> poll workers who report large numbers of Asian voters needing assistance, and requests from voters.<sup>219</sup> This usually encompasses poll sites where the minority population is growing or is small but has high turnout and high need.<sup>220</sup> Sometimes jurisdictions also employ language minority turnout as a targeting feature.<sup>221</sup>

Most smaller cities or even larger cities with relatively new and emerging Asian American voting populations are able to simply use the surname list for effective targeting. On the other hand, larger jurisdictions such as New York, Los Angeles, and San Francisco, that have more established Asian American communities with more native-born Asian Americans who primarily speak English, may need a more refined targeting methodology. The New York City Section 203 targeting methodology is the most refined and has been successful. Fewer interpreters overall are needed because the placement is more

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<sup>216</sup> *Id.* at 12.

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

<sup>218</sup> See Letter from Glenn D. Magpantay & Irene Jeon to George Gonzalez, *supra* note 124, at 4.

<sup>219</sup> GAO-08-182, *supra* note 14, at 23.

<sup>220</sup> Under this system, the Board reviews and evaluates information gathered from previous elections and other relevant sources, including data on language assistance provided as revealed by Interpreter Journals, information received as a result of telephone calls to the Board's phone bank on the day of an election, suggestions from interested persons and organizations, and may select additional Poll Sites for language assistance based on such information, even though such Poll Sites may not satisfy the targeting formula described above. See Chinese-Korean Language Assistance Plan, *supra* note 173, at 10-14.

<sup>221</sup> Agreement and Order, City of Walnut, *supra* note 128, at 8.

accurate and this has led to fewer complaints about the lack of assistance.

#### D. *Translated Websites*

Today, most information from election agencies is conveyed through the Internet. Local election officials have increasingly posted voter notices, voting materials, maps of poll sites, and even sample ballots on their websites. In addition to significant cost savings, the internet has also made voting information more accessible. However, technological obstacles have made compliance with Section 203 challenging at times.<sup>222</sup> It is also important to note that technology changes rapidly and though some examples here are from 2004, they illustrate the larger systemic and enduring problems of rendering language assistance through the internet.

In the first generation of Section 203 compliance—and maybe the first generation of election websites as well—translated materials were simply posted online as PDF documents to download.<sup>223</sup> Users would have to navigate an English page to find specific resources and they would have to point and click on a file that contained the translated version.<sup>224</sup> The first set of technological barriers was whether the website could accommodate a translation of the hyperlink so LEP voters would be able to find the link to see the information in their languages. When sites were entirely in English, including the URLs, voters would never be able to find the resources they needed. They would have to rely on third parties who read English to navigate the system for them and print out the translated documents. This was much too cumbersome.

It was especially frustrating because abroad, many people are using websites in their native language and those websites are immediately accessible here in the United States. Major Internet services like Google and Yahoo have websites fully translated in Asian languages and one can completely surf and navigate in Chinese, Korean or Japanese.<sup>225</sup> The U.S.

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<sup>222</sup> See JoNel Newman, *Ensuring That Florida's Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 357-58 (2007) (discussing, briefly, how the Voting Rights Act does not adequately address new technologies in voting).

<sup>223</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 1. Sometimes, voter information on websites was not even fully translated. First Amended Complaint, *supra* note 110, at 9-10.

<sup>224</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 1.

<sup>225</sup> See, e.g., YBMSISA.COM, <http://kr.dic.yahoo.com/search/eng/> (last visited Sept. 11, 2014) (Yahoo!'s Korean homepage).

Census Bureau has also found that among all racial groups, Asian Americans had the highest proportionate share of Internet users.<sup>226</sup>

Some jurisdictions provided no access to translated voting information at all or had election websites that were difficult, if not impossible, to navigate when trying to access translated voting materials. The Bergen County, New Jersey's Superintendent of Elections' website has links in English to translated Korean information.<sup>227</sup>

The second generation of Section 203 compliance looks at fully translated and navigable websites in Asian languages. This has already been done in Spanish because Spanish generally uses the English alphabet. Programming the HTML for a website in Spanish presented few problems. But the Asian languages, most notably Chinese, Korean, and Japanese, which are character or symbol based, presented more significant obstacles.

At first, government websites tended to be more linear and provided only one-way (outward) communication. They were incapable of translating pages into other languages. Today government websites are much more dynamic; they offer two-way communication, where voters can get information, request information, change their personal information in a record, and can take a survey. As more and more voting information is transferred on-line, the old fashioned posting of PDFs of translated materials is increasingly becoming inadequate. Elections officials will need to develop fully translated websites.<sup>228</sup> Elections websites also contained poor, inaccurate translations. Election officials must review and proofread the translations on their website, rather than exclusively relying on free automated translation systems that lack any quality controls.

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<sup>226</sup> *Computer and Internet Use in the United States: October 2009*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/hhes/computer/publications/2009.html> (last visited Nov. 4, 2014) (click "Table 1. Reported Internet Usage for Households, by Selected Householder Characteristics: 2009") (noting that 80% of Asian Americans live in a household with Internet).

<sup>227</sup> *Superintendent of Elections*, BERGEN COUNTY., NEW JERSEY, <http://www.co.bergen.nj.us/elections/default.html> (last visited Nov. 4, 2014).

<sup>228</sup> See Letter from Glenn D. Magpantay, Staff Attorney, AALDEF to John Ravitz, George Gonzalez, & Pamela Perkins, N.Y.C Bd. of Elections, Attach. D (June 16, 2005) (providing links to and descriptions of multilingual websites used by several Boards of Elections in California) (on file with author).

Suburban Cook County, Illinois' elections website uses Google Translate as the sole language assistance tool.<sup>229</sup> The errors that appeared in the past throughout the website clearly illustrate a failure to proofread. For example, in the past, if the viewer searched for her voter information—to confirm her registration or find her assigned poll site—by using the Chinese translation function, she was instructed to input her “last four nuclear submarines,” instead of the last four digits of her social security number.<sup>230</sup>

A current example of a mistranslation appears when voters search for a translated listing of candidates and their party affiliations on the “Candidate Filing” page. The abbreviation “DEM” is translated into Chinese not as “Democratic Party” but as “Digital Elevation Model.” Specifically, see the fourth column from the right:

管辖区	办公室	候选人	党派	地址	申请日期	状态
大都会水填海区, MWRD	专员	缙布拉岸	数字高程模型	9232斯言大道埃文斯顿, 60203	2011年11月28日 09:00!	
大都会水填海区, MWRD	专员	卡里光斯蒂尔	数字高程模型	7720南Chappel大道芝加哥, 60649	2011年11月28日 09:00!	
大都会水填海区, MWRD	专员	帕特里克·戴利·汤普森	数字高程模型	3536南洛大道芝加哥, 60609	2011年11月28日 09:00!	

In addition to mistranslating terms, Google Translate also directly translates any errors in the original, English version. Though errors such as extra spaces in words are not problematic in the English version, they cause nonsensical results if translated into another language using Google Translate.

<sup>229</sup> *Suburban Cook County Elections*, ELECTIONS—SUBURBAN COOK COUNTY, <http://www.cookcountyclerk.com/elections/pages/default.aspx> (last visited Oct. 2, 2012) (see top right for available language selections).

<sup>230</sup> Since the time of my initial research to this publication date, the website has changed somewhat.

Jurisdictions must review the translated webpages of their elections websites. They must correct easily identifiable translation errors. Elections officials must also take more care in ensuring that LEP voters can read and navigate websites as easily as English proficient voters can. Usually this will take dedicated staff to commit to this work. Moreover, federal monitoring of election websites through the year, in addition to poll sites only on Election Day, will ensure that language assistance is sufficiently “effective” to allow LEP voter groups to be informed of and to participate in voting.<sup>231</sup>

### *E. Affirmative Action for Poll Workers*

Enacting an affirmative action program in the hiring of poll workers can streamline language assistance and create more welcoming poll sites to accommodate a more racially diverse electorate. Language assistance is not only rendered through the translation of ballots, voting materials, and signs, but also the provision for oral language assistance available at poll sites on Election Day. It includes the recruitment and appointment of bilingual poll workers to assist LEP voters.<sup>232</sup>

The first generation of Section 203 compliance problems concerned difficulties in the recruitment and appointment of interpreters<sup>233</sup> whose positions were not necessarily codified in state election laws. Some election laws are explicit as to who may be present inside poll sites.<sup>234</sup> Local elections officials reasoned that because the appointment and placement of interpreters was necessary to comply with federal law, changes to state laws were not needed. One ongoing problem was hiring a sufficient number of interpreters.<sup>235</sup>

Under many state laws, poll workers typically have to be citizens of the United States, over 18 years old, registered to

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<sup>231</sup> See 28 C.F.R., § 55.2(b) (2012).

<sup>232</sup> See Meaghan Field, *Voting Equality and Educational Equality: Is the Former Possible Without the Latter and Are Bilingual Ballots A Sensible Response to Education Discrimination?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 385, 413 (2011) (arguing that interpreters may be more effective than bilingual ballots due to the education level of minority communities and that the education disparity needs to be solved first).

<sup>233</sup> GAO-08-182, *supra* note 14, at 26; *see also* Cartagena, *supra* note 13, at 507-08 (discussing New York’s failure to train its interpreters).

<sup>234</sup> *See, e.g.*, N.J. STAT. ANN. 19:15-8 (West 2005) (providing a list of “[p]ersons allowed in polling places”).

<sup>235</sup> *See* GAO-08-182, *supra* note 14, at 26; *see also* Complaint, *supra* note 93, at 9.

vote,<sup>236</sup> and enrolled in one of the major political parties.<sup>237</sup> In many jurisdictions, elections officials exempted interpreters from these requirements.<sup>238</sup> Oftentimes the Asian American population had not attained the overall naturalized rates or the requisite enrollments in both parties for a sufficient number of individuals to meet these requirements. Even when they were registered to vote, certain Asian American groups, in particular Chinese Americans, have larger pluralities of voters who chose not to enroll in any political party.<sup>239</sup> So jurisdictions relaxed the standards in order to ensure they could hire qualified bilingual interpreters.

But the role of interpreters is circumscribed. Their job is to interpret for official poll workers,<sup>240</sup> sometimes called inspectors, who are specifically authorized under state law to assist voters.<sup>241</sup> The interpreter's job is to interpret in the Asian language the instructions and directions of poll inspectors and then to repeat, in English, the responses or questions of the voter.<sup>242</sup> Typically after serving a dozen voters, interpreters often became sufficiently familiar with the voting process and are able to directly assist and direct voters. Election Day can run more smoothly when poll inspectors are satisfied with the interpreters' knowledge of election procedures.

Sometimes this does not occur and at times poll inspectors have segregated voters,<sup>243</sup> kept them subordinate,<sup>244</sup> and even accused them of improper electioneering without sufficient information.<sup>245</sup> Poll inspectors accused interpreters of cheating because they could not understand the interpreters' conversations with voters, but saw them point to a political party or candidate in the course of their translation.<sup>246</sup> All the while

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<sup>236</sup> N.Y. ELEC. LAW § 3-400(6) (McKinney 2014); *see also* BOARD OF ELECTIONS IN THE CITY OF NEW YORK: POLL WORKER APPLICATION, *available at* <http://www.vote.nyc.ny.us/downloads/pdf/forms/boe/pollworkers/PollworkerApplication.pdf>.

<sup>237</sup> *See* N.Y. ELEC. LAW. § 3-400(6).

<sup>238</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 7.

<sup>239</sup> AALDEF, *supra* note 3, at 7 (noting that 38% of Chinese American voters were not enrolled in any political party, the highest among all Asian ethnic groups surveyed).

<sup>240</sup> POLL WORKER'S MANUAL, *supra* note 109, at 17.

<sup>241</sup> *See* N.Y. ELEC. LAW § 3-404(1).

<sup>242</sup> POLL WORKER'S MANUAL, *supra* note 109, at 89-90.

<sup>243</sup> AALDEF 2004, *supra* note 100, at 16.

<sup>244</sup> AALDEF 2008 *supra* note 90, at 14; AALDEF 2004, *supra* note 100, at 10; Letter from Glenn D. Magpantay & Irene Jeon, *supra* note 124 (reviewing observations from the 2010 Primary Election).

<sup>245</sup> *Compare* OBSTACLES TO FULL AND EQUAL ACCESS, *supra* note 90, at 4.

<sup>246</sup> Letter from Glenn D. Magpantay, Democracy Prog. Dir., Asian Am. Legal Def. & Educ. Fund, to Dawn Sandow, Deputy Exec. Dir., & Pamela Perkins, Admin. Manager, N.Y.C. Bd. of Elections (Dec. 10, 2010) (reviewing observations from the 2010 General Election).

what the interpreter most likely said in Chinese was “Here are the Candidates for Governor” and then pointed.<sup>247</sup> Through ongoing complaints and observations, election officials have better understood that serious accusations of impropriety must be based in more than biased assumptions of guilt without more.<sup>248</sup>

In this second generation of Section 203 enforcement, the requirement of providing language assistance had gone beyond the hiring of interpreters,<sup>249</sup> and moved towards the full-fledged appointment of bilingual poll inspectors. Observers have found that bilingual poll inspectors have streamlined assistance for voters.

Poll inspectors carry the legal authority to administer elections.<sup>250</sup> They can challenge people’s eligibility to vote and handle ballots.<sup>251</sup> State law often requires at least two poll inspectors of different political parties<sup>252</sup> to counter fraud. In addition, having Asian Americans in positions of authority signals that the poll sites that serve LEP populations is welcoming to LEP voters.

Over the years, Asian Americans have developed the political maturity to move into these positions. A sufficient number of Asian Americans have naturalized and registered to vote and should be eligible for appointment. The most qualified poll inspectors should be interpreters who have already worked the poll on Election Day. But would it be so easy to make experience the basis of qualifications for appointment?

Leaders of the political parties typically appoint poll inspectors<sup>253</sup> and have applied additional considerations. They often give preference to those who are active members of the political party,<sup>254</sup> or who have worked as inspectors in many prior elections. But their demographics may not resemble a changing neighborhood. Asian Americans are often newer residents. Sometimes they are met with hostility in the local political

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

<sup>248</sup> This author has often seen election officials ask poll inspectors who accused interpreters of improper electioneering: “How do you know that they were cheating.” The poll inspectors did not speak Chinese and so they said: “Because I know it.”

<sup>249</sup> One commentator suggested, instead, developing federally certified interpreters as a solution. Benson, *supra* note 5, at 322-323.

<sup>250</sup> N.Y. ELEC. LAW § 3-402 (McKinney 2007).

<sup>251</sup> POLL WORKER’S MANUAL, *supra* note 109, at 16, 60-68.

<sup>252</sup> N.Y. ELEC. LAW § 3-400.3.

<sup>253</sup> *Id.* § 3-404.2

<sup>254</sup> This author remembers when one Commissioner said to voting rights advocates that the way to get more Chinese interpreters is to get Chinese involved in the local Republican Club. Notwithstanding that this significantly compromises non-partisanship, there was a sincerity and practicality in it.

establishments. Very often, the first string of appointments encompass old-time party members who tend to be white.

One stopgap effort has been to request and encourage political party leaders to find and appoint bilingual persons fluent in the needed Asian languages as poll workers.<sup>255</sup> But a request of party officials is merely a request. Others have worked longer for the party, or individuals believe they are entitled to appointment based on their years of service. I have found that bilingual candidates, who are often Asian Americans, have been commonly passed over.

Though affirmative action may be controversial, it would be exceedingly helpful in the election context to streamline language assistance and create more welcoming poll sites for racial and ethnic minority voters. Sometimes, merely the suggestion of imposing affirmative action could be sufficient to remedy the problems of diversity without formally implementing an affirmative action program. Here, political parties can be presented with the choice of either voluntarily diversifying their appointments of poll workers, or be compelled through an affirmative action policy to diversify. Then their authority to appoint poll workers may be relegated to another with the aim of hiring more poll workers with the linguistic diversity to effectively operate the poll site.<sup>256</sup> Section 203 has pushed elections officials to recruit and appoint more diverse poll workers.

### III. LOOKING FORWARD

The current issues in Section 203 enforcement for Asian languages are broad. These second-generation compliance issues involve addressing new questions about the desirability of multilingual ballots; the transliteration of candidate names on ballots; more refined methodologies to target language assistance; technological obstacles in translating election websites; and the consideration of using affirmative action in the hiring and appointment of racially diverse bilingual poll workers.

The electoral sound barriers exemplified in these second-generation Section 203 compliance issues require scholars, advocates, policy-makers, and lawyers to assess matters and consider new ways to look forward. In some places,

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<sup>255</sup> Chinese-Korean Language Assistance Plan, *supra* note 173, at 5-6.

<sup>256</sup> N.Y. ELEC. LAW § 3-404.7 (stating that if party leaders do not appoint, the Board of Election can appoint election inspectors).



election officials and the public at large have become more accepting of a diverse population. However, general anti-immigrant sentiment in much of middle America and among policy-makers<sup>257</sup> may contribute to poll workers and elections officials' unwillingness to accommodate new Americans.<sup>258</sup> Many hold the mistaken belief that full English proficiency—sufficient enough to read a complicated ballot proposition—makes one a valid United States citizen.<sup>259</sup>

Moreover, the cavalier attitude in providing language assistance to Asian American voters may also be due to the “model minority” myth.<sup>260</sup> Because Asian Americans as a whole are perceived as highly successful in education, business, sports, and the arts, their need for “assistance” is not as dire as other minority groups.<sup>261</sup> Notwithstanding these reasons, the guarantees for access to the fundamental right to vote cannot be compromised.

One scholar, Angelo N. Ancheta, wrote that the language rights provisions of the Voting Rights Act embody three distinct but related models of anti-discrimination enforcement:

One model—a structural remediation model—is embodied in the requirements of sections 4(f)(4) and 203 of the Act. Designed to be temporary and limited in scope, the mandates in these sections address the electoral and educational discrimination that Congress has documented against language minorities by requiring oral and written assistance in communities with large minority populations. A second model—a traditional anti-discrimination model—is embodied in section

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<sup>257</sup> See IMMIGRANTS OUT!, *supra* note 8, at 1; see also Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 299-304 (1989) (arguing that the English-only movement is contemporary xenophobia).

<sup>258</sup> See, e.g., Ao, *supra* note 21, at 383-87 (describing how anti-immigrant rhetoric was used to derail the reauthorization of section 203); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 202 n.121 (2007). In Persily's article, pages 183-85 refer to heated debates in the Senate, not in Congress. It speaks to the constitutionality and the desirability of the legislation in reauthorizing it. As a result of the heated Senate discussions, “[a]t various points it appeared that the legislation might be held over to the next Congress especially once the language assistance provisions of section 203 became framed by the parallel debate over immigration reform.” Persily, *supra* note 258, at 183-85.

<sup>259</sup> See also John J. Miller, *English Is Broken Here: Bilingual Ballots Are Bad for Democracy*, 79 POL'Y REV. 54, 54 (1996), available at <http://www.unz.org/Pub/PolicyRev-1996sep-00054?View=PDFPages>.

<sup>260</sup> Chang, *supra* note 9, at 1258-59.

<sup>261</sup> Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth”* 100 NW. U. L. REV. 331, 336 (2006) (discussing how the “model minority” stereotype deprives Asian Americans of the attention and assistance they need and deserve from the government); Wu, *supra* note 9, at 225-27 (discussing historical instances of Asians being viewed as a model minority and how it is used to attack affirmative action for minorities).

2 of the Act, which is a permanent provision that prohibits discrimination on the basis of race, color, or membership in a language minority group. A third model—an accommodation model—is embodied in section 208, which Congress added in 1982 primarily to assist disabled and illiterate voters, but which has evolved into a guarantee of assistance for limited[] English proficient voters as well.<sup>262</sup>

As Professor Ancheta describes, these provisions form a network of language rights under the Voting Rights Act,<sup>263</sup> but as I have illustrated, the needs and geographic concentration of LEP voters are greater than the Act addresses.<sup>264</sup>

Another scholar, Jocelyn F. Benson, has written forcefully about the need for language assistance and recommended Congressional action, including new federally certified interpreters to assist LEP voters on Election Day.<sup>265</sup> Interpreters would serve as poll workers to assist voters on Election Day at poll sites.<sup>266</sup> They would be appointed when local elections officials do not hire interpreters to assist LEP voters.<sup>267</sup>

The other commentator who has written extensively on Section 203 is voting rights lawyer and professor James Tucker.<sup>268</sup> Professor Tucker's works are perhaps the best sources of documentation of the realities in the national implementation of Section 203 from the election administration perspective,<sup>269</sup> as well as a detailed historical account of the congressional fight to reauthorize and extend Section 203.<sup>270</sup> While Professor Tucker's writings are inclusive of each of the language minority groups covered under Section 203—Latinos, Native Americans, and Asian Americans—the challenges facing Asian Americans deserve more review, as I have tried to offer in this article.

Local elections officials will continue to struggle with full and competent compliance with Section 203. Civil rights groups and the Department of Justice are critical watchdogs in this process. The next assessment of jurisdictions and

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<sup>262</sup> Ancheta, *supra* note 5 at 165; *but see* Rodriguez, *supra* note 10, at 1158-59 (discussing the justification of bilingual ballots on a pure access theory).

<sup>263</sup> *See* Ancheta, *supra* note 5, at 176-77.

<sup>264</sup> *See supra* Table, Part I.B.; *see also* Newman, *supra* note 222, at 360 (discussing the Voting Rights Act's shortcomings in addressing the needs of Florida's language minority populations).

<sup>265</sup> Benson, *supra* note 5, at 251, 322-23.

<sup>266</sup> *See id.*

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

<sup>268</sup> *See* Tucker, *supra* note 10; Tucker, *supra* note 14.

<sup>269</sup> *See* Tucker & Espino, *supra* note 89.

<sup>270</sup> *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS (James Thomas Tucker ed., 2009); *see also* Tucker, *supra* note 22.

languages to be covered under Section 203 will come out in 2015.<sup>271</sup> Then, election officials will have relatively little time to prepare for the surge of new voters excited to vote for the next President of the United States in 2016.<sup>272</sup> Concrete steps can be taken to ensure the promise the democracy for all Americans.

Beyond the second generation of Section 203 compliance issues described here—multilingual ballots, fully translated ballots that include transliterating candidate names, effective targeting methodologies, effective voting information on the internet, and the hiring of more racially diverse bilingual poll workers—advocates must consider the next steps looking forward.

I believe there are two necessary steps that voting rights proponents must advocate for it to overcome obstacles in the second generation of Section 203 compliance. The creation of community advisory groups is one such step. Community advisory groups have created structures to ensure on-going improvements in the implementation of local language assistance programs. In addition, in light of the almost unanimous use of settlement agreements to resolve Section 203 enforcement actions, advocates must look to settlement plans as controlling authority.

#### A. *Advisory Groups*

The Department of Justice's recent enforcement through Section 203 litigation has pressed for the development of advisory groups made up of community members to advise local elections officials in the development, implementation, and on-going maintenance of their language assistance programs.<sup>273</sup> These advisory groups can meaningfully address the second generation of Section 203 compliance on an ongoing basis. They create the flexibility and ability needed to respond to future changes.<sup>274</sup> Indeed, Section 203 promotes the consultation of representatives of language minority voters in developing

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<sup>271</sup> See H.R. 9, 109th Cong. § 8 (2006).

<sup>272</sup> See Levitt, *supra* note 177, at 487 (“The more effort dedicated, before an election, to designing poll sites so that they most efficiently accommodate persons with disabilities, or providing bilingual pollworkers or readily accessible translated materials—via paper or electronically—in areas with significant populations of voters with limited English proficiency, the smoother these procedures are likely to be on Election Day.”).

<sup>273</sup> Memorandum of Agreement and Settlement, *supra* note 146, at 14; Agreement and Order, *supra* note 128, at 11; Proposed Consent Decree, Order, and Judgment, *supra* note 115, at 9.

<sup>274</sup> See generally GAO-08-182, *supra* note 14, at 21-22.

language assistance programs.<sup>275</sup> Advocates have encouraged local election administrators to continue working closely with community groups to assess the quality of language assistance efforts and avert possible future problems.<sup>276</sup>

Some election officials viewed this as regular evaluation to provide the most effective and efficient language assistance services to voters.<sup>277</sup> Advisory groups are typically open to all interested individuals and organizations that work with or serve language minority communities and who are interested in developing election related language assistance efforts.<sup>278</sup> Materials are provided to the group including the language assistance compliance plan, sample voting materials, lists of poll sites and precincts to be targeted for language assistance, and sample translated ballots.<sup>279</sup> Election officials also receive reports or comments from interested persons or organizations regarding their observations of the language assistance programs on Election Day.<sup>280</sup> Generally this process has worked very well. For instance, comments from interested persons have provided invaluable input to elections officials on where to place interpreters due to new population growth or increases in voter registration.

On the other hand, some other jurisdictions have been unwilling, or even hostile, at the suggestion of any third party oversight.<sup>281</sup> The Hawai'i Office of Elections staunchly resisted any community advisory groups in a Section 203 private enforcement action.<sup>282</sup> In the settlement, they prevailed in never having to formally consider or receive any community feedback or input.<sup>283</sup>

Other jurisdictions instituted community advisory committees to thwart voting rights lawsuits. Boston Mayor Thomas Menino created an Election Task Force made of

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<sup>275</sup> See also Tucker & Espino, *supra* note 89, at 213-15 (discussing the importance of engaging in outreach to community organizations and members of the covered language groups to ensure effective language assistance).

<sup>276</sup> Letter from Frank Tse, Asian Law Caucus, to Glenn D. Magpantay, Asian Am. Legal Def. & Educ. Fund 1 (Aug. 10, 1999) (discussing the Bay Area Section 203 Monitoring 1998-99 Report) (on file with author).

<sup>277</sup> GAO-08-182, *supra* note 14, at 31, 35-36.

<sup>278</sup> See Chinese-Korean Language Assistance Plan, *supra* note 173, at 22-24.

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

<sup>280</sup> *Id.*

<sup>281</sup> See Letter from Eric A. Seitz, Attorney at Law, to Judge Barry M. Kurren, United State Dist. Court Magistrate Judge 3 (July 28, 2010) (discussing *Chen v. State of Hawai'i*, Civ No. 10-00245 SOM-BMK) (on file with author).

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

members of language minority, racial minority and government reform groups.<sup>284</sup> The Task Force was announced shortly (and strategically) after the Department of Justice filed its lawsuit against the City of Boston for anti-Asian voter discrimination.<sup>285</sup> For several years prior, community groups pressed for oversight and a response to voting complaints.<sup>286</sup> The Mayor's office was silent until the lawsuit.<sup>287</sup> The Mayor's Election Task Force effort was codified in the settlement agreement<sup>288</sup> and the Task Force has worked well in advising election officials in identifying voting barriers and suggesting improvements.

Community advisory groups, more generally, have been very helpful providing input to local election officials on language assistance compliance programs required under Section 203.<sup>289</sup> Moreover, they have the added benefit of engaging language minority community groups to assist election officials in reviewing translations, educating voters, and recruiting interpreters. Such collaborative models are not only encouraged but have been instituted under the law.

## B. Settlements

In addressing the second generation of Section 203 compliance problems, the practice of Section 203 enforcement has changed considerably since 2004. The first generation of enforcement was much more amicable and involved government attorneys encouraging local election officials to comply. The second generation involved more aggressive approaches, including court actions. The drawback to such an approach, however, is that virtually every Section 203 case settled out of court with no judicial opinion.<sup>290</sup> This presents some concerns

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<sup>284</sup> Memorandum of Agreement and Settlement, *supra* note 146, at 14-15.

<sup>285</sup> See *id.*; Donovan Slack, *Mayor Urged to Settle Elections Suit*, BOSTON GLOBE (Aug. 16, 2005), available at [http://www.boston.com/news/local/massachusetts/articles/2005/08/16/mayor\\_urged\\_to\\_settle\\_elections\\_suit/](http://www.boston.com/news/local/massachusetts/articles/2005/08/16/mayor_urged_to_settle_elections_suit/); Donovan Slack, *Menino Names Voting Panel*, BOSTON GLOBE (Aug. 4, 2005), available at [http://www.boston.com/news/local/massachusetts/articles/2005/08/04/menino\\_names\\_voting\\_panel/](http://www.boston.com/news/local/massachusetts/articles/2005/08/04/menino_names_voting_panel/).

<sup>286</sup> Complaint in Intervention at 6, *United States v. City of Bos.*, No. 05-11598 (D. Mass. Sept. 9, 2005) (noting problems occurring after the Preliminary 2003, General 2003, Primary 2004, and General 2004 elections in Boston).

<sup>287</sup> See *id.* at ex. A; Memorandum of Law in Support of Asian American and Latinos' Motion to Intervene as Plaintiffs, *supra* note 139, at 3.

<sup>288</sup> Memorandum of Agreement and Settlement, *supra* note 146 at 14.

<sup>289</sup> See GAO-08-182, *supra* note 14, at 20-21.

<sup>290</sup> See, e.g., Settlement and Release Agreement, *Chen et al., v. State of Haw.*, No. 10-00245 (D. Haw. Dec. 2, 2010). Joint Motion for Interlocutory Order Authorizing the Appointment of Federal Examiners and for Conditional Dismissal Pursuant to Rule 41(a)(2), *United States v. City of Bos.*, No. 1:05-cv-11598 (D. Mass Oct. 18, 2005), ECF No. 22.

under our current system of law that relies heavily on the precedential value of findings of fact and law by other courts.<sup>291</sup>

From the first point in which jurisdictions were covered under Section 203, the Department of Justice sent federal observers and attorneys to jurisdictions to monitor their compliance with Section 203.<sup>292</sup> Federal observers and attorneys recorded instances of missing translated signs, ballots, and interpreters. They interviewed voters about their interactions<sup>293</sup> and such interviews are *per se* admissible in any action.<sup>294</sup> The Department often sent, sometimes routinely, observers to jurisdictions and met with local election officials before and after Election Days to encourage them to improve their efforts.<sup>295</sup> There was almost no litigation.

The efforts were generally positive. Most jurisdictions made substantial efforts to implement new language assistance programs and continued to comply with Section 203.<sup>296</sup> However, in some instances, advocates also monitored elections and observed many of the same first generation problems occurring.<sup>297</sup> Poll workers hostile toward Asian American and LEP voters were re-appointed in subsequent elections, translated signs that were missing in prior elections remained missing, and shortages of interpreters continued with few meaningful efforts made to expand recruitment.<sup>298</sup> Advocates complained through phone calls, public hearings, and official complaint letters.<sup>299</sup> Election officials would receive the letters but rarely respond.<sup>300</sup> Language minority groups experienced a history of frustration in having their concerns addressed.<sup>301</sup>

After 2000, the Department of Justice became much more aggressive in its enforcement of Section 203.<sup>302</sup> The

<sup>291</sup> See Benson, *supra* note 5, at 323-24 (discussing the need for great involvement of courts in Section 203 actions).

<sup>292</sup> 52 U.S.C. § 10305 (2014); see also Cartagena, *supra* note 13, at 516-17 (noting that in New York, observers have been appointed since 1985).

<sup>293</sup> See Tucker, *supra* note 10, at 213.

<sup>294</sup> See *id.* at 214 (citing 52 U.S.C. § 10305f).

<sup>295</sup> Complaint, *supra* note 93, at 7.

<sup>296</sup> See, e.g., AALDEF, *supra* note 65.

<sup>297</sup> Complaint in Intervention, *supra* note 286, at 7-8.

<sup>298</sup> *Id.* at 8-11.

<sup>299</sup> *Id.* at 11 (alleging that complaints were submitted after the Primary and General Elections in 2005, 2004, 2003, 2002, 2001, 2000, 1998).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* (alleging that complaints were submitted after the Primary and General Elections in 2005, 2004, 2003, 2002, 2001, 2000, 1998 with no response).

<sup>302</sup> See *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55, 59 (2006) (statement of Wan J. Kim, Assistant Attorney Gen., Civil Rights Div.).

Department filed a number of legal actions against jurisdictions for non-compliance.<sup>303</sup> The new set of case filings encouraged greater compliance with Section 203, even in those jurisdictions that were never sued. All the cases generated more robust Section 203 compliance.

All of the cases, however, settled out of court.<sup>304</sup> There were very few judicial opinions.<sup>305</sup> Every case settled because the parties resisted having to go to trial, choosing rather to invest in the resolution of the suit instead of developing witnesses, collecting facts, doing through discovery. As a result, no jurisdiction had to admit any violation of law.<sup>306</sup> The settlements expressly say: “The parties waive a hearing and entry of findings of facts and conclusions of law on all issues involved” and that the defendants are “committed to complying fully with the requirements of Section 203 in future elections.”<sup>307</sup> In the end, many agreed that settlement was much more favorable.

The American legal system, however, involves judicial decision-making at its core.<sup>308</sup> There are consequences when settlements are almost always used in the enforcement of any law.<sup>309</sup> Most notably, settlements are not publically reported. They are listed on the website of the U.S. Department of Justice, but they can be removed at any time. They also contain no fact-finding, legal reasoning, or conclusions of law.

The cases settle with a judicially approved and enforced remedy, but when the parties need to return to court for further clarification or unforeseen differences, the lack of

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<sup>303</sup> *Cases Raising Claims under Section 2 of the Voting Rights Act*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/vot/litigation/caselist.php> (last visited Oct. 28, 2014). I have found that these first general actions were filed under a Justice Department under Democratic Administration, namely President Clinton. The second generation and more aggressive enforcement was under a Republican administration, George W. Bush. It is curious to me that under George H.W. Bush, commentators have noted that the first Bush pressed for majority-minority redistricting plans that significantly increased the representation of minority Members of Congress. It raises the question for me whether Republican or Democratic Administrations are better for minority voters.

<sup>304</sup> See GAO-08-182, *supra* note 14, at App. III at 62.

<sup>305</sup> See Transcript of Oral Argument, *supra* note 17 at 8.

<sup>306</sup> See Memorandum of Agreement and Settlement, *supra* note 146, at 2-3; Proposed Consent Decree, Order, and Judgment, *supra* note 115, at 3 (describing the settlement as one “[t]o avoid protracted and costly litigation”) at 3.

<sup>307</sup> See, e.g., Agreement and Order, *supra* note 128, at 3-4; Proposed Consent Decree, Order, and Judgment, *supra* note 115, at 3-4.

<sup>308</sup> Karl N. Llewellyn, *Case Law*, in 3 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 249 (Edwin R. Seligman & Alvin Johnson eds., 1930).

<sup>309</sup> See 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 (2002).

evidence, trial, and judicial opinion leaves the court impotent to revisit the matter.<sup>310</sup> In one hearing, a United States Circuit Judge noted that “a federal court can override state law if it is a necessary and appropriate remedy for a constitutional violation . . . [but because a settlement was agreed to,] there has been no finding [of] a violation, and the city [defendant] has not admitted a violation.”<sup>311</sup>

When courts seek guidance on Section 203 matters, there are few legal authorities. The doctrine of precedent, also known as the principle of *stare decisis*, becomes difficult to apply. In one hearing before a three-judge panel, both a United States Circuit Judge and United States District Judge commented that they could not find any case in the United States with respect to Chinese language assistance under the Voting Rights Act.<sup>312</sup> One commentator noted that such settlements and other court orders need better enforcement by the courts.<sup>313</sup> Jurists should not feel so restrained so as to not undertake a judicial finding, draft a judicial opinion, and impose a judicial remedy.<sup>314</sup>

Nevertheless, the abundant use of settlements poses concerns for the future of Section 203 enforcement. Perhaps, in the lack of judicial opinions and findings of fact,<sup>315</sup> settlements will become the legal authority for future courts and litigants to follow. Courts can cite to settlements in factually analogous cases to order similar remedies.

## CONCLUSION

Electoral sound barriers render the constitutional right to vote futile. The Language Assistance Provisions of the Voting Rights Act were designed to ensure that language minority voters can fully participate in elections. Under the Act, the Attorney General must determine whether the jurisdictions that are covered for language assistance have

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<sup>310</sup> See Transcript of Oral Argument, *supra* note 17, at 17 (U.S. Circuit Judge Sandra Lynch commenting that a federal court can override state law to remedy a constitutional violation, but because a settlement was agreed to, there was no finding of a violation and no admission of a violation).

<sup>311</sup> *Id.* (comments of U.S. District Judge Patti Saris); see also Memorandum of Agreement and Settlement, *supra* note 146 at 4.

<sup>312</sup> See Transcript of Oral Argument, *supra* note 17 at 8 (comments of U.S. District Judge Patti Saris); *id.* at 17 (comments of U.S. Circuit Judge Sandra Lynch).

<sup>313</sup> See Benson, *supra* note 5, at 323-28.

<sup>314</sup> See *id.*

<sup>315</sup> See, e.g., Transcript of Oral Argument, *supra* note 17, at 8.



taken all reasonable steps to achieve the goal of increasing voting participation of the covered language minority groups.<sup>316</sup>

The first generation of compliance focused on basic issues arising from the initial implementation of new requirements. Some jurisdictions still resist fully complying with Section 203's mandates. But in the past few years, the second generation of compliance issues has been more deliberative. More recently, since 2004, elections officials have grappled with the desirability of multilingual ballots, the transliteration of candidate names on ballots, new methodologies to target language assistance in areas where they are needed, technological obstacles in translating voting information on the internet, and the affirmative hiring of racially diverse bilingual poll workers.

The U.S. Census Bureau and the U.S. Department of Justice are expected to release the new determinations of Section 203 jurisdictions and languages in 2015. And the Presidential Election in 2016 will likely see a surge of new voters. Judges, lawyers, and elections officials must be prepared to accommodate the linguistic diversity of the American polity<sup>317</sup> by examining past problems and expecting comprehensive implementation plans in the future. The promise of inclusive American democracy requires this.

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<sup>316</sup> 28 C.F.R § 55.2(b)(1)-(2) (2012).

<sup>317</sup> See Rodríguez, *supra* note 12, at 136.