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Language Accessibility and Voting: How Effective Has the Law Been?

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LANGUAGE ACCESSIBILITY AND VOTING: HOW EFFECTIVE HAS THE LAW BEEN?

I. INTRODUCTION

The history of voting in America is heavily tainted with restrictive measures that have deterred voters from even appearing at the polls and have severely barred their eligibility to exercise the right to vote. Alexander Hamilton once stated, "This process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications."¹ The United States was built on this notion of the essential nature of the right to vote. The right to vote continues to be a contentious topic. Voting rights have been heavily disputed, specifically in more recent elections—one of those disputed topics is language accessibility.

Language access has been a topic of discussion, and it is vital to note that it is intertwined with the history of the civil rights movement. After finding that citizens of language minorities were excluded from election procedures alluding to discriminatory practices, federal legislation as enacted, today, allows voters the power to ask for and receive assistance—including assistance in languages other than English where required by federal or state law.² While many voters know they are aware of their right to vote, many do not comprehend the extent of support afforded to them through federal legislation. The application of this particular provision, Section 203, has varied significantly across the United States, to the point where advocacy groups have called for amendments to modify the VRA's language assistance requirements. Thus, restrictive

¹ The Federalist No. 68 (Alexander Hamilton).

² 52 U.S.C. § 10503

measures and inconsistencies in language accessibility have continued to deter eligible voters. This assertion on variance will be further explained throughout this article.

This article aims to discuss the future of language accessibility across the United States. It will begin with a historical background of the history and drafting of the Voting Rights Act, including a discussion of Section 203(b), detailing the timeline leading to federal legislation guaranteeing language accessibility. This article will compare this federal legislation with state application, legislation, and compliance to show the discrepancies that continue to exist in language accessibility. In revealing country-wide inconsistencies, this article will review the case law concerning language accessibility issues pertaining to various states. In assessing specific state implementation, this article will proceed with the comparative approach how to look at legislation and implementation of language provisions in two specific Northeastern states that border one another—Connecticut and New York. Examining these states individually and comparatively will show the inconsistencies that exist in applying Section 203(b). This article will then conclude with possible solutions to support language accessibility across the United States.

II. THE HISTORY OF THE VOTING RIGHTS ACT.

a. The Movements

Despite being a fundamental right in the eyes of United States citizens, the right to vote is not stipulated in the Constitution. A crucial moment was the passage of Voting Rights Act in 1965, calling for the enforcement of the 15th amendment to the Constitution.³ Embedded discriminatory practices triggered the Voting Rights Act, and its influence was immediate. Voter turnout

³52 U.S.C. § 10301

increased rapidly, combined with an increase in African American state legislatures.⁴ Voters ran to the polls dramatically, propelling increased voter turnout following the enactment of the Voting Rights Act. The combined sections of the Act prohibited literacy tests and other discriminatory practices that required preclearance and prohibited arbitrary voting practices based on race.⁵ The Voting Rights Act was profoundly shaped by social inequalities and systemic discriminatory practices that inevitably targeted African Americans.

b. Immigration, Language, and the Voting Rights Act

While Civil Rights was the driving force behind the Voting Rights movement, the enactment of the Voting Rights Act also appeared to address other social dilemmas.⁶ With immigrants flooding its shores, the United States became known as the "melting pot."⁷ Even as the primary objective of the Voting Rights Act targeted discriminatory practices against African Americans, it also appeared to target discriminatory practices against immigrants.

Increased immigration in the 1880s became an additional focus for states. In the 1850s, both Connecticut and Massachusetts passed English literacy tests targeting immigrants and precluding them from voting.⁸ The "illiterate," as they became known, needed to "assimilate." The reasoning behind the literacy tests was the following:

First, "illiterate men lacked the intelligence or knowledge necessary to be wise or even adequate voters." Second, "English-language literacy was essential for the foreign-born to become properly acquainted with American values and institutions." Third, "tying

⁴ Michael R. Dimino et al., *Voting Rights and Election Law: Cases, Explanatory Notes, and Problems, Third Edition* at 217 (3^d ed. 2020).

⁵ *Id.* at 217.

⁶ See Sandra Del Valle, *Language Rights and the Law in the United States: Finding our Voices*. 89-93 (2003). (discussing immigration, naturalization, and the process of limiting voting rights for immigrants).

⁷ *Id.* at 56 (highlighting Senator Hayakawa's rationale by the US being a made into a strong country by shedding the ethnic identity of immigrants arguing against a "melting pot" ideology).

⁸ *Id.*

voting to literacy would encourage assimilation and education, which would benefit American society as well as immigrants themselves." ⁹

Cemented in bias and a willingness to ostracize immigrants, widespread prejudice against the rapid growth of immigrants increased the spread of English literacy requirements. ¹⁰

As United States citizens and thus eligible voters, Puerto Ricans became vocal opponents of literacy requirements. English-language literacy requirements or voting became a restrictive tool that was used to target Spanish speakers or anyone residing in Puerto Rico; as such the Voting Rights Act of 1965 appeared to diffuse the constraints of literacy requirements rapidly.¹¹

Within the Voting Right Act, there was a section—Section 4(e) that was known as the "Puerto Rican exception." ¹²Section 4(e) guaranteed that every person who had "successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English" could not be denied the right to vote.

¹³This gave the impression of embracing and opening the doors to those U.S citizens who do not speak English..

While Section 4 (e) explicitly acknowledged the inclusion of those that do not understand English, it failed to *guarantee* language access. ¹⁴ Claims were brought forth challenging the new Section 4 (e) provision, including claims that were appealed to the Supreme Court.¹⁵

⁹ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*. at 116 (rev. ed. 2009).

¹⁰ Del Valle, *supra* note 6 at 90.

¹¹ Page 1431 *The Yale Law Journal*, Jun., 1988, Vol. 97, No. 7 (Jun., 1988), pp. 1419-1437 Sandra Guerra

¹² Del Valle, *supra* note 6 at 98-99.

¹³ *Id.*

¹⁴ *Id.* at 99 (discussing challenges to the bilingual provision requirements).

¹⁵ *Id.* at 98-99 (where Del Valle details several claims brought forth after Section 4(e) was enacted).

As the United States began shifting demographically, legislation concerning language accessibility arose. The rapidly shifting social and political landscape of the United States prompted the call for amendments to the Voting Rights Act. Amendments that emphasized language assistance legislation appeared in 1975, 1982, and 1992. In particular, the 1975 amendments to the Voting Rights Act of 1965 provided that any registration or voting notices, including forms, instructions, assistance, and ballots, were to be provided on a "multilingual basis" to eligible members of minority groups.¹⁶ These amendments made the "literary test ban indefinite and national in scope."¹⁷ This successfully cemented the literary test ban in federal legislation. Not only did these amendments solidify the nature of literacy tests, but they were also a substantial step for minorities.¹⁸ Congress addressed the discriminatory practices through the following, Section 4(f)(1):

"The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition, they have been denied equal educational opportunities by state and local governments resulting in severe disabilities and continuing illiteracy in the English Language...where state and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of this country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that in order to enforce the guarantees of the Fourteenth and Fifteenth amendments...it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices."¹⁹

¹⁶ See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975) codified in 42 U.S.C. 1973b(f)(4), (1975). The Voting Rights Act were continuously amended including expansion and extension of the language provisions in 1982, 1992, and 2006. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 4, 96 Stat. 131, 134 (1982). See also Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 Pub.L. No. 109-246 § 7, 120 Stat. 577. The provision extends to 2032.

¹⁷ Del Valle, *supra* note 6 at 105.

¹⁸ *Id.* at 105-106

¹⁹ 52 U.S.C §10303 (b)(f)(c)

Through Congress addressing the discriminatory language practices that minorities were repeatedly subjected to nationwide was significant.

The 94th Congress amended the Voting Rights Act by adding Section 203 based on a finding that "voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English." ²⁰ Addressing the growing inequality gap raised by language access which drove restrictive voting measures, Congress created Section 203, mandating:

"...that a state or political subdivision must provide language assistance to voters if more than 5 percent of the voting-age citizens are members of a single-language minority group who do not "speak or understand English adequately enough to participate in the electoral process" and if the rate of those citizens who have not completed the fifth grade is higher than the national rate of voting-age citizens who have not completed the fifth grade. When a state is covered for a particular language minority group, an exception is made for any political subdivision in which less than 5 percent of the voting-age citizens are members of the minority group and are limited in English proficiency, unless the political subdivision is covered independently."²¹

This initialized a process to determine eligibility for voting language assistance. This legislation has set a guideline of five percent—specifying that a political subdivision would fall within the bilingual language requirements if five percent of the minority population (of voting-age citizens) resided within that political subdivision. This minority population must be a single-language minority group that is limited in English language proficiency, inhibiting their successful participation in elections.

²⁰ *Id.*

²¹ 52 U.S.C. § 10503 *formerly cited as* 42 U.S.C. § 1973aa-1a

Even further, if more than five percent of the American Indian or Alaska Native voting-age citizens are members of a single language minority group who do not speak or understand English sufficiently *and* the rate of those voting-age citizens who have not completed the fifth grade is higher than the national rate, the political subdivision—including a county—falls within the language assistance provision of Section 203.

III. DISCREPANCIES IN FEDERAL AND STATE APPLICATION

a. Federal Legislation and the Role of the United States Census Bureau

Section 203, as introduced, requires that states and specific political subdivisions provide language assistance during elections for language minority groups that are unable to sufficiently understand nor speak English to participate in the election process. These requirements apply to all elections that are conducted within the jurisdiction that is determined to fall under Section 203.²²

Section 203 requires a formula to determine which jurisdiction is covered to receive language assistance that is heavily dependent upon the United States Census Bureau. This is dependent on whether the single language group within the particular jurisdiction has more than 10,000 members or makes up more than five percent "of all voting-age citizens"; or if voters live "on an Indian reservation, exceeds five percent of all reservation residents and the illiteracy rate of the group is higher than the national illiteracy rate."²³ Section 203 dictates that the "determinations

²² The United States Department of Justice, *Section 203 of the Voting Rights Act*, 2020, <https://www.justice.gov/crt/language-minority-citizens>

²³ Voting Rights Act Amendments of 2006; Determinations Under Section 203, 86 Fed. Reg. 69611 (December 8, 2021)

of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court."²⁴

Jurisdictional determinations for each political subdivision are based on state, county, or county subdivision, American Indian, and Alaska Native Areas depending on which is considered the operating level of government. Depending on the jurisdiction of the political subdivision as determined by the operating level of government, each subdivision then must undergo a series of mathematical calculations.

Put simply, first a determination needs to be made as to the following questions: Are more than five percent of voting-age citizens "limited-English proficient"? *or* Are more than 10,000 voting-age citizens limited-English proficient? If the answer is yes to either, the next question entails the determination of the rate of education for those limited-English proficient voting-age citizens: Is the rate of the total voting-age citizens (that are limited-English proficient) and have less than a fifth-grade education *higher* than the national rate? If the answer is yes, then the state, county, or county subdivision that is the subject of that determination, falls under Section 203 of the Voting Rights Act.

However, this still leaves the issue of which individuals fall under voting-age citizens. According to the *Executive Summary*, the population of voting age is relevant.²⁵ This indicates that only individuals eighteen and over are considered.²⁶ These voting-age persons are further categorized "according to Citizenship, Limited English Proficiency (LEP) and Illiteracy."²⁷

²⁴52 U.S.C. § 10503 *formerly cited as* 42 U.S.C. § 1973aa-1a

²⁵ Carolina Franco, Eric Slud, *Executive Summary: Statistical Methods for 2021 Coverage Determinations under Voting Rights Act Section 203(b)* (2021), https://www2.census.gov/programs-surveys/decennial/rdo/about/voting-rights-determination/2021_Section203/Sec203_ExecSummary2021_v3.pdf

²⁶ *Id.* at 1.

²⁷ *Id.* at 1-2

Where do they gather this information? This information determining Citizenship, LEP and Illiteracy is identified from questions pertaining to the American Community Survey (ACS)²⁸ The Census and ACS then define 73 Language Minority Groups for Section 203 (b).²⁹ Of these Language Minority Groups, 21 are Asian, 51 are American Indian or Alaska Native, and one is Hispanic.³⁰

Following the assessment, these jurisdictions have the legal requirement to provide language assistance as required by Section 203. The first assessment was provided after the 1980 Census was conducted. Later assessments were provided in 1990 and 2000.³¹ Recent reauthorization has required an extension of language provision until 2032.³²

In 2002, areas that were measured and fell under the Voting Rights requirement for Bilingual Election Materials—within the minority provisions— included the following jurisdictions: Alaska; Arizona; California; Colorado; Connecticut; Florida; Hawaii; Idaho; Illinois; Kansas; Louisiana; Maryland; Massachusetts; Michigan; Mississippi; Montana; Nebraska; Nevada; New Jersey; New Mexico; New York; North Dakota; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Dakota; Texas; Utah; and Washington.³³ Covered groups varied from Filipino, Japanese, American Indian, Hispanic, Chinese, Korean, to Vietnamese.

In 2015, the measurements were expanded to add additional minority groups. In addition to the already stated 2002 states, the covered states for Voting Rights Bilingual Election Material

²⁸ *Id.* at 1.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ United States Census Bureau, *Section 203 Language Determinations: Section 203 Language Provisions of the Voting Rights Act* (2017). <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html>

³² *Id.*

³³ Table: Covered Areas for Voting Rights Bilingual Election Materials; National Archives, *Voting Rights Act Amendments of 1992, Determinations Under Section 203*, 67 Fed. Reg. 488732 (July 26, 2002).

added Wisconsin, Virginia, Iowa, and Georgia.³⁴ As such, different minority groups were added. This includes Yupik; Alaskan Athabascan; Chinese, Taiwanese; Cambodian; Asian Indian; and other American Indian Tribes.³⁵

While the United States Census measurements have provided a rubric for determining which states must comply with Section 203 of the Voting Rights Act, the ultimate implementation decision rests upon the specific political subdivision. Once covered, language accessibility includes election day ballots or translating assistance of general forms, registration, voting notices, and instructions.³⁶ Fundamentally, anything remotely related to the electoral process should be eligible for multilingual translation.

Therefore, election material that is in English is required to be in minority languages—with a caveat. Despite the expansive nature of statistical data propelling inclusion of distinct minority groups, possibly reshaping the voting access landscape, it still leaves the issue of application across the states.

b. State Implementation

Although federal legislation has provided a roadmap for the qualification of minority groups, a concern lies upon whether states have been employing language access requirements to benefit those minority groups.

³⁴ Voting Rights Act Amendments of 1992, Determinations Under Section 203, 81 Fed. Reg. 87532 (Dec., 16, 2016).

³⁵ *Id.* at 87533.

³⁶ See Department of Justice, Part 55- *Implementation Of The Provisions Of The Voting Rights Act Regarding Language Minority Group*, 28 CFR at § 55.15 (Section 55.15, Affected Activities details the inclusion of “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process including ballots.”) <https://www.justice.gov/crt/page/file/927236/download>

Recently, on December 8, 2021, the U.S Census Bureau released a list that included 331 jurisdictions required to provide accurate language assistance during an election.³⁷ These political subdivisions included counties and minor civil divisions across the United States.³⁸ The determinations included a significant increase in the number of covered populations, an increased number from the previous list released in 2016.³⁹ The 2021 Section 203 Public Use Data included an increase in jurisdictional requirements in comparison to the 2016 released list. The United States Census Bureau computed the population-based upon their ethnicity and determined that throughout the U.S Section 203 covered jurisdictions, there are a total of 20,386,604 Hispanics, 3,621,264 Asians, and 236,942 American Indian and Alaska Native voting-age citizens.⁴⁰ These three highlighted groups, including Asians, Latinos, and Native Americans, have faced significant challenges in obtaining equal language access. Accessibility varies among states and among each minority language group. The Native American language varies in dialect and comprehension from other minority languages that have fallen within the Voting Rights Act accessibility requirements.

i. Native American Language Accessibility through Caselaw

Native American languages differ in written form, and a significant number of challenges have arisen with the reasoning that is historically unwritten.⁴¹ North American indigenous languages vary in number as initially, there were about 150 indigenous languages spoken; however, today, the numbers have significantly decreased.⁴² Native American languages were

³⁷ United States Census Bureau, *The 2021 Section 203 Public Use Dataset* (Dec. 8, 2021)

³⁸ United States Census Bureau, *Census Bureau Releases 2021 Determinations for Section 203 of the Voting Rights Act*, CB21-202, (2021)

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Lyle Campbell & William O. Bright, *North American Indian languages*. Encyc. Britannica., July 14, 2016, <https://www.britannica.com/topic/North-American-Indian-languages#ref75305>

⁴² *Id.*

not founded on any writing system; rather, their communication method is based on oral tradition.⁴³ As case law has evolved, oral language assistance became a requirement and thus inclusive of Native Americans as will be further discussed below.⁴⁴

Challenges to state execution and federal legislation have been exposed through case law, beginning with the ostracization of Native Americans in 1988. In *United States of America v. New Mexico and Sandoval County*,⁴⁵ Native Americans pertaining to different tribes within the state of New Mexico, specifically Sandoval County, were not being provided with the necessary voting and election information in their respective Keres and Navajo languages.⁴⁶ This case was dismissed in 1990 as the parties resolved the case through an order granting joint motion for entry of limited consent decree.⁴⁷ The complaint alleged that New Mexico had violated 203 of the Voting Rights Act by failing to provide adequate election access:

"In the case of historically unwritten Native American languages, a jurisdiction covered under § 203 'must furnish oral instruction, assistance, or other information relating to registration and voting.' 42 U.S.C. § 1973aa-1a(c). As relevant here, the United States initiated this action against Sandoval County, New Mexico, its Board of County Commissioners, and its County Clerk (collectively "Sandoval County") in December 1988, alleging a violation of § 203 of the VRA."⁴⁸

The limited consent decree further identifies that the action was brought forth due to the lack of election practices and procedures, which disenfranchised Native Americans, that speak

"historically unwritten languages."⁴⁹ Failure to immediately comply would have resulted in the

⁴³ *Id.*

⁴⁴ The United States Department of Justice, *Language Minority Citizens: Section 203 of The Voting Rights Act*, Jan. 4, 2002, <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act>

⁴⁵ Order Granting Joint Motion For Entry Of Limited Consent Decree, *United States of America v. Sandoval County*, No. 88-CV-1457-BRB-DJS (D.N.M)

⁴⁶ *Id.*

⁴⁷ *Id.* at 14-15.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.*

elected officials showing cause as to why they should not be held in contempt of court.⁵⁰ The court emphasizes this stating, "the time for Sandoval County to come into compliance with the VRA is now."⁵¹ This agreement detailed the imposition of a Native American Election Information Program (N.A.E.I.P) in New Mexico, particularly in Sandoval County.⁵²

Similarly, ten years later, in *United States v. Bernalillo County* (D.N.M. 1998), the United States filed a complaint alleging that various election procedures had "unlawfully" denied the Voting Rights of Native American Citizens in Bernalillo County.⁵³ Further, Bernalillo County acknowledged that more than five percent of the voting-age Navajo were limited-English proficient and with an illiteracy rate higher than the national illiteracy rate recognizing that they were subject to the requirements of Section 203.⁵⁴ While the parties decided to address this similarly to *United States v. New Mexico*, in 2003, the Federal Court entered an order that approved the Provision extension guaranteeing the already established Native American Election Information Program through 2005.⁵⁵

The N.A.E.I.P. has endured and has advanced significantly since 1988. The N.A.E.I.P continues to be located within the Office of the Secretary of State of New Mexico, specifically within the Bureau of Elections.⁵⁶ This unique program monitors state objectives and the federal Voting Rights Act. The state objectives include monitoring state compliance with the minority

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.* at 5.

⁵³ Order Granting Joint Motion For Entry Of Limited Consent Decree, 2, *United States of America v. Bernalillo County*, Civ. No. CV-156-BB/LCS

⁵⁴ *Id.* at 2.

⁵⁵ The United States Department of Justice, *Language Minority Citizens: Section 203 of The Voting Rights Act*, Jan. 4, 2002, <https://www.justice.gov/crt/cases-raising-claims-under-language-minority-provisions-voting-rights-act>

⁵⁶ New Mexico Secretary of State, *Voting and Elections: Native American Election Information Program*, (2022). <https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/>

language assistance amendments of the Voting Rights Act of 1965.⁵⁷ The N.A.E.I.P now further involves technical assistance to New Mexico tribes and Country Clerks to determine statutory compliance with both the federal and state election laws, including oral assistance and voter education programs.⁵⁸

Caselaw has propelled legislation enacting programs that provide Native American voters with the means to vote, including oral communication. The United States Department of Justice states that this requires bilingual employees at election day polls, courthouses, and city hall.⁵⁹

"All information that is provided in English also must be provided in the minority language as well. This covers not only the ballot, but all election information - voter registration, candidate qualifying, polling place notices, sample ballots, instructional forms, voter information pamphlets, and absentee and regular ballots - from details about voter registration through the actual casting of the ballot, and the questions that regularly come up in the polling place. Written materials must be translated accurately, of course. Assistance also must be provided orally. Most Native American languages historically are unwritten, so that all information must be transmitted orally. Oral communications are especially important in any situation where literacy is depressed. Bilingual poll workers will be essential in at least some precincts on election day, and there should be trained personnel in the courthouse or city hall who can answer questions in the minority language, just as they do for English-speaking voters."⁶⁰

While including expansive measures for Native Americans, the DOJ also expands upon what measures these covered jurisdictions need to implement.⁶¹ This denotes written materials, oral language assistance, as well as registration material.⁶²

c. Spanish Language Accessibility through case law

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The United States Department of Justice, *Language Minority Citizens*: Section 203 of the Voting Rights Act, (March 24, 2022). <https://www.justice.gov/crt/language-minority-citizens>

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Case law has also highlighted other minority groups, such as Spanish-speaking voters. Spanish-speaking voters have faced distinct legal deterrence measures. The issues surrounding the Voting Rights Act and the inclusion of Puerto Ricans were questioned in 1966. In 1966, the State of New York had measures that denied a voter from voting based on being unable to read or write in English, contrary to Section 4 (e) of the Voting Rights Act. This issue was at the forefront of *Katzenbach v. Morgan*.⁶³ The Supreme Court in *Katzenbach v. Morgan* highlighted and repudiated the deterrent measures instigated by the state of New York,

"There can be no doubt that § 4(e) may be regarded as an enactment to enforce the Equal Protection Clause. Congress explicitly declared that it enacted § 4(e) "to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English." The persons referred to include those who have migrated from the Commonwealth of Puerto Rico to New York and who have been denied the right to vote because of their inability to read and write English, and the Fourteenth Amendment rights referred to include those emanating from the Equal Protection Clause. More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York non-discriminatory treatment by government — both in the imposition of voting qualifications and the Provision or administration of governmental services, such as public schools, public housing and law enforcement."⁶⁴

Referencing the above, the Supreme Court outlines the enforcement measures Congress took in securing the Fourteenth Amendments rights of those U.S-born students whose native language was not English as essential. The Court included voting qualifications, but it also expanded this to incorporate the provision *or* administration of government services. This comprehensive understanding appears to establish and address the diversity of United States citizens. Based

⁶³ 384 U.S. 641 (1966)

⁶⁴ *Id.* at 652

upon the conclusion of the Court in *Katzenbach*, the literacy requirements lent to discriminatory practices by the government in violation of section 4(e) of the Voting Rights Act.

Recent case law has highlighted other language access issues despite the repudiation of discriminatory literacy requirements. In *United States v. Brentwood Union Free School District*,⁶⁵ the United States brought forth a claim alleging that the Brentwood School District in Suffolk County, New York, violated Section 203 of the Voting Rights Act. In the complaint, the United States detailed that Brentwood had not provided adequate bilingual accessibility attributable to insufficient bilingual election officials, failing to translate election information from English to Spanish, as well as training to election officials that outlined the prevention of hostile or discriminatory treatment for Hispanic voters who speak English as a limited second language. In 2003, the court entered a consent decree, requiring the county to provide adequate Spanish language provisions. This required that Suffolk County establish a Spanish language election program. It also included the ability for federal observers to monitor school district elections.⁶⁶

More recent case law continues to address Spanish language assistance. In *United States v. Orange County*⁶⁷, the United States again alleged a failure of compliance. Orange County had failed to provide Spanish election information and language assistance to Puerto Rican voters who comprehended a minimal amount of English. Again, the court entered a consent decree requiring the implementation of a bilingual elections program, including providing bilingual ballots country-wide, hiring and training more bilingual workers to deliver essential language

⁶⁵ Order of Consent Decree, *United States v. Brentwood Union Free Sch. Dist.*, Civ. No. 03-071 (E.D.N.Y. June 4, 2003).

⁶⁶ Press Release, Dept. of Justice, Justice Department Announces Resolution of Voting Law Violations in New York (Jun. 4, 2003), https://www.justice.gov/archive/opa/pr/2003/June/03_crt_335.htm

⁶⁷ Stipulation, *United States v. Orange County Board of Elections*, Civ. No. 03-2775 (S.D.N.Y. June 4, 2003).

assistance on election day.⁶⁸ In 2012, a similar complaint in Nebraska, *United States v. Colfax County*⁶⁹, required a consent order and federal observers for failure to comply with Section 203 by not providing election materials, information, or assistance in Spanish.⁷⁰

As evidenced through the summarized cases, state implementation of Section 203's language assistance provisions has varied. While highlighting only Native American and Spanish language access here, it is evident that these cases principally establish the severe inconsistencies in applying voting rights and language assistance throughout various parts of the country. State implementation and compliance have varied considerably, resulting in differing solutions as evidenced through the consent decree, which later established N.A.E.I.P. for Native Americans in New Mexico.

d. Examples of Solutions and Deterrence Measures within the States

Certain states have attempted to restrict language access, while others have expanded upon language access. Compare the states of Florida and California. Florida's legislative history has detailed substantial attempts at restricting the Voting Rights Act, resulting in Florida voters facing significant language discrimination.⁷¹ In Florida, Miami-Dade County⁷², a restrictive and discriminatory movement was born in response to the rapid increase in Cuban and Haitian immigrants.⁷³ Not only was there a movement born, but also a referendum driven by this movement was passed in 1980. This referendum detailed the requirements that included meetings, hearings, and publications regarding the government to be in English only—despite

⁶⁸ *Id.* at 2-7 (detailing different terms of the stipulation).

⁶⁹ Order of Consent Decree, *United States v. Colfax County*, Civ. No. 84 (D. Neb. Feb. 13, 2012).

⁷⁰ *Id.* at 3.

⁷¹ Joel Newman, *Ensuring That Florida's Language Minorities Have Access To The Ballot*, 36 *Stetson Law Review*, 346-347 (2007) (discussing English-only movements within Miami-Dade County)

⁷² *Id.*

⁷³ *Id.* at 347.

Dade County falling under a Section 203 jurisdiction requiring compliance.⁷⁴ This Provision was repealed in 1993—almost 13 years later.⁷⁵ In response, voters moved to pass a statewide referendum that would include that English is the official language of Florida in the Florida Constitution. This measure was passed, but the Florida Legislature has so far not moved to enforce it.⁷⁶ Professor Jonell Newman of the University of Miami School of Law calls this saga "symbolic" in nature, in the sense that it imposed a discriminatory and isolating message on both Spanish and Creole speakers.⁷⁷

This rhetoric continues to be the driving force behind discriminatory practices in Florida. In 2019, a hearing was held following the 2018 suit where the Florida Secretary of State and the Supervisors of Elections in thirty-two counties were sued for violation of the Voting Rights Act of 1965 due to their failure to provide bilingual voting assistance, coupled with voter purging and restrictive early voting practices.⁷⁸ Vocal opponents of the failure to provide language assistance requirements detailed obstructive implementation practices on the part of the state of Florida. In the 2019 hearing, Anjenys Gonzalez-Eilert, Executive Director of Common Cause Florida, stated that the committee had not revised the Polling Place Procedures Manual since 2014 and that the such manuals failed to include language access, among other things.⁷⁹ Through the hearing, she provided a visualization of the lack of language access when a voter seeks to take the first step in exercising their right to vote, stating, "Language access has long been a problem in the State of Florida. The only option currently available to people when they go to the Division of Elections

⁷⁴ *Id.*

⁷⁵ Joel Newman, *Ensuring That Florida's Language Minorities Have Access To The Ballot*, 36 Stetson Law Review, 346 (2007)

⁷⁶ *Id.*

⁷⁷ *Id.* at 346-347.

⁷⁸ Fla. H. Rep. No. 116-1 (2019).

⁷⁹ See Statement Of Anjenys Gonzalez-Eilert; Fla. H. Rep. No. 116-1 at 15-54, 65-72 (2019)

website is to use Google Translate."⁸⁰ Visualize a working mother or father who comprehends limited English—going on an exclusive website likely deters them from taking the next step. Utilizing Google Translate when waiting in line or scrambling to look at the conditions for voting is insufficient. Gonzalez-Eilert further identifies the systemic failure coupled with natural disasters, hurricanes, and reaching Florida during the election seasons, calling for effective measures to be established.⁸¹ These issues are not solely limited to Florida, as natural disasters wreak havoc across the United States.

Contrary to Florida, California and Virginia have implemented different measures. In 2021, the Virginia General Assembly passed the Voting Rights Act of Virginia, which expanded language assistance requirements throughout the state.⁸² Effective September 1, 2021, the State Board must provide "voting and election materials in languages other than English for use by a county, city or town that is subject to the requirements of Section 24.2-128, which deals with minority language accessibility. Section 24.2-128 includes the federal guidelines of the 5% threshold detailed in Section 203 of the VRA.⁸³ It further details the inclusion of registration forms, voting notices, general forms, instructions, assistance, voter information pamphlets, ballots, sample ballots, candidate qualification information, and notices detailing changes to local election districts, precincts, or polling locations. If election materials are not provided, the voter (or the Attorney General) has the ability to compel the provision of election materials commencing with a cause of action.⁸⁴

⁸⁰*Id.* at 20.

⁸¹ *Id.*

⁸² Virginia House Bill 1890 (2021)

⁸³ A Bill to Amend and Reenact §§ 24.2-105; Discrimination; prohibited in voting and elections administration, H.R. 1890 (2021)

⁸⁴ Virginia House Bill 1890 (2021 Session), <https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB1890>

California implemented slightly different measures. California Election Code § 14201 requires counties to comply with language requirements that post a "facsimile ballot and related instructions in that language in the precinct's polling place."⁸⁵ Furthermore, California Election Code § 12303 requires that the county make reasonable efforts to recruit poll workers that speak the language of the voters who need language assistance.⁸⁶ This requirement is based upon a three percent determination—vastly different from the five percent imposed by federal guidelines. This arguably appears to provide a more significant net of inclusion. Nevertheless, Asian Americans' Advancing Justice state this expanded percentage is insufficient. "These requirements are often insufficient to provide L.E.P. voters the language services they need to cast an effective ballot, usually because L.E.P. voters are not aware that these language services are or should be available."⁸⁷ This lack of awareness emphasizes the expansion of language access and the ability to understand that language access is a guaranteed right.

The above state law, implementation, and caselaw depict a significant variation in the execution of language access requirements. Nonetheless, The Brennan Center details that as of January 14, 2022, 32 states have expanded voting access, including language accessibility, to combat existing barriers.⁸⁸

e. Northeastern Language Access Implementation

Having begun with a broad perspective of state case law and legislation, a central focus of visualizing specific language access applications will assess New York and Connecticut's legislative efforts. New York and Connecticut, as evidenced in the United States Census

⁸⁵ Asian Americans Advancing Justice, *Language Access Best Practices* (2021)

⁸⁶ Asian Americans Advancing Justice, *Language Access Best Practices* (2021)

⁸⁷ *Id.*

⁸⁸ Brennan Center for Justice, *Restrictive Legislation, Voting Laws Roundup: February 2022* (Feb.9, 2022) <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022>

determinations, have been included within the legally required areas to provide language assistance under Section 203(b) of the Voting Rights Act.

Connecticut has been known to have a history of restrictive voting practices.⁸⁹ The Center for Public Integrity has highlighted Connecticut as upholding "some of the most restrictive voting laws in the Country."⁹⁰ This is put into perspective through the history of Connecticut's imposition of English literacy tests. Connecticut was one of the first states to implement literacy test requirements in the 1850s.⁹¹ The Current "Voter's Bill of Rights" states that "Every registered voter in this state has the right to: (4) Ask for and receive assistance in voting, including assistance in languages other than English where required by federal or state law."⁹² The advocates behind the 2021 Connecticut Voting Rights Act detailed the obstacles voters have faced from voter suppression and restrictive election rules that suppress minority votes and turnout to the lack of fluidity in election administration.⁹³ Through minority voter suppression, testimony before the Connecticut General Assembly highlighted barriers inhibiting language assistance, despite falling within the requirements of the Section 203 language assistance provision.

Hispanic Federation Director, Ingrid Alvarez-DiMarzo, testified before the National Commission on Voting Rights, emphasizing the town of Danbury, Connecticut and its problems

⁸⁹ Matt DeReienzo, *In Connecticut, voters face some of the biggest obstacles outside the South*. Center for Public Integrity (Oct. 6, 2020) <https://publicintegrity.org/politics/elections/us-polling-places/connecticut-voters-face-some-of-the-biggest-obstacles-outside-the-south/>

⁹⁰ NAACP Legal Defense and Educational Fund, *The White Paper: The Connecticut Voting Rights Act*, 1-7 (March 25, 2021).

⁹¹ *Id.* at 7.

⁹² CT Gen Stat § 9-236b (2018)

⁹³ NAACP Legal Defense and Educational Fund, *The White Paper: The Connecticut Voting Rights Act*, 1-7 (March 25, 2021).

⁹⁴ During the consideration of the Connecticut Voting Rights Act, Danbury did not have language access, although "30% of people in Danbury" were Latino, and voting "officials were facing allegations of voter suppression against language minority voters." ⁹⁵ The C.V.R.A. propelled language access in lowering the threshold even beyond the federal V.R.A. ⁹⁶ In June 2021, Governor Ned Lamont signed this into legislation. A new section indicating a language access determination threshold change outlines the following:

"In the case of a municipality, or a voting district within a municipality, in which, as reported in the decennial census of the United States, (1) the number of United States citizens of voting age in a single language minority group (A) is more than seven thousand five hundred, (B) makes up more than three percent of all voting-age citizens in such municipality or voting district, or (C) if on an Indian reservation, makes up more than three percent of all reservation residents, or (2) the illiteracy rate of a single language minority group is higher than the national illiteracy rate, such municipality at any election, primary or referendum held within such municipality or voting district shall make available ballots in the language of each such language minority group to be used in such municipality or voting district at such election, primary or referendum."⁹⁷

Similar to California, Connecticut has also established three percent as the basis for compliance with language accessibility provisions. This three percent threshold is vastly lower than the five percent requirement imposed by federal legislation. This advances the opportunity for an increase in voter turnout in Connecticut. In the 2016 Election, Pew Research tabulated Latino demographics within Connecticut. Based on this tabulation, Pew Research found that the Hispanic population in Connecticut is the "18th largest in the nation," and about 73.6 percent of

⁹⁴ Ingrid, Alvarez-DiMarzo, *Testimony Before the Nat. Commission on Voting Rights*, Hispanic Federation (April 2014)

⁹⁵ NAACP Legal Defense and Educational Fund, *The White Paper: The Connecticut Voting Rights Act*, pp. 1-7 (March 25, 2021)

⁹⁶ See Connecticut General Assembly, An Act Concerning a State Voting Rights Act, S.B. No. 820, The Connecticut Voting Rights Act, CTVRA

⁹⁷ State of Connecticut General Assembly, *An Act Concerning Increased Opportunities for Absentee Voting*, S.B. 5 No. 820, 45 (2021)

that Hispanic population speaks only Spanish at home.⁹⁸ This percentage has likely increased from the 2016 assessment, and as such, the 2021 Connecticut Voting Rights Act contributes a step in a positive direction for language assistance requirements.

New York has also had a history of systemic barriers restricting voting rights. This has been cemented in New York case law through *Cardona v. Power*⁹⁹ and *Katzenbach v. Morgan*.¹⁰⁰ Cardona, a Puerto Rican-born U.S Citizen, moved to New York in 1948; while she could read and write Spanish, she could not comply with the state-enacted English literacy requirement that existed at the time, creating a significant barrier to her when it came to voting. The trial court failed to provide relief, and the New York Court of Appeals affirmed. Following this vacated judgment, Congress enacted Section 4(e) of the Voting Rights Act, providing the way for *Katzenbach v. Morgan*, where the Supreme Court held that Section 4(e) was properly implemented through Congressional Power.

The New York State Voter's Bill of Rights includes equal non-discriminatory access provisions to the voting system, including those "alternative language minorities."¹⁰¹ The language differs from Connecticut's bill of rights through the limited terminology defining language accessibility. Contrary to Connecticut, New York State has maintained similar language access guidelines as the federal Voting Rights Act.¹⁰² The New York State Election Law and Rules § 7–202 states that the voting law must "permit alternative language accessibility pursuant to the requirements of Section 203 of the Voting Rights Act of 1965 (42 U.S.C.

⁹⁸ <https://www.pewresearch.org/hispanic/fact-sheet/latinos-in-the-2016-election-connecticut/>

⁹⁹ *Cardona v. Power*, 209 N.E.2d 119 (N.Y. 1965), 384 U.S. 672, 86 S. Ct. 1728, 16 L. Ed. 2d 848 (1966)

¹⁰⁰ 384 U.S. 641 (1966)

¹⁰¹ NYC Votes, *Who Gets to Vote? On Race and Language Access in New York*, (Feb., 14, 2019)

<https://nycvotes.nycceb.info/votingrightsandrace>; see also Board of Elections in the City of New York, *New York State Voter's Bill of Rights* (2022)

¹⁰² State of New York Board of Elections, *Election Law*, 290-293 (2022).

1973aa–1a) such that it must have the capacity to display the full ballot in the alternative languages required by the federal Voting Rights Act." ¹⁰³ Therefore, New York state complies with the five percent threshold implemented by Federal Legislation but does not go beyond the necessary requisites.

In the 2016 Election, Pew Research tabulated Latino demographics within New York. Based on this tabulation, Pew Research found that the Hispanic population in the state of New York is the fourth largest in the nation. ¹⁰⁴ Further, about 3.7 million Latinos live in the state of New York, which denotes 6.6 percent of all the Latinos in the United States. ¹⁰⁵ 76.8 percent of that Hispanic population speaks only Spanish at home. ¹⁰⁶

The assessment of population, case law, and state legislation of New York and Connecticut, respectively, establish that voters do not receive cohesive language access due to the varied compliance of Section 203 across the United States.

IV. CONCLUSION: WHERE DO THE DISCREPANCIES LEAVE US?

Discriminatory practices have shifted election law and broadened voting rights; however, implementation of the law—particularly Section 203—has resulted in discrepancies across the United States. As evidenced from case law and legislation above, solutions expanding and facilitating a more cohesive multilingual voting access system have been distinct across the United States. Advocacy groups have called for different language assistance measures.

¹⁰⁴ Pew Research Center, *Latinos in the 2016 Election: New York, Hispanics in New York's Eligible Voter Population (2016)* <https://www.pewresearch.org/hispanic/fact-sheet/latinos-in-the-2016-election-new-york/>

¹⁰⁵ *Id.* at *Characteristics of Eligible Voters*

¹⁰⁶ *Id.*

Congressional developments expand upon further solutions. One possibility includes lowering the federal threshold for language access determinations. This would lower the five percent ¹⁰⁷ threshold to a more inclusive percentage. Lowering the state threshold has already been instituted across several states, including California and Connecticut.

Another possible measure has been defined as practice-based coverage. Practice-based coverage would implement a new section to the current Voting Rights Act. This, Section 6 of H.R. 4, recommends a new "preclearance process and specifies voting practices." States would be required to adhere to a new preclearance process which may bring opposition. However, preclearance through section 6 would only be triggered by seven instances—significantly narrowing the scope of practice-based coverage. These seven instances of the election system that would trigger preclearance are "election methods; jurisdiction boundaries; redistricting; voting documentation or qualification requirements, such as voter I.D.; multilingual voting materials, such as ballots; voting locations or opportunities, such as a reduction of Sunday voting hours or prohibiting providing food or nonalcoholic beverages; or registration list maintenance, such as new criteria for removing voter names." ¹⁰⁸ Despite seemingly arduous and time-consuming, this would impose a more cohesive nature to combating inequalities in language access. While multilingual voting materials are specifically named, all seven instances intertwine with potential language access discrepancies.

Finally, another possible solution includes court-ordered preclearance. Court-ordered preclearance is also named the "bail-in" provision. Court-ordered preclearance would amend

¹⁰⁷ Asian Americans Advancing Justice, Fair Elections Center, NALEO Educational Fund, *Policymakers' Guide to Providing Language Access in Elections*, (July 2018).

¹⁰⁸ See Congressional Research Service, *Voting Rights Act and H.R. 4 (117th Congress): An Overview* (2021) (Where practice-based coverage is defined under Section 6) <https://crsreports.congress.gov/product/pdf/IF/IF11908>

Section 3(c) of the Voting Rights Act. Current legislation dictates that a court is eligible for jurisdiction over a "state or political subdivision and require preclearance" if there are violations of the Fourteenth or Fifteenth Amendments of the United States Constitution. This potential amendment, Section 4 of H.R. 4, would essentially expand Section 3(c) in allowing courts to exercise jurisdiction over additional violations of the Voting Rights Act. Section 3(c) authorizes federal courts to place political subdivisions that have violated the Fourteenth or Fifteenth Amendments under preclearance. ¹⁰⁹Court-ordered preclearance would potentially include violations of the "Voting Rights Act *or* of any federal law prohibiting voting discrimination based on race, color, or membership in a language minority group."¹¹⁰ Equipping courts with the adequate tools to resolve incongruity in language assistance Voting Rights Requirements may create more cohesive and inclusive language assistance provisions across the United States. Professor Travis Crum of Washington University validates preclearance through the following: "by shifting coverage determinations from Congress to courts, minority groups actually have more control over coverage determinations."¹¹¹ Therefore, preclearance may provide substantial success for minority groups.

While the United States has accomplished momentous transformations throughout the history of voting rights, a great deal remains to be done. The ability to comprehend the language you are voting in affords the voter the ability to understand the voting system and fosters increased voter participation. Language assistance is so much greater than mere translation

¹⁰⁹ Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, at 1997, (2010)

¹¹⁰ *Supra* note 108 at 2.

¹¹¹ *Id.* at 2032.

services. It cultivates and expands upon a renewed hope in the voting system initially established by the framers of the United States Constitution.