

NOTES

LANGUAGE ACCOMMODATIONS AND SECTION 203 OF THE VOTING RIGHTS ACT: REPORTING REQUIREMENTS AS A POTENTIAL SOLUTION TO THE COMPLIANCE GAP

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Certain voters with limited English proficiency (LEP) are afforded affirmative accommodations under section 203 of the Voting Rights Act (VRA). Section 203's provisions, however, are often critically misunderstood and only partially implemented. The law's substantial compliance gap stems largely from its complex and fact-specific mandates as well as its requirement that election jurisdictions themselves determine the extent of their own affirmative duties.

*In an effort to partially close section 203's compliance gap and promote universal enforcement of federal election laws, this Note adapts a recent proposal requiring the advance disclosure of federal voting changes to the language assistance context. In response to the Supreme Court's decision in *Shelby County v. Holder*, academics and members of Congress have proposed a requirement that all election jurisdictions report to the local media and the government certain changes to their election laws before those changes take effect. This Note modifies and applies this general framework to address the low compliance rates of the VRA's language assistance provisions.*

This proposal requires all covered language jurisdictions to publicly present a section 203 compliance plan six months before an election. It represents a cost-effective way to inform election officials of their particularized legal obligations and to more efficiently leverage third-party resources to ensure that the language assistance provisions are consistently and properly enforced.

INTRODUCTION.....	918
I. <i>SHELBY COUNTY</i> AND RECENT PROPOSALS FOR DISCLOSURE	926

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A. <i>Shelby County and the Legislative Response</i>	926
B. <i>The Case for Reporting Requirements for Voting Changes</i>	930
II. SUSTAINED VULNERABILITY OF LEP VOTERS AND CURRENT LEGAL PROTECTIONS	931
A. <i>Reauthorization of Section 203 and the Law's Vague Standards</i>	932
B. <i>Section 203 as a Partial Solution to LEP Voters' Low Participation Rates and Sustained Vulnerability</i>	935
C. <i>A Confusing Legal Standard and Widespread Misperceptions Largely Contribute to Jurisdictions' High Rates of Noncompliance with Section 203</i>	938
D. <i>The Infrequency of Enforcement Likely Contributes to the Compliance Gap</i>	942
III. PROPOSING AND DEFENDING REPORTING REQUIREMENTS FOR SECTION 203...	945
A. <i>Mechanics of Disclosure in the Section 203 Context</i>	945
B. <i>Reporting Requirements Will Increase Section 203 Compliance Primarily by Correcting Confusion Among Election Officials</i>	948
C. <i>Reporting Requirements Will Enhance the Effectiveness of Poll Watching, Place Informal Pressure on Election Officials, and Ease Section 203's Litigation Burden</i>	951
1. <i>More efficient and effective poll watching</i>	951
2. <i>Easing section 203's litigation burden</i>	952
D. <i>Exploring Alternative Proposals and Counterpoints: The Virtue of Embracing Slight Modifications to Spur Compliance and Focusing on the Imperative of Universal Enforcement of Voting Laws</i>	953
E. <i>Applying the "Current Needs" Standard Introduced in Shelby County, Section 203 and This Plan Are Likely Constitutional</i>	957
CONCLUSION.....	960

INTRODUCTION

To state it mildly, *Shelby County v. Holder*¹ was a significant decision. The merits of the opinion are perhaps debatable,² but the final result is not. By ruling section 4 of the Voting Rights Act (VRA) unconstitutional, the decision effectively transformed the “heart of the Voting Rights Act”³—section 5—into a “nullity.”⁴

1. 133 S. Ct. 2612 (2013).

2. Compare William S. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, 2012-2013 CATO SUP. CT. REV. 31, 60 (“In sum, the dissent simply had no answer to the majority’s conclusion that Section 4(b)’s coverage formula is irrational in theory.”), with Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714 (2014) (“*Shelby County* is an audacious opinion which ignores history . . .”).

3. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>; see also *Shelby Cnty.*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting) (“[T]he Court today terminates the remedy that proved to be best suited to block [voter] discrimination.”). But see *Voting Rights Act After the Supreme Court’s Decision in Shelby County: Hearing Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 113th Cong.

The response from various commentators and legislators alike was immediate and in some cases powerful.⁵ Indeed, Congress has demonstrated at least the limited capacity to foster bipartisan support and craft a compromise bill to “restore the protections of the Voting Rights Act.”⁶ Many proposals attempt to reinfuse legal force into section 5 “preclearance”—that is, to devise a remedy that once again requires high-risk jurisdictions to receive approval from the federal government before changing their voting laws.⁷

Other proposals, however, are more novel. Among them is the plan to create a nationwide disclosure requirement, mandating that jurisdictions publicly disclose certain prospective changes to their voting laws before those changes take effect. One of the proposal’s animating rationales is to identify and ideally prevent violations *before* such laws jeopardize important voting rights. Upfront, complete, and accessible information will decrease the plaintiffs’ burden in identifying and challenging discriminatory voting practices and, in theory, will deter bad actors from passing such laws at the outset. This proposal was most recently articulated by Samuel Issacharoff,⁸ and a version of it has been substantially incorporated into the multifaceted voting rights bill currently before Congress.⁹

As commentators and Congress each turn their attention to refining the “two distinct structures”¹⁰ of the VRA—section 2 and section 5—one of the most pressing voting rights issues of our time goes largely unaddressed: limited English proficient (LEP) voters continue to face obstacles as federal voting laws designed to enhance their participation remain critically underenforced. Section 203 of the VRA guarantees oral and written language assistance to cer-

49 (2013) (prepared statement of Hans A. von Spakovsky, Senior Legal Fellow, Heritage Foundation) (“The ‘heart’ of the VRA today is Section 2, not Section 5.”).

4. George F. Will, *Supreme Court Is Correct on Voting Rights Act*, WASH. POST (June 26, 2013), <http://wapo.st/1MlrYf4>.

5. See, e.g., Andrew Cohen, *On Voting Rights, a Decision As Lamentable As Plessy or Dred Scott*, ATLANTIC (June 25, 2013), <http://www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455>; Press Release, Representatives Keith Ellison & Mark Pocan, Pocan & Ellison: Supreme Court Voting Rights Act Decision Demonstrates Need for National Right to Vote Amendment (June 25, 2013), <http://pocan.house.gov/media-center/press-releases/pocan-ellison-supreme-court-voting-rights-act-decision-demonstrates-need> (“Today’s Supreme Court decision is an assault on what should be our most fundamental right as Americans.” (bolding omitted) (internal quotation mark omitted)).

6. Press Release, Senator Patrick Leahy, Leahy, Sensenbrenner & Conyers Lead Bipartisan, Bicameral Introduction of Legislation to Restore the Voting Rights Act (Jan. 16, 2014), <http://www.leahy.senate.gov/press/leahy-sensenbrenner-and-conyers-lead-bipartisan-bicameral-introduction-of-legislation-to-restore-the-voting-rights-act>.

7. See, e.g., *id.* For the full mechanics of section 5’s “preclearance” requirement, see 42 U.S.C. § 1973c(a) (2013).

8. Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 120-25 (2013).

9. See Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. § 4 (2015).

10. Richard H. Pildes, *Introduction* to THE FUTURE OF THE VOTING RIGHTS ACT, at xi, xiv (David L. Epstein et al. eds., 2006).

tain voters “unable to speak or understand English adequately enough to participate in the electoral process.”¹¹ Unfortunately, compliance with this provision is unacceptably low. Although the compliance rates have not been widely studied, one examination suggested that forty percent of section 203 covered¹² jurisdictions fail to provide written and oral language assistance to LEP voters,¹³ as is required by law. Moreover, even for those jurisdictions that do provide the requisite accommodations, the quality of assistance varies tremendously.¹⁴

Unlike section 2, which forbids states and localities from passing voting laws with a racially discriminatory effect,¹⁵ section 203 creates and imposes affirmative duties. Section 203 applies only to Spanish, Asian languages, and Native American and Alaska Native languages,¹⁶ and is governed by a coverage formula that is updated every five years.¹⁷ If coverage is triggered in a state or jurisdiction, election officials must then administer bilingual elections.¹⁸ All written election materials, such as ballots, voter registration materials, and ballot instructions, must be translated, and oral assistance must be available to voters in the appropriate languages.¹⁹

Under section 203’s coverage formula, two criteria must be satisfied for the provision to apply in a given state or jurisdiction. First, the LEP citizens of voting age in a single protected language group must (1) number more than 10,000, (2) comprise more than five percent of all citizens of voting age, or (3) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation.²⁰ Second, the illiteracy rate of the citizens of the LEP group must exceed the national illiteracy rate.²¹

11. 42 U.S.C. § 1973aa-1a(b) (requiring certain “covered” jurisdictions to provide assistance to LEP voters and defining the term “limited-English proficient”).

12. Like section 5 of the VRA, section 203 does not apply nationwide. Congress fashioned a coverage formula to determine in which jurisdictions section 203 carries legal force. *See id.* § 1973aa-1a(b)(2).

13. *See* James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 176, 188 (2007) (stating that of 361 jurisdictions surveyed, only 60.4% “reported providing both oral and written language assistance”).

14. *Id.* at 231 (“Even where language assistance is available, it frequently is inadequate because of the lack of quality control.” (footnote omitted)).

15. 42 U.S.C. § 1973(a) (outlawing any voting practice that results in a “denial or abridgment of the right . . . to vote on account of race or color”).

16. *Id.* § 1973aa-1a(e).

17. *Id.* § 1973aa-1a(b)(2)(A).

18. *See id.* § 1973aa-1a.

19. *Id.* § 1973aa-1a(c) (requiring that “voting notices, forms, instructions, assistance, or other materials . . . , including ballots,” be provided in the applicable minority languages); *see* James Thomas Tucker, *The Census Bureau’s 2011 Determinations of Coverage Under Section 203 of the Voting Rights Act Mandating Bilingual Voting Assistance*, 19 ASIAN AM. L.J. 171, 173-74 (2012) (explaining that in addition to translating written voting materials, jurisdictions covered by section 203 “also must provide oral language assistance”).

20. *See* 42 U.S.C. § 1973aa-1a(b)(2)(A)(i).

21. *See id.* § 1973aa-1a(b)(2)(A)(ii).

The stakes of fully implementing section 203 are considerable. The compliance failures undermine the rule of law, contribute to the sustained vulnerability of LEP voters, and significantly impact political dynamics on the national, state, and local levels. While section 203 has been effective when properly implemented,²² voting rates in the LEP community continue to substantially lag behind the electorate as a whole.²³ In the 2012 presidential election, 48% of eligible Hispanic voters cast ballots, as opposed to 66.6% of blacks and 64.1% of whites.²⁴ The turnout figures were even lower for Asian Americans and American Indians.²⁵ LEP citizens make up a large portion of Latino, Asian, and American Indian communities,²⁶ and English proficiency has been shown to significantly influence voter turnout, independent of other factors like age or income.²⁷ As the number of protected LEP voters continues to grow, low turnout rates and obstacles to participation will likely become more visible and significant. As of 2011 census calculations, section 203 applied in jurisdictions with 5,578,600 LEP voting-age citizens, representing a 38.6% increase from 2002.²⁸

Much of the section 203 compliance gap is rooted in the law's vague mandates, as well as the requirement that election officials themselves (1) assess the need for language accommodation in their jurisdictions and (2) develop their own compliance plans.²⁹ Election officials often misunderstand the law's requirements, underestimate the numbers of LEP voters in their jurisdictions, or

22. See *infra* notes 149-50 and accompanying text.

23. See *infra* notes 131-32 and accompanying text.

24. MARK HUGO LOPEZ & ANA GONZALEZ-BARRERA, PEW RESEARCH CTR., INSIDE THE 2012 LATINO ELECTORATE 3 (2013), available at http://www.pewhispanic.org/files/2013/05/the-latino-electorate_2013-06.pdf. Overall, Latinos made up "10.8% of eligible voters, but just 8.4% of all voters." *Id.* at 5.

25. See *infra* notes 133-35 and accompanying text.

26. See, e.g., HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, NO. ACS-12, LANGUAGE USE IN THE UNITED STATES: 2007, at 4 fig.2b (2010), available at <http://www.census.gov/prod/2010pubs/acs-12.pdf> (showing that approximately 21% of native-born Spanish speakers and 18% of native-born Asian language speakers speak English less than "very well"); Press Release, Asian Am. Legal Def. & Educ. Fund, AALDEF to Poll 5,000 Asian American Voters and Document Voting Problems in 11 States on Election Day (Oct. 30, 2014), <http://aaldef.org/press-releases/press-release/aaldef-to-poll-5000-asian-american-voters-and-monitor-in-11-states-on-election-day.html> (describing an exit poll that found 37% of Asian American voters in the 2012 election were LEP). Additionally, according to the U.S. Census Bureau, 28.1% of American Indian and Alaska Native households speak a language other than English at home. JULIE SIEBENS & TIFFANY JULLIAN, U.S. CENSUS BUREAU, NO. ACSBR/10-10, NATIVE NORTH AMERICAN LANGUAGES SPOKEN AT HOME IN THE UNITED STATES AND PUERTO RICO: 2006-2010, at 3 tbl.3 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-10.pdf>.

27. See Wendy K. Tam Cho, *Naturalization, Socialization, Participation: Immigrants and (Non-)Voting*, 61 J. POL. 1140, 1146-47 (1999).

28. See Tucker, *supra* note 19, at 176.

29. See *infra* Part II.A.

both.³⁰ As a result, many election officials only partially enforce the law, while others fail to do so altogether.

In this Note, I argue that a version of the “voting changes” reporting requirement currently proposed in the Voting Rights Amendment Act of 2014³¹ (VRAA) should be applied to section 203. Proponents of the “voting changes” disclosure requirement argue that the availability of advance information in the voting context is warranted due to the particular expense entailed in identifying and challenging violations³² and the preferability of defeating “proposed restrictions on voting” prior to, as opposed to after, an election.³³ Although the mechanisms by which the disclosure proposals function slightly diverge, in both instances disclosure will cheaply and efficiently promote substantive compliance before violations occur.

My proposal would require section 203 covered jurisdictions to issue reports documenting the manner in which they will comply with section 203’s requirements in an upcoming election. First and foremost, this proposal would allow jurisdictions to ensure that their compliance plans properly adhere to the law’s complex and context-specific requirements. The proposal has the additional benefit of providing increased opportunity for third-party involvement through ex ante collaboration with election officials and more targeted and effective poll watching.³⁴ At the outset, this requirement would enable private parties to use public reports to alert jurisdictions of inadequacies or misperceptions contained in their compliance plans. Then, more strategic and effective poll watching would informally pressure election officials to comply, reduce the litigation burden for private parties, and provide the Department of Justice (DOJ) with useful information to lessen enforcement costs and potentially initiate more enforcement actions. Moreover, on the margins, public disclosure may deter bad actors who otherwise would intentionally violate section 203’s requirements.

30. See *infra* Part II.C.

31. H.R. 885, 114th Cong. § 4 (2015).

32. See Issacharoff, *supra* note 8, at 122 (“[T]he combined effect would be to lessen the litigation burden on those challenging suspected official misconduct. The critical work of spotting changes would be greatly simplified and the burdensome discovery task of establishing the state justification for conduct would be eliminated.”); see also *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting) (“[Section 2] litigation places a heavy financial burden on minority voters.” (citing *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005))).

33. See Issacharoff, *supra* note 8, at 124 & n.143 (noting, with “optimism,” examples of proposed restrictions on voting access being defeated before the 2012 election). Indeed, it is generally assumed that denial of the right to vote constitutes irreparable harm. *E.g.*, *League of Women Voters v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury.”); *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (“Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.”).

34. For the most part, this third-party involvement will come from civil rights organizations and local LEP communities. See *infra* notes 45-47 and accompanying text.

This proposal raises the following question: If election officials do not comply with section 203's substantive requirements, why would they comply with additional reporting requirements? The answer lies in part in the ease of enforcing the reporting requirement itself. Currently, the primary means to spur compliance with section 203's substantive requirements is an enforcement action brought by the DOJ,³⁵ although private litigants—usually civil rights groups—can, and sometimes do, bring claims.³⁶ Such litigation is expensive, uncertain, and of course hampered by personnel and resource constraints within the DOJ and at civil rights organizations. To win a section 203 lawsuit, the DOJ or a private plaintiff must present “detailed and widespread evidence” of violations “reported by location (e.g., neighborhood, county), poll site and election”³⁷—an endeavor that, needless to say, requires a “great deal of time, resources, and funds.”³⁸ For a variety of reasons, namely costs³⁹ and issues relating to standing,⁴⁰ “the vast majority of lawsuits filed involving Section[] . . . 203 have been filed by the [DOJ].”⁴¹ Indeed, as a practical matter,

35. Glenn D. Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 ASIAN PAC. AM. L.J. 31, 39 (2005) (“Section 203 is primarily enforced by the Department of Justice so voters are relegated to report violations solely to the Department. It is in the Department’s discretion whether and how to act on these complaints.” (footnote omitted)); see 28 C.F.R. §§ 55.2(b), 55.23(a) (2014).

36. See Order Re: Plaintiff’s Motion for a Preliminary Injunction Against the State Defendants at 2, *Nick v. Bethel*, No. 3:07-cv-0098 TMB (D. Alaska July 30, 2008) [hereinafter Order Re: Preliminary Injunction], available at http://www.narf.org/nill/documents/20080730_injunction_bethel.pdf (issuing a preliminary injunction for violations of section 203 in a lawsuit brought by private plaintiffs); Press Release, Asian Am. Legal Def. & Educ. Fund, NYC Board of Elections Settles Lawsuit on Bengali Ballots in Queens (Mar. 24, 2014), <http://aaldef.org/press-releases/press-release/nyc-board-of-elections-settles-lawsuit-on-bengali-ballots-in-queens.html> (describing a section 203 lawsuit and subsequent settlement between Asian American Legal Defense and Education Fund (AALDEF) and the New York City Board of Elections). More information about the lawsuit against Alaska is available online. *Nick v. Bethel and the State of Alaska*, NATIVE AM. RTS. FUND, <http://www.narf.org/cases/nick-v-bethel> (last visited Mar. 30, 2015).

37. Magpantay, *supra* note 35, at 39 n.73.

38. Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 296-97 (2007).

39. *Id.* at 290-91, 296-97 (“[P]rivate lawsuits brought to force covered jurisdictions into compliance require a great deal of detailed evidence of discrimination and participation barriers, and for that reason are often too expensive for private litigants or community groups to pursue. . . . The cases typically require a great deal of time, resources, and funds, which are in limited supply for many LEP citizens and communities.” (footnote omitted)).

40. Glenn D. Magpantay, *Associational Rights and Standing: Does Citizens United Require Constitutional Symmetry Between the First Amendment and Article III?*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 667, 684 (2012) (explaining in detail challenges AALDEF faced in finding plaintiffs with standing willing to challenge voter suppression laws for suits to compel compliance with section 203).

41. Michael J. Pitts, *Defining “Partisan” Law Enforcement*, 18 STAN. L. & POL’Y REV. 324, 331 n.31 (2007).

“[t]he Attorney General has primary, if not necessarily exclusive, jurisdiction to enforce these provisions.”⁴²

In contrast to the substantial costs entailed in bringing a traditional section 203 lawsuit, enforcing the reporting requirements would present only minimal expense to the DOJ and potential private litigants. Because the issue is binary—the jurisdiction issued a report or it did not—costs associated with enforcing the reporting requirement would be minimal. Importantly, the evidentiary issues that hamper traditional section 203 enforcement are simply absent. This proposal echoes Issacharoff’s and recognizes that failure to issue a report with a compliance plan would constitute *prima facie* evidence against a jurisdiction.⁴³ Securing compliance with the basic disclosure requirement, as opposed to section 203’s substantive requirements, would therefore be straightforward and inexpensive.

Although this proposal in part relies on simple enforcement, the disclosure requirements are not insensitive to the adequacy of the reports’ contents. When faced with these new disclosure requirements, election officials can take one of three courses of action. First, they can fail to issue a report; second, they can issue a report that contains a plan that does not meet section 203’s substantive requirements; or third, they can issue a report with a compliant plan. Regardless of how election officials initially respond, disclosure requirements will enhance substantive compliance with section 203.

In the first instance, the DOJ, or at times private parties, would be able to use the genuine threat of a lawsuit to pressure nonreporting jurisdictions to issue a plan. If need be, and ideally only in rare situations, these parties could then bring a lawsuit with relative ease to force a jurisdiction to do so. Recognizing and using the threat of litigation to correct a jurisdiction’s failure to issue a language accommodation plan will promote compliance with section 203’s substantive requirements in two primary ways: (1) election officials will be made aware of their particularized legal obligations; and (2) voting rights activists will identify such jurisdictions as high risk and more strategically deploy poll watchers.

Second, if a jurisdiction issues a report with an inadequate plan, third parties—and in some cases the DOJ—will have increased leverage and information to collaborate with officials to craft an appropriate plan in advance of an election, likely leading to an increase in compliance. Although the federal regulations encourage election officials to work with the LEP community in developing compliance plans,⁴⁴ one study suggests that only one-third of officials

42. *Id.* at 331. It is important to note that the Supreme Court has never ruled on whether section 203 provides a private right of action. *Id.* at 331 n.31.

43. Issacharoff argues that disclosure requirements and accompanying voter impact statements “would then set the template for either DOJ challenge or private party challenge, with the disclosure serving as the *prima facie* evidentiary basis.” Issacharoff, *supra* note 8, at 122.

44. 28 C.F.R. § 55.16 (2014).

actually do so.⁴⁵ With access to the jurisdiction's inadequate plan, the LEP community and civil rights organizations will be better positioned to alert election officials that their plan fails to meet section 203's legal requirements. If election officials then refuse to modify their plan, the third parties can channel more resources to poll watching in those jurisdictions as well as inform the DOJ.⁴⁶ Doing so will place informal pressure on election officials to comply and could ultimately provide evidence of a substantive violation of section 203. Moreover, because section 203 lawsuits "require detailed and widespread evidence" of violations,⁴⁷ an increased flow of accurate and precise information would also decrease section 203's litigation burden and potentially increase the number of robust enforcement actions brought by both the DOJ and private parties.

Finally, if a jurisdiction issues an adequate report, the disclosure requirement will nonetheless enhance substantive compliance because poll watchers for the first time will have a benchmark to evaluate covered jurisdictions. Currently, poll watchers monitor polling locations for blatant violations of section 203's vague and context-specific standard. Disclosure requirements, however, will allow election officials to be measured against a concrete plan. The plans will include verifiable metrics, such as the number of non-English ballots and bilingual poll workers at a given location. Third parties can then evaluate jurisdictions against the figures they provided and more easily and precisely document violations, which once again will increase the pressure on election officials to comply and decrease section 203's litigation burden. In this instance, like the first two, election officials become substantially more likely to fully implement section 203's substantive mandates and effectuate the promises of an important, though often misunderstood, provision of the VRA.

In summary, I seek to address and partially solve the problem of section 203's low compliance rates. This Note proceeds in three Parts. Part I provides an overview of the VRA, discusses the recent decision in *Shelby County*, and outlines existing proposals to amend the VRA, paying particular attention to the calls for nationwide reporting requirements of federal voting changes. Part II discusses the legal mechanics of section 203, highlights the enduring vulnerability of LEP voters, and reviews the extent and potential causes of section 203's compliance gap. Part III begins by outlining the general proposal to include a requirement that section 203 covered jurisdictions develop and publicly disclose a compliance plan. It then provides support for the proposal, examines counterarguments and alternatives, and explores the proposal's underlying constitutionality.

45. See Tucker & Espino, *supra* note 13, at 187.

46. Third-party organizations already invest heavily in poll watching. Providing such groups with the tools and information to target high-risk jurisdictions will make their efforts more effective. See *infra* Part III.C.

47. Magpantay, *supra* note 35, at 39 n.73.

I. *SHELBY COUNTY* AND RECENT PROPOSALS FOR DISCLOSURE

After the Supreme Court in *Shelby County* ruled section 4 of the VRA unconstitutional, members of Congress proposed a broad, multifaceted solution to enhance protections for minority voters. Within it is the proposal to require advance disclosure of any and all voting changes involving federal elections.

In Subpart A, I examine the reasoning undergirding *Shelby County* and the recent academic and legislative propositions to address the decision, with emphasis on disclosure requirements; and in Subpart B, I discuss the ways in which disclosure efficiently protects voters and is appropriately incorporated into these academic and congressional proposals.

A. *Shelby County and the Legislative Response*

The Supreme Court in *Shelby County* struck down section 4 of the VRA, determining it was irrational and therefore unconstitutional to base preclearance coverage on forty-year-old election data.⁴⁸ The Court formally left the core of the VRA⁴⁹—section 2 and section 5—intact,⁵⁰ though in a practical sense, the decision nullified section 5 until Congress takes further action.⁵¹

Originally enacted in 1965 and reauthorized in 1970, 1975, 1982, and 2006, the VRA seeks to protect racial minorities from state and local discriminatory voting laws and practices.⁵² The Act operates primarily through section 2 and section 5, which, like other provisions of the VRA, were modified at different times and in pursuit of “distinct policy aims.”⁵³ While section 2 applies nationwide, section 5 applies only to select states and jurisdictions, as determined by sections 3⁵⁴ and 4.⁵⁵

When initially passed in 1965, Congress sought to address laws and practices of the 1960s, primarily in the South, that directly or effectively prevented black citizens from registering and voting. It did so by crafting a “coverage formula” to identify the most blatantly racist states and jurisdictions and subject

48. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

49. See Pildes, *supra* note 10, at xiii (noting that the VRA contained “two distinct structures for protecting minority voting rights”).

50. *Shelby Cnty.*, 133 S. Ct. at 2631 (“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula.”).

51. *Id.* at 2648 (Ginsburg, J., dissenting) (“The Court stops any application of § 5 by holding that § 4(b)’s coverage formula is unconstitutional.”).

52. *Id.* at 2635; see also *id.* at 2619 (majority opinion).

53. See Pildes, *supra* note 10, at xi.

54. Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2006 (2010) (“[S]ection 3 authorizes courts to impose preclearance in response to violations of the Fourteenth and Fifteenth Amendments.”).

55. 42 U.S.C. § 1973b(b) (2013).

them to section 5's "preclearance" review.⁵⁶ Under the coverage formula, section 5 applied to any state or jurisdiction that maintained a literacy test and had less than fifty percent voter participation or registration in the most recent presidential election.⁵⁷ In 1965, this formula covered Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, thirty-nine counties in North Carolina, and one county in Arizona.⁵⁸

With section 4 determining its coverage, section 5 provided the framework for preclearance. While section 4 first suspended key existing voting barriers, such as literacy tests,⁵⁹ section 5 prevented covered states and jurisdictions from enacting any law that affected voting—no matter how large or how small—until the jurisdiction was granted permission by the federal government to make the change.⁶⁰ Preclearance of a law was denied unless the DOJ or a specially designated three-judge panel in Washington, D.C., determined that it would not have a retrogressive effect on minority voters.⁶¹

Clearly, section 5's structure represents "an exceptionally proactive regulatory philosophy,"⁶² placing the burden on local jurisdictions to prove to the federal government that their proposed voting change would not disproportionately harm racial minorities. And it was hugely successful—so much so that "[t]he Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965."⁶³

As opposed to section 5, section 2 "applies nationwide"⁶⁴ to prohibit states and jurisdictions from passing voting laws that have a racially discriminatory effect.⁶⁵ Moreover, private citizens, as well as the DOJ, can sue to enforce its provisions.⁶⁶ As discussed, section 5's preclearance remedy has been so successful because it prevents certain proposed discriminatory voting laws and

56. See *Shelby Cnty.*, 133 S. Ct. at 2619-20.

57. *Id.* at 2619.

58. *Id.* at 2620.

59. *Id.* at 2619-20.

60. *Id.* at 2620.

61. See *Beer v. United States*, 425 U.S. 130, 138, 141 (1976) (describing the role that the Attorney General and the district court play in preclearing proposed voting laws, and stating that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise").

62. Pildes, *supra* note 10, at xiii.

63. *Shelby Cnty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting) (second and third alterations in original) (quoting Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992)) (internal quotation marks omitted).

64. *Id.* at 2642.

65. 42 U.S.C. § 1973(a) (2013).

66. See *Shelby Cnty.*, 133 S. Ct. at 2619.

practices from ever taking effect.⁶⁷ In section 2, however, “[l]itigation occurs only after the fact.”⁶⁸ Indeed, it may take “several election cycles” before a plaintiff can gather sufficient evidence to challenge a discriminatory voting law.⁶⁹

In 2006, Congress reauthorized the major provisions of the VRA and left section 4’s coverage formula unchanged. For twenty-five more years, section 5 would apply to any state or jurisdiction that maintained a voting test and had less than fifty percent voter participation or registration in either the 1964, 1968, or 1972 presidential election.⁷⁰ Based on these decades-old data, nine states and a handful of counties were forbidden from changing any voting laws without prior federal approval.⁷¹ The remaining states were free to change their voting laws as they saw fit, subject of course to later enforcement under section 2.

Shelby County zeroed in on the coverage formula. The debate between the majority and dissent centered on whether Congress had properly demonstrated that “current needs” justify an aberration from the norm that federal regulations and burdens are applied evenly across the states.⁷² The dissent focused on additional considerations to justify the preclearance formula, such as “second-generation” voting discrimination and the argument that section 5’s very effectiveness discounts the value of using contemporary turnout or registration data to assess the present-day risks to minority voters.⁷³ The majority, however, was more direct when it ruled the formula unconstitutional, stating: “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”⁷⁴

Because the Court struck down the formula used to identify jurisdictions subject to preclearance, section 5 is for now effectively null, and the formerly covered states and subdivisions are free to change their election laws without advance federal approval.⁷⁵ As the Court sees it, the practical effect and functional purpose of the coverage formula is of no moment. Quite simply, the

67. Issacharoff, *supra* note 8, at 115.

68. *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting).

69. *Id.*

70. *Id.* at 2620-21, 2627 (majority opinion). Coverage is also subject to the VRA’s “bailout” provisions. For more information, see generally J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 257* (Ana Henderson ed., 2007) [hereinafter *VOTING RIGHTS ACT REAUTHORIZATION OF 2006*].

71. *Shelby Cnty.*, 133 S. Ct. at 2624.

72. *Id.* at 2619 (“[T]he Act imposes current burdens and must be justified by current needs.” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 203 (2009)) (internal quotation marks omitted)).

73. *See id.* at 2635, 2650 (Ginsburg, J., dissenting).

74. *Id.* at 2629 (majority opinion).

75. *Id.* at 2648 (Ginsburg, J., dissenting) (“The Court stops any application of § 5 by holding that § 4(b)’s coverage formula is unconstitutional.”).

Fourteenth and Fifteenth Amendments do not permit Congress to use “decades-old data relevant to decades-old problems” to “divide the States.”⁷⁶

Following the Court’s invitation that “Congress may draft another formula based on current conditions,”⁷⁷ a recent legislative proposal to amend the VRA has advocated for formulas based on rolling, dynamic triggers and has pushed for nationwide, rather than regional, solutions. The bill rejects the notion that a silver bullet exists to protect voting rights; rather, the drafters adopted a multi-faceted approach.⁷⁸ Primarily, the current bill seeks to reinfuse legal force into section 5 by adopting an updated and dynamic section 4 coverage formula based primarily on recent section 2 violations and by strengthening judges’ authority to “bail-in” high-risk jurisdictions through section 3.⁷⁹

In addition to amending the various sections of the 2006 VRA, the proposed amendment creates an entirely new section requiring notice and disclosure for changes to federal voting laws and procedures.⁸⁰ Specifically, states and political subdivisions would be required to inform local media of, and post on the Internet, (1) any changes in voting standards or procedures affecting elections for federal office made less than 180 days before an election, (2) the allocation of polling resources involving federal elections (e.g., polling places) at least 30 days before an election, and (3) any redistricting or other changes in voting districts no later than 10 days after they are made. Moreover, the new legislation clarifies that preliminary injunctive relief applies to all provisions of the VRA and specifies that such relief will be granted if the hardship to the plaintiff outweighs the hardship to the state.⁸¹ With greater information and a welcoming legal standard for injunctions, private plaintiffs will be better positioned to challenge discriminatory voting practices before they take effect.⁸²

Lastly, and importantly for the purposes of this Note, the proposed amendments also clarify that the Attorney General maintains the authority to request federal observers to monitor elections in jurisdictions subject to either section 4 or section 203 coverage.⁸³ In doing so, the proposed amendments recognize that LEP voters continue to face unique challenges.

76. *Id.* at 2629 (majority opinion).

77. *Id.* at 2631.

78. Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. (2015). For a digestible summary, see Ari Berman, *Members of Congress Introduce a New Fix for the Voting Rights Act*, NATION (Jan. 16, 2014, 12:53 PM ET), <http://www.thenation.com/blog/177962/members-congress-introduce-new-fix-voting-rights-act#>.

79. Berman, *supra* note 78. For more general information on the “bail-in” provision of the VRA, see generally Crum, *supra* note 54.

80. See Berman, *supra* note 78.

81. *Id.*

82. Issacharoff, *supra* note 8, at 122 (stating that with disclosure requirements, “[t]he critical work of spotting changes would be greatly simplified and the burdensome discovery task of establishing the state justification for conduct would be eliminated”); cf. *Shelby Cnty.*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting) (“An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it.”).

83. See Berman, *supra* note 78.

B. *The Case for Reporting Requirements for Voting Changes*

In large part, Congress's specific proposal for disclosure substantially overlaps with, if not borrows from, Issacharoff's proposal in *Beyond the Discrimination Model on Voting*.⁸⁴ Issacharoff begins his argument by highlighting the authority that Congress has under the Elections Clause⁸⁵ and asserting that "[s]ection 5 corresponds to an older, highly formal vision of ex ante controls on the range of permissible conduct."⁸⁶ In his view, advance disclosure of voting changes properly devises "a less costly and less intrusive form of regulation, and one that could be implemented nationwide."⁸⁷ He proposes that all changes to federal elections be reported to a federal agency before taking effect. The disclosure would identify both the changed practice and the reason for the change, and the federal agency would be required to immediately post notice of the relevant submissions to the Internet.⁸⁸

As Issacharoff puts it, "The disclosure would then set the template for either DOJ challenge or private party challenge, with the disclosure serving as the prima facie evidentiary basis. This result both facilitates prosecution and review, and forces transparency and accountability on administrative conduct prompted by partisan or other malevolent objectives."⁸⁹

This disclosure would "lessen the litigation burden on those challenging suspected official misconduct."⁹⁰ The burden on plaintiffs to identify voting changes in the first place would decrease substantially, and the "discovery task of establishing the state justification for conduct would be eliminated."⁹¹ Essentially, Issacharoff argues that disclosure of voting changes effectively increases the exposure of potential misconduct and facilitates "private and public enforcement," deterring at the outset "wayward public officials" from pursuing unlawful objectives.⁹²

While the proposed VRAA substantially incorporates Issacharoff's argument for advance disclosure, there are some key differences. Mainly, the pro-

84. In recent years, several other scholars have also argued that advance disclosure of voting changes could significantly help in protecting voting rights. See, e.g., Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 724 (2006).

85. Issacharoff, *supra* note 8, at 111 ("The opinion put the Elections Clause on a higher rung of full federal power than even the Commerce Clause . . .").

86. *Id.* at 115.

87. *Id.* at 119, 121; see also *id.* at 118 ("First, after-the-fact enforcement may be more surgically efficient than the preclearance regime in a way, as suggested by the trifling number of objections currently yielded by the system. And a liability regime, by being more efficient, can be applied broadly, thereby reaching beyond the problematic geographical confines of section 5 and its attachment to a trigger largely produced by 1964 voting results.").

88. *Id.* at 121-22.

89. *Id.* at 122.

90. *Id.*

91. *Id.*

92. *Id.* at 121-25.

posed VRAA does not require disclosure reports to state “the reason for the [voting] change.”⁹³ Moreover, while each proposal requires that the voting changes be posted to the Internet, Issacharoff suggests that election officials also report changes to a federal agency, while the VRAA instead requires that election officials also give “reasonable public notice.”⁹⁴ Lastly, as opposed to Issacharoff’s proposal, Congress’s recent bill sees disclosure as a supplement to, rather than a replacement for, the VRA’s traditional preclearance model.⁹⁵

In any case, Congress’s proposal implicitly recognizes the value of advance disclosure. Without such disclosure, enforcement of section 2 entails expensive monitoring to identify violations and requires time-consuming research and analysis to build a winning case. These factors tend to burden plaintiffs, delaying the appropriate remedies and often rendering prospective relief altogether unattainable.⁹⁶ As I discuss in Part III, the same principles similarly apply to section 203 and support the case for creating comparable advance reporting requirements for the VRA’s language assistance provisions.

II. SUSTAINED VULNERABILITY OF LEP VOTERS AND CURRENT LEGAL PROTECTIONS

Section 203 identifies jurisdictions with large numbers or proportions of certain LEP voters and requires that election officials provide such voters with oral and written language assistance. While the law has proved to be effective when properly enforced,⁹⁷ noncompliance is rampant⁹⁸—largely a result of the vague and fact-specific nature of the requirements—and LEP voters remain vulnerable. This Part proceeds with discussions of the following: (A) section 203’s 2006 reauthorization and the context-specific legal standards that weaken current compliance with the law; (B) LEP voters’ sustained vulnerability and section 203 as an effective solution; (C) the ways in which ignorance of the law

93. Compare *id.* at 121, with Voting Rights Amendment Act of 2015, H.R. 885, 114th Cong. § 4 (2015).

94. Compare Issacharoff, *supra* note 8, at 121-22, with H.R. 885 § 4. The VRAA’s additional “reasonable public notice” requirement would almost surely be satisfied by “notice in the local media.” Berman, *supra* note 78.

95. For further information on this ongoing debate, see Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 29 (2013), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol127_overton.pdf (responding directly to Issacharoff’s proposal and arguing that new legislation should update the preclearance formula in addition to imposing new disclosure requirements). See also Samuel R. Bagenstos, *Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2875 (2014) (arguing that disclosure alone is insufficient and that the race-targeted preclearance regime “remain[s] essential to address the continuing problems of race discrimination in elections”).

96. See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting) (“An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it. And [§ 2] litigation places a heavy financial burden on minority voters.” (citation omitted)).

97. See *infra* notes 149-53 and accompanying text.

98. See *infra* notes 154-58 and accompanying text.

and misperception fuel section 203's high rates of noncompliance; and (D) how the infrequency of enforcement plays a role in the compliance gap.

A. *Reauthorization of Section 203 and the Law's Vague Standards*

Although the concept of providing affirmative accommodations to LEP voters is uncontroversial to many voting rights activists and commentators,⁹⁹ section 203 was included in the 2006 reauthorization of the VRA only after withstanding organized and impassioned opposition.¹⁰⁰ In the end, Congress found that the covered language groups continued to suffer from discrimination with respect to voting and education,¹⁰¹ and reauthorized section 203 until 2032.¹⁰² Despite sufficient support for passage, however, several witnesses testified before Congress arguing that the law should expire.¹⁰³ Even more notably, Representative Steve King (R-Iowa) introduced an amendment to allow section 203 to expire in 2007.¹⁰⁴ The amendment was given a floor vote and was only narrowly defeated 238 to 185, with 9 members not voting.¹⁰⁵ Arguments against section 203 tend to focus on the burdensome costs of compliance¹⁰⁶ (a largely debunked argument¹⁰⁷) and the notion that administering elections in multiple languages “balkanizes” the United States—that is, foments

99. See, e.g., *infra* note 111.

100. See generally Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377 (2006).

101. For an account of congressional findings of discrimination against covered LEP voting groups, see H.R. REP. NO. 109-478, at 45, 50-52 (2006).

102. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 7, § 203(b)(1), 120 Stat. 577, 581 (codified as amended at 42 U.S.C. § 1973aa-1a(b)(1) (2013)).

103. See Ao, *supra* note 100, at 383, 384 & n.38.

104. The amendment would have struck the reauthorization provisions for section 203, H.R. REP. NO. 109-478, at 85, without which it would have been set to expire in 2007, *id.* at 4.

105. 152 CONG. REC. 14,302 (2006) (recorded vote on the amendment offered by Rep. King). For more information, see Press Release, Representative Steve King, King Applauds Decision to Give Americans Another Chance to End Bilingual Voting (June 21, 2006), <http://steveking.house.gov/media-center/press-releases/king-applauds-decision-to-give-americans-another-chance-to-end-bilingual>.

106. Congressman Mike Coffman (R-Colo.) made the following statement after introducing legislation in 2011 to repeal section 203: “Since proficiency in English is already a requirement for U.S. citizenship, forcing cash-strapped local governments to provide ballots in a language other than English makes no sense at all.” Nancy Lofholm, *Colorado Congressman Wants Ballots Printed Only in English*, DENV. POST (Aug. 18, 2011, 1:00 AM MDT), http://www.denverpost.com/ci_18704500 (internal quotation marks omitted). This statement echoes those made during the 2006 reauthorization debate. See Tucker, *supra* note 19, at 172 (citing JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 205-31 (2009)).

107. See *infra* notes 159-64 and accompanying text.

sectarianism between various ethnic groups and frustrates the goals of assimilation.¹⁰⁸

Unlike most provisions of the VRA, which deal with vote denial or dilution, section 203 is designed to “affirmatively ensure access to the political process for language minority voters.”¹⁰⁹ This section was incorporated into the 1975 amendments to the VRA and enacted to address “pervasive” discrimination against LEP citizens.¹¹⁰ Interestingly and somewhat controversially,¹¹¹ the provisions only protect four “language minority groups”: persons of Alaskan Native, American Indian, Asian American, and/or Spanish heritage.¹¹²

These affirmative protections, however, do not apply nationwide; section 203 contains a separate “triggering formula” to determine whether a specific jurisdiction is “covered”—that is, required to provide language assistance to certain LEP voters. Under section 203, a jurisdiction is covered if two criteria are satisfied. First, the LEP citizens of voting age in a single protected language group must (1) number more than 10,000, (2) comprise more than five percent of all citizens of voting age population, or (3) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation. Second, the illiteracy rate of the citizens of the LEP group must exceed the national illiteracy rate.¹¹³

Once a jurisdiction is covered for a particular language, it is required to administer bilingual elections.¹¹⁴ In doing so, election officials must ensure that all “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, . . . [are available] in the language of the applicable [language] minority

108. See, e.g., 152 CONG. REC. 12,975 (2006) (statement of Rep. Rohrabacher).

109. Brian J. Sutherland, *The Patchwork of State and Federal Language Assistance for Minority Voters and a Proposal for Model State Legislation*, 65 N.Y.U. ANN. SURV. AM. L. 323, 328-29 (2009).

110. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, sec. 203, § 4(f)(1), 89 Stat. 400, 401 (codified as amended at 42 U.S.C. § 1973b(f)(1) (2013)). Congress provided the following explanation: “Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language.” *Id.*

111. For articles arguing in favor of expanding coverage to protect additional, if not all, language minority groups, see, for example, Benson, *supra* note 38, at 314 (“[S]ection 203, in limiting coverage to only four language minority groups, is actually too narrowly tailored to address sufficiently the extensively documented language barriers in our electoral system.”); JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 U. MIAMI L. REV. 1, 32-36 (2006) (arguing for coverage to be expanded to Haitian Americans); and Brenda Fathy Abdelall, Note, *Not Enough of a Minority?: Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J.L. REFORM 911, 913 (2005) (arguing for protections to be granted to LEP Arab Americans).

112. 42 U.S.C. §§ 1973aa-1a(e), 1973l(c)(3).

113. See *id.* § 1973aa-1a(b)(2).

114. *Id.* § 1973aa-1a(c).

group as well as in the English language.”¹¹⁵ Highlighting the two basic standards to measure compliance, the Attorney General’s interpretation of the law is codified at 28 C.F.R. part 55.¹¹⁶ First, the regulations state that bilingual materials and language assistance “should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities.”¹¹⁷ Second, covered jurisdictions “should take all reasonable steps to achieve that goal.”¹¹⁸ The regulations apply to all elections¹¹⁹ and to political subdivisions as well as states.¹²⁰

In applying these standards, the regulations compel both written and oral language assistance for LEP voters. With respect to written assistance, the standards apply to any information, instructions, or materials relating to the electoral process.¹²¹ They also specifically apply to written public notices and other written materials that provide assistance by mail or pertain to voter registration and polling place activities.¹²² Moreover, “[i]t is essential that material provided in the language of a language minority group be clear, complete and accurate.”¹²³ Similarly, when dealing with oral communication, the regulations require that assistance be provided “to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.”¹²⁴

For both written and oral accommodations, compliance is “best measured by results,”¹²⁵ and in both cases, the *covered jurisdiction itself* is responsible for determining what actions are required to fully comply with the law.¹²⁶ When dealing with written materials, “[i]t is the obligation of the jurisdiction to decide what materials must be provided in a minority language.”¹²⁷ Likewise, when considering its obligations under the regulations’ requirement for oral assistance, “the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided.”¹²⁸ In determining compliance, the Attorney General also considers whether the covered jurisdiction has consulted with members of the applicable

115. *Id.*

116. 28 C.F.R. pt. 55 (2014).

117. *Id.* § 55.2(b)(1).

118. *Id.* § 55.2(b)(2).

119. *Id.* § 55.10(a).

120. *Id.* § 55.9.

121. *Id.* § 55.15 (quoting 42 U.S.C. § 1973b).

122. *Id.* § 55.18.

123. *Id.* § 55.19(b).

124. *Id.* § 55.20(a).

125. *Id.* § 55.16.

126. *Id.* § 55.2(c).

127. *Id.* § 55.19(a).

128. *Id.* § 55.20(c).

language minority community.¹²⁹ Lastly, and importantly for our purposes, the regulations specifically note that implementation of the Attorney General's regulations "would be facilitated if each covered jurisdiction would maintain . . . records and data" to document its actions taken to achieve compliance.¹³⁰ In sum, a jurisdiction's obligation under section 203 is particularized—that is, dependent on the level of need in that locality—and the jurisdiction is granted enormous latitude in developing and implementing a plan to satisfy those obligations.

B. *Section 203 as a Partial Solution to LEP Voters' Low Participation Rates and Sustained Vulnerability*

Although section 203 has been in effect since 1975, voters belonging to the covered minority language groups remain vulnerable on the national, state, and local levels. English proficiency has an "enormous effect" on voting participation rates of certain LEP voters,¹³¹ and this effect manifests itself on a national scale. In the 2012 presidential election, for example, only 48% of eligible Hispanic voters turned out, as opposed to 64.1% of whites and 66.6% of blacks.¹³² Moreover, Asian voting rates have been lower than Hispanic turnout rates for every presidential election since 2000,¹³³ with only 47.3% of eligible Asian voters casting ballots in 2012.¹³⁴ Meanwhile, Native American and Alaska Native voters also continue to suffer from low participation rates, with only 47.5% of eligible American Indian and Alaska Native voters turning out in 2008.¹³⁵

All of these groups have significant portions of LEP voters,¹³⁶ and studies have shown English proficiency—independent of other factors such as income or age—significantly contributes to this discrepancy in voter participation.¹³⁷ In fact, one study found that once English proficiency is controlled, whether an

129. *Id.* § 55.16.

130. *Id.* § 55.21.

131. Tam Cho, *supra* note 27, at 1147; *see also* Michael Parkin & Frances Zlotnick, *English Proficiency and Latino Participation in U.S. Elections*, 39 *POL. & POL'Y* 515, 529 (2011) ("Taken together, these results demonstrate the importance of English proficiency in determining Latino political participation in U.S. elections. Latino citizens who struggle with English appear to be less motivated and more constrained by the administrative burdens of registration than those with stronger English skills.").

132. LOPEZ & GONZALEZ-BARRERA, *supra* note 24, at 3. Overall, Hispanics made up 10.8% of eligible voters but just 8.4% of all voters. *Id.* at 5.

133. THOM FILE, U.S. CENSUS BUREAU, NO. P20-568, *THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS)* 3 fig.1 (2013), *available at* <http://www.census.gov/prod/2013pubs/p20-568.pdf>.

134. *Id.*

135. *See* TOVA WANG, DEMOS, *ENSURING ACCESS TO THE BALLOT FOR AMERICAN INDIANS & ALASKA NATIVES: NEW SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY* 6 fig.1 (2012), *available at* <http://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf>.

136. *See supra* note 26.

137. *See* Tam Cho, *supra* note 131, at 1146 tbl.2, 1147.

eligible voter is Latino has little to no bearing on the probability of that voter actually voting.¹³⁸ Put differently, English proficiency is a “crucial determinant” of whether a Latino voter casts a ballot.¹³⁹ For Asian communities as well, “[o]nce the foreign-born status and English proficiency variables are [accounted for], . . . participation rates are roughly equal to those of blacks and non-Hispanic whites.”¹⁴⁰ Compounding the problem, English proficiency rates track literacy rates very closely. Notably, according to a 2002 determination based on the 2000 census, the average illiteracy rate of voting-age LEP citizens in covered language groups was “18.8%, or nearly fourteen times the national illiteracy rate.”¹⁴¹ The combination of limited English proficiency and illiteracy results in a “particularly acute need for language assistance” and likely contributes to LEP voters’ low turnout rates.¹⁴²

In addition to the national politics, LEP voters face distinct obstacles on the state level. For example, California is wholly covered by section 203;¹⁴³ however, common compliance failures often make it difficult if not impossible for many LEP voters to participate in the electoral process.¹⁴⁴ While in recent years ballot initiatives have determined critical aspects of the state’s public policy, including same-sex marriage, the death penalty, and the criminal three-strikes law,¹⁴⁵ “complexities and subtleties” in the “vast ballot initiatives” pose insurmountable difficulties to LEP citizens who wish to vote on ballot measures but are not provided language assistance.¹⁴⁶

On the county and municipal levels, as well, LEP voters often deal with acute challenges. One such example comes from Colfax County, Nebraska, a county of under 11,000 people whose Latino population grew from 2732 in 2000 to 4315 in 2010.¹⁴⁷ In 2012, the DOJ filed a complaint in federal court

138. *See id.* at 1147.

139. *Id.*

140. *Id.* Although English proficiency is an “obviously powerful variable[,]” the study found that foreign-born status is the primary factor in determining voter participation within the Asian community. *Id.* at 1147-48.

141. Tucker & Espino, *supra* note 13, at 177-79.

142. *See id.* at 179.

143. *See* Tucker, *supra* note 19, at 176.

144. *See* Joaquin G. Avila et al., *Voting Rights in California: 1986-2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 189-90 (2007) (discussing various section 203 violations in California and concluding that “[t]he geographic breadth indicates that the issue of Section 203 non-compliance is widespread”).

145. Randal C. Archibold & Abby Goodnough, *California Voters Ban Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06ballot.html>; Jack Leonard & Maura Dolan, *Californians Back Change on Three Strikes, but Not on Death Penalty*, L.A. TIMES (Sept. 30, 2012), <http://articles.latimes.com/2012/sep/30/local/la-me-poll-three-strikes-20120930>.

146. *See* Ao, *supra* note 100, at 389 n.70 (quoting H.R. REP. NO. 109-478, at 142 (2006) (statement of Rep. Sanchez)).

147. Complaint at 2-3, *United States v. Colfax Cnty., Neb.*, No. 8:12-cv-84 (D. Neb. Feb. 27, 2012), available at http://www.justice.gov/crt/about/vot/sec_203/documents/Colfax_comp.pdf.

alleging that local election officials violated section 203 by failing to provide election-related information, materials, and assistance in Spanish.¹⁴⁸ Although such local cases often lack national or even statewide significance, they contribute to LEP voters' overall vulnerability and lend support to general proposals to increase compliance with section 203.

States and other jurisdictions' low section 203 compliance rates are particularly problematic because when the law's provisions are successfully implemented, they are dramatically effective in increasing political participation among LEP voters. The law's effectiveness manifests itself in multiple measurable ways. First, there are dramatic increases in LEP voters' political participation after the DOJ pursues litigation and the jurisdiction enters into a consent decree to obey section 203's mandates. For example, a string of DOJ section 203 enforcement actions in the early 2000s contributed to an increase of registered Latino voters from 7.6 million to 9.3 million between 2000 and 2004.¹⁴⁹ Second, we have seen dramatic increases in political participation nationally among *all* members of covered language groups since Congress passed section 203.¹⁵⁰ Lastly, and significantly, in jurisdictions where section 203 coverage has not been triggered, participation among LEP voters significantly lags behind that in covered jurisdictions.¹⁵¹ Symbolically, translated ballots and oral assistance signal to LEP voters that they are "welcome in the American political system" and further explain the effectiveness of language accommodations.¹⁵² When language assistance is available, LEP voters embrace it and, in

148. *Id.* at 4.

149. James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195, 233 (2006). For an account of these actions and an explanation of their effectiveness, see Benson, *supra* note 38, at 329 & n.413.

150. See Tucker & Espino, *supra* note 13, at 230 ("Among American Indians, registration and turnout have increased between 50% and 150% in many places as a direct result of language assistance. The Hispanic voter registration rate, which was 34.9% in 1974, has nearly doubled since Sections 4(f)(4) and 203 have been in effect. Similarly, between 1996 and 2004, Asian-American voter registration and turnout increased 58% and 71% respectively, as a direct result of increased coverage that followed the 1992 amendments to Section 203." (footnotes omitted)).

151. See Michael Jones-Correa, *Language Provisions Under the Voting Rights Act: How Effective Are They?*, 86 SOC. SCI. Q. 549, 558 (2005) (comparing the voter turnout for Latinos living in jurisdictions required by section 203 to conduct a bilingual election with those Latino voters residing elsewhere, and finding that living in a covered jurisdiction is "significant and positively correlated with voter turnout for Latinos"); see also Daniel J. Hopkins, *Translating into Votes: The Electoral Impacts of Spanish-Language Ballots*, 55 AM. J. POL. SCI. 813, 814 (2011) (finding that language assistance increases turnout by eleven percentage points among LEP Latino voters in some elections); Parkin & Zlotnick, *supra* note 131, at 528 ("This confirms that ballots printed in Spanish affect the relationship between English proficiency and Latino turnout."). Although the Jones-Correa study did not find a statistically significant effect with respect to Asian American voters, it determined that the results "call[ed] out for further exploration." Jones-Correa, *supra*, at 561.

152. See Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1518 (1993).

many cases, rely on it.¹⁵³ It is no wonder then that such accommodations—at least when properly implemented—increase political participation among language minority citizens.

C. *A Confusing Legal Standard and Widespread Misperceptions Largely Contribute to Jurisdictions' High Rates of Noncompliance with Section 203*

As documented by James Thomas Tucker and Rodolfo Espino,¹⁵⁴ section 203 compliance is low.¹⁵⁵ Of the 361 covered jurisdictions participating in their study, only 60.4% reported that they provide both oral and written language assistance to LEP voters.¹⁵⁶ In other words, approximately 40% of the covered jurisdictions in the survey reported that they did not comply with section 203's basic requirements. Not inconsistent with these findings, another academic study by Michael Jones-Correa and Israel Waismel-Manor randomly selected sixty-six covered jurisdictions to monitor on Election Day and found that one in four did not offer language assistance at the polling place.¹⁵⁷ The study broadly concluded that "Section 203 compliance is very uneven."¹⁵⁸

Generally speaking, noncompliant jurisdictions fall into five broad and often overlapping categories: (1) jurisdictions facing resource constraints that are financially unable to comply; (2) jurisdictions controlled by election officials purposely violating the law's requirements; (3) jurisdictions with appropriate

153. See Tucker, *supra* note 149, at 242-46 (documenting in detail numerous survey and exit polls indicating that LEP voters in covered jurisdictions rely heavily on language assistance and that such assistance greatly increases their participation); see also Benson, *supra* note 38, at 270-73 (discussing data indicating that language accommodation makes LEP voters more comfortable and more likely to register and vote).

154. I focus extensively on Tucker and Espino's paper because it is far and away the most comprehensive recent study of section 203 compliance and costs. Indeed, "we know remarkably little of how Section 203 of the act . . . has actually been implemented or of the effects of its implementation." Michael Jones-Correa & Israel Waismel-Manor, *Verifying Implementation of the Language Provisions in the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, *supra* note 70, at 161, 161.

155. See Tucker & Espino, *supra* note 13, at 188. Tucker and Espino sought to update two General Accounting Office (GAO) reports published in 1984 and 1997 documenting the costs associated with language assistance under section 203. Their study "update[d] the cost data collected by the two GAO studies and . . . determine[d] the practices of public election officials in providing oral and written language assistance." *Id.* at 175. The authors surveyed section 203 covered jurisdictions at the state and local level in thirty-three states and received responses from 361 of them. *Id.* at 176. "The survey concluded by asking about the respondent's views on reauthorization and the federal government's role in providing language assistance, and an open-ended question about the jurisdiction's experiences under Section 203." *Id.* at 175.

156. *Id.* at 176, 188.

157. Jones-Correa & Waismel-Manor, *supra* note 154, at 161, 178.

158. *Id.* at 178; see also Avila et al., *supra* note 144, at 190 (discussing various section 203 violations in California and concluding that "[t]he geographic breadth indicates that the issue of Section 203 non-compliance is widespread").

and comprehensive compliance plans but poor administration and execution; (4) jurisdictions overseen by election officials unaware of the law's general requirements; and (5) jurisdictions in which election officials are unaware of the large and growing numbers of LEP voters in need of language assistance in their district. As we shall see, the primary contributors to noncompliance are confusion about the law's requirements and election officials' misperceptions regarding the depth of need for language accommodation.

In very few instances are the costs of language assistance great enough to prohibit jurisdictions from achieving compliance with section 203. Although this topic has been a matter of debate,¹⁵⁹ recent studies have largely snuffed out the controversy.¹⁶⁰ For example, Los Angeles County, which provided oral and written language assistance to five separate LEP groups in 5632 polling places, reported such assistance as only 3.6% of its total election budget.¹⁶¹ More recently, in Tucker and Espino's study, the majority of covered jurisdictions responding to the survey reported incurring no additional cost in providing either oral or written language assistance.¹⁶² Excluding the top ten percent of respondents as significant outliers, the study showed that the remaining surveyed jurisdictions incurred average additional expenses of 1.5% of all election costs for oral language assistance and only 3% of all election costs for written language assistance.¹⁶³ Simply put, costs are not a significant contributor to the sizable gap in compliance with section 203.¹⁶⁴

Like costs, purposeful evasion only plays a small role in section 203's dismal compliance rate. Although overt discrimination against language minorities

159. *Compare Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 27 (2005) (statement of K.C. McAlpin, Executive Director, ProEnglish) ("Bilingual ballots are a costly, unfunded mandate that function like a tax on English-speaking Americans. . . . [I]n most jurisdictions covered by sections 203 and 4(f)(4), bilingual ballots are hardly used, and where they are used, their use scarcely justifies the cost and effort needed to provide them."), *with id.* at 76 (statement of James Tucker, Att'y, Ogletree Deakins, P.C.) ("Some critics have opposed section 203 because they believe it imposes high costs on local election officials. Their fears have not materialized. The costs of compliance were modest, if there are any costs at all. Of the jurisdictions reporting oral language assistance expenses, 59.1 percent report incurring no expense at all.").

160. For a detailed discussion on the low costs of compliance with section 203, see Tucker, *supra* note 149, at 250-59.

161. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-81, BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS 20 tbl.2 (1997).

162. Tucker & Espino, *supra* note 13, at 215 ("Among the 154 jurisdictions reporting oral language assistance expenses, 59.1% (N = 91) incurred no extra costs. Similarly, of the 144 jurisdictions reporting written language material expenses, 54.2% (N = 78) did not incur any additional costs.").

163. *Id.* at 217-19.

164. There are, however, rare instances in which cash-strapped covered jurisdictions appear financially unable to comply with section 203. See Benson, *supra* note 38, at 324 (discussing Hamtrack, Michigan, a section 203 covered jurisdiction that was "bankrupt and in receivership" in the initial years after a federal court ordered it to comply with its language assistance obligations).

is not uncommon,¹⁶⁵ direct ethnic hostility is not common enough to account for such widespread noncompliance. As a general statement, if election officials were aware their actions violated the law, they would very likely not provide documentation of their shortcomings in a public survey. Indeed, Tucker and Espino's study found that "very few election officials" underestimate the need for language assistance because of "ideological opposition to that assistance."¹⁶⁶

Although it is extremely difficult to measure the impact that poll workers, and on-the-ground election administration more generally, have on section 203's low compliance rates, anecdotes suggest that such factors likely play a role. Because poll workers "serve in the front lines on Election Day[,] . . . their most significant role lies in providing an efficient and positive experience for citizens arriving to vote."¹⁶⁷ Accounts abound, however, of poll workers failing to properly administer provisional ballots¹⁶⁸ and incorrectly and illegally demanding photo identification.¹⁶⁹ Additionally, "[d]iscriminatory remarks [against LEP voters] made by poll workers in covered jurisdictions continue to be a problem."¹⁷⁰ As in other areas of election administration, poorly trained, incompetent, or overburdened poll workers, as well as poor execution more generally, likely contribute to section 203's compliance gap.¹⁷¹

165. See, e.g., LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA, VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000-2013, at 17-19 (2014), available at <http://www.lccr.com/wp-content/uploads/Voting-Rights-Barriers-In-21st-Century-Cal-Update.pdf> (discussing numerous recent instances of poll workers and election officials in California intimidating or purposely deceiving LEP voters); Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT'L BLACK L.J. 1, 3-6 (2005) (discussing numerous instances of hostile poll workers threatening or intimidating LEP voters).

166. Tucker & Espino, *supra* note 13, at 187-88. Moreover, only 3.3% of responding jurisdictions indicated a belief that elections should be conducted only in English, *id.* at 225, making it reasonable to infer that the widespread compliance issues stem not from ideologically motivated disregard but from other factors.

167. Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW. 269, 273 (2008).

168. *Provisional Voting*, PROJECT VOTE, <http://projectvote.org/provisional-voting.html> (last visited Mar. 30, 2015) ("In some situations, poll workers have failed to offer provisional ballots to voters at all.").

169. Ethan Bronner, *Long Lines, Demands for ID and Provisional Ballots Mar Voting for Some*, N.Y. TIMES (Nov. 6, 2012), <http://www.nytimes.com/2012/11/07/us/politics/long-lines-id-demands-and-provisional-ballots-mar-voting.html> (providing an account of poll workers in Pennsylvania inappropriately and illegally informing voters that they could not vote without presenting a photo ID).

170. Benson, *supra* note 167, at 295 (discussing in detail recent accounts).

171. One report explained that "average [poll worker] training [is] 3.5 hours," though greater in some jurisdictions and less than an hour in ten percent of jurisdictions. BARRY C. BURDEN & JEFFREY MILYO, *THE RECRUITMENT AND TRAINING OF POLL WORKERS: WHAT WE KNOW FROM SCHOLARLY RESEARCH* 15 (2013), available at http://electionadmin.wisc.edu/bm_pollworker_report.pdf; see also Benson, *supra* note 167, at 276 ("A recent report noted that in Philadelphia in 2006, training for poll workers lasted only 17 minutes . . ."). In small

More pointedly, however, studies have shown that the primary causes of noncompliance with section 203 are election officials' ignorance of the law's basic requirements and a widespread underestimation of the need for language accommodation. As discussed, each covered jurisdiction is responsible for "determin[ing] what actions by it are required for compliance with the requirements of . . . section 203(c)." ¹⁷² Although the DOJ has provided guidance, ¹⁷³ widespread confusion persists. In addition to the 20% of covered jurisdictions that reported they provide no language or oral assistance of any kind, fully 14% reported they provide written but not oral assistance, and 6.2% reported they provide only oral assistance. ¹⁷⁴

Within these broad categories, the quality of assistance varies tremendously. ¹⁷⁵ For example, only half of all covered jurisdictions provide language assistance to voters seeking absentee ballots, and only 40.9% provide oral assistance to those seeking to register. ¹⁷⁶ Likewise, regarding written assistance, while a strong majority of covered jurisdictions provide translated ballots and sample ballots, a quarter reported that they do not provide written language assistance for instructions on how to operate a voting machine or properly mark a ballot. ¹⁷⁷ Similarly, a separate study found that one in seven covered jurisdictions could not provide voter registration materials in the covered language. ¹⁷⁸ The election officials' survey responses with respect to training, outreach, and specific requirements for oral and written assistance "demonstrate[] some fundamental misunderstandings about the need for language assistance" and section 203 compliance. ¹⁷⁹

In addition to the requirements of the law, election officials grossly underestimate the number of LEP voters in their jurisdictions and the overall need for language assistance. This miscalculation is acutely problematic given the wide discretion that election officials are given to develop their specific compliance

jurisdictions, "only a third of poll workers are training on provisional ballots and just over half are on the operation of voting equipment." BURDEN & MILYO, *supra*, at 15.

172. 28 C.F.R. § 55.14(c) (2014).

173. *Minority Language Citizens: Section 203 of the Voting Rights Act*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_203/203_brochure.php (last visited Mar. 30, 2015) (discussing the "keys to a successful program" and specifically providing guidance on outreach, bilingual election personnel, translating materials, timing, planning, and accurate recording).

174. Tucker & Espino, *supra* note 13, at 188.

175. See Benson, *supra* note 167, at 294-95 ("Where there is compliance, several non-profit monitoring groups have found written materials to be poorly or incorrectly translated, and oral language assistance to be unavailable or nonexistent. Where bilingual interpreters are provided, they are sometimes poorly trained or speak the wrong language or dialect In Queens, New York during the general election of 2000, Chinese-language ballots were translated incorrectly at six voting sites, so that Democratic candidates were labeled as Republican, and [vice versa].") (footnotes omitted).

176. Tucker & Espino, *supra* note 13, at 194 fig.4.

177. *Id.* at 196 fig.5.

178. Jones-Correa & Waismel-Manor, *supra* note 154, at 178.

179. Tucker & Espino, *supra* note 13, at 230.

plan. When asked to estimate how many voters in their jurisdiction needed oral assistance, election officials' average response was 5.5%; in fact, the number in those jurisdictions that actually needed such assistance was double at 10.9%.¹⁸⁰ Even more troubling, "[t]his divergence between perception and reality occurred regardless of how much language assistance the jurisdiction provided, if any."¹⁸¹ There are likely "several reasons for these misperceptions."¹⁸² Chief among them, however, is the fact that two-thirds of all covered jurisdictions reported they did not consult with community organizers in LEP groups in developing a compliance plan.¹⁸³

D. *The Infrequency of Enforcement Likely Contributes to the Compliance Gap*

In addition to confusion and misperception, a high litigation burden and the relative infrequency of enforcement actions likely contribute to section 203's low compliance rate. Section 203 is enforced primarily through DOJ litigation, though private parties, usually civil rights organizations, may also bring claims.¹⁸⁴ As a practical matter, however, due to high costs¹⁸⁵ and standing issues,¹⁸⁶ "the vast majority of lawsuits filed involving Section[] . . . 203 have been filed by the [DOJ]."¹⁸⁷ Private litigation is very uncommon,¹⁸⁸ and as a consequence, voters are typically "relegated to report[ing] violations solely to the [DOJ]."¹⁸⁹ The DOJ then retains "discretion [to decide] whether and how to act on these complaints."¹⁹⁰

Scant enforcement likely contributes to violations within all five subsets of the noncompliant categories (as listed in Part II.C). For example, a lack of robust enforcement likely increases the prevalence of ignorance of the law and confusion regarding its requirements; it reduces the incentive of cash-strapped

180. *Id.* at 186.

181. *Id.*

182. *See id.* at 187.

183. *Id.*

184. Order Re: Preliminary Injunction, *supra* note 36, at 2 (issuing a preliminary injunction for violations of section 203 in a lawsuit brought by private plaintiffs); Press Release, Asian Am. Legal Def. & Educ. Fund, *supra* note 36 (describing a section 203 lawsuit and subsequent settlement between AALDEF and the New York City Board of Elections).

185. Benson, *supra* note 38, at 290-91, 296-97 ("[P]rivate lawsuits brought to force covered jurisdictions into compliance require a great deal of detailed evidence of discrimination and participation barriers, and for that reason are often too expensive for private litigants or community groups to pursue. . . . The cases typically require a great deal of time, resources, and funds, which are in limited supply for many LEP citizens and communities." (footnote omitted)).

186. *See* Magpantay, *supra* note 40, at 684.

187. *See* Pitts, *supra* note 41, at 331 n.31.

188. *See id.* at 331 ("The Attorney General has primary, if not necessarily exclusive, jurisdiction to enforce these provisions.").

189. Magpantay, *supra* note 35, at 39.

190. *Id.*

jurisdictions to invest the proper resources; and it diminishes the perceived need for election officials to continually educate themselves on the numbers of LEP voters in their jurisdictions. With confusion and ignorance as the primary contributors to section 203's uneven implementation, a lack of frequent enforcement reduces section 203's salience and likely intensifies these and other factors underlying noncompliance.

Section 203 enforcement actions are relatively rare and typically brought only after repeated violations have occurred. Since 2009, the DOJ has filed only seven section 203 enforcement actions¹⁹¹—not an insignificant number, though modest in the face of such common compliance failures. And private lawsuits, though potentially meritorious, “are often too expensive for private litigants or community groups to pursue.”¹⁹² Moreover, to resolve a suit, it is common for jurisdictions simply to consent to follow the law and permit additional monitoring.¹⁹³ Judging by the stubbornly high rates of noncompliance, these relatively mild consequences seem insufficient to widely and effectively promote section 203's requirements, deter misconduct, and reduce nonfeasance in other election jurisdictions. Further compounding the problem is that so little can be done to prevent violations before they occur. Enforcement actions are brought only after (often egregious) violations have already been documented.¹⁹⁴ Lastly, the most conspicuous section 203 enforcement actions are usual-

191. *Voting Section Litigation*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/vot/litigation/caselist.php#sec203cases> (last visited Mar. 30, 2015). Since 2009, the DOJ has filed section 203 claims against Orange County, New York; Colfax County, Nebraska; Lorain County, Ohio; Alameda County, California; Cuyahoga County, Ohio; Riverside County, California; and Fort Bend County, Texas. *Id.*

192. Benson, *supra* note 38, at 290-91.

193. In recent years, nearly all consent decrees have contained provisions that require jurisdictions to agree to translate election materials, provide oral assistance, train and recruit poll workers, and allow federal observers. *See, e.g.*, Consent Decree, Judgment, & Order at 4-14, *United States v. Alameda Cnty., Cal.*, No. C-11-3262 EMC-MMS-RS (N.D. Cal. Oct. 19, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_203/documents/alameda_cd11.pdf; *see also* Memorandum of Agreement Between the United States of America & Lorain County, Ohio Regarding Compliance with Section 4(e) of the Voting Rights Act at 5-12, *United States v. Lorain Cnty., No. 1:11-CV-02122-SO* (N.D. Ohio Oct. 6, 2011); Benson, *supra* note 38, at 323-24 (“[T]he outcome of much litigation brought seeking enforcement of language protections under section[] . . . 203 . . . is consent decrees or court orders mandating that the noncompliant jurisdiction provide some sort of written and oral accommodations for its LEP citizens.” (footnote omitted)).

194. *See, e.g.*, Complaint, *supra* note 147, at 4 (alleging that the defendant, a jurisdiction covered under section 203, failed to comply with the provision by “a) [f]ailing to provide all election-related information, materials and assistance in the Spanish language; b) [f]ailing to translate and disseminate election-related information and materials . . . ; and c) [f]ailing to recruit, hire, train, and maintain at least one bilingual, fluent Spanish-speaking poll official capable of providing necessary and effective Spanish language assistance”); Complaint at 3, *United States v. Cuyahoga Cnty. Bd. of Elections*, No. 1:10-cv-01949-PAG (E.D. Ohio Sept. 1, 2010) (employing similar language); Complaint Alleging Violations of Section 203 of the Voting Rights Act at 3, *United States v. Cnty. of Riverside, Cal.*, No. CV10-01059-SJO (C.D. Cal. Jan. 29, 2010) (same).

ly brought against blatant violators and in tandem with a section 2 lawsuit.¹⁹⁵ Violations stemming from confusion or negligence—by far the largest contributors to the compliance gap—often go unremedied and unnoticed.

Enforcement is relatively infrequent in part because the DOJ and would-be private litigants are hampered by a significant litigation burden and an expensive fact-gathering process. Unlike section 2, for section 203 enforcement the DOJ (or, in rare cases, private litigants) must compile and analyze firsthand accounts of violations, which are difficult and expensive to gather and easy for opponents to contradict. Admittedly, vote dilution or voter access claims under section 2 are expensive to litigate. Those cases, however, often deal with publicly available quantitative information (e.g., election data and racial breakdowns),¹⁹⁶ making the facts at issue more stable and the course of litigation more predictable.

Because in most cases, a voter's sole recourse in the face of a section 203 violation is to report that violation to the DOJ,¹⁹⁷ the DOJ must invest ample time and resources to sift through various allegations to separate fact from fiction. The DOJ then determines if available evidence simply implicates an errant poll worker, or if it tends to demonstrate systemic violations and consequent liability for the jurisdiction. Importantly, there is always the possibility that a DOJ witness's account will be contradicted by a witness for the defense or challenged by an election official,¹⁹⁸ a reality that imposes additional risks and costs on the DOJ—and potential private litigants. Thus, a substantial litigation burden helps to ensure that enforcement of section 203 is relatively uncommon, always reactionary, and at times limited to the small subset of purposeful violators—likely further contributing to the provision's large compliance gap.

195. See, e.g., Complaint, *United States v. City of Bos.*, No. 05-11598WGY (D. Mass. July 29, 2007), available at http://www.justice.gov/crt/about/vot/sec_203/documents/boston_comp.pdf (seeking, among other things, injunctive and declaratory relief pursuant to sections 2 and 203 of the VRA); Amended Complaint, *United States v. City of Phila.*, No. 2:06-cv-4592 (E.D. Pa. Apr. 26, 2007), available at http://www.justice.gov/crt/about/vot/sec_203/documents/phillyamended_comp.pdf (same).

196. See, e.g., Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 HARV. LATINO L. REV. 183, 196 (2012) (discussing how section 2 vote dilution claims turn on whether plaintiffs can use publicly available election and racial data to “demonstrate that there has been more than one election where a white majority has voted cohesively and in such a way as to defeat the minority coalition's preferred candidate or measure”).

197. Magpantay, *supra* note 35, at 39 (“Section 203 is primarily enforced by the Department of Justice so voters are relegated to report violations solely to the Department. It is in the Department's discretion whether and how to act on these complaints.” (footnote omitted)).

198. See, e.g., ELECTIONLINE.ORG, TRANSLATING THE VOTE: THE IMPACT OF THE LANGUAGE MINORITY PROVISION OF THE VOTING RIGHTS ACT 8 (2006), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/election_reform/electionlinetranslatingvote1006pdf.pdf (discussing Boston mayor Thomas Menino's decision to dispute the DOJ's complaint alleging that Boston was in violation of section 203). To see the original DOJ complaint, see Complaint, *supra* note 195.

III. PROPOSING AND DEFENDING REPORTING REQUIREMENTS FOR SECTION 203

The problem I seek to address is section 203's unacceptably high noncompliance rates, and I propose to partially solve it by imposing self-reporting requirements on covered jurisdictions. As stated, two leading causes of section 203 noncompliance are election administrators' widespread "misconceptions of what the federal language assistance provisions require[]"¹⁹⁹ and their dangerous and common tendency to underestimate the numbers of LEP voters.²⁰⁰ At very little cost, my proposal uses disclosure to (1) correct the confusion among election officials surrounding the complex and fact-specific requirements of section 203, and (2) allow for more targeted and effective poll watching, which will place informal pressure on election officials to comply and reduce the cost of enforcement actions.

This Part proceeds with the following: (A) a detailed description of my proposal to impose reporting requirements on covered jurisdictions; (B) an explanation of how reporting requirements will reduce confusion and leverage third-party resources to enhance compliance; (C) a discussion of how such requirements will allow for more targeted and effective poll watching, placing pressure on noncompliant jurisdictions and easing the litigation burden for the law's substantive provisions; (D) a discussion of alternative proposals, counterarguments, and the imperative of universal enforcement of federal voting laws; and (E) a discussion of the plan's constitutionality.

A. *Mechanics of Disclosure in the Section 203 Context*

As appropriate as the VRAA's reporting requirements are in the federal voting changes context, I argue in this Note that reporting requirements would be equally—if not more—valuable in the section 203 context. I propose that six months prior to an election, all jurisdictions covered by section 203 should be forced to post on the Internet or submit to the DOJ a plan detailing how they will comply with the section's affirmative duties. If the plan is submitted to the DOJ, the Department would then make it available on the Internet. The new

199. See Tucker & Espino, *supra* note 13, at 187; see also *id.* at 163 ("Despite [the] increasing importance [of minority language assistance provisions] throughout the United States, these provisions are widely misunderstood."). In the 308 responding jurisdictions covered for Spanish, 41 (13.3%) reported that they provide no written or oral language assistance to LEP voters. *Id.* at 189. The numbers are even worse for jurisdictions covered for Alaska Native and American Indian languages and Asian languages, which reported a complete lack of language assistance in 30.7% and 18.9% of jurisdictions, respectively. *Id.* at 190. Overall, 20% of covered jurisdictions reported that they provide no language assistance, while nearly 40% reported that they do not provide both written and oral assistance, as is required by law. *Id.* at 188.

200. See *id.* at 186 ("[The] divergence between perception and reality [of the number of LEP voters and the extent of their needs] occurred regardless of how much language assistance the jurisdictions provided, if any.").

legislation would specify the base-level information that each report must contain, and the DOJ could potentially develop a template for local election officials to use. This proposal would require that the reports contain the following information: (1) how many non-English ballots the jurisdiction will provide, in what languages, and at what polling locations; (2) how the jurisdiction plans to train its poll workers in interacting with and accommodating LEP voters; (3) how the jurisdiction intends to recruit bilingual poll workers; and (4) the number of poll workers with foreign language facility on Election Day and their specific polling locations. Additional or more detailed information could, of course, also be provided. Then, two months before an election, the jurisdiction would be required to state whether its plan is properly on schedule. Both this plan and the recent proposal for disclosure of federal voting changes recognize that up-front and accessible information increases compliance by fostering transparency.

Although this proposal and the “voting changes” proposal both rely on front-end information, the ultimate objectives of disclosure and the manner in which those goals are effectuated diverge. Disclosure in the voting changes context in part seeks to deter “wayward public officials” from imposing “restrictions on voting access.”²⁰¹ Theoretically, election officials would be discouraged from pursuing such laws because if they did, voters and the government would be better equipped to sue the jurisdiction and obtain relief.

Under section 203’s legal framework, disclosure would serve primarily an informational purpose. Disclosure would be chiefly valuable because it provides third parties and the government with an opportunity to work with election officials to craft proper accommodation plans for LEP voters. Keeping in mind that only one-third of jurisdictions collaborate with their LEP community,²⁰² disclosure represents a sensible way to encourage cooperation.

In addition to information, however, disclosure does provide a softer form of deterrence by allowing for more targeted, effective poll watching. First, this more strategic poll watching will pressure noncompliant jurisdictions by raising awareness of violations and potentially mobilizing LEP voters to demand reform. Second, it will provide the DOJ and potential litigants with more detailed accounts of violations, thus easing the litigation burden and potentially increasing the number of enforcement actions.

My proposal can use as models consent decrees following section 203 enforcement actions and language assistance plans that jurisdictions have voluntarily made public. First, reporting requirements in consent decrees resulting from section 203 lawsuits are very common.²⁰³ These reporting requirements

201. Issacharoff, *supra* note 8, at 124-25.

202. *See* Tucker & Espino, *supra* note 13, at 187.

203. *See, e.g.*, Consent Decree at 11, *United States v. Orange Cnty. Bd. of Elections*, No. 12 Civ. 3071 (ER) (S.D.N.Y. Apr. 18, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_203/documents/orange_cd_ny.pdf (“Throughout the duration of this Consent Decree, at least fourteen (14) days before each election, the [Orange County Board of Elections] shall provide to counsel for the United States: a. The name, address, and election dis-

are incredibly detailed and likely only appropriate when blatant violations have been documented; however, the logic of compelling reporting to enhance compliance can be applied universally to covered jurisdictions. Whereas these consent decrees typically require the boards of elections to provide names of bilingual election personnel, my proposal would require only the polling locations and the number of bilingual personnel to be made publicly available. Additionally, jurisdictions would not necessarily have to provide copies of all election materials as is common in consent decrees; rather, election officials could simply provide numbers and affirm that all election materials are presented pursuant to their *specific* obligations under section 203. As the scope of a jurisdiction's duties under section 203 varies depending on the number of LEP voters and the languages they speak, it is critical that jurisdictions publicly state their particular legal obligation and how they intend to comply.

Some jurisdictions, such as Minneapolis, already make their LEP voter-accommodation plans publicly available.²⁰⁴ In advance of an election, Minneapolis publishes the number of poll workers who can provide language assistance at each polling location and specifies what languages they speak.²⁰⁵ Additionally, the plan details how voter assistance signs will be translated²⁰⁶ and specifically states that poll workers have been trained to “identify[] language support or translation needs and coordinat[e] that assistance for voters.”²⁰⁷ Lastly, the report states that the city conducted a “Voter Ambassador Program,” making election materials “available in multiple languages to facilitate effective outreach to all voters.”²⁰⁸ Here again, I do not propose to make Minneap-

tricts at each polling place; b. The name of each election inspector appointed and assigned to serve at each polling place; c. The names of those election inspectors who are fluent in English and Spanish; d. Copies of any signs or other written information provided at polling locations; e. A set of all written materials to be provided to voters at the upcoming election; and f. A copy of the most recent voter registration list in a format to be agreed upon by the Parties.”). Other consent decrees contain substantially similar language. *See, e.g.*, Proposed Consent Decree Judgment, & Order at 13-14, *United States v. Colfax Cnty., Neb.*, No. 8:12-cv-84 (D. Neb. Feb. 13, 2012); Consent Decree, Judgment, & Order at 16-17, *United States v. Alameda Cnty., Cal.*, No. C-11-3262 EMC-MMS-RS (N.D. Cal. Oct. 19, 2011).

204. Minneapolis publishes a report of its election plans and preparations on its website in advance of elections. *See* STANDING COMM. ON ELECTIONS, MINNEAPOLIS CITY COUNCIL, THE 2013 MUNICIPAL ELECTION: A REPORT ON FINAL PLANS & PREPARATIONS (2013), *available at* <http://vote.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-116198.pdf>.

205. Exhibit C of the 2013 plan is titled “2013 Municipal Election Staffing Analysis (Election Judges)” and displays the numbers of election personnel at each polling location and the language support they can provide. *Id.* exh. C, *available at* <http://vote.minneapolismn.gov/www/groups/public/@clerk/documents/webcontent/wcms1p-116201.pdf>.

206. *Id.* at 4 (“In precincts known to have larger voter populations with limited English proficiency, all directional and voter-assistance signs will be translated into the primary non-English languages spoken in that precinct, as well as information about how to access translation assistance or language support.”).

207. *Id.* at 6.

208. *Id.* at 8-9.

olis's approach a mandatory requirement for all covered jurisdictions; instead, the Minneapolis model demonstrates that once a compliance plan is in place (as is required by law), making that plan publicly available imposes manageable, if not negligible, costs and presents a viable alternative to our current model of after-the-fact enforcement.

B. *Reporting Requirements Will Increase Section 203 Compliance Primarily by Correcting Confusion Among Election Officials*

First and foremost, this proposal will increase compliance by prompting election officials to educate themselves on the fundamental requirements of section 203 and their particularized obligations under the law. While some jurisdictions are ignorant of the law's basic requirements, nearly all election officials underestimate the number of LEP voters in their jurisdictions. Disclosure offers a partial solution. First, in drafting public reports, election officials must make themselves aware of the law's fundamental requirements. Second, once the report is published, the LEP community, voting rights advocates, and in some cases the DOJ will have the opportunity to correct election officials' often inadequate plans.

This proposal finds the most practical and direct solution by recognizing that compliance would increase if election officials were aware of the law's requirements. Because approximately twenty percent of election officials surveyed in covered jurisdictions voluntarily reported they do not provide any written or oral language assistance, one may infer that many of them are simply unaware of the plain requirement to do so. Otherwise, many of these officials simply would not have participated in the survey. If the law forced election officials to disclose a compliance plan, it would, at a bare minimum, force them to become familiar with the law's basic mandates and would increase compliance for an important subset of violators.

In addition, publication of the compliance plans will improve election officials' understanding of the scope of LEP voters' needs in their jurisdiction by prompting ex ante collaboration with the LEP community, voting rights advocates, or the DOJ. As election officials nearly universally underestimate the needs and number of LEP voters in their jurisdiction, only one-third report engaging with LEP communities when developing their compliance plans²⁰⁹—something the regulations encourage. Currently, third-party advocates and LEP communities are eager to uphold voting rights; look no further than the section 203 claims they have recently filed²¹⁰ and the substantial resources they invest

209. See Tucker & Espino, *supra* note 13, at 187.

210. See, e.g., Order Re: Preliminary Injunction, *supra* note 36, at 2 (issuing a preliminary injunction for violations of section 203 in a lawsuit brought by private plaintiffs); Press Release, Asian Am. Legal Def. & Educ. Fund, *supra* note 36 (describing a section 203 lawsuit and subsequent settlement between AALDEF and the New York City Board of Elections).

in poll watching.²¹¹ But, given the substantial costs inherent in bringing a section 203 lawsuit, LEP voters and their advocates have only limited avenues to protect those rights. With public disclosures, LEP communities and civil rights organizations could channel their resources into reviewing reports and alerting election officials of inadequacies.

Civil rights organizations already play a crucial role in enforcing voting laws, and other proposals have likewise sought to further empower them.²¹² For example, in 2006, Heather Gerken proposed allowing section 5 to expire in favor of an “opt-in” system that would privilege local control and community involvement in voting rights enforcement.²¹³ Similar to Issacharoff’s in some ways, her proposal centered on disclosure and also prioritized local community action.²¹⁴

In response to potential criticisms that new responsibilities would overburden civil rights organizations,²¹⁵ Gerken focused on the critical, though often informal, role such organizations already play. Under section 5, DOJ voting rights investigations often turned on the information that civil rights groups provided.²¹⁶ Further, DOJ staff members stay in contact with the local minority communities throughout the year to receive updates on developments in local

211. See, e.g., ASIAN AM. LEGAL DEF. & EDUC. FUND, LANGUAGE ACCESS FOR ASIAN AMERICANS UNDER THE VOTING RIGHTS ACT IN THE 2012 ELECTIONS (2012), available at <http://aaldef.org/AALDEF%20Election%202012%20Interim%20Report.pdf> (documenting an extensive on-the-ground examination of language assistance plans for thirteen jurisdictions in ten states); LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, ELECTION PROTECTION 2012: A PRELIMINARY LOOK AT THE PROBLEMS PLAGUING THE AMERICAN VOTER 5-6 (2012), available at <http://www.lawyerscommittee.org/admin/site/documents/files/EP-2012-Preliminary-Report-to-Congress-FINAL.pdf> (discussing in detail accounts of unavailable language assistance in covered jurisdictions and documenting specific violations LEP voters experienced in Philadelphia and Lehigh Counties, Pennsylvania; Los Angeles, California; Hamtramck, Michigan; Saint Paul, Minnesota; Palm Beach, Florida; and Vacaville, New Mexico).

212. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131, 142-48 (2013), http://www.yalelawjournal.org/pdf/1172_7tf1ew4q.pdf (discussing the importance of “third party institutions” in upholding voting rights). Examples of such civil rights organizations include AALDEF, the Mexican American Legal Defense and Education Fund (MALDEF), and the Lawyers’ Committee for Civil Rights Under Law.

213. Gerken, *supra* note 84, at 708 (italics omitted).

214. *Id.* at 724 (“[L]ocalities would simply disclose what changes they planned to make in a publicly accessible format available to any public interest groups willing to take part in the enforcement process. Informal negotiations between community leaders and the locality would replace the DOJ investigation as the first step in the process.” (footnote omitted)).

215. *Id.* at 725 (“One might worry that civil rights groups lack the resources to play such an important role in enforcing the right to vote.”).

216. *Id.* at 726 (noting that under section 5, the DOJ’s “‘investigation’ . . . usually involves an informal call by a DOJ staffer to a civil rights group or an elected minority official to see if there is a problem”).

election laws or administration.²¹⁷ In short, local communities and civil rights groups are almost always the first to gather information on voting-related issues.²¹⁸ The disclosure provisions and more formal enforcement mechanisms that Gerken advocates for “might even ease the burden already shouldered by these groups by providing them a readily accessible means for identifying violations and pooling information.”²¹⁹

Although section 203 lawsuits are often prohibitively expensive for civil rights organizations to bring, a lack of robust private enforcement is likely a function of the “great deal of time, resources, and funds” that such litigation requires.²²⁰ Indeed, these lawsuits “require detailed and widespread evidence of voting barriers,” which “must be reported by location (e.g., neighborhood, county), poll site and election.”²²¹ But even facing these challenges, civil rights organizations have recently brought successful section 203 claims in New York City and Alaska,²²² once again demonstrating the critical role they already play in enforcing the rights of LEP voters.

Echoing other commentators, my proposal seeks to further empower the LEP community and their advocates by providing them with more complete and front-end information. Recognizing local communities’ pivotal role and equipping them with useful information is a sensible and straightforward way to increase constructive collaboration with election officials and enhance overall section 203 compliance.²²³

Admittedly, this argument largely takes at face value the accounts that election officials are well meaning and earnest in their attempts to comply with section 203. To reiterate, Tucker and Espino’s study found that noncompliance is rooted not in “ideological opposition to [language] assistance,” but in ignorance of the law and underestimation of LEP voters’ numbers and needs.²²⁴ The purpose of disclosure requirements is to provide a platform to reduce confusion and ultimately increase compliance, with outside groups and LEP com-

217. *Id.* (“According to DOJ staffers, ‘standard contacts’ in a community include local minority officials and the local chapters of the NAACP or the League of United Latin American Citizens (LULAC).”).

218. *Id.* (noting that members of the local community and civil rights organizations undertake “[t]he fact-gathering legwork—the crucial and most burdensome step in the process”).

219. *Id.*

220. Benson, *supra* note 38, at 296-97.

221. Magpantay, *supra* note 35, at 39 n.73.

222. Order Re: Preliminary Injunction, *supra* note 36, at 2 (issuing a preliminary injunction for violations of section 203 in a lawsuit brought by private plaintiffs); Press Release, Asian Am. Legal Def. & Educ. Fund, *supra* note 36 (describing a section 203 lawsuit and subsequent settlement between AALDEF and the New York City Board of Elections).

223. Like Gerken’s, this proposal seeks to facilitate “[o]n-the-ground solutions negotiated by local stakeholders.” Gerken, *supra* note 84, at 728.

224. See Tucker & Espino, *supra* note 13, at 187-88; *supra* note 199 and accompanying text.

munities better positioned to inform election officials that their upcoming efforts are legally inadequate.

Unlike section 203's substantive provisions, enforcing the initial issuance of public reports would be simple. Enforcement would not entail the expensive and uncertain process of discovery, nor would it require using individual, isolated complaints to develop a case for a jurisdiction's systemic noncompliance. Identifying jurisdictions failing to issue a report would be straightforward because the inquiry is binary; a jurisdiction either issues a report or it fails to do so. Such failure would then serve as a *prima facie* case in a lawsuit to compel a jurisdiction to issue a report—resulting in all or nearly all jurisdictions doing so. In issuing a report, election officials would then become aware of the law's plain requirements, and LEP communities and outside groups would be provided with an opportunity to engage election officials and correct misperceptions.

C. *Reporting Requirements Will Enhance the Effectiveness of Poll Watching, Place Informal Pressure on Election Officials, and Ease Section 203's Litigation Burden*

In addition to clarifying the law's requirements and correcting misperceptions, disclosure requirements will enhance compliance by (1) providing poll watchers and third parties with information to more efficiently and effectively monitor noncompliant jurisdictions and document violations, and (2) potentially easing the litigation burden by increasing the flow of accurate information, corroborating accounts of violations, and providing the DOJ or private parties with jurisdictions' inadequate plans, which at times could serve as independent evidence of a violation.

1. *More efficient and effective poll watching*

Disclosure of compliance plans will allow poll watchers to more strategically and efficiently identify and document section 203 violations—placing direct pressure on election officials to comply with the law. Civil rights organizations already heavily invest in poll watching. For example, in 2014, the Asian American Legal Defense and Education Fund (AALDEF) dispatched over 500 attorneys, law students, and community volunteers in eleven states to document voter problems on Election Day.²²⁵ Meanwhile, the nonpartisan Election Protection coalition, which includes “more than 100 local, state and national partners,” coordinates election monitoring for more than 10,000 volunteers.²²⁶ More complete advance information will allow these organizations to use their resources more efficiently and monitor the jurisdictions most likely to violate

225. Press Release, Asian Am. Legal Def. & Educ. Fund, *supra* note 26.

226. *About Us*, ELECTION PROTECTION, <http://www.866ourvote.org/about> (last visited Mar. 30, 2015).

section 203. In turn, those jurisdictions will recognize that they will face additional scrutiny, likely leading to an increase in compliance.

This increased and more targeted pressure functions in two ways. First, jurisdictions that initially issue reports with inadequate plans could be easily identified as high risk. Additional third-party resources could then be more efficiently allocated to monitor such jurisdictions and document violations. Second, this proposal will make it easier for poll watchers to record violations because they can now measure a jurisdiction against a specific and concrete plan (e.g., whether there are bilingual poll workers at a given location, as called for in the report). This method is much more direct than the current approach, where poll watchers are simply on the lookout for egregious violations and noncompliance with a vague and context-specific standard. In other words, the compliance plans provide a benchmark by which jurisdictions can be more effectively monitored and evaluated. With more efficient monitoring, informal pressure will build on noncompliant jurisdictions to devise a proper plan and adhere to it—ultimately leading to an overall increase in compliance.

In some senses, what this disclosure mechanism creates is a softer form of the deterrence effect suggested by Issacharoff.²²⁷ Apart from a lingering threat of litigation, election officials may be influenced by the increased monitoring of the language accommodations they do provide (or fail to provide). More targeted poll watching and frequent documentation of violations may intensify the threat of heightened public awareness or mobilize advocates and voters to demand reform and adherence to the law. Simply put, informal pressure on election officials to understand the relevant legal requirements and to increase compliance would likely build as it becomes more common for poll watchers to document violations.

2. *Easing section 203's litigation burden*

In addition to using more targeted poll watching to informally spur compliance, the disclosure requirements would likely ease the formal enforcement burden in formal proceedings brought by the DOJ or private parties. As discussed in Part II.D, section 203 compliance is likely low in part because enforcement is infrequent. Self-reporting requirements offer a partial solution by providing the DOJ and civil rights organizations with a means to more easily navigate the factfinding process and obtain independent evidence of violations.

Enforcement of section 203 is dependent on an unpredictable discovery process, and self-reporting requirements provide a promising alternative. First, deploying poll watchers more strategically would increase documentation of violations and make accurate and precise information more available. Litigating section 203 claims is particularly onerous primarily because it “require[s] de-

227. Issacharoff, *supra* note 8, at 124-25 (“A strategy aimed at relieving the litigation burden on after-the-fact challenges should not only ease the burden on private enforcement but might create a corresponding deterrent effect on wayward public officials.”).

tailed and widespread evidence of voting barriers.”²²⁸ More effective documentation would reduce this burden by allowing the DOJ or private parties to more easily and efficiently ascertain the truth, manage the difficult factfinding process, and create a basis for further investigation.

Second, early on in an investigation, the DOJ or potential litigants will no longer be forced to rely exclusively on eyewitness, after-the-fact accounts that can be difficult to corroborate and easy to rebut. Instead, failure to issue a report or refusal to issue a report with an *adequate* plan can signal that a jurisdiction warrants further investigation and potentially could be used as independent evidence against a jurisdiction for a substantive section 203 violation. If nothing else, the government or litigants could use the content of these reports to more cheaply identify high-risk jurisdictions and corroborate individual accounts of noncompliance.

Importantly, better access to information will potentially allow civil rights organizations to more regularly initiate lawsuits. These groups already have the technical expertise to pursue section 203 claims,²²⁹ but are hampered by the substantial costs of doings so.²³⁰ More targeted poll watching could deliver the information necessary to decrease the litigation burden and provide these groups a meaningful opportunity to bring enforcement actions. With decreased costs of enforcement, both private parties and the DOJ will likely pursue more formal legal actions, increasing the salience of section 203 and enhancing compliance for the reasons set out in Part II.D.

Lastly, on the margins, this plan will also likely deter bad actors who intentionally skirt their obligations. Purposeful evasion is certainly a contributor to the compliance gap, and this proposal will prompt compliance from a small set of election officials who intentionally do not follow section 203 but would be induced to comply when faced with increased scrutiny, the threat of litigation, and the dangers inherent in lying on public disclosures.

D. *Exploring Alternative Proposals and Counterpoints: The Virtue of Embracing Slight Modifications to Spur Compliance and Focusing on the Imperative of Universal Enforcement of Voting Laws*

Political calculations concerning section 203 are complicated by the ongoing and impassioned debate over the role of the English language in America and the impact that substantive reform would have on current political dynamics. In every Congress since 1981, a bill to repeal section 203 has been introduced.²³¹ More recently, in March 2013, Representative Steve King, a leading figure against section 203 reauthorization in 2006, introduced the English Language Unity Act of 2013, which would require all official U.S. government

228. Magpantay, *supra* note 35, at 39 n.73.

229. See *supra* note 36 and accompanying text.

230. See Benson, *supra* note 38, at 296-97.

231. Tucker, *supra* note 19, at 173.

functions to be conducted in English, among other measures to promote English as the national language.²³² The bill had ninety-four cosponsors in the House,²³³ and Senator Inhofe (R-Okla.) introduced a companion bill in the Senate.²³⁴ The same groups of legislators who opposed section 203 reauthorization in 2006 are likely to oppose disclosure requirements using the familiar arguments that language accommodations are costly and run counter to the goals of ethnic assimilation.

Moreover, passage of voting rights laws is always delicate because the legislation directly impacts the interests and future prospects for both legislators and their political parties.²³⁵ If section 203 were fully implemented, it could affect the composition of the national electorate and potentially produce material political consequences.²³⁶ Notably, coverage was recently extended to a number of politically competitive states and jurisdictions. After the 2011 determinations based on census data, for example, section 203 coverage was triggered on a statewide basis in Florida for the first time and in jurisdictions in Wisconsin and Virginia, each of which were previously wholly uncovered.²³⁷ Measured calls for sensible reforms have repeatedly and predictably given way to the intractable politics²³⁸ and forces of inertia that surround minority language voting accommodations.

Because English-only issues remain emotional and politically charged, supporters of this proposal would benefit by making rule-of-law arguments rather than focusing on the substance of section 203. Properly understood, this proposal intentionally avoids the debate on the appropriate role of English in the United States or the policy judgments embedded in minority language voting accommodations; rather, it rests on the democratic ideal that election officials should enforce all election laws evenly and vigorously.

Less than a decade ago, Congress passed a law that today is seriously underenforced, a result that is particularly troublesome in the election law are-

232. H.R. 997, 113th Cong. (2013).

233. *Cosponsors—H.R. 997—113th Congress (2013-2014): English Language Unity Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/997/cosponsors> (last visited Mar. 30, 2015).

234. S. 464, 113th Cong. (2013).

235. See, e.g., Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 722 (2006) (“[M]inority voters [are] caught in the crossfire of this new party politics.”).

236. Daniel J. Hopkins, *Translating into Votes: The Electoral Impacts of Spanish-Language Ballots*, 55 AM. J. POL. SCI. 813, 814 (2011) (“The instrumental impacts of Spanish-language assistance are marked. And they can influence election outcomes as well.”).

237. Tucker, *supra* note 19, at 177 & nn.51, 54.

238. See, e.g., 152 CONG. REC. 12,975 (2006) (statement of Rep. Rohrabacher) (“We are, in fact, doing a great disservice to those least fortunate people and those immigrants who come to our country by not encouraging them, by not giving them the incentive to learn English. It is a crime against those people and against their children.”); *supra* notes 231-34 and accompanying text.

na. There are roughly 8000 election jurisdictions in the United States,²³⁹ and they exercise more autonomy now—post-*Shelby County*—than at any other point in the last fifty years. Given that different procedures and systems naturally develop across the thousands of election jurisdictions,²⁴⁰ it is imperative that Congress advance the norm that all election officials enforce all federal voting laws.

The decentralized and local nature of election administration should make the universal enforcement of national voting laws a top priority of the federal government.²⁴¹ Supporters of this legislation should therefore refrain from debates on the substance of section 203 and present the proposal for what it is: a simple and sensible response to widespread underenforcement of an often-misunderstood provision of the VRA. Although consensus support and final passage are uncertain, to say that Congress should take incremental steps to ensure all election administrators follow all federal voting laws is not meant to be a provocative or controversial claim.

Further strengthening the case for passage is the law's low cost and the minimal burdens it places on states and the federal government. Even for covered states and jurisdictions not currently complying with section 203, the costs of full implementation are minimal.²⁴² For those already fully implementing section 203, jurisdictions will simply make information they already have publicly available—creating virtually no additional costs because most election jurisdictions operate websites.²⁴³ The proposed VRAA seems to come to a similar conclusion when it makes Internet posting by local jurisdictions a central feature of its brand of “less costly and less intrusive”²⁴⁴ regulation. Moreover,

239. PRESIDENTIAL COMMISSION ON ELECTION ADMIN., *THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 1* (2014) (“The United States runs its elections unlike any other country in the world. Responsibility for elections is entrusted to local officials in approximately 8,000 different jurisdictions.”).

240. *See id.* at 2 (“Some of the differences in approaches to election administration may be explained by cultural differences between states. . . . [T]he diversity of election processes spawns problems . . .”).

241. *See* Janai S. Nelson, *Fair Measure of the Right to Vote: A Comparative Perspective on Voting Rights Enforcement in a Maturing Democracy*, 18 *CARDOZO J. INT'L & COMP. L.* 425, 426 (2010) (discussing how underenforcement of voting laws “implicate[s] the rule of law” and “triggers concerns about democracy”).

242. *See supra* notes 160-64 and accompanying text.

243. *See, e.g., County Elections Offices*, CAL. SECRETARY ST., <http://www.sos.ca.gov/elections/voting-resources/new-voters/county-elections-offices> (last visited Mar. 30, 2015) (listing websites for every county elections office in California); *County Election Offices*, COLO. SECRETARY ST., <http://www.sos.state.co.us/pubs/elections/Resources/CountyElectionOffices.html> (last visited Mar. 30, 2015) (listing websites for every county election office in Colorado); *Local County Election Offices*, N.J. DEP'T ST., <http://www.state.nj.us/state/elections/voting-information-local-officials.html> (last visited Mar. 30, 2015) (listing websites for every county board of elections in New Jersey).

244. Issacharoff, *supra* note 8, at 119.

jurisdictions are free to submit the plan to the DOJ, which will then be responsible for making it publicly available.

While, if enacted, this proposal would produce material gains at insignificant costs, admittedly much more could be done to enhance political participation among LEP voters. For example, there have been calls to modify section 203's triggering requirements by lowering the threshold from 10,000 voters²⁴⁵ or by covering additional languages.²⁴⁶ Federal poll watchers could be deployed more frequently and easily, and penalties could be imposed on purposeful, or even negligent, violators.

Moreover, an obvious weakness in my proposal is the failure to address on-the-ground administration. This plan minimizes the important role of often insufficiently trained poll workers in the election process²⁴⁷ and does not account for negligent execution. Once a jurisdiction develops a plan, there is no guarantee that it will fully or properly execute it, even if it intends to do so. To increase LEP participation, more resources could be devoted to poll worker training, or election administration could be more centralized. This proposal also does nothing to address funding problems that contribute to noncompliance in some, though few, covered jurisdictions.

This plan is therefore not a cure-all solution to section 203's compliance problem. Instead, the proposal recognizes that the section 203 reauthorization in 2006 was fragile and somewhat controversial. Like section 5 preclearance in the 2006 reauthorization, proposals to seriously tinker with section 203's coverage formula or basic requirements could "shatter[] [the legislation] into a thousand pieces," given current political realities.²⁴⁸ Many of these proposals would impose substantial costs on local jurisdictions, the federal government, or both. These costs combined with a difficult political environment make substantial changes to section 203 unrealistic. Rather, at virtually no increased expense to the federal government or local administrators, this proposal enhances compliance by prompting jurisdictions to consider their section 203 obligations, leveraging third-party resources to correct misperceptions, and more effectively deploying poll watchers to pressure election officials into compliance and to reduce section 203's substantial litigation burden. With a focus on the imperative of universal enforcement rather than the merits of inclusivity, this measure is attuned to political realities and more likely to pass than other, more substantive proposals for reform.

245. See, e.g., Magpantay & Yu, *supra* note 165, at 15 ("Congress should consider lowering the trigger to either 7,500 or 5,000.").

246. See *supra* note 111.

247. See *supra* note 171 and accompanying text.

248. Persily, *supra* note 235, at 738 (referencing the delicate compromise struck to reauthorize section 5 of the VRA).

E. *Applying the “Current Needs” Standard Introduced in Shelby County, Section 203 and This Plan Are Likely Constitutional*

Although questions of section 203’s constitutionality under *City of Boerne v. Flores*’s “congruence and proportionality” standard²⁴⁹ have been long debated,²⁵⁰ section 203’s coverage formula and this proposal for disclosure very likely pass muster under *Shelby County*’s “current needs” test. *Shelby County* renewed questions concerning the constitutionality of section 203’s coverage formula. These issues remain important and unresolved and warrant a more detailed discussion outside of the scope of this Note. This Note primarily flags these concerns for further research and debate and provides a high-level summary of why section 203 and the disclosure proposal likely conform to *Shelby County*’s newly articulated constitutional standard.

Because section 203’s coverage formula selectively imposes “current burdens” in response to “current needs,”²⁵¹ it is very likely acceptable under *Shelby County*. In contrast to section 4 coverage, section 203 coverage is not fixed in time. Coverage is rooted in “current” data, updating every five years²⁵² and responsive to the effects of demographic changes and future generations of current LEP communities learning English. Although the number of LEP voters that benefit from section 203 is growing, those voters tend to be concentrated in “the nation’s most populous urban areas.”²⁵³ As a result, the number of covered jurisdictions has in fact shrunk since 2002: after the 2011 coverage determinations, a total of 248 political subdivisions nationwide were covered—48

249. 521 U.S. 507, 520 (1997) (stating that under the enforcement power that the Fourteenth Amendment grants Congress, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”).

250. Congress enacted section 203 under the enforcement sections of the Fourteenth and Fifteenth Amendments to remedy depressed political participation among language minorities “directly related to the unequal educational opportunities afforded them.” 42 U.S.C. § 1973aa-1a(a) (2013). Attacks on the constitutionality of this congressional action under *Boerne* take two primary forms. First, critics have rhetorically asked, “[I]s it a congruent and proportional response to education discrimination to force states to make ballots available in foreign languages?” *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 22, 32* (2005) (prepared statement of Linda Chavez, President, One Nation Indivisible). Second, others have argued that a voter not understanding English “is not a violation of the 14th or 15th amendment” and that section 203’s remedial approach is therefore constitutionally void. *Id.* at 48 (statement of Roger Clegg, Gen. Counsel, Center for Equal Opportunity). For well-researched and compelling counterarguments and a more thorough defense of section 203’s constitutionality under *Boerne*, see James Thomas Tucker, *The Battle over “Bilingual Ballots” Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507 (2008).

251. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013) (quoting *NAMUDNO*, 557 U.S. 193, 203 (2009)) (internal quotation marks omitted).

252. 42 U.S.C. § 1973aa-1a(b)(2)(A).

253. Tucker, *supra* note 19, at 176.

fewer than in 2002.²⁵⁴ Importantly, these 248 covered jurisdictions account for only 3.1% of political subdivisions in the United States.²⁵⁵

Politicians and commentators at times have underestimated the dynamic nature of section 203's coverage and the extent to which it responds to changing social conditions. For example, in 2011, Congressman Coffman (R-Colo.) introduced legislation to preemptively remove Spanish-language coverage that was expected to be added in 16 additional Colorado counties.²⁵⁶ To his and others' surprise, the state actually saw a substantial decrease in the number of covered jurisdictions, losing 7 of the 10 counties that were covered based on the 2002 determinations.²⁵⁷

In short, unlike section 4, section 203 coverage is rationally related to the problem it seeks to address—depressed political participation among language minorities.²⁵⁸ As opposed to section 4, the disparate treatment is “adapted to [achieve its] end,”²⁵⁹ and statistics demonstrate that the underlying problems that first motivated the passage of section 203 persist. Specifically, political participation rates remain low in LEP communities,²⁶⁰ and illiteracy rates are on average fourteen times greater than in the nation as a whole.²⁶¹ In *Shelby County*, the Court noted that literacy tests “have been banned nationwide for over 40 years” and racial disparities in voter registration and turnout no longer exist.²⁶² It was therefore “irrational” for Congress to base section 5 coverage on these factors.²⁶³ In contrast, section 203 coverage is determined by on-the-ground realities and continues to be tailored to the low participation rates of LEP voters that the language accommodations are designed to address.

In addition to the needs being current, the burdens that section 203 places on states and subdivisions are far slighter than those of section 5. The test presented in *Shelby County* weighs current burdens against current needs. The Court noted that the burdens section 5 imposes were “unprecedented” and “extraordinary,”²⁶⁴ making it more difficult for Congress to justify such an imposition on some states but not on others.

254. *Id.*

255. Press Release, U.S. Census Bureau, Census Bureau Releases 2011 Determinations of Political Jurisdictions Subject to Minority Language Assistance Provisions of Section 203 of the Voting Rights Act (Oct. 12, 2011), https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn189.html.

256. Lofholm, *supra* note 106.

257. Tucker, *supra* note 19, at 173.

258. 42 U.S.C. § 1973aa-1a(a) (2013).

259. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) (emphasis omitted) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819)).

260. *See supra* notes 131-42 and accompanying text.

261. *See Tucker & Espino, supra* note 13, at 179.

262. *Shelby Cnty.*, 133 S. Ct. at 2627.

263. *Id.* at 2630-31.

264. *See id.* at 2626 (“Those extraordinary and unprecedented features were reauthorized—as if nothing had changed.”).

Section 203's disparate burdens, on the other hand, are far slighter and easier to justify. First, section 203 imposes circumscribed affirmative duties and allows the government to pursue conventional remedies; it does not turn the traditional regulatory framework and core principles of federalism on their heads. Moreover, by isolating states and subdivisions with significant LEP communities, the coverage formula ensures that many of section 203's requirements, such as recruiting and training bilingual poll workers, are not overly burdensome to satisfy. The burden is also reduced by section 203's limitation to certain languages. In effect, the burden falls well short of requiring every covered jurisdiction to provide language assistance to every LEP voter. Consequently, when properly implemented, the requirements impose only minimal financial costs on covered jurisdictions.²⁶⁵ Because coverage is sensitive to changing conditions, is rationally related to addressing depressed political participation, and imposes only slight burdens on states and subdivisions, section 203 is very likely constitutional under *Shelby County's* "current needs" test.

Lastly, if section 203 is constitutional under *Boerne's* "congruent and proportional" standard and *Shelby County's* "current needs" test, then the new proposal for additional reporting requirements is surely constitutional. The additional burden that reporting requirements would impose on covered jurisdictions is immaterial because the proposal simply mandates that jurisdictions make information available that they are already required to produce.

As is well known, *Boerne* has circumscribed Congress's power to remedy or prevent constitutional violations. With that in mind, if the Court were to rule that section 203 is constitutional, then it would have necessarily found that unequal educational opportunities and a history of discrimination against LEP voters do in fact permit Congress to require that states and subdivisions conduct bilingual elections. In doing so, the Court would have determined that the harm done to LEP voters is significant²⁶⁶ and Congress's ability to enhance voting protections is robust.²⁶⁷ It is therefore difficult to see how additional disclosure requirements to promote the implementation of a constitutional law would then make the congressional response somehow incongruent or disproportional to the underlying harm.

In addition to *Boerne*, if section 203's coverage is permitted under *Shelby County's* "current needs" test, then the additional burden for reporting requirements would also be justified. In *Shelby County*, the Court scrutinized Congress's decision to divide up states.²⁶⁸ Even without additional reporting re-

265. See *supra* notes 159-64 and accompanying text.

266. See Tucker, *supra* note 250, at 548-68 (discussing how present-day barriers to equal educational opportunities and the current effect of past discrimination are significant and support renewal of section 203).

267. See *id.* at 530 (arguing that after upholding the language assistance requirements in previous decisions, "[t]here is nothing in *Boerne* suggesting that the Court would resolve the constitutionality of the language assistance requirements . . . differently today").

268. *Shelby Cnty.*, 133 S. Ct. at 2629.

quirements, section 203's coverage formula must withstand the same scrutiny. If the Court finds section 203's current coverage formula and substantive provisions constitutional, then it would have been persuaded that depressed political participation, motivated in part by unequal educational opportunities, justifies selectively requiring states and jurisdictions to provide language accommodations to LEP voters. If the basic requirements and coverage formula are constitutional, then disclosure would have also been adopted in response to current and pressing needs and would also surely be constitutional.

CONCLUSION

Primarily due to ignorance and misperception, election officials across the country are failing to enforce critical provisions of the Voting Rights Act. Meanwhile, enforcement is sparse, as the DOJ is hampered by an expensive and uncertain fact-gathering process and third parties largely lack the necessary information to intervene. As a result, and directly contrary to the purpose of section 203, certain LEP voters remain vulnerable on the national, state, and local levels.

Reporting requirements provide a partial solution. At virtually no additional cost, in many cases election officials' misperceptions would be corrected, third parties would be better positioned to collaborate with election officials and monitor polling places, and the DOJ would be better equipped to efficiently identify violations and bring enforcement actions.

Fundamentally, this proposal is not about enacting new legislation. It is about fully implementing a voting law originally passed in 1975 and renewed in 2006 following considerable public debate. The time has come for us to take simple, sensible steps to increase compliance with section 203 of the VRA and advance the goal of universal enforcement of federal voting laws.