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VOTING RIGHTS IN CALIFORNIA
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INTRODUCTION TO THE VOTING RIGHTS ACT
The purpose of this report is to assess whether discrimination against minority voters and minority voting strength exists in California. In assessing whether such discrimination exists, the report will chronicle the efforts of minority communities in California to secure access to the political process utilizing the Voting Rights Act of 1965 ("VRA") from 1982, the year the VRA was reauthorized and amended, to the present. This chronicle indicates that two important provisions of the VRA have played a pivotal role in assisting racial and ethnic minority communities, as well as language minority groups, to secure greater access to the political process and, in some instances, to increase minority electoral representation - Section 5 and Section 203. However, the continued effectiveness of these provisions is in jeopardy since both

In addition, the results of this study support the conclusion that voting discrimination is still a persistent hallmark of California electoral politics that has prevented minority communities from completely achieving an equal opportunity to participate in the political process and elect candidates of their choicedespite electoral gains by minority communities.of these provisions are due to expire in 2007.

In California, this voting discrimination often occurs within the context of racially polarized voting. When a Section 5-covered jurisdiction seeks to implement a voting change and elections are characterized by racially polarized voting, the potential for a discriminatory impact on minority voting strength is enhanced. Accordingly the U.S. Attorney General has objected to the implementation of changes in voting practices and procedures ranging from redistricting plans, a conversion from election districts to an at-large method of election, and annexations. Without Section 5 coverage, these voting changes in California would have been implemented, resulting in a discriminatory effect on minority voting strength.

Voting discrimination has also occurred when governmental jurisdictions subject to the minority language provisions of the VRA fail to comply with the corresponding language assistance provisions. This discrimination is often manifested in actions by election officials at polling sites that have adversely impacted the ability of limited-English proficiency voters to cast an effective

and meaningful vote. The extent of this non-compliance is well documented and evidenced by the filing of numerous actions by the Attorney General against the cities of Azusa, Paramount, Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda, and San Francisco.

These special provisions of the VRA continue to be effective tools in combating voting discrimination in California. The experiences in this state have demonstrated the continued need for the Section 5 preclearance and the Section 203 language assistance provisions. Without these special provisions, minorities will have insurmountable difficulties in challenging the adoption of voting changes that discriminate against minority strength. Moreover, without federal legislation to require political jurisdictions to provide language assistance during the election process, limited-English proficiency eligible voters and registered voters will be effectively excluded from the body politic. For these reasons, Congress should reauthorize and amend these provisions so that minority communities in California can continue their efforts to "'banish the blight of racial discrimination in voting' once and for all."

This report is divided into several sections. The first section will provide a brief overview of the VRA focusing on key provisions that are due to expire in 2007. The second section will discuss the efforts of minority communities to utilize Section 5 to prevent the implementation of voting changes that discriminate against minority voting strength. The third section will focus on the language assistance provisions that permit limited-English proficiency voters to effectively participate in the political process. The fourth section will document the presence of racially polarized voting as demonstrated in cases and expert reports. Finally, the report's conclusion will focus on the continued necessity for federal intervention to protect the rights of racial and ethnic minorities that still have yet to receive the full benefits of the Fifteenth Amendment to the U.S. Constitution, which provided in 1870 that states can no longer engage in voting discrimination on the basis of color, race, or previous condition of servitude.

I. Overview of the VRA

Faced with the continued recalcitrance of states and local governments in the South to eliminate obstacles that prevented African Americans from voting,Congress enacted the VRA in 1965. The 1965 VRA targeted states and local governmental entities in the South. This targeting was accomplished through a triggering formula that focused on voter registration or voter turnout levels in states and local governments that utilized tests or devices, such as literacy tests, as a prerequisite for voter registration. These tests or devices prevented African Americans from registering to vote. Accordingly, the use of these tests or devices were suspended in these covered jurisdictions for a five-year period. As noted previously, another important provision, Section 5, sought to prevent the implementation of any change affecting the right to vote unless federal approval was secured from the U.S. Attorney General in an administrative proceeding or in a judicial action from the U.S. District Court for the District of Columbia. The most significant feature of Section 5 related to the burden placed upon the covered jurisdiction submitting the proposed voting change. The covered jurisdiction had the burden of demonstrating that the proposed voting change did not have a discriminatory effect on minority voting strength and that the change was not adopted pursuant to a discriminatory purpose.

The 1965 VRA was subsequently amended. To further extend the temporary provisions of the VRA, Congress modified the applicable triggering formula found in Section 4. In 1970, Congress extended the regional ban on tests or devices to the nation. In addition, Congress extended the Section 5 preclearance requirement, as well as the national ban on tests or devices, for another five years. In 1975, Congress made the ban on tests or devices a permanent feature of the VRA and extended the Section 5 preclearance requirement for an additional seven years. Most significantly, Congress recognized that voting discrimination was not limited only to African Americans, but applied to other racial and ethnic groups as well. Specifically, Congress found "that voting discrimination against citizens of language minorities is pervasive and national in scope." Accordingly Congress expanded the definition of a test or device to include English-only elections in those jurisdictions where more than five percent of the eligible voters were members of an applicable language minority group. Thus, if a jurisdiction met the requirements relating to either having less than a 50 percent voter registration rate or less than a 50 percent voter turnout rate; and having English-only elections in a state, county, or jurisdiction that conducted voter registration; and more than 5 percent of the eligible voters were members of an applicable language group, the jurisdiction was subject to the Section 5 preclearance requirements. This expanded definition subjected the states of Arizona and Texas, states having large Latina/o populations, to Section 5 review.

The 1975 amendments also expanded the rights of limited-English proficiency eligible voters and voters to participate in the political process. Language assistance during elections was mandated in those jurisdictions subject to Section 5 meeting certain criteria, and were also mandated in those jurisdictions subject to the newly enacted Section 203 of the VRA. Under the 1975 VRA amendments, a jurisdiction could simultaneously be subject to the language assistance provisions of Section 5 and Section 203. In California, there were more counties subject to the language assistance provisions of Section 203 than to the provisions of Section 5.

After the passage of the 1975 amendments, a plurality of the U.S. Supreme Court in a 1980 case held that invalidating an at-large method of election on the basis of violating the Fourteenth and Fifteenth Amendments or Section 2 of the VRA required proof of a discriminatory intent. In response, Congress amended Section 2 to eliminate the requirement of a discriminatory intent. The newly amended Section 2 required proof only of a discriminatory effect on minority voting strength. The Senate Report accompanying the 1982 VRA amendments further defined the standard. According to the Senate Report, Section 2 was violated when it was demonstrated that under the totality of circumstances, minority voters did not have an equal opportunity to participate in the political process and elect candidates of their choice. The Supreme Court further refined Section 2 in a case involving a challenge to multimember and single-member legislative districts in North Carolina.

With respect to Section 5, Congress extended the preclearance requirement for a 25-year period until 2007. In addition, Congress established a new mechanism to create an incentive for covered jurisdictions to comply with Section 5 of the VRA. In creating this incentive, Congress provided for an expanded "bail-out" mechanism that permitted Section 5 covered jurisdictions to be exempt from Section 5 preclearance upon meeting certain criteria. Recently, eleven jurisdictions in Virginia have been removed from Section 5 coverage via the bailout procedures. As to Section 203, the language assistance provisions were extended for a ten year period until 1992.

In 1992, Congress extended the language assistance provisions to 2007. As a result of these amendments, the triggering formula was modified. Under the formula, a jurisdiction is subject to the language assistance provisions if the following criteria are met: 1) of the total number of eligible voters, more than five percent or 10,000 must consist of members of a single language minority group; 2) the members of this single language minority group must be limited-English proficient; 3) for those political jurisdictions that contain all or part of an Indian reservation, more than five percent of the total number of eligible voters within the Indian reservation must be eligible voters of a single language minority group who are of limited-English proficiency; and 4) "the illiteracy rate of the citizens in the language minority as a group [must be] higher than the national illiteracy rate."

As further described in this report, the language assistance provisions have been instrumental in providing citizens who are not proficient in English with an opportunity to register to vote and to vote in elections, but only if there is effective compliance. Without effective compliance, in some instances, Asian-American and other language minority voters have been prevented from casting a ballot simply because of a misunderstanding or the failure of polling place officials to provide assistance. In other instances, racial hostility served to discourage Asian-American and other language minority voters who are limited-English proficient from voting. Indeed, effective compliance with and enforcement of these language assistance provisions provides physical access to the electoral process to persons who are of limited-English proficiency.

In a similar manner, the Section 5 preclearance requirement serves to provide access to the political process by preventing the implementation of potentially discriminatory voting changes. Moreover, the deterrent effect of the law cannot be underestimated; legislators or local officials who are aware that they will be expected to show that a new law or practice satisfies the Section 5 standards are far less likely to propose voting changes that would be prohibited in order to avoid unnecessary additional costs, disruption, or litigation.

The next section of this report will provide documentation of specific examples demonstrating the use of Section 203 and Section 5 by minority communities to eliminate obstacles and barriers that prevented them from effective participation in the political process. These examples demonstrate that covered jurisdictions will continue to adopt new voting changes that have the potential for a discriminatory effect on minority voting strength. In addition, this documentation will provide examples of Section 5 covered jurisdictions simply ignoring the submission requirement. Such ongoing non-compliance presents a clear justification for extending the preclearance requirement for another period of time to permit full Section 5 compliance. Finally, the litigation involving Section 203 compliance provides clear evidence that many covered jurisdictions are resisting the efforts to fully integrate limited-English proficiency speakers into the body politic.

II. Section 5 - An Effective Deterrent Against Voting Discrimination in California

The U.S. Attorney General has issued six letters of objection in California, four of which were issued after 1982. A review of these four letters of objections demonstrates that Section 5 has served as an important tool to eliminate discriminatory voting changes. The impact on local communities has been dramatic and historic. These experiences show that Section 5 is the most

effective tool available to minority communities in California to prevent the implementation of potentially discriminatory voting changes. Unfortunately, these experiences are also evidence of the failure of effective Section 5 compliance and enforcement. In many instances, the covered jurisdiction simply does not submit the voting change to the Attorney General for Section 5 administrative approval and does not file an action in the U.S. District Court for the District of Columbia for judicial preclearance. On these grounds alone Section 5 should be extended to permit minority communities to reap the benefits of full compliance with the preclearance requirement.

A. The Impact of Section 5 Has Been Dramatic and Historic

As a result of Section 5 enforcement, the first Latino was elected to the Monterey County Board of Supervisors in more than a hundred years. The U.S. Attorney General issued a letter of objection to a county supervisor redistricting plan that served as the catalyst for the adoption of a new redistricting plan. The implementation of the new non-discriminatory redistricting plan resulted in a historic election that provided the Latina/o community in Monterey County with a Latino county supervisor for the first time in over a hundred years.
A review of the circumstances surrounding the issuance of this letter of objection highlights the importance of having federal oversight of the election process in California, especially in areas where there are significant Latina/o communities. The 1990 Census showed that Latinas/os constituted 33.6 percent of Monterey County's population.At the time of the 1991 county supervisor redistricting process, there had not been a single Latina/o serving on the board of supervisors since 1893. After the completion of the county supervisor redistricting process, the plan was submitted for Section 5 review. Shortly thereafter Latinas/os filed an action based upon Section 5 and Section 2 of the Voting Rights Act of 1965. Since the redistricting plan had not received Section 5 preclearance, the plaintiffs argued that the court should enjoin the implementation of the plan in the upcoming 1992 elections. Alternatively, if the redistricting plan received Section 5 approval, the plan violated the Section 2 rights of Latinas/os by fragmenting a politically cohesive minority community.

This Monterey County litigation was not a typical suit. After the lawsuit was filed, the U.S. Attorney General requested additional information from the county. This request prompted the county to seek a settlement with the Latina/o plaintiffs. A settlement was reached that avoided the fragmentation of the Latina/o community. However, as a result of a referendum petition, voter approval of the county ordinance incorporating the redistricting plan was necessary. The referendum was successful in invalidating the county ordinance. Thereafter, the county was permitted another opportunity to adopt a new redistricting plan. The county was given until February 26, 1993, to secure the adoption of a redistricting plan and Section 5 approval. The new plan was adopted and submitted to the U.S. Attorney General for Section 5 approval. After receiving comments from the Latina/o community, the Attorney General issued a letter of objection.

The Attorney General concluded that Monterey County had not met its Section 5 burden. Although the new redistricting plan incorporated two supervisor districts each with a majority of Latina/o population, non-white Latinas/os comprised a plurality of the eligible voter population in each of the districts. Such an eligible voter population distribution was accomplished by

fragmenting politically cohesive Latina/o voting communities in the city of Salinas and the northern part of the county. As noted by the Attorney General:
Your submission fails to disclose a sufficient justification for rejection of available alternative plans with total population deviations below ten percent that would have avoided unnecessary Hispanic population fragmentation while keeping intact the identified black and Asian communities of interest in Seaside and Marina. The proposed redistricting plan appears deliberately to sacrifice federal redistricting requirements, including a fair recognition of Hispanic voting strength, in order to advance the political interests of the non-minority residents of northern Monterey County.
After the issuance of the letter of objection, the district court implemented the plaintiffs' plan in a special 1993 election. As the result of the letter of objection and the implementation of the court-ordered redistricting plan, a Latino was elected to the Board of Supervisors for the first time in over a hundred years. This historic event would not have occurred without Section 5 oversight.

Another example of Section 5's positive impact on a minority community involved a letter of objection issued against Merced County. In 1990, Latinas/os constituted 32.6 percent of the county's population. After the publication of the 1990 Census, the Board of Supervisors initiated a redistricting process. The Board of Supervisors, as a result of presentations relating to the county's demographics, was aware of the substantial growth in the county's Latina/o community in the 1980s. The Board of Supervisors disregarded this information, as well as rejected a redistricting plan developed by its demographer that created a supervisor district consisting of a majority of Latinas/os. The Attorney General objected to the proposed redistricting plan. The proposed plan fragmented the Latina/o community in the city of Merced. In addition, the plan did not place a city that was predominantly Latina/o into a supervisor district containing a significant portion of the county's Latina/o population. The submitted redistricting did not have a single supervisor district that contained a majority Latina/o population. After the letter of objection was issued, the county submitted for Section 5 approval a redistricting plan that avoided the fragmentation of the Latina/o community in the city of Merced and included significant Latina/o communities within a majority Latina/o supervisor district. The new plan was approved and resulted in the election of a Latina supervisor.

Both of these examples illustrate the concrete results achieved by the enforcement of Section 5. Since there are only 58 counties in California, securing the right of a minority community to have equal access to the political process and to elect a candidate of its choice to a county board of supervisors is a significant accomplishment. In the case of Monterey County, it took a hundred years and a federal statute to make the rights protected by the Fifteenth Amendment a reality. There can be no question that if Merced and Monterey counties had not been subject to Section 5 review, the counties would have implemented the objectionable redistricting plans. After all, the counties formally adopted the redistricting plans that were ultimately invalidated by the Section 5 preclearance proceeding. If there had been no Section 5 oversight, the only recourse would have been to file an action pursuant to Section 2 of the Voting Rights Act of 1965. As previously noted, the Monterey County litigation included a Section 2 claim. However, the difficulties associated with Section 2 litigation, as discussed below, occurred after the case was filed. These difficulties with Section 2 would have for all practical purposes foreclosed any remedial action, due to the significant evidentiary burdens imposed upon minority plaintiffs and the substantial

costs associated with these types of lawsuits. Section 2 litigation to challenge these county redistricting plans would not have been feasible.

B. Section 2 Litigation Cannot Serve as a Substitute for Section 5 Preclearance

The experience with Section 5 enforcement in California demonstrates the stark contrast between the protections offered by both Section 2 and Section 5. It has been suggested that by strengthening the protections provided by Section 2, there may be no need for Section 5 preclearance. However, the experiences in California demonstrate that Section 2 cannot serve as a substitute for Section 5 preclearance. Under Section 5, the advantages of "time and inertia" are shifted "from the perpetrators of the evil [of voting discrimination] to its victims." An administrative process of 60 days, where the burden of proof is upon the submitting jurisdiction, is substituted for a judicial process, where the burden of proof is upon the minority plaintiffs. Such a difference will often dictate whether an election feature or change will survive a legal challenge.

Section 2, on the other hand, presents the minority community with more formidable obstacles in successfully dismantling a method of election that has a discriminatory effect on minority voting strength. A short history is necessary to assess the limitations of litigation based upon Section 2 in California when compared to the Section 5 preclearance process.

Latinas/os in California have relied upon the federal courts to protect their voting rights and offset the lack of access to the political process caused by racially polarized voting. Initially litigants relied upon a constitutional standard. In 1973, the U.S. Supreme Court held for the first time in White v. Regester that at-large or multimember districts violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The White decision invalidated at-large or multimember legislative districts in Bexar County, Texas, on the grounds that these districts diluted the voting strength of Mexican Americans in the San Antonio greater metropolitan area. After the White decision, at-large election challenges at the local governmental level were instituted across the Southwest. In California, the first at-large election challenge based upon the Fourteenth Amendment was filed against the city of San Fernando. The action was unsuccessful and resulted in establishing difficult evidentiary standards for minority communities seeking to demonstrate that at-large methods of election were unconstitutional. As a result of the district court's Aranda decision, there were no at-large election challenges filed in California during the late 1970s.

The constitutional standard was made more difficult when the Supreme Court in City of Mobile v. Bolden ruled that litigants had to demonstrate a discriminatory intent in either the enactment of an at-large election system or its maintenance in order to prove that a given at-large election system was unconstitutional. As a result of the City of Mobile decision, many at-large election challenges across the country were dismissed. The impact of this decision prompted Congress to amend Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and eliminate the necessity of proving a discriminatory intent pursuant to a constitutional standard. Instead, Section 2 was amended to incorporate a discriminatory effects standard as the basis for successfully challenging at-large methods of election that diluted minority voting strength.

After Section 2 was amended, Latinas/os filed the first case in California against the city of Watsonville. In Gomez v. City of Watsonville, the local Latina/o community had been unsuccessful in securing the election of its Latina/o preferred candidates to the city council. This lack of success was due to the city's use of an at-large method of election within the context of racially polarized voting patterns that diluted the voting strength of the Latina/o community. The case was ultimately successful on appeal to the U.S. Court of Appeals for the Ninth Circuit. In California, the Gomez decision served to renew efforts at the community level to eliminate discriminatory at-large methods of elections. After the success of the city of Watsonville case, at large election challenges were filed in other parts of California.

However, this period of Section 2 enforcement in California was short-lived. Two major unsuccessful at-large election challenges served to discourage any further litigation by private parties. These two cases involved challenges to the at-large method of election in the El Centro School District and the city of Santa Maria. These cases consumed substantial resources and in the case of the Santa Maria litigation, a final decision was not rendered until ten years after the case had been filed. Perhaps the most chilling aspect of these losses were the efforts by the defendants to collect on their Bill of Costs filed pursuant to 28 U.S.C. § 1920. In the El Centro School District litigation, the ultimate Bill of Costs was pared down to $ 19,462.01. The district court denied the plaintiffs request to retax the costs and did provide for a ten-day stay to permit the plaintiffs to seek a stay before the U.S. Court of Appeals for the Ninth Circuit. The school district successfully applied pressure on the plaintiffs to dismiss their appeal in exchange for the school district to withdraw their Bill of Costs. A similar litigation strategy was pursued in the Santa Maria litigation.

As a result of the El Centro and Santa Maria litigation experiences, since 1992, no private litigants have filed at-large election challenges under the federal Voting Rights Act of 1965.

The absence of private litigants is significant, since as the following table demonstrates, the private bar has been largely responsible for enforcement of minority voting rights.
Voting Cases Commenced in United States District Courts
Year U.S. Cases -Plaintiff U.S. Cases -Defendant Private
Cases Totals
1977 15 9 179 203
1978 11 5 123 139
1979 13 7 125 145
1980 6 7 147 160
1981 8 9 135 152
1982 4 11 155 170
1983 1 6 168 175
1984 10 9 240 259
1985 17 5 259 281

16 Voting Cases Commenced in United States District Courts Year U.S. Cases - Plaintiff U.S. Cases - Defendant Private Cases Totals

1986 12 4 178 194
1987 12 7 195 214
1988 11 9 327 347
1989 11 5 167 183
1990 10 6 114 130
1991 10 7 180 197
1992 9 12 473 494
1993 14 11 188 213
1994 13 13 207 233
1995 9 11 215 235
1996 8 9 168 185
1997 2 10 129 141
1998 2 7 99 108
1999 6 3 93 102
2000 16 10 141 167
2001 10 16 163 189
2002 6 15 181 202
2003 3 5 139 147
2004 12 9 152 173
Totals 261 237 5,040 5,538

Due to the difficulties associated with filing at-large election challenges under the federal Voting Rights Act of 1965, an effort was pursued to create a state voting rights act in California. The state act was designed to permit the filing of legal actions in state court against at-large methods of election without having to demonstrate the costly and difficult evidentiary standards required under the federal VRA. This effort was successful. In 2002, the California State Voting Rights Act became law. Although the California State Voting Rights Act is a significant improvement over Section 2, it only applies to at-large elections and does not apply to other methods of elections, such as redistrictings, and other voting changes. Moreover, the state Act was declared to be unconstitutional by a Superior Court.

To summarize, Section 2 has been ineffective in eliminating discriminatory at-large methods of elections in California. As discussed above, Section 2 cases consume a significant amount of financial resources. In addition, the evidentiary burdens established by federal courts to prove a Section 2 are often insurmountable. Given these experiences with Section 2 litigation, there can be no dispute that in California, Section 5 provides a more effective tool to challenge the adoption of potentially discriminatory voting changes. Two examples will illustrate this point.

As the result of the 1975 amendments to the Voting Rights Act of 1965, the city of Hanford in Kings County became subject to the Section 5 preclearance requirement. Subsequently, after an extended delay, the city of Hanford submitted a series of annexations for Section 5 preclearance. The U.S. Attorney General issued a letter of objection. The Attorney General concluded that the city of Hanford had not met its burden of demonstrating that the proposed annexations did not have a discriminatory effect on minority voting strength. After an unsuccessful effort to seek a withdrawal of the letter of objection and an accompanying Section 5 lawsuit, the city agreed to implement a district-based method of election. This districting plan ultimately resulted in the

election of one Latina and one Latino to the City Council in a city containing a significant Latina/o population. If the protections afforded by Section 5 had been unavailable, then the only recourse would have been to file an at-large election challenge pursuant to Section 2. Given the results in the El Centro and Santa Maria litigation, the prospect of a successful outcome would have been highly unlikely.

In Monterey County, election officials decided to reduce the number of polling places for the special gubernatorial recall election held on October 7, 2003. According to county officials, the number of polling places utilized in the November 2002 general election was reduced from 190 to 86 for the special recall election. The Department of Justice ultimately approved the voting precinct consolidations only after Monterey County withdrew from Section 5 consideration five precinct and polling place consolidations. Absent Section 5 coverage there would not have been a withdrawal of these particular polling place consolidations. The only alternative would have been to file a Section 2 case and seek a preliminary injunction enjoining the consolidation of these polling places. Given the shortened time periods involved between the setting of the special election and the actual date of the election, presenting a Section 2 case with all of the required expert-intensive evidence relating to a history of voting discrimination, racially polarized voting, and racial appeals, among other factors, would not have been possible. With respect to the Monterey County polling place consolidations, there was no realistic opportunity to even utilize Section 2.

Based upon these case studies, Section 2 cannot be viewed as a substitute for Section 5 protection. The difficulties presented by a Section 2 case with its extensive use of expert testimony and with the burden on minority plaintiffs to demonstrate that a method of election or voting change results in a denial of an equal opportunity to elect a candidate of their choice is outweighed by a Section 5 administrative proceeding where the burden of proof is reversed.

Even if Section 2 cases were feasible, the shifting of the burden of proof to the covered jurisdiction in a Section 5 proceeding is far superior to having to expend substantial time and resources to meet the evidentiary burden imposed by Section 2.

C. Without Section 5 Coverage Jurisdictions Will Revert to Discriminatory Methods of Election

Any doubt as to whether covered jurisdictions would revert to discriminatory methods of election if Section 5 preclearance were no longer required was laid to rest with the attempted conversion from a district election system to an at-large method of election for the Chualar Union Elementary School District in Monterey County. The Department of Justice issued a letter of objection which prevented this conversion from occurring. The school district at one time had elected its board members pursuant to an at-large method of election. In 1995, when the Latina/o board membership consisted of a majority of the board, the method of election was changed to a district-based election system.
After a period of time, however, a dispute arose between the Latina/o board members and members of the white community. As a result of this dispute, members of the white community sought to change the method of election by circulating a petition that would ultimately result in the conversion back to an at-large method of election. In evaluating the proposed voting change, the Department of Justice found that the cover letter accompanying the petition to change the method of election contained language that was expressed in a tone that "raises the implication

that the petition drive and resulting change was motivated, at least in part, by a discriminatory animus." Moreover the letter of objection stated that under the previous at-large method of election, the Latina/o board members were susceptible to recall petitions, whereas under the district based election system, Latina/o board members had not been subject to recall elections. In Chualar, the absence of the protective features of Section 5 would have resulted in a reversion to the former discriminatory at-large method of election.

D. Section 5 Serves as a Deterrent to the Enactment of Voting Changes that Have the Potential to Discriminate Against Minority Voting Strength

In California, Section 5 has served as a deterrent to the adoption of potentially discriminatory voting changes. A recent example serves to illustrate this deterrence. As noted previously, in Monterey County, county officials withdrew from consideration a series of voting precinct consolidations only after the U.S. Attorney General voiced concerns regarding problems related to minority voter access to the county's polling places. The county intended to reduce the number of its polling places by close to one half. Such a dramatic reduction in a county that has 3,322 square miles would have clearly made it difficult for minorities to travel to their local polling site and cast their ballot. However, upon receiving the Attorney General's concerns, Monterey County withdrew the objectionable precinct consolidations from Section 5 review.

Since no letter of objection was issued, there was no readily available public document serving as a record of this event. Only because the withdrawal occurred within the context of Section 5 litigation, can this instance of deterrence be documented. Apart from this deterrent effect, Section 5 enforcement has produced gains in minority electoral representation as a result of increased community involvement in campaigns, even when a questionable voting change has received Section 5 approval. Given these beneficial effects, the record for reauthorizing and amending Section 5 becomes more compelling.
There is also an additional reason for continuing Section 5 coverage in the four California counties: non-compliance. Not all of the political entities located within the four counties have complied with the Section 5 preclearance requirement. As discussed in the next section of this Report, the issue of non-compliance has resurfaced repeatedly during the VRA's 41-year history. On this basis alone, Section 5 should be reauthorized.

E. Section 5 Should Not Be Permitted to Expire in the Face of Continuing Instances of Non-Compliance

One could simply conclude that four letters of objection since 1982 in the four counties covered under Section 5 in California indicates that Section 5 is not needed. However, such a conclusion would be unwarranted for two reasons. First, as discussed above, the letters of objection have served to discourage governmental entities from adopting plans which discriminated against Latina/o voting strength. Second, the conclusion assumes that there has been compliance with the Section 5 preclearance requirement. Such an assumption is unwarranted.

There is a significant problem relating to the enforcement of the Section 5. To achieve the purpose of eliminating voting discrimination, the VRA relies upon the voluntary compliance of Section 5-covered jurisdictions with the submission requirements. Based upon a long series of cases culminating in Lopez I, Section 5-covered jurisdictions are under a legal mandate to submit

their voting changes prior to implementation in any elections. In reality, many Section 5-covered jurisdictions are delinquent in the timely submission of their voting changes. But for litigation, some jurisdictions would not have submitted any voting changes.

This sordid record of non-compliance is documented in letters of objection and litigation. For example, in the Lopez litigation, the Supreme Court referred to voting changes, adopted by California and implemented by Monterey County in the late 1960s, which as of 1999 had still not received the necessary Section 5 preclearance. Also, in litigation involving a special election to recall Governor Gray Davis, Monterey County disclosed that voting precinct consolidations had not been submitted since the mid 1990s. This record of non-compliance has been cited numerous times by the United States Commission on Civil Rights, by congressmen and witnesses in testimony when the Act was reauthorized in 1970, 1975, and 1982, by the Government Accounting Office, and by Supreme Court precedent. Finally, as a result of independent reviews of voting changes in selected jurisdictions, the record demonstrates that non-compliance is still a significant problem. For example, in Merced County, California, there are special election districts that have not submitted their annexations for Section 5 approval.

Despite this record of non-compliance, there were efforts underway to either amend the VRA "bailout" provisions to facilitate the process of securing an exemption from Section 5 review, or to explore the feasibility of securing a "bailout" from Section 5 compliance. As previously noted, under the "bailout" provisions, covered jurisdictions can institute an action in the U.S. District Court for the District of Columbia seeking a judicial declaration that the covered jurisdictions are no longer subject to Section 5 preclearance. Before such a declaratory judgment can issue the covered jurisdiction must meet several requirements. For a ten year period prior to the filing of the declaratory judgment action, the covered jurisdiction must demonstrate, among other requirements, that all changes affecting voting have been submitted for Section 5 preclearance prior to implementation in the electoral process, that the covered jurisdiction or its political subunits must not have been the subject of a letter of objection or the denial of a declaratory judgment pursuant to Section 5, that no judgments or consent decrees have been entered in any litigation affecting the right to vote, and that the covered jurisdiction should "have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process . . . ."

Three of California's Section 5-covered jurisdictions, Monterey, Merced, and Kings counties, have sought to amend the bailout provisions or seek changes in the triggering formulas that determine Section 5 coverage in order to facilitate an exemption from this federal preclearance. Their efforts to seek a legislative amendment is not surprising, since none of the three counties could qualify for a bailout under the statute's current criteria. Merced County would have difficulty demonstrating that there are no discriminatory methods of elections within the county that deny minorities with equal access to the political process. For example, the city of Los Banos has a total population of 25,869, based upon the 2000 Census, of which 13,048 or 50.4 percent are Latina/o. The at-large method of election is implemented to select members to the City Council. Despite this large concentration of Latinas/os within the city there is not a single Latina/o serving on the City Council. Such an absence clearly suggests that the at-large method of election utilized by the city of Los Banos may have a dilutive effect on Latina/o voting strength and thus would impede efforts of Merced County to seek a Section 5 bailout. In

addition, based upon an on-site study of annexations for special election districts by one of the authors, there appeared to be many annexations that had not been submitted for Section 5 approval. This factor, if true, would also prevent Merced County from successfully securing a Section 5 bailout.
The remaining two counties also would not be successful in securing a Section 5 bailout. In Kings County, the recent settlement involving the Hanford Joint Union High School District which resulted in the abandonment of the at-large method of election and the implementation of district elections would also prevent Kings County from bailing out from Section 5 coverage. In Monterey County, the recent letter of objection issued against the Chualar Union Elementary School District on March 29, 2002, would result in the same outcome.

This effort by Monterey, Kings, and Merced counties to secure legislative amendments to facilitate a Section 5 bailout further reinforces the need to have Section 5 coverage in California. These efforts demonstrate that these counties and their political subunits would have no hesitation in reverting back to redistricting plans or methods of elections that had a discriminatory effect on minority voting strength.
In summary, based upon this review of Section 5 letters of objections and non-compliance efforts, there continues to be a need for Section 5 preclearance. At a minimum, efforts should be undertaken to insure that jurisdictions have fully complied with Section 5. In California, Section 5 has been very effective in preventing the implementation of discriminatory voting changes and has discouraged jurisdictions from reverting back to previous election methods that denied Latinas/os with access to the political process.

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

A. Language Assistance Provisions - Sections 203 and 4(F)(4)

As previously noted, the language assistance provisions of the VRA, Sections 203 and 4(f)(4), were enacted in 1975 and reauthorized in 1982 because Congress found that discrimination against language minorities limited the ability of limited-English proficient (LEP) members of those communities to participate effectively in the electoral process. The language assistance provisions require language assistance for language minority communities in certain jurisdictions during the election process and apply to four language minority groups: American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage. Congress has continually found that these covered groups have faced and continue to face significant voting discrimination due to "unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation." Other language groups have not been included because Congress did not find evidence that shows they experienced similar sustained difficulties in voting. By providing language assistance, Congress intended to break down the language barriers that effectively prevented limited-English speaking citizens from exercising their constitutional right to vote.
The adoption of these language assistance provisions are derived from a very basic principle: an eligible voter should not be penalized for his or her lack of English proficiency, especially when this inability to understand the English language reflects the failure of educational institutions to insure that its young students, as well as, adult students, meet a certain minimal level of English proficiency. The congressional testimony in support of the language assistance provisions has documented the need for the implementation and the continued need for these provisions.

The language assistance provisions require that any election materials provided in English must also be provided in the language of the covered minority group. Election information includes registration or voting notices, forms, instructions, ballots, and any other materials or information relating to the electoral process. Where the language of a covered minority group has no written form, the state or locality is only required to provide oral instructions, information, and assistance.

In 1992, after determining that the type of discrimination previously encountered by covered language minority populations still existed and that the need for language assistance continued, Congress passed the Voting Rights Language Assistance Amendments, which reauthorized the language assistance provisions until August 2007. In addition to reauthorization, Congress determined that an expanded formula for determining coverage was necessary.

The pre-1992 formula required coverage only if an Asian, Native American, Alaskan Native or Latina/o language minority community had LEP voting age citizens equal to five percent of the jurisdiction's citizen voting-age population. This resulted in dense urban jurisdictions with large LEP voting populations not being covered while jurisdictions with smaller populations were being covered, and required an excessively large LEP language minority citizen voting-age population for urban jurisdictions to meet the five percent threshold. For example, the number of LEP voting age citizens from a single language minority community needed to meet the five percent threshold in 1990 for Los Angeles County was 443,158, as compared to Napa County, which required only 5,538 to meet the threshold. Similarly, San Francisco County would have also had to reach a much higher threshold than Napa County at 36,198. Congress determined that a 10,000 person benchmark served as an appropriate threshold that would solve that problem. The numerical benchmark has been extremely important to Asian Americans because 97 percent of Asian Americans live in densely populated urban areas.

A community of one of these language minority groups will qualify for language assistance under Section 203 of the Act if more than five percent or 10,000 of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited-English proficiency; and the illiteracy rate of voting-age citizens in the language minority group is higher than the national illiteracy rate. A community of one of these language minority groups will qualify for language assistance under Section 4(f)(4) if (i) more than five percent of the voting-age citizens in a jurisdiction belong to a single language minority community, (ii) registration and election materials were provided only in English on November 1, 1972, and (iii) fewer than 50 percent of the voting-age citizens in such jurisdiction were registered to vote or voted in the 1972 presidential election. Jurisdictions covered under Section 4(f)(4) are covered under Section 5.
Currently, Sections 203 and 4(f)(4) apply in California. Presently there are 25 counties in California subject to Section 203 that are required to provide an election process in a language other than English. Of the Section 5-covered jurisdictions, there are only three counties subject to the language assistance requirements.

B. Continuing Need

Language minority voters face discrimination on the basis of their limited-English proficiency. Even though language minority voters are citizens and have the legal right to vote, poll workers and other election officials single them out as persons who should not be voting because they are not completely fluent or literate in English. This discrimination creates barriers to voting. Most obviously, discrimination can result in outright denials of the right to vote. Discrimination also creates an unwelcoming atmosphere in poll sites that serves as a deterrent to language minority voters exercising their right to vote. Section 203 addresses both of these barriers in a manner that is more fully described in the section of this report addressing discrimination against language minority voters.

Language minority voters face another barrier to voting - language. Because of their limited-English proficiency, language is the largest barrier that language minority voters face in becoming full participants in our democracy. Some language minority voters, even though they were born in the United States or came to the United States at an early age, are limited-English proficient because they attended substandard schools that did not afford them an adequate chance to learn English. Other language minority voters are limited-English proficient because they immigrated to this country and have lacked adequate opportunities to fully learn English. In either case, Section 203 language assistance lowers the single largest hurdle that these voters face in the voting process.

Many Asian American and Latina/o voters in California have high rates of limited-English proficiency, which means they are unable to speak or understand English adequately enough to participate in the electoral process. For many language minority voters in California, the language barrier would be insurmountable without the language assistance that they receive pursuant to Section 203. California voters must contend with extremely complicated ballots. For example, the ballot used in the October 2003 gubernatorial recall election listed 135 candidates. The ballot used in the November 2004 general election contained a total of 16 statewide ballot propositions, and the ballot used in the November 2005 statewide special election contained ballot propositions addressing such arcane topics as redistricting reform, prescription drug discounts and electricity regulation. Many voters who speak English as their first language have difficulty understanding these types of ballots. For language minority voters, the language barrier doubles or triples this difficulty.

Voter information guides are also full of complexity. These guides contain not only the text of proposed laws, but also analyses by the state legislative analyst, arguments for and against proposed laws, and rebuttal arguments. Adding to the complexity is the length of these guides. The voter information guide used in the November 2005 statewide special election is more than 75 pages long. For voters who do not read English at a high level, reading these types of guides would take weeks.

In short, language minority voters need Section 203 to help them climb the language hurdle. Several indicators show that this need is particularly compelling for voters in California.

1. Demographic Indicators of Need

Disaggregated Census 2000 data show that the language minority population in California does indeed have a high rate of limited-English proficiency. Disaggregated Census 2000 data also show that a significant portion of the Asian-American population, including significant portions

of specific Asian-American ethnic groups, and the Latina/o population in California live in what are referred to as "linguistically isolated households." A household is considered linguistically isolated if all members of the household 14 years and older are limited- English proficient. Voters who live in linguistically isolated households are in particular need of language assistance because they do not have family members who can assist them in the voting process even if they wanted the assistance.

The Asian-American population in California is nearly 40 percent limited-English proficient, and over one-quarter of Asian American households are linguistically isolated. A number of Asian-American groups are majority or near-majority limited-English proficient, including Vietnamese at 62 percent, Korean at 52 percent, and Chinese at 48 percent. These groups also have high rates of linguistic isolation, with 44 percent of Vietnamese American households isolated, 41 percent of Korean American households isolated, and 34 percent of Chinese American households isolated. The Latina/o population in California is 43 percent limited-English proficient, and 26 percent of Latina/o households are linguistically isolated.
The table below provides additional data on rates of limited-English proficiency and linguistic isolation for various racial and ethnic groups in California:
California - LEP and LIH Rates
Group Percentage of Population That Is Limited-English Proficient (LEP) Percentage of Households That Are Linguistically Isolated (LIH)
California 20% 10%
White 3% 2%
Latina/o 43% 26%
American Indian/Alaska Native 16% 8%
Asian overall 39% 26%
Vietnamese 62% 44%
Cambodian 56% 32%
Korean 52% 41%
Chinese 48% 34%
Filipino 23% 11%
Japanese 22% 18%

2. Requests for Language Assistance

Another indication that language minority voters are in need of language assistance is the number of voters who request language assistance. According to data gathered by the Los Angeles County Registrar of Voters, the total number of voters in Los Angeles County requesting language assistance increased by 38 percent from December 1999 to August 2005. This increase reflects increased outreach by Los Angeles County and illustrates language minority voters' reliance on language assistance. The following table shows these increases for specific language minority groups:

Los Angeles County - Voter Requests for Language Assistance
Language Percentage Increase in Number of Voter Requests for Language Assistance From December 1999 to August 2005
Chinese 49%

Japanese 25%
Korean 26%
Tagalog 63%
Vietnamese 40%
Spanish 37%

These data indicate that because of voter outreach and education by Los Angeles County and community advocates, many limited-English proficient Asian Americans and Latina/o voters are using the language assistance provided under Section 203. The data also indicate that as the number of requests for language assistance increases, language minority voters have a continuing need for Section 203 assistance.

3. Exit Poll Indicators of Need

During major elections, APALC conducts large-scale exit polls at poll sites throughout Southern California. These poll results show that the limited-English proficiency rate of APIA voters mirrors the limited-English proficiency rate of the general APIA population. For example, in November 2004, 40 percent of APIA voters surveyed in APALC's exit poll indicated that they are limited-English proficient. The following table shows similar exit poll data for other elections:

Southern California Exit Poll Data - LEP Rates
Election Percentage of APIA Voters Who Are Limited-English Proficient
November 2004 * 40%
November 2002 32%
November 2000 46%
March 2000 47%
November 1998 35%

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* Represents preliminary findings. Subject to adjustment based on statistical weighting.

In addition to illustrating that language minority voters have a need for language assistance, these exit poll results show that many APIA and Latina/o voters in Los Angeles and Orange counties would benefit from language assistance during the voting process. For example, in November 2000, 54 percent of APIA voters and 46 percent of Latina/o voters indicated that they would be more likely to vote if they received language assistance. The following table provides similar data for other elections:

Southern California Exit Poll Data - More Likely to Vote If Assistance Received
Election Percentage of APIA
Voters More Likely to Vote If Assistance Received Percentage of Latina/o
Voters More Likely to
Vote If Assistance Received
November 2000 54% 46%
March 2000 53% 42%
November 1998 43% 38%

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

C. Unequal Educational Opportunities for Language Minorities

Congress enacted Section 203 after concluding that English-only elections and voting practices effectively denied the right to vote to a substantial segment of the nation's language minority population. Congress made findings that language minorities suffer from unequal educational opportunities, high illiteracy, and low voting participation. Language minorities still face unequal educational opportunities, and the continuing existence of these inequalities constitutes a sufficient basis for Congress to renew Section 203 for an additional 25 years.

1. Demographic Indicators of Unequal Educational Opportunities

Current demographic data indicate that educational inequalities still exist. Using high school completion as a measure, disaggregated Census 2000 data show that Asian Americans and Latinas/os have lower rates of educational attainment than white Americans. In California, 19 percent of Asian Americans have less than a high school degree, compared with 10 percent of the white population. These differences are even more dramatic when looking at specific Asian American ethnic groups. For example, 36 percent of Vietnamese Americans have less than a high school degree. Latinas/os have even lower rates of educational attainment, with 53 percent having less than a high school degree. The following table shows rates of high school non-completion in California:

California - High School Non-Completion
Group Percentage of Population With
Less Than a High School Degree

California 23%
White 10%
Latina/o 53%
Asian overall 19%
Hmong 66%
Laotian 58%
Cambodian 56%
Vietnamese 36%
Chinese 22%
Filipino 12%
Korean 12%

These low rates of high school completion are a contributing factor to continuing high rates of limited-English proficiency among Asian American and Latina/o children, defined as children age 17 years and younger. According to disaggregated Census 2000 data, over one-fifth of Asian American children in California are limited-English proficient. In the majority of counties

covered by Section 203 for an Asian-American language minority group, these rates are higher. For example, 30 percent of Asian American children in San Francisco County and 24 percent of Asian American children in Los Angeles County are limited-English proficient. Almost one-third of Latina/o children in California are limited-English proficient. Los Angeles, Orange, and San Diego are the three counties in California with the largest numbers of limited-English proficient voting-age citizens covered under Section 203 for persons of Spanish heritage. Over 30 percent of Latina/o children in these counties are limited-English proficient.

2. Other Indicators of Unequal Educational Opportunities

There are other indications that language minorities suffer from unequal educational opportunities in California. K-12 students in California designated as "English learners" suffer from a number of educational inequities. English learners are students who speak a language other than English at home and who are not proficient in English. Students who speak a language other than English at home must take a test to assess their level of English proficiency. Students who are considered not proficient in English are classified as English learners, and most are placed into English language development programs.
According to a recent 2005 study, there are more than 1.6 million English learners in California, representing over one-fourth of California's elementary and secondary students. Over 90 percent of these students are from language minority groups specified in Section 203 (Latinas/os comprise 85 percent of English learners, and APIAs make up 9 percent of English learners). Contrary to common perception, approximately 85 percent of California's English learners are born in the United States.

3. Achievement Gap for English Learners

According to a 2003 study of English learners in California schools, the academic achievement of English learners lags significantly behind the achievement levels of English-only students. The study finds that the achievement gap puts English learners further and further behind English-only students as the students progress through school grades. For example, in grade 5, current and former English learners read at the same level as English-only students who are between grades 3 and 4, a gap of approximately 1.5 years. By grade 11, current and former English learners read at the same level as English-only students who are between grades 6 and 7, a gap of approximately 4.5 years.
The study also found that English learners have significantly lower rates of passing the California High School Exit Exam, a standards-based test that all students in California must pass in order to graduate from high school. In the graduating class of 2004, only 19 percent of English learners had passed the test after two attempts, compared with 48 percent of all students. The study attributes this achievement gap to a number of educational inequalities that English learners face. The study finds that English learners face seven categories of unequal educational opportunities:

a) California lacks a sufficient number of appropriately trained teachers to teach English learners.

English learners are more likely than any other students to be taught by teachers who are not fully credentialed. The study notes that 14 percent of teachers statewide were not fully credentialed in 2001-2002. In contrast, 25 percent of teachers of English learners were not fully certified. The study also finds that as the concentration of English learners in a school increases,

the percentage of teachers without full credentials also increases.
The study observes further that only 53 percent of English learners who were enrolled in grades 1 to 4 during the 1999-2000 school year were taught by a teacher with any specialized training to teach them. In addition, many newly certified teachers report that they do not have sufficient training to work with English learners and their families. Of the teachers graduating from teacher credential programs in the California State University system in 1999-2000, one-fourth reported that they felt they were only somewhat prepared or not at all prepared to teach English learners.

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

The study notes the intense instructional demands that teachers of English learner students face. Teachers must provide instruction in English language development while simultaneously attempting to ensure that English learners have access to core curriculum subjects. Despite these demands, teachers devote inadequate amounts of time to their professional development in the area of teaching English learners. For example, in 1999-2000, the percentage of professional development time that teachers reported spending on the instruction of English learners was about seven percent. Even for teachers whose students are more than 50 percent English learners, this percentage was only ten percent.
As reported in the study, one cause of this is the lack of funding devoted to making professional development available to teachers so that they can enhance their skills in teaching English learners. For example, in 2000-2001, the state provided $50.9 million to the University of California to provide professional development to teachers. However, only $8.6 million was allotted for professional development in the area of English language development. This amount was only 16 percent of the professional development budget even though English learners make up more than 25 percent of the student population in California and are arguably the most educationally disadvantaged of all students.

c) English learners are forced to use inappropriate assessment tools to measure their achievement, gauge their learning needs, and hold the system accountable for their progress.

The study describes the impact that inappropriate testing has on English learners. California schools administer English-only tests to measure achievement for English learners. These tests fail to provide accurate data for purposes of gauging whether their educational needs are being met. They also fail to help teachers in monitoring the progress of English learners and enhancing the instruction of English learners.
The study observes that such tests can also have serious negative effects on English learners in at least two ways. First, increases in test scores can give the inaccurate impression that English learners have gained subject matter knowledge when in fact they may have simply gained proficiency in English. This misperception can lead schools to continue providing a curriculum that fails to emphasize subject matter that is substantively appropriate. Second and conversely, consistently low test scores can lead educators to mistakenly believe that English learners need remedial or even special education, when in fact they may have mastered the curriculum in another language, but are unable to show their learning gains when taking an English language test.

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

The study notes that a significant body of research shows a clear relationship between increased time devoted to academic instruction and increased levels of achievement, but that English learners fail to spend as much time receiving academic instruction time as other students. This happens in a number of ways. For example, elementary schools commonly take English learners out of their regular classes in order to put them in English language development classes. These "pulled out" students miss regular classroom instruction, and there is generally no opportunity for students to later acquire the instruction they missed during the pull out period.

The study also observes that English learners in secondary schools are frequently assigned to multiple periods of English as a Second Language (ESL) classes while other students are taking a full complement of academic courses. When schools do not have enough courses available for English learners, the English learners are often given shortened day schedules, leading to the students receiving significantly less amount of academic instruction.

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

The study notes that English learners need additional materials beyond what is provided to all students. This need exists in two areas. First, English learners need developmentally appropriate texts and curriculum to learn English and to meet standards for their development of English skills. Second, English learners who receive instruction in their primary language need texts and curriculum that are in their primary language.
However, the study finds that many English learners lack access to such materials. For example, the study cites a 1998-2001 survey that reports 75 percent of teachers use the same textbooks for both English learners and English-only students and that only 46 percent of teachers use any supplementary materials for English learners. Not surprisingly, only 41 percent of teachers reported that they were able to cover as much material with English learners as with English-only students.

f) English learners lack access to adequate school facilities.

The study reports that teachers of English learners are more apt than teachers of English-only students to respond that they do not have facilities that are conducive to teaching and learning. For example, the study cites a 2002 survey finding that close to half of teachers in schools with higher percentages of English learners reported that the physical facilities at their schools were only fair or poor, compared with 26 percent of teachers in schools with low percentages of English learners. Also, teachers in schools with high percentages of English learners were 50 percent more likely to report bathrooms that were not clean and open throughout the day and to have seen evidence of cockroaches, rats, or mice. Lastly, more than a third of principals in schools with higher concentrations of English learners reported that their classrooms were never adequate or often not adequate, compared with eight percent of principals in schools with low concentrations of English learners.

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

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

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

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

h) Litigation Against the State of California

Public schools and teachers are the responsibility of government, and California's failures to provide adequate education to language minorities have contributed to the educational inequalities described above. In a number of instances, these failures have even led to direct litigation against the state. These legal actions highlight the state's educational failures and indicate the severity of these failures.

For example, in 1970, the state entered into a consent decree that settled the Diana v. California State Board of Education class action lawsuit. The lawsuit was filed on behalf of Chinese and Mexican-American English learners who were inappropriately placed in special education classes. The 2003 study described above reports that although the state agreed to address this problem in the Diana consent decree, the state has failed to fully implement the consent decree in the 30 years following the consent decree. The result is that English learners are still over-represented in special education classes. Because schools continue to fail to offer support services in the primary language of English learners, English learners are misdiagnosed as needing special education and misplaced into special education programs at higher rates than other students. When students are placed in special education programs, especially when the placement is not warranted, the placement has devastating effects on students' access to opportunities later in life, leading to massive rates of high school non-completion, underemployment, poverty, and marginalization during their adult lives.

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

In 2000, a class action lawsuit entitled Williams v. State of California was filed on behalf of students in low-income communities and communities of color. APALC served as co-counsel in this litigation. The lawsuit challenged substandard conditions rampant in schools located in low-income and primarily minority communities and alleged that the state's failure to provide minimum educational necessities violated the state constitution and state and federal laws. In 2004, the state entered into a settlement agreement pursuant to which the state is required to provide all students with books, keep schools clean and safe, and ensure that students have qualified teachers. It remains to be seen whether the state's compliance efforts will succeed, or

whether they will fail as they did in the implementation of the Diana consent decree. Either way, the devastating impact on language minority students who suffered through substandard conditions has the potential to persist for the remainder of the students' lives.

Most recently, ten school districts filed a lawsuit against the state of California. As part of a statewide coalition, APALC is an organizational plaintiff in the lawsuit, which demands that schools test English learners in their primary language and/or provide reasonable testing accommodations as mandated by the federal No Child Left Behind Act. The lawsuit alleges that the state's failure to provide assessments to English learners that yield accurate and reliable results has resulted in numerous harms to English learners, including the stigmatization of English learners who are not afforded the opportunity to demonstrate their academic learning, the curtailing of basic educational programs in school districts deemed "education failures" compared to other districts, and diminished opportunities for English learners to advance to higher grades and to graduate.

i) Lack of Opportunities for Adult Language Minorities to Learn English

Adult language minorities also suffer from a lack of opportunities to learn English. According to the 2004 Annual Report of the Commission on Asian & Pacific Islander American Affairs, current federal and state funding for English acquisition classes in California consistently fails to meet the demand of California's growing limited-English proficient population. The report found that ESL courses are often oversubscribed and overcrowded. For example, from 2001 to 2002, individuals enrolled in ESL courses made up 43 percent of the total number of people in California who participated in an adult school program and 20 percent of people who participated in non-credit courses offered by California's community colleges. The report also found that ESL courses are rarely offered outside of work hours when working language minorities can take advantage of the courses.

D. Impact of Section 203

In the 40 years since the Voting Rights Act was enacted, and in the 30 years since Section 203 was added to the Act, there have been substantial gains in APIA electoral representation and levels of APIA voter registration and voting participation. Many of these gains have occurred since Section 203 was amended in 1992 to add a numerical threshold for triggering coverage.

1. Increases in Voter Registration and Participation

In California, there have been significant increases in APIA registration and turnout levels over the past several years. According to census data, the number of APIA registered voters increased by 61 percent from the November 1998 election to the November 2004 election. In the same period, the number of APIA voters who turned out to vote increased by 98 percent. Both of these increases outpaced increases in both the overall APIA voting age population and the overall APIA citizen voting age population. The second table below shows the total APIA voting age population in California, the total APIA citizen voting age population, the total number of registered APIA voters, and the total number of registered APIA voters who voted in the relevant election.

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

During the same time period, the Latina/o registration and turnout levels in California have also increased. According to census data,140 the number of Latina/o registered voters increased by 40 percent from the November 1998 election to the November 2004 election. In the same period, the number of Latina/o voters who turned out to vote increased by 56 percent. Both of these increases outpaced the increase in the overall Latina/o voting age population and the turnout outpaced the increase in the total Latina/o citizen voting age population. The table on the next page shows the total Latina/o voting age population in California, the total Latina/o citizen voting age population, the total number of registered Latina/o voters, and the total number of registered Latina/o voters who voted in the relevant election.

Election Total Latina/o
Voting Age
Population Total Latina/o Citizen Voting
Age Population Total Registered
Latina/o Voters Total Turnout
Among Registered
Latina/o Voters
November 1998 6,264 3,154 1,749 1,338
November 2000 6,514 3,489 1,919 1,597
November 2002 6,964 3,974 2,017 1,206
November 2004 8,127 4,433 2,455 2,081
Increase 1998 - 2004 30% 41% 40% 56%

Moreover, according to the U.S. Department of Justice, levels of voter registration in San Diego County have increased dramatically since the Justice Department brought enforcement action to bring San Diego County into compliance with Section 203. Specifically, Latina/o and Filipino American voter registration has increased by 21 percent and Vietnamese American registration has increased by 37 percent since the Justice Department's action.

However, although APIA and Latina/o voters have seen gains in voter registration and turnout, their turnout levels still lag behind the overall population, as well as the white and African American communities in California. For example, in the November 2004 elections, almost 73

percent of white voters registered and 67 percent turned out to vote. African Americans in California exhibit similar rates, with 68 percent registering and 61 percent turning out to vote. In contrast, Latina/os registered at a rate of 55 percent and APIAs 53 percent while they turned out at rates of 47 percent and 44 percent respectively. Continued compliance with Section 203 and an effective language assistance program can help to continue the increases in voter registration and turnout for the Latina/o and APIA communities.

2. Discrimination against Language Minorities

Despite the protections of the Voting Rights Act, discrimination against language minority voters still occurs in the voting process. Evidence of this discrimination can be seen in the anecdotes from poll monitoring efforts by APALC and other organizations and schemes of discrimination that are described below. Before describing these anecdotes and schemes, it is important to illustrate in general the nature of discrimination against language minority voters and how Section 203 addresses this discrimination in a unique and successful manner.

a) Nature of Discrimination Against Language Minority Voters and Uniqueness of Section 203 Remedy

Poll worker comments such as "why can't these people speak English" create a pernicious atmosphere in polling sites that non-English speaking voters are unwelcome. In turn, this unwelcoming atmosphere acts as a deterrent to language minority voters exercising their right to vote. In other cases, discrimination against language minority voters serves as an outright denial of their right to vote. For example, language minority voters are disenfranchised by poll workers who, exasperated with their inability to find "foreign-sounding" names in the voter roster, send language minority voters to the back of the line. In both respects, the Section 203 remedy addresses discrimination against language minority voters in a unique and successful manner. With regard to the deterrent barrier, language minority voters feel welcome as they interact with poll workers who hail them with familiar greetings and show them how to use complicated voting machines. Language minority voters also feel confident that they can make informed voting choices by using translated election materials. During the weeks leading up to election day, language minority voters feel included in the process as they see translated notices informing them of polling place changes and deadlines to request absentee ballots.

With regard to outright denials of the right to vote, language minority voters are able to get recourse that they would otherwise lack. For example, when faced with problems, voters can read translated signs that list telephone hotline numbers for the voters to call and report problems. Also, translated voter bill of rights signs give language minority voters awareness of their voting rights, which empowers them to protest voting discrimination. Naturally, like many people who have been historically disenfranchised, language minority voters are often hesitant to speak up for themselves. In such cases, enforcement of Section 203 by the Justice Department and poll monitoring by advocacy organizations deter and prevent discrimination against language minority voters and also ensure that jurisdictions fully comply with Section 203.

b) Non-Compliance and Poll Worker Ignorance Leading to Voting Problems

Poll monitors have seen recurring problems at poll sites, including problems in Section 203 implementation. Section 203 implementation problems include:
? Poll sites lacking a sufficient number of bilingual poll workers and interpreters
? Translated materials not being supplied to poll sites
? Translated materials being supplied but poorly displayed at poll sites
? Poll sites lacking adequate translated signage or lacking signage altogether directing voters where to go and explaining what their rights are

Recurring problems in Section 203 implementation reflects the failure of county registrars to properly educate their poll workers about language assistance. Many of these problems are the result of poor poll worker training or poll workers not attending training sessions at all. Poll monitors are at times able to resolve problems of non-compliance, thereby preserving the right of language minority voters to vote. On other occasions, poll workers' ignorance of voting rights has led to language minority voters being turned away and denied the right to vote. Poll monitors have observed several instances of this disenfranchisement in California:
? November 2000 general election, San Francisco County - Poll monitors witnessed a poll worker yelling at several elderly Chinese-American women, telling them, "Get out!" The poll worker later explained that he was angry at an elderly Chinese-American voter who had brought a friend to help her vote. The poll worker mistakenly believed that it was "illegal" to have someone other than a poll worker provide voting assistance. The elderly voter was turned away before she could vote.
? November 2002 general election, San Francisco County - A poll worker reported to the poll monitor that one voter left the polling place without voting because the voter was unable to communicate with the poll worker. The poll worker did not know that he could have called the language assistance line operated by the city of San Francisco's Department of Elections and obtained language assistance for the voter.
? November 2002 general election, San Francisco County - At a poll site with a large number of elderly Chinese-American voters who needed language assistance, the poll monitor observed a number of voters whose votes were not counted. These problems resulted from the Department of Elections failing to staff the poll site with a sufficient number of bilingual poll workers. Many of the voters at the poll site struggled with the voting process, and the bilingual poll workers were overwhelmed and unable to help everyone who needed voting assistance. The poll inspector showed the poll monitor spoiled ballots on which voters had voted for the wrong number of candidates or checked the write-in box without entering a candidate's name. The poll inspector expressed frustration that some of these voters left the poll site before the poll inspector could ask them to complete new ballots, or left despite being asked because they could not understand his request. The poll monitor observed the poll site's optical scan machine rejecting many completed ballots.

c) Hostile Poll Workers Create an Unwelcoming Atmosphere and Cause Denials of Votes by Language Minorities.

Despite improvements in poll worker training, discrimination against Asian-American and other language minority voters still occurs in the polling place. Even the most comprehensive poll worker training program will not completely eliminate the discriminatory attitudes retained by some poll workers. Such poll workers display a cavalier attitude about language assistance or

even an attitude that language assistance should not be provided to voters. This ambivalence about providing language assistance reflects a view of society that excludes non-mainstream voters from the political process. This view not only contributes to the recurring non-compliance problems described above, but it also creates an unwelcoming atmosphere that acts as a deterrent to language minority voters exercising their right to vote.

Poll monitors deployed by APALC and other organizations in California have observed poll workers expressing these attitudes either verbally or in their obvious refusal to provide language assistance. A few illustrative examples that span from the 2000 election cycle to the 2004 election cycle include the following:

? March 2000 primary election, Monterey Park, Los Angeles County - The inspector stated, "The bilingual materials are a waste of time and money." She pulled the bilingual materials out, but then put them back in the envelope. Ultimately, the poll monitor had to assist in laying them out.

? November 2000 general election, San Francisco County - A poll inspector complained that it was difficult to assist Chinese-American voters, stating his belief that they generally are ignorant about the voting process. The poll inspector told the poll monitor, "I guess they don't have free elections in their countries. We don't always have all this time to explain everything about free elections to them."

? November 2002 general election, San Francisco County - The poll monitor noted to a poll worker that the poll site lacked Spanish language voter information pamphlets. The poll worker responded, "If they don't speak English, then they shouldn't be voting in the United States of America."

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

? November 2004 general election, Monterey Park, Los Angeles County - When the APALC poll monitor surveyed the poll workers to ascertain which poll workers were bilingual, one of the poll workers responded, "I speak English; this is America."

Over the years, monitors have observed poll workers being outright hostile towards language minority voters. A few illustrative examples include the following:

? March 2000 primary election, Santa Ana, Orange County - The poll inspector was rude and curt to voters, particularly young voters, and was also reluctant to help limited-English proficient voters. She inappropriately asked some young APIA voters for identification (California state law did not at the time and does not now require voters to show identification). The APALC poll monitor heard the inspector comment, "Everybody wants to come to America and take what is ours - our land."

? November 2004 general election, Rowland Heights, Los Angeles County - The poll inspector talked slowly and loudly to elderly APIA voters. When two elderly APIA women made a mistake on their ballots and wanted assistance to get new ones, the inspector told them very loudly, "Just stay there, just stay." When asked about translated voter registration forms, the inspector replied that the forms were available in the "American language." When asked about hotline numbers for language assistance, the inspector replied, "They're around here somewhere" and walked away.

? November 2000 general election, San Francisco County - A poll monitor observed a poll worker yell at a Chinese-American voter and take the voter's ballot away. The poll worker was frustrated that the voter, who was limited-English proficient, was not following his instructions.

The voter left without casting a ballot.
? November 2004 general election, San Diego County - In the words of the poll monitor at one poll site, a poll worker talked to minority voters "as if they were children."
? November 2004 general election, San Mateo County - A poll worker questioned the competency of a voter to vote because of the voter's limited-English proficiency.
? Latina/o voters also encountered difficulties in securing bilingual oral assistance and did not find written voter information that would have enabled them to vote.

d) Intentional Discriminatory Schemes

In addition to individual instances of discrimination in polling sites, there have also been instances of schemes of voter discrimination. Section 6253.6 of the California Government Code is a reminder of such instances. Enacted in 1982, this section requires government officials to maintain the confidentiality of information in voter files that identifies voters who have requested bilingual voting materials. The section was enacted to protect language minority voters from being targeted with allegations of voter fraud.

As detailed in the legislative history of Section 6253.6, the section's enactment was precipitated by an investigation conducted by the U.S. Attorney's office in nine Northern Californian counties. The U.S. Attorney's office randomly investigated voters who had requested Spanish and Chinese language voting materials and arranged for the Immigration and Naturalization Service (INS) to cross-check the voters' records with citizenship records.

This investigation followed on the footsteps of INS raids on factories and businesses and was part of a larger scheme to scapegoat language minority and immigrant communities for economic woes. The investigation also occurred during voter registration drives among minority language communities in Northern California. Amidst concerns that the investigation would intimidate language minority voters, the American Civil Liberties Union and the Mexican American Legal Defense and Educational Fund filed suit under the Voting Rights Act. There was also a large amount of public outcry against the investigation, including censures by a number of city councils. The U.S. Attorney's office abated its investigation, and Section 6253.6 was passed overwhelmingly in the legislature by a 54 - 7 Assembly vote and a 38 - 0 Senate vote.

E. Enforcement of Section 203

As with other provisions of the Voting Rights Act of 1965, litigation is often the only effective avenue available for language minority groups to enforce these language assistance provisions and secure access to the political process. Recently, the U.S. Attorney General has been enforcing these provisions in California. The Attorney General has filed Section 203 actions against the cities of Azusa, Paramount, Rosemead, and the counties of Ventura, San Diego, San Benito, Alameda, and San Francisco. Generally, all of these actions are directed to the failure of the cities and counties to effectively implement the language assistance provisions. The complaints cover such topics as the failure to provide ballots and other election materials in the required language, failure to provide an adequate number of bilingual election personnel on election day, and the woefully inadequate outreach conducted by these Section 203-covered jurisdictions to reach relevant non-English speaking communities. The consent decrees have provided provisions for the translation of election materials and public notices, for the

distribution of translated election materials to language minority communities, for the establishment of a language minority advisory committee that oversees the terms of the consent decree, for the creation of a coordinator position responsible for assuring that the terms of the consent decree are followed, and for periodic oversight and reporting on the efforts of these covered jurisdictions to meet their statutory obligations.

Nonetheless, the federal enforcement has been very limited. Recent testimony before Congress and before the National Commission on the Voting Rights Act, highlighted the continued necessity for enforcement of the language assistance provisions. As previously discussed, Latina/o and Asian Americans are still characterized by significant numbers of persons who are limited-English proficient and experience out-right hostilities at the polls.

The necessity of Section 203 can also be measured by the geographic distribution of the litigation that has been filed by the Attorney General. Cases have been filed in Northern California (counties of Alameda, San Francisco, and San Benito), the central coast area (Ventura County), and Southern California (San Diego County, and the cities of Rosemead, Paramount, and Azusa (located within Los Angeles County)). An examination of the complaints and consent decrees indicate that there are common issues of non-compliance. The geographic breadth indicates that the issue of Section 203 non-compliance is widespread. Instead of seeking to eliminate the language assistance requirements, greater enforcement efforts need to be undertaken by the U.S. Department of Justice. Moreover, given their increasing use and necessity within communities of limited-English proficiency, the language assistance provisions should be expanded to include more communities.

In summary, there is both a demonstrated and documented need for assistance in the electoral process in California. Access to the political process can be denied by elections that voters who are of limited-English proficiency cannot understand. Voters from language minority groups can only be successfully integrated into the body politic by providing an election process that is language accessible. The litigation filed by the Attorney General to enforce Section 203 reinforces the application of a very fundamental principle: a democracy can not tolerate excluding a well defined ethnic, racial, or language minority group from the body politic. This litigation also demonstrates that there is widespread non-compliance with Section 203. At a minimum, a further extension should be provided so that the Attorney General and private parties can finally secure complete compliance with this important provision of the Voting Rights Act of 1965.

IV. Elections in California Are Characterized by Racially Polarized Voting

There is racially polarized voting in California. Such patterns of voting have been documented in numerous cases and expert reports. After the enactment of the 1982 amendments to the VRA, the first case to document such voting patterns involved a challenge to an at-large method electing city council members to the Watsonville City Council. In the Watsonville case, the U.S. Court of Appeals noted that "the plaintiffs have shown that Watsonville Hispanics overwhelmingly and consistently have voting preferences that are distinct from those of white voters . . . [and] that white voters have consistently voted as a racial bloc against candidates . . . ."

The next major finding of racially polarized voting occurred in the successful redistricting challenge against the Los Angeles County Board of Supervisors. The redistricting plan fragmented the predominantly Latina/o community located in East Los Angeles. The district court found that elections in Los Angeles County were characterized by racially polarized voting and that the board of supervisors had intentionally fragmented a politically cohesive Latina/o community in order to maintain their incumbencies.

In addition, in a series of at-large election challenges in the central California valley, expert reports demonstrated that racially polarized voting existed. Finally, a recent study of thirteen elections during the time period from 1994 to 2003 in the San Gabriel area of Los Angeles County shows that elections are characterized by racially polarized voting. The report concluded: Our analysis of the votes taken across these thirteen elections provides convincing evidence that racially polarized voting has occurred in every election. The degree to which the polarization occurs may vary slightly between elections, and with the number of Latino candidates who are involved in a contest. Nonetheless, there can be no doubt that in each of these elections non-Latinos voted substantially against the Latino preferred candidate or issue.160

In summary, there is significant evidence demonstrating that racially polarized voting still plays a substantial role in determining the outcome of elections. To effectively minimize the impact of racial bloc voting, minority communities need to have federal oversight of the electoral process in California. Both Section 5 and Section 203 of the VRA have provided that federal oversight and should be reauthorized.

CONCLUSION

This report has presented a brief description of the obstacles faced by racial and ethnic minorities in California. Although minority voters are not physically prevented from registering to vote and participating in elections, many limited-English proficient voters have experienced an equivalent exclusion from the political process. In addition, minority voters are often subject to the effects of racially polarized voting that prevent them from effectively participating in the political process and electing a candidate of their choice. Apart from the presence of at-large methods of election that can discriminate against minority voting strength, minority voters in Section 5-covered jurisdictions continue to experience voting discrimination that is directly caused by the jurisdiction's failure to comply with the Section 5 preclearance requirements on a timely basis. Waiting twenty-two years as the city of Hanford did in submitting their annexations for Section 5 review cannot be construed as timely. All of these acts of non-compliance with Section 203 and Section 5 only serve to further alienate a growing community that is a non-participant in those important governmental and decision-making processes that serve to solidify the body politic and that are important to the future social cohesiveness of our society. In view of this compelling record of non-compliance, voting discrimination, and political exclusion, the conclusion is inescapable that continued federal oversight of the elections continues to be necessary.

Since the founding of this nation to the culmination of the Second Reconstruction161 and the passage of the 1965 Voting Rights Act of 1965, minorities were effectively excluded from the political process and body politic. For close to two centuries, there was a struggle to expand the franchise and provide that most fundamental of all rights. As documented in this report, the problems associated with voting discrimination continue to this day, especially as evidenced in

both the 2000 and 2004 presidential elections. Unfortunately the well-documented history of voting discrimination in this country has clearly demonstrated that there is still much work to be done. Without the protection provided by the special provisions of the Voting Rights Act of 1965, we will simply retrogress in our efforts to expand the right to vote. As a society, we cannot continue to have in our midst political outcasts who have no vested interest in the well-being of our communities. Only by instilling a sense of ownership through participation in the political process, can we begin to meaningfully politically integrate these communities. Access to the ballot provides a powerful tool for the development of politically vested stakeholders who will not only protect their community, but will also serve as role models for our next generation of political leaders. This is why renewal of the special provisions of the Voting Rights Act of 1965 is needed.