

M E M O R A N D U M

To: Nate Persily
From: Jacob Shelly & Matt Forbes
Re: Language Challenges and Voting – Version 2
Date: June 17, 2013

I. Introduction

Despite an array of federal, state, and local laws and practices requiring accommodations for voters of limited English proficiency, the need for assistance is often unmet. This Memo summarizes existing laws, catalogues nine categories of problems confronting language minorities (with anecdotes from recent elections), and proposes seven solutions that would supplement the existing statutory scheme to address the identified problems.

We arrived at three broad conclusions. First, existing scholarship and commentary often focuses on racial, ethnic, and country of origin discrimination, instead of language issues. These issues are difficult but important to distinguish, and this memo attempts to do so. Second, most problems appear to come from inadequate training of election workers, failure to properly implement language assistance, and lack of awareness about legal responsibilities. Finally, although the Voting Rights Act could be amended to require jurisdictions to provide language assistance to additional in-need language communities, it appears that enforcement and implementation of existing federal, state, and local law—by all of the relevant authorities—is the larger problem.

II. Federal and state laws with minority language protection provisions:**A. Voting Rights Act Minority Language Assistance Provisions**

In 1975, Congress amended the Voting Rights Act of 1965, adding two provisions intended to remove barriers preventing some language minorities from accessing the electoral process.¹ For the purposes of both Section 203 and Section 4(f)(4), “language minority” applies to “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”² Congress justified both provisions as enforcing the Fourteenth and Fifteenth Amendments.³

¹ Voting Rights Amendments of 1975, Pub. L. No. 94–73, 89 Stat. 400 (1975).

² 42 U.S.C. § 1973l(c)(3). Some members of Congress, during the debate over the 2006 reauthorization of the Voting Rights Act, sought to expand the minority language assistance provisions to include speakers of other languages, such as Arabs and Haitian-Creoles. These efforts were ultimately unsuccessful.

³ 42 U.S.C. § 1973b.

1. Section 203: Jurisdictions must provide language assistance if they reach a threshold of “limited English proficient” minorities.

Section 203 applies to a state or political subdivision if it has a sufficient number of “limited-English proficient”⁴ citizens belonging to a minority language group whose illiteracy rate (within the state or political subdivision) is higher than the national average. There are three ways a state or political subdivision can be said to have a sufficient number of applicable citizens: (1) if 5% of its citizens of voting age are limited-English proficient and members of a single language minority; (2) if 10,000 of its citizens of voting age are limited-English proficient and members of a single language minority; or (3) if an Indian reservation is part of the state or political subdivision and more than 5% of that reservation’s citizens of voting age are limited-English proficient and members of a single language minority.⁵ Twenty-five states are either fully or partially counties that are covered by Section 203.⁶

If a state or political subdivision is covered by Section 203, then when it “provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,” it must “provide them in the language of the applicable minority group as well as in the English language.”⁷ If the language of “the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians,” where “the predominate language is historically unwritten,” then “the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”⁸

2. Section 4(f)(4): Jurisdictions with historically low-turnout among language minorities are subject both to Section 203 and the other special provisions of the Voting Rights Act.

The 1975 amendments also added section 4(f)(4) to the Voting Rights Act. States and political subdivisions covered by 4(f)(4) are subject not only to the minority language assistance provisions in Section 203, but also to all of the special provisions of the Voting Rights Act, such as Section 5’s “preclearance” requirement.

A state or political subdivision is subject to 4(f)(4) if all three of the following conditions are met: (1) on November 1, 1972 over five percent of the voting-age citizens were members of a single language minority group; (2) the U.S. Attorney General finds that election materials were

⁴ “Limited-English proficient” is defined as “unable to speak or understand English adequately enough to participate in the electoral process.” 42 U.S.C. § 1973aa-1a(b)(3)(B).

⁵ 42 U.S.C. § 1973aa-1a(b)(2). For political subdivisions with fewer than 200,000 people, the first threshold is more easily triggered; the second threshold is more easily triggered for larger political subdivisions.

⁶ Determinations Under Section 203, 76 Fed. Reg. 63,602, (Oct. 13, 2011), available at http://www.justice.gov/crt/about/vot/sec_203/2011_notice.pdf.

⁷ 42 U.S.C. § 1973aa-1a(c).

⁸ *Id.*

provided only in English on November 1, 1972; and (3) the Director of the Census determines that fewer than fifty percent of voting-age citizens were registered to vote on November 1, 1972—or fewer than fifty percent actually voted in the 1972 presidential election.

Nine states are either fully or partially covered by Section 4(f)(4).

3. Section 208: Jurisdictions must provide assistance to voters unable to read ballots.

In the 1982 amendments, Congress inserted Section 208, which provides: “Any voter who requires assistance to vote by reason of . . . inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.”⁹ At least one federal court has read Section 208 to include non-English speakers within the “inability to read” portion of Section 208.¹⁰

B. HAVA and other federal laws

In addition to various other provisions, the Help America Vote Act (“HAVA”) authorizes federal funding for language assistance programs.¹¹ HAVA authorizes appropriations to states for “[i]mproving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.”¹² Title VI of the Civil Rights Act of 1964 also recognizes that the failure to address language barriers among recipients of federal funding can constitute national origin discrimination.¹³

C. State and local jurisdictions provide various forms of language assistance.

State and local language assistance policies vary widely. While some states do not require any assistance beyond what federal law requires or provides, other states have enacted broader language assistance policies. This section provides a sampling of approaches taken by different localities.

Some states voluntarily provide assistance to language minorities not covered by Section 203 due to their population size in the jurisdiction or the language spoken. For example, although the Voting Rights Act does not cover French speakers, voters in Maine may request translated ballot instructions in French from local election officials.¹⁴ California requires accommodations in counties where 3% of voting-age citizens “lack sufficient skill in English to

⁹ 42 U.S.C. § 1973aa-6.

¹⁰ *United States v. Berks Cnty.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (holding that county election board denied Spanish-speaking voters of Puerto Rican descent their right to bring a person of their choice into the voting booth for assistance, in violation of Section 208).

¹¹ 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

¹² *Id.* § 15301(b)(1)(G).

¹³ 42 U.S.C. §§ 2000d (2006).

¹⁴ *See* ME. REV. STAT. ANN. tit. 21-A, § 603(5).

register without assistance.”¹⁵ Minnesota law requires the state demographer to determine what languages are used so commonly in the state as to necessitate language assistance.¹⁶

It is also common for some states to implement outreach and education campaigns targeting language minorities. California offers telephonic assistance in multiple languages, and Connecticut undertook a voter outreach campaign in 2008 that registered 21,000 Latinos.¹⁷ Several states offer websites with links to language assistance sites and translated materials.¹⁸ Cities and counties have also enacted voluntary language assistance programs. For example, San Diego County,¹⁹ Boston, and Santa Clara County all provide Vietnamese language assistance beyond what federal statutes require.²⁰ The District of Columbia defines “non-English-speaking person” broadly to include anyone “whose native speaking language is a language other than English, and who continues to use his or her native language as his or her primary means of oral and written communication.”²¹ Assistance is provided in wards where such persons constitute 5% or more of the voting population. A number of other jurisdictions provide bilingual interpreters and poll workers on Election Day.²²

Many other states have resisted expansions of language assistance. Iowa, for example, prohibits the distribution of voter materials in languages other than English.²³ Some states have also erected procedural hurdles, such as withholding assistance unless the voter signs an oath affirming an inability to read English.²⁴

III. Language minorities continue to face problems with the election process.

A. Problems with the Voting Rights Act:

i. Language assistance is sometimes not voluntarily provided if the law does not require assistance.

¹⁵ CAL. ELEC. CODE § 2103(c)-(d) (2009).

¹⁶ MINN. STAT. § 204B.27(11) (1992). Although Minnesota law grants her the power to do so, the Secretary of State is not required to issue voting instructions in languages other than English. *Id.*

¹⁷ Angelo N. Ancheta, *Language Assistance and Local Voting Rights Law*, 44 IND. L. REV. 161, 183 (2010).

¹⁸ *Id.*

¹⁹ Vietnamese registration increased by more than 37% in the six months after assistance was first provided. The benefits were more than statistical: Upon finding a Vietnamese poll worker for the first time, a Vietnamese voter exclaimed “America is the greatest country in the world.” John Tanner, *Federal Enforcement of the Language Assistance Provisions*, in JAMES THOMAS TUCKER, THE BALLOT OVER BILINGUAL BALLOTS 317-18 (2009).

²⁰ Ancheta, *supra* note 17, at 177-79.

²¹ D.C. CODE § 1-1031.01.

²² *Id.* at 184. For example, in 2008 Chicago hired election judges who spoke Gujarati, Hindi, Korean, Tagalog, Urdu, and Vietnamese.

²³ Michael A. Zuckerman, *Constitutional Clash: When English-Only Meets Voting Rights*, 28 YALE L. & POL’Y REV. 353 (2010).

²⁴ States with similar provisions include Colorado, Florida, Illinois, Kentucky, Nevada, Rhode Island, and Vermont. 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. 324, 351 (2009).

a. Arab American languages are not covered.

Evidence suggests some non-covered language minorities—Arab Americans in particular—suffer from language barriers similar to those Congress sought to dismantle with the Voting Rights Act, and yet the Voting Rights Act grants these groups no special protections. 90% of Arab Americans over the age of 5 speak Arabic at home, and nearly 35% of those at-home Arabic speakers speak English “less than very well.”²⁵ Arab communities suffer from lower levels of educational attainment, are less likely to vote, and anecdotal evidence suggests Arab Americans are discriminated against at the polls.²⁶

b. Population triggers are not always met when a limited English proficient minority is present in a jurisdiction.

The Voting Rights Act does not require jurisdictions to provide non-English forms of assistance if they do not meet the population triggers in Section 203 or the historical turnout triggers in Section 4(f)(4). The following jurisdictions all have more than 7,500 limited English proficient members of a single language minority, but less than the 10,000 members required to trigger Section 203: Sacramento County, CA (Chinese); Los Angeles County, CA (Cambodian); Cook County, IL (Korean); and Queens County, NY (Asian Indian).²⁷ An additional eight language groups in 21 jurisdictions fall between the 5,000 and 7,500 mark.²⁸

ii. Language assistance is sometimes not provided because election administrators are unaware of the needs of their community and unaware of their legal obligations.

A 2005 study of all jurisdictions covered by Sections 203 and 4(f)(4) found that election officials drastically underestimated the number of voters in their jurisdictions who needed language assistance. On average, officials estimated that 5.5% of the voters needed assistance, but in reality the number was 10.9%.²⁹

A number of these covered jurisdictions actually failed to provide the required forms of assistance, apparently in part because of a misperception by the election officials about the need for that assistance. For example, 14% of covered jurisdictions responded that they provided neither oral nor written assistance to voters, estimating that only 2.5% of their voters needed assistance, when in reality 4.5% did.³⁰ Anecdotal evidence also shows cracks in the system. In Houston, Texas in 2008 two Vietnamese American voters stated that they were

²⁵ Jocelyn Friedrichs Benson, *Expanding the Language Protections of the Voting Rights Act to Additional Communities*, in JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS* 299, 300 (2009). Benson points to Russian Americans as a language minority that has not suffered low turnout at the ballot box, or widespread language related discrimination.

²⁶ *Id.* at 300-02.

²⁷ *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the H. Comm. on the Judiciary*, 109th Cong. 6 (2005) (Testimony of Margaret Fung, Executive Director, Asian American Legal Defense Fund).

²⁸ *Id.*

²⁹ JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS* 131 (2009).

³⁰ *Id.* at 132.

unable to vote even after requesting poll worker assistance.³¹ Most of the U.S. D.O.J.'s Section 203 enforcement actions were brought because covered jurisdictions simply failed to provide assistance.³²

Additionally, the 2005 study concluded that a number of covered jurisdictions failed to provide the proper assistance because they misunderstood their legal obligations. Ideology did not appear to be the cause behind the districts that failed to provide assistance: only 12 of the 361 covered jurisdictions had an expressed "English-only" election, while over three-fourths responded that they believed the federal language assistance provisions should remain in effect.³³

iii. Language assistance is provided for some but not all election materials (e.g. ballots are translated, but not voter guides)

Covered jurisdictions do not always meet the full demands of the law. For example, a 2005 study found that of jurisdictions covered for an Asian language, 18.9% provided no language assistance whatsoever, 35.1% provided assistance only through written materials, and 2.7% provided only oral assistance.³⁴ Of the jurisdictions covered for Spanish, 13.3% provided no assistance, 15.3% provided only written assistance, and 2.9% provided only oral assistance.

iv. The remedies available for Voting Rights Act violations are not enough.

The Voting Rights Act's language assistance requirements are often enforced through consent decrees.³⁵ However, Dean Benson finds that the prevailing method of enforcement of these consent decrees often fails to address the initial problem.³⁶ Consent decrees are often entered into only after discriminatory treatment has resulted, they require high levels of commitment and oversight from the federal government if they are to prove effective, and sometimes state and local governments must take additional action in order to achieve

³¹ *Hearing on Lessons Learned from the 2008 Election Before the H. Comm. on the Judiciary*, 111th Cong. 4 (2009) (Statement of Glenn D. Magpantay, Staff Attorney, Asian American Legal Defense Education Fund).

³² *See, e.g.*, Complaint at 3-4, *United States v. Orange Cnty.* (S.D.N.Y. 2012), available at http://www.justice.gov/crt/about/vot/litigation/recent203.php#orange_ny; Complaint at 2-4, *United States v. Colfax Cnty.* (D. Neb. 2012), available at http://www.justice.gov/crt/about/vot/sec_203/documents/colfax_comp.pdf.

³³ *Id.*

³⁴ Tucker, *supra* note 29, at 139. It is worth noting that many jurisdictions covered for an Asian language are also covered for Spanish, meaning it is difficult to know if the assistance these jurisdictions provided always included all of the languages necessary.

³⁵ *See Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/litigation/recent203.php#orange_ny (listing recent D.O.J. enforcement actions, nearly all of which result in consent decrees).

³⁶ *See, e.g.*, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000) (first consent decree); *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2004) (second amended consent decree).

real enforcement of the consent decree's aims.³⁷ And while section 208 allows a voter to be accompanied by another individual who is able to provide assistance, the section does not compel poll workers to offer assistance, thus limiting its effect to voters who are fortunate enough to have a friend or family member willing and able to assist them on election day.³⁸

B. Problems implementing language assistance:

i. Language assistance is provided, but insufficient to meet demand.

In some jurisdictions, there are not enough bilingual poll workers to help all of the voters in need of language assistance. AALDEF reported that at a polling place in New York City there was only one interpreter for hundreds of voters. "Poll workers tried to get additional interpreters but were told they 'didn't need' them. The lone Chinese interpreter was extremely overworked."³⁹ During the 2008 presidential primary elections in Philadelphia, the language line for poll workers to call for on-the-spot assistance was overwhelmed and constantly busy.⁴⁰

ii. Language assistance is deficient because translations are incorrect.

There have been several reports of ballots and other language materials that were translated incorrectly. In 2012, Arizona published the wrong election date in the Spanish translation of official election materials, listing the election date as November 8 instead of November 6.⁴¹ The same problem was repeated on Spanish-language bookmarks distributed at a voter-education event.⁴² In Maryland, the Spanish translation of Maryland ballot summary misstated the proposed effect of the voter initiative on same-sex marriage.⁴³ "Barack Obama" was misspelled as "Barack Osama" on 2008 New York absentee ballots for Spanish speakers, and a 2010 ballot in Massachusetts had to be reprinted when it improperly spelled the word "Alguacil" (Spanish for "sheriff") as "Aguacil" (Spanish for "dragonfly").⁴⁴

³⁷ Jocelyn Friedrichs Benson, *Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws*, J. ACS ISSUE GROUPS 124, 128 (2008). As an example of a state legislature acting where a consent decree failed, Dean Benson notes that after the California Supreme Court issued a court order in *Castro v. State*, 466 P.2d 244 (Cal. 1970) (overturning a state literacy requirement) the California state legislature enacted a law mandating that counties provide translated election materials where 3 percent or more of the citizens in a county qualify as a language minority. *Id.* at 128, n. 36.

³⁸ *Id.* at 126.

³⁹ Magpantay, *supra* note 31, at 4.

⁴⁰ *Id.* at 5.

⁴¹ Alyssa Newcomb, *Arizona Elections Department Flubs Election Date*, ABC NEWS (Oct. 17, 2012, 10:26 AM), <http://abcnews.go.com/blogs/politics/2012/10/arizona-elections-department-flubs-election-date>.

⁴² John Rosman, *More Controversy with Spanish Translation in Arizona*, FRONTERAS (Oct. 24, 2012), <http://www.fronterasdesk.org/news/2012/oct/24/more-controversy-spanish-translation-arizona>.

⁴³ Michelle Garcia, *Spanish Translation Problems for Maryland Ballot Summary*, ADVOCATE (Oct. 23, 2012, 3:03 PM), <http://www.advocate.com/politics/2012/10/23/spanish-translation-problems-maryland-ballot-summary>.

⁴⁴ Adam Wooten, *Elections Lost in Translation*, DESERET NEWS (Oct. 28, 2011), <http://www.deseretnews.com/article/705393232/Elections-lost-in-translation.html?pg=all>.

iii. Language assistance is deficient because of problems with transliterating Asian-language characters.

According to AALDEF, in 2008 Boston did not provide ballots with transliterations of candidates' names in Chinese. Since limited English proficient voters typically rely on Asian-language media for election news, where candidates are known by their transliterated names, many Chinese voters had difficulty identifying their candidate on the ballot.⁴⁵ There was also a fear, however, that transliterations could be different depending on the personal preference of the translator. Transliterated Chinese names for candidates would include "Uncooked Rice" for Mitt Romney, and "Upset Stomach" for Hillary Clinton.⁴⁶

C. Other problems:

i. Language may be a barrier to voter registration.

In 2008 and 2010, the Census Bureau's Voting and Registration Supplement to the Current Population Survey identified Americans who declined to register because of "difficulty with English."⁴⁷ In 2010, 1.7% didn't register because of language difficulties, and 1.4% cited the same reason in 2008. Of those with disabilities, 1.9% didn't register in 2010 due to language difficulties; 1.8% didn't register in 2008 for that reason. In a 2005 survey, only 132 of 361 surveyed jurisdictions covered by Sections 203 and 4(f)(4) provided bilingual voter registration materials.⁴⁸

When put in context, language is far from the most common reason given for not registering. In 2008, of those who did not register and were not disabled, 66.8% cited general apathy, disillusionment, not knowing how or where to register, or missing the registration deadline.⁴⁹

ii. Language assistance is sometimes not provided because of racial animus or ideological opposition.

Anecdotal evidence suggests racial animus continues to be a barrier toward non-English speaking voters. In 2008, the Asian American Legal Defense and Education Fund ("AALDEF") monitored polls in jurisdictions across America and encountered animus in several places. In Brooklyn, NY, one poll worker remarked that Middle Eastern voters "looked like terrorists," while another challenged an Arab American voter: "We don't trust you; you're not voting. It's my authority. If you want to complain go to the judge."⁵⁰ In Alexandria, VA, poll workers did not allow limited English proficient voters to bring interpreters with them into the voting booth.⁵¹

⁴⁵ Magpantay, *supra* note 31, at 4.

⁴⁶ Tucker, *supra* note 29, at 101.

⁴⁷ Lisa Schur and Doug Kruse, *Disability and Election Policies and Practices*, in *The Measure of American Elections* at Table 8.4 at 8-32 (Barry C. Burden and Charles Stewart III, ed., 2013).

⁴⁸ Tucker, *supra* note 29, at 142.

⁴⁹ Of those without disabilities, 66.8% of those who did not register cited "not interested in the election" (42.5%), "did not meet registration deadlines" (16.1%), "my vote would not make a difference" (4.2%), or "did not know where or how to register" (4.0%). Schur and Kruse, *supra* note 47, at 8-32; *see also id.* at 8-12.

⁵⁰ Magpantay, *supra* note 31, at 6.

⁵¹ *Id.* at 5.

Poll workers stated that all voters should have a minimum proficiency in English to be American citizens and to vote.⁵²

Additionally, some Americans ideologically oppose providing ballots and election administration materials in languages other than English. For example, then U.S. Representative and current U.S. Senator Dean Heller introduced the “American Elections Act of 2009” in the 111th Congress, which would have required that all ballots for federal elections be printed in English only (with an exception for American Indian and Native Alaskan populations).⁵³ Forty members of Congress cosponsored Mr. Heller’s bill.⁵⁴

IV. Possible Solutions:

A. Federal solutions:

i. Congress could expand the number of jurisdictions covered by section 203 by adjusting the triggers and including Arab Americans.

Some advocates and scholars believe language assistance could be improved by reducing the numerical cutoff for section 203’s coverage formula. Instead of requiring at least 10,000 limited English proficient citizens in the jurisdiction, that number could be reduced to 7,500,⁵⁵ or even as low as 1,000.⁵⁶ While the Supreme Court’s interpretation of the Fourteenth Amendment likely limits the breadth of federally-mandated language assistance to language minorities who have experienced a history of discrimination in the United States, some scholars advocate expanding the language groups covered by section 203 to include, for example, Arab Americans.⁵⁷ Brian Sutherland also argues that coverage determinations need to be updated more frequently than every five years to best reflect rapidly changing demographic needs.⁵⁸

ii. Congress could send federally-trained translators to polling places.

Dean Benson recommends that Congress should create program to send federally certified language translators to the in-need locations on Election Day.⁵⁹ Since localities are

⁵² *Id.*

⁵³ H.R. 764, 111th, first session.

⁵⁴ *Id.*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR00764:@@P>

⁵⁵ *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the H. Comm. on the Judiciary*, 109th Cong. 6 (2005) (Testimony of Margaret Fung, Executive Director, Asian American Legal Defense Fund) (“The effect of lowering the numerical trigger to 7,500 would be to remove language barriers for at least 77,955 limited English proficient Asian American citizens eligible to vote. This increase of 9 jurisdictions would affect counties in California, Illinois, New York, and Washington, in which all but one county are already mandated to provide voting assistance in one or more Asian languages.”)

⁵⁶ Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1436 (1988).

⁵⁷ Jocelyn Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act*, in DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT 327, 353-373 (Ana Henderson ed., 2006).

⁵⁸ Sutherland, *supra* note 24, at 369.

⁵⁹ Benson, *Towards Full Participation*, *supra* note 37, at 132.

often unable or unwilling to recruit accurate translators, federal training, certification, and deployment to high-need areas on Election Day, a federal program could potentially improve the voting experience for language minorities.⁶⁰

iii. Court orders could be more vigorously enforced.

Dean Benson also believes consent decrees could better serve the needs of language minorities by including specific, detailed procedures for the offending jurisdiction to follow.⁶¹ Dean Benson proposes imposing financial sanctions against states and localities that are sued for noncompliance, as a means of providing more effective deterrence.⁶²

B. State and local government solutions:

i. Poll workers could be trained more thoroughly.

Many language assistance problems result from the unavailability of translators and properly trained poll workers. AALDEF recommends better training in the following areas:

- the requirements for language assistance and the proper use and posting of translated voting materials and signs under Section 203, where applicable;
- voters' rights to be assisted by the persons of their choice, who may also accompany voters inside voting booths under Section 208;
- how to properly direct voters to their assigned poll sites and precinct voting booths;
- proper demands for voter identification checks under HAVA; and
- proper administration of provisional ballots under HAVA.⁶³

Finally, states should actively recruit and retain bilingual poll workers, not just train English speaking poll workers how to provide language assistance.⁶⁴

ii. State and local governments could create institutions with the political incentive to protect language minorities.

Los Angeles County has a Community Voter Outreach Committee ("CVOC") that advises the Department of Registrar-Recorder/County Clerk.⁶⁵ CVOC is stocked with representatives from various minority interest groups. CVOC only provides advice, but because it formalizes opinions from minority constituent groups with political power, the committee legitimizes the needs of language minorities, often resulting in action from government officials. CVOC, in combination with Sections 203 and 4(f)(4), has helped make Los Angeles elections more accessible to language minorities.

⁶⁰ *Id.*

⁶¹ Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 423 (Spring 2002).

⁶² Benson, *Towards Full Participation*, *supra* note 37, at 133.

⁶³ Magpantay, *supra* note 31, at 9.

⁶⁴ James Thomas Tucker and Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 231 (2007).

⁶⁵ Thad Hall, *Public Participation in Election Management: The Case of Language Minority Voters*, 33 AM. REV. OF PUB. ADMIN., 407, 412-15 (2003), available at <http://arp.sagepub.com/content/33/4/407>.

iii. **States could devote more resources to enforcing state and federal laws protecting language minorities.**

Protecting language minorities is not a top priority in fiscal battles for states, and even in terms of the Voting Rights Act, the non-language provisions are often of attention. Still, if most problems are related to lax enforcement of existing law as opposed to a lack of helpful statutes, increased funding and government attention to the problem could go a long way.

C. **Other structural reforms:**

i. **Model state legislation protecting minority language voters could be created, in the mold of the Model Penal Code, ALEC, and ALICE.**

Brian Sutherland recommends developing model legislation to address the lack of compliance with federal regulations.⁶⁶ Providing model legislation at the state level recognizes that states are more familiar with the needs and situations of their citizens, and better positioned to assist with necessary translations (such as translations of official state forms) and to provide comprehensive training to local poll workers. Model legislation would have several components. First, it would create an Office of Minority Language Assistance within the office of the chief

elections official for each state. This office would develop training for the recruitment, hiring, training, and retention of election workers and translators, and it would hold annual meetings with all local election officials for these purposes. The office would provide common forms, signs, and other written election materials, and operate a telephone assistance line. Finally, the office would perform outreach to language minority communities, and audit local election officials for compliance.

Model legislation would further incorporate many of the solutions suggested above. The state would provide for a broader coverage formula, expanding coverage beyond section 203's requirements to include other language minority citizens who experience barriers to participation. The legislation would also relax section 203's limitations to single language minority groups, strict illiteracy requirement, and high numerical trigger, and it would provide for more frequent coverage determinations.

ii. **The voter registration process could be reformed.**

Voter registration reforms generally are outside the scope of this memo, but several changes to the voter registration process could ease voting problems for language minorities. First, the federal government could work on a voluntary basis with the states to create a national voter roll, collecting and automatically registering citizens based on information in various government databases, like the Social Security Administration, U.S. Postal Service, Internal Revenue Service, and state and local agencies.⁶⁷ Alternatively, Congress could, by either conditioning federal funding or using its authority under the Times, Place, and Manners

⁶⁶ Sutherland, *supra* note 24, at 372-79.

⁶⁷ *Universal Voter Registration: The Canadian Model*, FAIR VOTE, available at http://www.fairvote.org/universal-voter-registration-the-canadian-model#.UXxINb_LVUQ

Clause,⁶⁸ mandate that states automatically register citizens with information in state and federal databases.⁶⁹ Finally, Congress could use the same authorities to mandate that registration forms for elections with federal races on the ballot be printed in minority languages in addition to English.

IV. Annotated Bibliography

1. **Angelo N. Ancheta, *Language Assistance and Local Voting Rights Law*, 44 IND. L. REV. 161 (2010).**

Prof. Ancheta analyzes federal, state, and local language assistance policies, and notices an incremental but upward trend in recent years toward expanded assistance for language minorities. However, he adds, the needs of many voters requiring oral assistance and translations of election materials go unmet. He suggests that the federal government could better accommodate language minorities and spur greater civic engagement by following the lead of local governments and treating language assistance as an essential modern practice that is more than merely a remedy for past discrimination.

2. **Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act, U.S. Dept. of Justice, http://www.justice.gov/crt/about/vot/litigation/recent203.php#orange_ny.**

The Justice Department's website keeps an up-to-date listing of Section 203 enforcement actions, including complaints and consent decrees. There are quite a few.

3. **Jocelyn Friedrichs Benson, *Expanding the Language of the Voting Rights Act to Additional Communities*, in JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS 299 (2009).**

This short essay at the end of Tucker's larger work argues that Arab Americans should be included in Section 203's protections, and the thresholds for Section 203 should be lowered.

4. **Jocelyn Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act*, in DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT 327 (Ana Henderson ed., 2006).**

This book chapter justifies the continued relevance of Section 203, and advocates for extending coverage to Arab Americans. This group, she argues, has experienced educational disparities and electoral discrimination (especially post-September 11) similar to the language minorities that are currently covered by the Voting Rights Act.

⁶⁸ U.S. CONST. art 1, § 4.

⁶⁹ See, e.g., *The Case for Voter Registration Modernization*, BRENNAN CENTER FOR JUSTICE 8-10 (2013), available at <http://www.brennancenter.org/publication/case-voter-registration-modernization>.

5. Jocelyn Benson, *Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws*, 2008 J. ACS ISSUE GROUPS 124.

Dean Benson notes several problems of the current legislative requirements, including noncompliance, poorly or incorrectly translated materials, and nonexistent oral language assistance. She proposes empowering the Election Assistance Commission or Department of Justice to provide avenues for periodic expansions of the section 203 coverage formula, developing federally certified language translators to assist voters on Election day, and providing better enforcement for court orders.

6. *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the H. Comm. on the Judiciary*, 109th Cong. 6 (2005) (Testimony of Margaret Fung, Executive Director, Asian American Legal Defense Fund).

Ms. Fung testified about the significance of possible changes to the threshold requirements for what jurisdictions are “covered” by Section 203.

7. Thad Hall, *Public Participation in Election Management: The Case of Language Minority Voters*, 33 AM. REV. OF PUB. ADMIN., 407, 412-15 (2003), available at <http://arp.sagepub.com/content/33/4/407>.

Prof. Hall thoroughly explores an innovative body Los Angeles County created to further minority interest group incentives. This new body is helping to ensure access to the polls for language minorities.

8. *Hearing on Lessons Learned from the 2008 Election Before the H. Comm. on the Judiciary*, 111th Cong. 4 (2009) (Statement of Glenn D. Magpantay, Staff Attorney, Asian American Legal Defense Education Fund).

Mr. Mantay’s testimony describes the unmet need for language assistance among Asian Americans in the 2008 election. He includes anecdotes from across the country where required assistance was either negligently or maliciously not provided. He offers recommendations for improvements at the national and local levels, ranging from providing universal voter registration to providing better training for poll workers.

9. Lisa Schur and Doug Kruse, *Disability and Election Policies and Practices*, in *The Measure of American Elections* at Table 8.4 at 8-32 (Barry C. Burden and Charles Stewart III, ed., 2013).

Schur and Kruse do not address language issues, but their chapter contains a table containing data about why people do not register. One answer in the table is because of language problems.

10. 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. 324, 351 (2009).

Brian Sutherland, a former staff attorney for the ACLU Voting Rights Project, surveys various state laws on language assistance from across the country. He argues that states are best

positioned to ensure effective language assistance, and advocates for the development of model state legislation. Such legislation, he proposes, would include an Office of Minority Assistance to coordinate local language assistance efforts and ensure compliance. He also recommends extending coverage more broadly than section 203 currently does.

11. JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS (2009)

Dr. Tucker's book reviews the history of language assistance from pre-1975 through the 2006 reauthorization of the Voting Rights Act, paying close attention to the legislative process (describing committee drafts, expert testimony, and statutory amendments). He includes a section "debunking ten myths about language assistance," and provides a case study of discrimination that focuses on Alaska Natives