

**BALLOTS IN AN UNFAMILIAR LANGUAGE AND  
OTHER THINGS THAT MAKE NO SENSE:  
INTERPRETING HOW THE VOTING RIGHTS ACT  
UNDERMINES CONSTITUTIONAL RIGHTS FOR VOTERS  
WITH LIMITED ENGLISH PROFICIENCY**

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## INTRODUCTION

Imagine an ordinary county in the United States. Imagine a citizen in this county arriving to their local polling place on Election Day to vote. Now imagine a poll worker who is unable to communicate with this voter, give instructions, or provide a ballot in a language the voter can understand. What if one election in this county had hinged on only eleven votes? What if this situation was perfectly consistent with existing federal and state law? Unfortunately, Spanish-speaking voters in Lebanon, Pennsylvania—and countless other voters across the country—have experienced this situation firsthand.<sup>1</sup>

Cesar Liriano, a community leader in Lebanon shared his experience as an interpreter for voters.<sup>2</sup> He noted that many citizens “end up [not] voting just because they can’t understand what the people at the polling place are telling them to do.”<sup>3</sup> Though Liriano sets an alarm for five o’clock in the morning and rushes from “one poll to the other” on Election Day, he does not always “ma[k]e it before the language barrier discourage[s] voters away.”<sup>4</sup>

The right to vote and access to the political process are defining features of democracy.<sup>5</sup> Without laws that ensure access to these critical rights, however, the American guarantee of a democratic form of government remains an unfulfilled promise and an empty aspiration. The fact remains that a large group of citizens lacks full access to the franchise: voters with limited English proficiency.<sup>6</sup> These citizens face sometimes insurmountable obstacles to voting because they do not have the resources necessary to read ballots and other crucial voter information.<sup>7</sup>

Not only do such barriers undermine the core principles of democracy, but also do they carry practical significance. The group of citizens who do not speak English fluently constitutes a significant portion of the population.<sup>8</sup> In fact, the number of affected voters is large enough to change the outcome of federal elections.<sup>9</sup> More

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<sup>1</sup> See Emily Previti, *Translation Help At the Polls: What’s Required and How It Works*, 90.5 WESA (Nov. 8, 2016), <https://www.wesa.fm/post/translation-help-polls-whats-required-and-how-it-works#stream/0> [<https://perma.cc/9M88-8F9F>].

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

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

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., James Madison, *Documentary History of the Constitution of the United States of America*, Note to His Speech on the Right of Suffrage, THE UNIV. OF CHI. PRESS (1821) (“The right of suffrage is a fundamental Article in Republican Constitutions.”).

<sup>6</sup> See Richard Salame, *If You Can’t Speak English, Good Luck Voting in Trump’s America*, THE NATION (Oct. 29, 2020) [hereinafter Salame, *If You Can’t Speak English*], <https://www.thenation.com/article/politics/voting-department-justice/> [<https://perma.cc/XFQ2-B8YP>].

<sup>7</sup> *See id.*

<sup>8</sup> *See infra* Section I.B.

<sup>9</sup> Richard Salame, *Voters with Limited English Could Help Determine Congress*, TYPE INVESTIGATIONS (Nov. 5, 2018) [hereinafter Salame, *Voters with Limited English*], <https://>

specifically, commentators have noted that expanded access to interpreters and translators for voters who require language accommodation could have “sw[un]g 20 congressional elections” in the 2018 midterm elections.<sup>10</sup>

This Note will argue that the current federal scheme for determining the baseline resources that a state must provide to voters with limited English proficiency is unconstitutional. Specifically, the Voting Rights Act neglects to require adequate translation and interpretation services for many voters with limited English proficiency. Such failure to adequately support this group of citizens throughout the election process effectively excludes them from the democratic process and deprives them of their constitutional right to vote. Whether this group of voters has access to translated materials currently hinges on the language they speak, their nationality, and their geographic location; the scheme set forth in the Voting Rights Act, therefore, deprives these citizens of their right to equal protection under the law.

Part I will provide background information, including a closer look at the non-English speaking population in the United States.<sup>11</sup> It will also examine the various ways that the federal and state governments have succeeded in expanding—or have failed to expand—voting rights for citizens who speak a language besides English, including relevant provisions of the Voting Rights Act.<sup>12</sup> Part II will explain the remaining barriers to access and the problems with the current language assistance system laid out in the Voting Rights Act.<sup>13</sup> Part III will assess whether the minority language provisions of the Voting Rights Act violate the Equal Protection Clause, using both the *Anderson-Burdick* test and a more traditional equal protection analysis.<sup>14</sup> Part IV will recommend solutions that could expand access to language resources, while also considering potential counter-arguments and challenges that may stand in the way of implementing lasting change.<sup>15</sup>

## I. BACKGROUND

### A. History of the Voting Rights Act and the Minority Language Provisions

The Voting Rights Act, originally enacted in 1965, focused primarily on eradicating racial discrimination with respect to voting and protecting Black Americans’ right to vote.<sup>16</sup> In *South Carolina v. Katzenbach*, for example, the Court explained, “[t]he

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[www.typeinvestigations.org/investigation/2018/11/05/lep-voters-midterms/](http://www.typeinvestigations.org/investigation/2018/11/05/lep-voters-midterms/) [https://perma.cc/X3SG-Y68T].

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

<sup>11</sup> *See infra* Part I.

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

<sup>13</sup> *See infra* Part II.

<sup>14</sup> *See infra* Part III.

<sup>15</sup> *See infra* Part IV.

<sup>16</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."<sup>17</sup>

Since then, Congress has expanded this view and considered how the Voting Rights Act might also protect other minority groups from practices that unconstitutionally infringe on their right to vote.<sup>18</sup> In 1975, for example, Congress expanded the protections in the Act, noting "the barriers to registration and voting that language minority citizens encounter in the electoral process" and aiming to "broaden [the Act's] special coverage . . . in order to ensure the protection of the voting rights of 'language minority citizens.'"<sup>19</sup> Section 203 of the Voting Rights Act, which requires the government to provide translated voting materials for some individuals,<sup>20</sup> is one important outcome of this discussion.

### *B. America's Non-English Speaking Population*

Before exploring the challenges to access for limited-English proficiency (LEP) voters and recommend solutions to expand that access, it is important to consider several defining characteristics of LEP voters as a group and their influence as part of the population. At least three important features describe the population of individuals who reside in the United States and speak a language other than English: size, diversity, and growth.<sup>21</sup>

The United States has a long tradition, and continues to boast, of an impressively large group of residents who speak a language other than English.<sup>22</sup> In 2019, the U.S. Census Bureau estimated that there were 67.8 million people in the United States who speak a language other than English at home.<sup>23</sup> In 2019, this was approximately twenty-two percent of the U.S. population.<sup>24</sup>

<sup>17</sup> *Id.*

<sup>18</sup> See S. REP. NO. 94-295, at 24–25 (1975).

<sup>19</sup> *Id.*

<sup>20</sup> See 52 U.S.C. § 10503.

<sup>21</sup> See *infra* notes 20–30 and accompanying text.

<sup>22</sup> Though there have been controversial debates and legislative attempts to make English the official language of the United States, one particularly noteworthy feature of the United States is that there is no official language. Harmeet Kaur, *FYI: English Isn't the Official Language of the United States*, CNN (2018), <https://www.cnn.com/2018/05/20/us/english-us-official-language-trnd/index.html> [<https://perma.cc/K2TV-QJ4E>]. At least in part, this reflects a long tradition of language diversity in the United States. See Ruben G. Rumbaut & Douglas S. Massey, *Immigration and Language Diversity in the United States*, 142 DAEDALUS 141, 141 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4092008/pdf/nihms578335.pdf> [<https://perma.cc/ZA8K-3Q8Z>] (“[T]he United States historically has been a polyglot national containing a diverse array of languages.”).

<sup>23</sup> *American Community Survey: Language Spoken at Home*, U.S. CENSUS BUREAU (2019) [hereinafter *American Community Survey*], <https://data.census.gov/cedsci/> [<https://perma.cc/V2MS-B8ZM>] (search “language spoken at home” and follow the hyperlink for Table S1601 from the search results).

<sup>24</sup> *Id.*

Not only is the population of foreign language speakers impressively large, it also is incredibly diverse.<sup>25</sup> In 2015, the Census Bureau reported at least 350 different languages spoken in the United States.<sup>26</sup> In New York City, for example, residents speak at least 192 different languages at home.<sup>27</sup> In Los Angeles, residents speak at least 185 different languages at home.<sup>28</sup> Languages range from more common languages like Spanish to less commonly spoken languages like Bengali, Indonesian, Serbian, Telugu, Malayalam, Tamil, Amharic, Romanian, Swahili, Albanian, Panjabi, Syriac, Dutch, Pima, and Ukrainian.<sup>29</sup>

Finally, the number of people who speak a language other than English at home has grown tremendously over the past several decades.<sup>30</sup> More specifically, there were 23.06 million people who spoke a foreign language at home in 1980.<sup>31</sup> By 2019 this number had nearly tripled to approximately 67.8 million.<sup>32</sup> As an illustration of such growth, for example, the Instituto Cervantes estimated that by 2060 the United States will be the second largest Spanish-speaking country in the world after Mexico and that almost one in three Americans will be Hispanic.<sup>33</sup>

Thus, due to this group's size, diversity, and recent growth, foreign language speakers play a large role in American culture and politics. Of course, not everyone who resides in the United States may vote.<sup>34</sup> And, certainly, not everyone who speaks a language besides English at home requires language assistance to participate fully in elections. Nevertheless, the Census Bureau estimates that over thirty-eight million American citizens over the age of eighteen speak a language besides English at home.<sup>35</sup>

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<sup>25</sup> See *Census Bureau Reports at Least 350 Languages Spoken in U.S. Homes*, U.S. CENSUS BUREAU (Nov. 3, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-185.html>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Christopher Ingraham, *Millions of U.S. Citizens Don't Speak English to One Another. That's Not a Problem.*, WASH. POST (May 21, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/05/21/millions-of-u-s-citizens-don-t-speak-english-to-each-other-thats-not-a-problem/> [<https://perma.cc/U7CN-LH6C>] (“The share of non-English speakers has been rising steadily for more than three decades.”).

<sup>31</sup> *Top Languages Other than English Spoken in 1980 and Changes in Relative Rank, 1990–2010*, U.S. CENSUS BUREAU (Feb. 14, 2013), <https://www.census.gov/dataviz/visualizations/045/508.php> [<https://perma.cc/VQ88-8R92>].

<sup>32</sup> *American Community Survey*, *supra* note 23 and accompanying text.

<sup>33</sup> *El Español: Una Lengua Viva*, INSTITUTO CERVANTES 16–17 (2019), [https://cvc.cervantes.es/lengua/espanol\\_lengua\\_viva/pdf/espanol\\_lengua\\_viva\\_2019.pdf](https://cvc.cervantes.es/lengua/espanol_lengua_viva/pdf/espanol_lengua_viva_2019.pdf) [<https://perma.cc/D2UQ-LM3E>] (“En 2060, Estados Unidos será el segundo país hispanohablante del mundo, después de México . . . . [C]asi uno de cada tres residentes en Estados Unidos, será hispano.”).

<sup>34</sup> See *Who Can and Can't Vote in U.S. Elections*, USA.GOV, <https://www.usa.gov/who-can-vote> [<https://perma.cc/5Z3N-A44K>].

<sup>35</sup> *American Community Survey*, *supra* note 23 and accompanying text.

11.5 million of these eligible voters “speak English less than very well.”<sup>36</sup> In addition, one commentator estimates that there are “5.78 million eligible voters who have Limited English Proficiency (LEP) and who do not receive federal language accommodations with voting.”<sup>37</sup> As discussed above, this group’s sheer size renders them capable of swinging election results and makes them a critical piece of the democratic puzzle in this country.<sup>38</sup>

### C. Language Accommodations for LEP Voters

In light of the United States’ substantial population of LEP voters, local, state, and federal governments have attempted to expand language assistance through various programs and legislation.<sup>39</sup> Some initiatives have proven more successful than others.<sup>40</sup> Access to translated voting materials greatly affects voter turnout and thus constitutes a critical tool for protecting American democracy.<sup>41</sup> Thus, the following section will address the two most common types of providing such language assistance.<sup>42</sup> Then, it will summarize the relevant portions of the federal Voting Rights Act as well as various state initiatives.<sup>43</sup>

#### 1. Language Assistance Tools: Translation and Interpretation

The two primary types of language assistance are translation and interpretation.<sup>44</sup> Though often mistakenly considered synonyms, translation and interpretation represent two distinct ways for people to communicate across language barriers.<sup>45</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> Salame, *Voters with Limited English*, *supra* note 9.

<sup>38</sup> *See supra* notes 21–30 and accompanying text; *see also id.*

<sup>39</sup> *See infra* Section I.C.

<sup>40</sup> *See infra* Sections I.C.2, I.C.3, Part II.

<sup>41</sup> Sarina Vij, *Why Minority Voters Have a Lower Voter Turnout: An Analysis of Current Restrictions*, 45 HUM. RTS. MAG., June 2020 (reporting that translated ballots “increased voter turnout by 11 points in the 2004 presidential election.”).

<sup>42</sup> *See infra* Section I.C.1.

<sup>43</sup> *See infra* Sections I.C.2 and I.C.3.

<sup>44</sup> *See* 52 U.S.C. § 10503 (requiring the State, in some circumstances, to provide voting materials in the original English and materials *translated* into “the language of the applicable minority group”); *see also id.* § 10508 (allowing certain voters to select an *interpreter* to accompany them to the polls in order to assist them when casting a vote).

<sup>45</sup> *Press Room FAQ*, AM. TRANSLATORS ASS’N, <https://www.atanet.org/pressroom/FAQ.php#FAQ4> [<https://perma.cc/PEW3-HH4C>] (last visited Dec. 13, 2021) (explaining the difference between a translator and an interpreter: “Translators write. Interpreters speak.”); *see also Interpreters vs. Translators*, REFUGEE HEALTH TECH. ASSISTANCE CTR., <https://refugeehealthta.org/access-to-care/language-access/interpreters-vs-translators/> [<https://perma.cc/L9DT-TD6W>] (last visited Dec. 13, 2021) (“While the general public may use the terms

Translators take information written in the original source language and find the words to express that same information in the target language.<sup>46</sup> Their work must be precise and take into account the many nuances of language to convey not only the same words but the same implicit meaning and tone.<sup>47</sup> In contrast, interpreters translate live, assisting with oral communication between parties who are conversing in real time.<sup>48</sup> Unlike a translator, interpreters must work accurately and precisely without the benefit of time to pore over every individual word.<sup>49</sup>

This distinction matters because the Voting Rights Act provides for different language accommodations in different situations.<sup>50</sup> For instance, section 203 discusses access to *translated* materials for a subset of LEP voters.<sup>51</sup> In contrast, section 208 permits *interpreters* to accompany certain voters in order to assist them at the polls.<sup>52</sup> In other words, the differences between the types of accommodations are relevant to the broader conversation about whether these provisions adequately protect the right to vote.<sup>53</sup>

## 2. The Voting Rights Act

The two primary sections of the Voting Rights Act that address access to translators and interpreters are Sections 203 and 208.<sup>54</sup> Section 203 of the Voting Rights Act sets forth the “bilingual election requirements.”<sup>55</sup> More specifically, the law

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interchangeably, and may mistakenly perceive that interpreters and translators are simply bilingual ‘parrots,’ in reality specialized skills are needed to achieve effective communication between people who use different languages.”)

<sup>46</sup> *Translators vs. Interpreters: What’s the Difference?*, AM. TRANSLATORS ASS’N, <https://www.atanet.org/client-assistance/translator-vs-interpreter/> [<https://perma.cc/M9AR-WBMM>] (last visited Dec. 13, 2021).

<sup>47</sup> *Id.*

<sup>48</sup> *What Interpreters and Translators Do*, U.S. BUREAU OF LAB. STATS., <https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm#tab-2> [<https://perma.cc/5GWX-BXNK>] (“Interpreters convert information from one spoken language to another.”) (last visited Dec. 13, 2021).

<sup>49</sup> *See id.* A common example of interpretation is court interpretation. For instance, consider a testifying witness who speaks Spanish. In that instance, the interpreter would communicate an attorney’s questions to that witness in Spanish. She would also listen to the witness’s answer—given in Spanish—and repeat that response in English for those in the courtroom (perhaps the judge or jury) who cannot understand Spanish. Of course, precision matters a great deal. For instance, an interpreter must be careful to accurately represent a witness’s words and tone so the jury can properly decide whether that witness is trustworthy.

<sup>50</sup> *See* 52 U.S.C. §§ 10503, 10508.

<sup>51</sup> *Id.* § 10503.

<sup>52</sup> *Id.* § 10508.

<sup>53</sup> *See id.* §§ 10503, 10508.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 10503.

requires “covered” states and localities to provide bilingual election materials such as voting forms, instructions, and ballots to citizens who are part of a minority language group.<sup>56</sup> Covered states only include those where more than five percent of (or more than ten thousand) voting-age citizens are members of a single language minority and limited-English proficient.<sup>57</sup> The determination about whether a state or locality meets these thresholds is based on data provided by the Census Bureau every five years.<sup>58</sup>

In addition, Section 203 defines “language minorities” as “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”<sup>59</sup> Because the Act only protects language minorities, states and localities are not required to provide translated election materials to those who do not fall into one of those listed groups.<sup>60</sup> In other words, the Act explicitly limits coverage based on two factors: first, whether a set number of other individuals in the same geographic area share that language and second, whether the citizen falls within one of the specific nationalities listed.<sup>61</sup> Thus, the Act provides different coverage on the basis of which language a citizen speaks, where they live, and their nationality and/or cultural heritage.<sup>62</sup>

Section 208, on the other hand, provides that any voter “who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”<sup>63</sup> In other words, citizens who require assistance voting have the right to bring someone of their choice with them to the polling place, regardless of whether they have access to translated election materials under Section 203.<sup>64</sup> Though the language of the statute itself does not explicitly protect LEP voters, it has been applied to allow people who cannot read or write well in English to bring an interpreter with them for assistance.<sup>65</sup> This means that even those individuals living in uncovered jurisdictions not protected by Section 203 may still have, at least in theory, access to some language assistance.<sup>66</sup>

Based on the most recent determination of which states and localities, are considered “covered” under Section 203, 263 counties and cities in twenty-nine different states must offer translated election materials in at least one language besides

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<sup>56</sup> *Id.* § 10503(b).

<sup>57</sup> *Id.* § 10503(b)(2)(A).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 10503(e).

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* § 10503.

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* § 10508.

<sup>64</sup> *Id.*

<sup>65</sup> *See id.*; *see, e.g.*, OCA–Greater Houston v. Texas, No. 1:15-cv-00679, 2016 WL 9651 777 (W.D. Tex. Aug. 12, 2016).

<sup>66</sup> *See* 52 U.S.C. § 10508.



English.<sup>67</sup> Among the areas that must provide translated election materials, Spanish assistance is the most commonly required form of accommodation under Section 203.<sup>68</sup> Even still, a large number of Spanish-speaking LEP voters do not enjoy protection under Section 203.<sup>69</sup> More specifically, 1.9 million Spanish-speaking voters with limited English proficiency live in areas without a sufficiently large population of Spanish speakers to be considered “covered” by Section 203.<sup>70</sup> And those numbers are for Spanish, which is one of the most commonly spoken languages in the United States.<sup>71</sup>

What about those who speak languages even less common than Spanish? These individuals are even less likely to live in a covered area that must provide translated materials in that language because it is more difficult for them to reach the high thresholds set under the Voting Rights Act.<sup>72</sup> This fact indicates an even greater number of individuals who will struggle to access their right to vote under the current federal scheme.

### 3. Other State Initiatives

Beyond the mandates within the Voting Rights Act, some states and localities have undertaken voluntary efforts to provide expanded access to language assistance.<sup>73</sup>

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<sup>67</sup> See Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532, 87,533–38 (Dec. 5, 2016); see also D’Vera Cohn, *More Voters Will Have Access to Non-English Ballots in the Next Election Cycle*, PEW RSCH. CTR. (Dec. 16, 2016), <https://www.pewresearch.org/fact-tank/2016/12/16/more-voters-will-have-access-to-non-english-ballots-in-the-next-election-cycle/> [<https://perma.cc/L5BZ-RHXX>].

<sup>68</sup> See Cohn, *supra* note 67.

<sup>69</sup> See Salame, *Voters with Limited English*, *supra* note 9.

<sup>70</sup> *Id.*

<sup>71</sup> See *American Community Survey*, *supra* note 23 (search “language spoken at home” and follow the hyperlink for Table S1601 from the search results) (reporting that, of the 67,802,345 people who spoke a language besides English at home, 41,757,391—or sixty-one percent—spoke Spanish).

<sup>72</sup> This is the logical conclusion to draw from the fact that individuals live in a “covered” area and are entitled to translated materials in their native language only if a substantial number of people in their area—either five percent of the voting age citizens in the area or ten thousand people total—also speak that language. It is, therefore, necessarily true that a person is more likely to meet the threshold if more people speak that language. See 52 U.S.C. § 10503 (providing information about the calculation for determining whether a person lives in a covered area).

<sup>73</sup> A more whimsical example of language inclusion with respect to voting involves the beloved “I Voted” sticker. See Brittany Martin, *These Are the 13 Languages on California’s New “I Voted” Sticker*, L.A. MAG. (June 5, 2018), <https://www.lamag.com/citythinkblog/i-voted-sticker/> [<https://perma.cc/5HED-TN8H>]. In California, election officials have distributed stickers that each say “I Voted” in thirteen different languages, celebrating the diversity of voters within that state. *Id.* Though this initiative does not directly provide assistance to LEP voters, it reflects the state’s commitment to involving the population of foreign language speakers in the electoral process. See *id.*

For instance, in Multnomah County, Oregon (where Portland is located), any resident who needs free interpretation services for election-related matters may request assistance.<sup>74</sup> The county will locate an interpreter and pay this person to assist the voter.<sup>75</sup> For the 2018 midterm elections, Multnomah County received 107 requests to provide assistance in ten languages.<sup>76</sup> Similarly, the San Francisco Department of Elections provides broader access to language resources than is required by the Voting Rights Act.<sup>77</sup>

In addition to state and local policies which expand the requirements for whom the state must provide assistance, some states have turned to technology to connect more citizens with interpreters.<sup>78</sup> Among these localities is Harris County, Texas, which includes Houston and is the largest county in the state.<sup>79</sup> Harris County has introduced a computer system, called the “multilingual virtual pollworker,” that allows voters to communicate via video chat with interpreters in thirty-four languages.<sup>80</sup> This type of technology makes it easier and more cost-effective to provide expanded language access, something which might incentivize more states to use these programs on their own initiative without federal intervention.<sup>81</sup>

Thus, state and local initiatives have proven critical in expanding language access—even where federal law fails to protect LEP voters.

## II. REMAINING BARRIERS TO ACCESS

These efforts to expand language access for elections, though admirable, continue to fall short. With respect to state efforts, not all county officials support expansion of voter access programs beyond that which is federally mandated.<sup>82</sup> In 2018, for

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<sup>74</sup> *Language Access for Voters Needing Interpretation*, MULTNOMAH CNTY. ELECTIONS DIV., <https://multco.us/VEOLang> [<https://perma.cc/V2T8-LRKN>] (last visited Dec. 13, 2021).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Per the Voting Rights Act calculation, the city need only provide bilingual election materials in Chinese and Spanish. The city ordinance expands this list of languages to include Filipino as well. In addition, the California Elections Code requires the Department of Elections to provide some assistance for those who speak Burmese, Japanese, Korean, Thai, and Vietnamese. *See Language Access*, S.F. DEP’T OF ELECTIONS, <https://selections.sfgov.org/language-access> [<https://perma.cc/L67C-3GP4>] (last visited Dec. 13, 2021).

<sup>78</sup> *See* Matt Harab, *Harris County Unveils New Polling Technology for Non-English Speakers*, HOUS. PUB. MEDIA (Feb. 14, 2020), <https://www.houstonpublicmedia.org/articles/news/harris-county/2020/02/14/360756/harris-county-unveils-new-polling-technology/> [<https://perma.cc/F9NP-QDXN>].

<sup>79</sup> *See id.*; *see also Population Estimates by County*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/search-results.html?page=1&stateGeo=&searchtype=web&cssp=&q=texas+counties+population&search.x=0&search.y=0&search=submit> [<https://perma.cc/6EEW-R8WM>] (last visited Dec. 13, 2021).

<sup>80</sup> *See* Harab, *supra* note 78.

<sup>81</sup> *See id.*

<sup>82</sup> One county official in Georgia allegedly told an advocacy group organizer that expansion

example, a representative for the North Carolina State Board of Elections confirmed that there would not be “any Spanish ballots printed in the entire state,” explaining that such measures were not required under the Voting Rights Act.<sup>83</sup> In addition, these expansions of voter access programs have been met with legal challenges, which may disincentivize future progress toward additional state support for LEP voters.<sup>84</sup> Thus, while some states have begun to increase language access, others have been unable or unwilling to do so.<sup>85</sup> Therefore, a lack of protections at the state level creates yet another barrier to language access for LEP voters.

The current federal scheme also carries a host of practical issues which work to limit language access as well.<sup>86</sup> With respect to federal law, the practical issues with Sections 203 and 208 of the Voting Rights Act present the need for additional analysis, which is provided below.

#### *A. Calculation for Determining Section 203 Coverage*

As discussed above, data from the Census Bureau determines whether an area meets the criteria for Section 203 coverage.<sup>87</sup> This data is only updated every five years, which does not keep pace with the exponential growth of foreign-language speaking populations in the United States.<sup>88</sup> In addition, the data is not calculated at a municipal level, which means fewer groups are covered merely because of the method of calculation.<sup>89</sup> Even if a community is large enough to meet the threshold within their municipality as a whole, some people in that municipality will not be covered if the population of LEP voters who all speak that language is more dispersed across voting districts within that municipality.<sup>90</sup> In other words, the current calculation

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of language access is “going to have to be mandated federally, or you’re going to have to sue us, or it’s not going to happen.” Salame, *Voters with Limited English*, *supra* note 9.

<sup>83</sup> Ashley Claster, *All Voters in North Carolina Must Vote in English, According to SBOE*, SPECTRUM NEWS 1 (Oct. 25, 2018), <https://spectrumlocalnews.com/nc/triad/news/2018/10/26/all-voters-in-north-carolina-must-vote-in-english--according-to-state-board-of-elections> [<https://perma.cc/5HGJ-LRNA>]. Residents in Forsyth County worried that this was “quite unfair” because it would be “discouraging” to vote in a language other than their first language. *Id.*

<sup>84</sup> New York State sued New York City after the city government attempted to expand language access and provide interpreters for speakers of Russian, Haitian Creole, Yiddish, Polish, and Italian. Though New York City ultimately triumphed, worry over possible legal action could potentially hinder such efforts in other parts of the country. *See generally* Bd. of Elections v. Mostofi, 108 N.Y.S.3d 819 (N.Y. Civ. Term 2019).

<sup>85</sup> *See supra* notes 82–84 and accompanying text.

<sup>86</sup> *See infra* Sections II.A and II.B.

<sup>87</sup> *Supra* text accompanying note 58; 2 U.S.C. § 10503(b)(2)(A).

<sup>88</sup> *See supra* text accompanying notes 31–34.

<sup>89</sup> *See, e.g.*, Previti, *supra* note 1 (explaining that the percentage of language speakers in several Pennsylvania counties fell below the five-percent threshold, while the percentage of language speakers living in a city within one of those counties was far above the five-percent coverage threshold).

<sup>90</sup> *See, e.g., id.*

conducted by the Census Bureau arbitrarily excludes voters who live in areas that might otherwise be considered “covered.”<sup>91</sup>

### *B. Languages Excluded from Section 203*

Further, Section 203 explicitly covers only people who are American Indian, Asian American, Alaskan Native, or of Spanish heritage.<sup>92</sup> Thus, the Act neglects to explicitly protect individuals of other, unlisted backgrounds—including people with African, some European, and Middle Eastern backgrounds.<sup>93</sup>

Particularly, this portion of the Act ties language to nationality and cultural background.<sup>94</sup> Thus, the Act explicitly excludes people from certain legal protections based not just on language preference or geographic location within the United States, but also nationality.<sup>95</sup> As discussed below, this could increase the level of judicial scrutiny a court would apply when conducting an Equal Protection analysis.<sup>96</sup>

### *C. Difficulty Finding an Interpreter*

Individuals who live in areas not covered by Section 203 must rely on interpreters to vote.<sup>97</sup> Section 208 allows these interpreters, but it does not create an affirmative duty for the government to locate, train, and pay qualified individuals.<sup>98</sup> Especially for the groups most likely to be unprotected by Section 203, it may be difficult even to find an interpreter because they will speak less common languages with a statistically smaller chance of finding an available interpreter who speaks both that rare language and English comfortably enough to interpret.<sup>99</sup> In addition, a person may not know how to go about finding an interpreter on their own or may not be able to afford interpretation services without assistance.<sup>100</sup> Though LEP voters are allowed

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<sup>91</sup> See 52 U.S.C. § 10503 (providing the calculation for determining which areas are “covered”); see, e.g., Previti, *supra* note 1 (discussing nineteen Pennsylvania municipalities with high populations of Spanish-speaking residents that are not “covered” because they are located within counties with otherwise low numbers of Spanish-speakers).

<sup>92</sup> See 52 U.S.C. § 10503(e).

<sup>93</sup> See *id.*

<sup>94</sup> See *id.* It is worth noting that courts have traditionally attempted to separate these two intertwined concepts for the purpose of Equal Protection analysis, explaining that discrimination based on a person’s native language is different than discrimination based on national origin or race. See *Olagues v. Russoniello*, 770 F.2d 791, 801 (9th Cir. 1985); *infra* Section II.B.

<sup>95</sup> See 52 U.S.C. § 10503(e).

<sup>96</sup> *Infra* Section II.B.

<sup>97</sup> See 52 U.S.C. §§ 10503, 10508.

<sup>98</sup> See *id.* § 10508.

<sup>99</sup> See *id.* § 10503 (providing coverage only for those individuals who speak a language that at least five percent of voting age citizens also speak).

<sup>100</sup> Cf. MULTNOMAH CNTY. ELECTIONS DIV., *supra* note 74 (quoting a voter who said “you guys are awesome, so glad you’re here, would not have voted if you weren’t here, so thank you”).

to bring a person of their choice to help interpret, that person may not be qualified to interpret or feel confident in their language skills, especially if the individual chooses a family member or friend.<sup>101</sup> As discussed above, translation and interpretation are both skilled professions requiring more than just the ability to speak two languages.<sup>102</sup> Thus, the ability to bring an *interpreter* of their choice to the polls does not adequately resolve the problem of not having professionally *translated* election materials provided by the state.

#### *D. Violations of Section 208 of the Voting Rights Act*

Not only do LEP voters struggle to find an appropriate interpreter to accompany them to the polls, but also their right to an interpreter under Section 208 is voting officials and state laws also stand in the way of LEP voters' right to an interpreter under Section 208.<sup>103</sup>

In some instances, state and local officials blatantly and directly violate Section 208 by refusing to allow individual interpreters into the polling place.<sup>104</sup> One poll worker in Georgia allegedly told an interpreter, "if they can't speak English, we don't want them here."<sup>105</sup> Beyond such blatant, xenophobic denials, poll workers have also turned away interpreters for seemingly more innocent reasons.<sup>106</sup> For example, voters in Harris County, Texas encountered problems when they tried to bring an interpreter with them into the polling place.<sup>107</sup> The poll workers instructed volunteer interpreters to remain beyond the 100-foot radius of the polling place due to concerns about electioneering.<sup>108</sup> As one Korean interpreter explained her experience, "she was worried that we were [electioneering] and couldn't confirm that we weren't, other than to go by our word."<sup>109</sup> Many of these voters do not know their rights, challenge the rules, or question when poll workers deny them the resources to which they have a right.<sup>110</sup> Thus, these actions not only deprive voters of their rights to an

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<sup>101</sup> See 52 U.S.C. § 10508 (describing how a voter can have the assistance of a person of the voter's choice, but not requiring any level of expertise of the person assisting the voter).

<sup>102</sup> See *supra* Section I.C.1.

<sup>103</sup> See, e.g., Salame, *Voters With Limited English*, *supra* note 9 (discussing concerns of intimidation used by poll workers).

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> Chris Fuchs, *Federal Law Allows Nearly Anyone to Translate for Voters. At Polls, It Can Be a Different Story*, NBC NEWS (Dec. 19, 2018, 8:33 AM), <https://www.nbcnews.com/news/asian-america/federal-law-allows-nearly-anyone-translate-voters-polls-it-can-n949056> [<https://perma.cc/4UR6-DNTE>] (describing concerns by poll workers of interpreters potentially electioneering).

<sup>107</sup> See *id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Stephanie Cho et al., *Strengthening the Asian American Electorate*, A.B.A. (June 26,

interpreter under Section 208 but also functionally deprive them of their right to vote as well.

In other circumstances, state law (as opposed to the actions of individual poll workers) more systematically interferes with the federally guaranteed right of LEP voters to bring an interpreter to the polls.<sup>111</sup> For example, a Minnesota law limits the number of voters that an individual may assist while at the polls.<sup>112</sup> This law allows an interpreter to accompany only three voters in any single election.<sup>113</sup> A lawsuit has been filed, arguing that this law interferes with a person's ability to bring an interpreter of their choice to the polls.<sup>114</sup> Especially in smaller communities and with less common languages, where individuals qualified to interpret between two languages may already be in short supply, this could have a significant impact. The interaction between this state law and the Voting Rights Act scheme that requires some individuals to rely on interpreters therefore serves to undermine citizens' right to vote.

Similarly, a Texas law required interpreters assisting LEP voters at the polls to also be registered to vote in the same county.<sup>115</sup> Many LEP voters, such as Mallika Das, rely on their children to help interpret for them.<sup>116</sup> Because her son did not live in the same exact county, however, Ms. Das was not allowed to bring him into the polling place to help her vote.<sup>117</sup> With the help of an advocacy group, Ms. Das brought a lawsuit for this violation of the Voting Rights Act.<sup>118</sup> The court assessed whether the Texas law violated Section 208, discussing the breadth of the law: "[voters] must be able to understand and fill out any required forms, and to understand and to answer any questions directed at them by election officers" with the assistance of someone they trust.<sup>119</sup> Finding that the Texas law "flatly contradict[ed] Section 208" in violation of the Voting Rights Act, the court struck it down.<sup>120</sup>

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2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/voting-in-2020/strengthening-the-asian-american-electorate/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/strengthening-the-asian-american-electorate/) ("A lack of access to targeted, in-language civics education is a major barrier to civic engagement for many Asian Americans. Three-quarters of Asian American adults were born outside the United States, many in countries where they did not participate actively in democratic electoral processes."); *see also* Previti, *supra* note 1 (explaining that many voters end up not voting when they face challenges at the polling place).

<sup>111</sup> *See infra* notes 112–15.

<sup>112</sup> DSCC v. Simon, 950 N.W.2d 280, 283 (Minn. 2020).

<sup>113</sup> *Id.* at 283.

<sup>114</sup> *See generally id.* at 284.

<sup>115</sup> *See* OCA—Greater Houston v. Texas, No. 1:15-cv-00679, 2016 WL 9651777, at \*1 (W.D. Tex. Aug. 12, 2016).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* In addition this law limits access to interpreters because many bilingual children who could assist their parents are not themselves old enough to vote.

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

<sup>119</sup> *Id.* at \*10.

<sup>120</sup> *Id.*

To merely write off these incidents and state laws as violative of the Voting Rights Act, however, does not do enough to remedy the underlying problem. In many of these cases, the ability to bring a lawsuit to vindicate one's voting rights does not resolve the problem because most of these individuals will never reach this point, especially for these communities who will also struggle to navigate the legal system in a foreign language.<sup>121</sup> Though it is inexcusable that those entrusted with the responsibility of safeguarding the integrity of elections would blatantly impede individuals from exercising their right to vote or pass laws in direct contradiction of federal law, the current structure of the language access provisions of the Voting Rights Act permits these violations to occur in the first place and exacerbates their effects on LEP voters. If Section 203 covered more individuals, then voters would not need to rely on their right to interpreters under Section 208 as heavily because their ballots, instructions, signs at the polling place, etc., would already be translated into their preferred language.

### III. EQUAL PROTECTION ANALYSIS

The challenges that LEP voters face extend beyond violations of the Voting Rights Act. Though citizens and advocacy groups have begun challenging laws that restrict access to interpreters, the underlying issue remains that so many people must bring their own interpreters in the first place.<sup>122</sup> This indicates a problem with the Act itself: a significant number of voters face substantial barriers to access, based solely on the language that they speak and their geographic location.<sup>123</sup> Rather than providing improved language access and guaranteeing citizens the right to vote regardless of their spoken language, the provisions in Section 203 of the Voting Rights Act exacerbate this problem, as the discussion above elucidates.<sup>124</sup> By requiring a certain population to seek their own interpreters, who poll workers might illegally turn away, a subset of the population of LEP voters has been denied equal protection under the law.<sup>125</sup>

#### *A. Equal Protection Generally*

The Fourteenth Amendment provides that the government must not “deny to any person within its jurisdiction the equal protection of the laws.”<sup>126</sup> To demonstrate

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<sup>121</sup> See Wendy N. Davis, *Justice Moves Slowly for Those Who Need Interpreters*, A.B.A. J. (March 1, 2016), [https://www.abajournal.com/magazine/article/justice\\_moves\\_slowly\\_for\\_those\\_who\\_need\\_interpreters](https://www.abajournal.com/magazine/article/justice_moves_slowly_for_those_who_need_interpreters) [<https://perma.cc/5QCD-ZVUQ>].

<sup>122</sup> See *supra* Part II.

<sup>123</sup> See *id.*

<sup>124</sup> See discussion *supra* Part II; 52 U.S.C. §§ 10503, 10508.

<sup>125</sup> See *infra* Part III.

<sup>126</sup> U.S. CONST. amend. XIV, § 1.

that they have been denied such equal protection, a plaintiff must show “adverse treatment of individuals compared with other similarly situated individuals [and that] such selective treatment was based on impermissible considerations” like race or religion.<sup>127</sup> In addition, a plaintiff must also show that the alleged “disparity in treatment cannot survive the appropriate level of scrutiny.”<sup>128</sup> For instance, to justify different treatment on the basis of race, the policy must generally survive strict scrutiny.<sup>129</sup>

The individuals referenced in this Note, certain LEP voters not covered by Section 203 and therefore unable to access their right to vote, are similarly situated both to LEP voters who *are* covered by the Act and to the broader population of voters in general: they are all U.S. citizens older than eighteen who are legally entitled to vote in federal and state elections. Further, these individuals are treated differently because, unlike their covered or English-speaking peers, they are not all being provided election materials in a language they can readily understand. Thus, this Note will focus on the inquiry regarding the appropriate level of scrutiny and whether the provisions in the Voting Rights Act survive that scrutiny.

### *B. Vote Denial and Equal Protection Scrutiny*

The *Anderson-Burdick* standard sets forth the level of judicial scrutiny that applies when a state imposes a burden that stands in the way of full electoral participation.<sup>130</sup> The Supreme Court has used this standard in cases involving filing deadlines for independent candidates,<sup>131</sup> prohibitions against write-in voting,<sup>132</sup> and laws that require government-issued voter identification for in-person voting.<sup>133</sup> In those cases, a court will weigh the burden that a state imposes on electoral participation against the state’s asserted benefits.<sup>134</sup> Such analysis typically focuses on whether the law presents a complete barrier to participation and the degree to which the law is merely an “inconvenience.”<sup>135</sup>

The *Anderson-Burdick* test could outline the appropriate level of scrutiny to the minority language provisions of the Voting Rights Act because the current legislation creates certain barriers to participation in elections on the basis of language

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<sup>127</sup> *Miner v. Clinton Cnty.*, 541 F.3d 464, 474 (2d Cir. 2008).

<sup>128</sup> *Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005).

<sup>129</sup> *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“[Race-based] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.”).

<sup>130</sup> *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

<sup>131</sup> *See Anderson*, 460 U.S. at 780.

<sup>132</sup> *Burdick*, 504 U.S. at 428.

<sup>133</sup> *Crawford*, 553 U.S. at 185.

<sup>134</sup> *Id.* at 190.

<sup>135</sup> *See, e.g., id.* at 198.



spoken, national origin, and geographic location within the United States.<sup>136</sup> Assuming, therefore, that this is the correct test for assessing the relevant provisions of the Voting Rights Act, a court would conduct a balancing test to assess the burden imposed on voters compared to the government's interest.<sup>137</sup>

One potential benefit that could flow to the government from narrow language accommodations includes financial savings.<sup>138</sup> In addition, the government may want to alleviate other administrative concerns about the practicability of rolling out such extensive aid to LEP voters. The government might argue that the practical burden of finding qualified interpreters and translators for the extensive variety of languages spoken in the United States and then monitoring states for compliance justifies their more limited (though less helpful) approach. Notably, the government could not successfully argue any interest like "safeguarding voter confidence," as it did when defending government-issued voter identification requirements in *Crawford*.<sup>139</sup> In fact, voter confidence theoretically should be much lower if citizens were to discover that a large portion of the population was arbitrarily being denied their right to vote.

Because of fears of electioneering and other concerns about interpreters and translators trying to improperly influence voters, the government may argue an interest in protecting the integrity of elections and preventing fraud, which courts have recognized as an important interest.<sup>140</sup> However, unsubstantiated government fears of interpreters substituting their own political preferences for those of the LEP voter remain unconvincing absent evidence of these types of abuses.<sup>141</sup>

On the other side of the scale would be the burdens imposed on voters from such a scheme. These burdens rise to a level beyond the mere "inconvenience of making a trip to the DMV, gathering the required documents, and posing for a photograph" as described in *Crawford*.<sup>142</sup> The burden of not having access to translated materials could mean that a voter would need to find an interpreter on their own, which could potentially be an insurmountable obstacle depending on the popularity of the language in the individual's area. The burden could be so severe as to require voters to attempt registering to vote, comprehending directions on Election Day, and—if they even get that far—submitting a valid ballot all in a foreign language they do not fully understand.<sup>143</sup> As discussed above, voters may experience xenophobic comments or

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<sup>136</sup> See *id.* at 190.

<sup>137</sup> See *id.*

<sup>138</sup> For example, it cost one county about \$75,000 to add assistance for a new language. Jen Fifield, *Yo Voté: Communities Scramble to Translate Ballots*, PEW (June 28, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/06/28/yo-vote-communities-scramble-to-translate-ballots> [<https://perma.cc/GB7G-JAXM>]. That said, this cost constituted only a small portion of the \$36 million two-year election budget. *Id.*

<sup>139</sup> See *Crawford*, 553 U.S. at 191.

<sup>140</sup> See *id.* at 191–92.

<sup>141</sup> See *id.* at 200.

<sup>142</sup> See *id.* at 198.

<sup>143</sup> See Salame, *If You Can't Speak English*, *supra* note 6.

even get turned away by poll workers because of their language ability.<sup>144</sup> In other words, the burdens imposed on LEP voters functionally cut them off from the electoral process altogether.

When weighing these two considerations, the expressed interests in saving money and practicability are far outweighed by the extreme burden placed on citizens who will not be able to vote without additional support. Of course, the Court may even apply a different, higher level of scrutiny.<sup>145</sup> Justice Stevens, writing for the majority in *Crawford*, explained that “even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”<sup>146</sup> In those instances, a more traditional strict scrutiny–based equal protection analysis would control.<sup>147</sup>

Much like the poll taxes at issue in *Harper* or the literacy tests at issue in *Katzenbach*, laws which prevent citizens from accessing the ballot in their native language essentially “test” the voter’s ability to read and communicate in English, a qualification unrelated to the voter’s ability to cast a valid ballot.<sup>148</sup> The ability to speak English in a country with no official language, or the ability to afford or locate an interpreter without state assistance, has no bearing on whether a legal citizen is qualified to vote.<sup>149</sup> The limitations imposed on voters who do not currently live in a “covered” area or who happen to fall outside of the definition of language minorities covered in Section 203 (based on nationality) could, therefore, be considered more similar to the “invidious” types of restrictions contemplated by Justice Stevens.<sup>150</sup>

As one commentator has noted, “[t]he Supreme Court has been somewhat fickle on the level of scrutiny to apply when it comes to the fundamental right to vote.”<sup>151</sup> Therefore, though the current scheme already fails under the *Anderson-Burdick* standard, this Note will also turn and address the more traditional Equal Protection analysis in the event that a court applies this different standard instead.

### C. Traditional Equal Protection Analysis and Level of Scrutiny

As already noted above, when assessing equal protection claims, courts will consider the level of scrutiny that applies.<sup>152</sup> Strict scrutiny applies in “cases involving laws

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<sup>144</sup> See *id.*; Fuchs, *supra* note 106.

<sup>145</sup> See *Crawford*, 553 U.S. at 189.

<sup>146</sup> *Id.*

<sup>147</sup> See *The Anderson-Burdick Doctrine: Balancing the Benefits and Burdens of Voting Restrictions*, SCOTUSBLOG, <https://www.scotusblog.com/educational-resources/the-anderson-burdick-doctrine-balancing-the-benefits-and-burdens-of-voting-restrictions/> [https://perma.cc/VEC3-26UG].

<sup>148</sup> See generally *Harper v. Va. State Bd. of Elections*, 380 U.S. 930 (1965).

<sup>149</sup> See *id.*

<sup>150</sup> See SCOTUSBLOG, *supra* note 147.

<sup>151</sup> Joshua A. Douglas, *A Tale of Two Election Law Standards*, AM. CONST. SOC’Y (Sept. 24, 2019), <https://acslaw.org/expertforum/a-tale-of-two-election-law-standards> [https://perma.cc/Z4Q2-93XQ].

<sup>152</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973).

that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution.”<sup>153</sup>

Courts have considered whether classifications based on an individual’s native language should be subject to strict scrutiny or to a less rigorous standard.<sup>154</sup> On this issue, courts have said that “if the classification is language-based, it is subject to rational basis scrutiny.”<sup>155</sup> Though race-based classifications receive strict scrutiny, courts have ruled that language-based classifications are distinct from race-based ones, even though language, race, and nationality are often intertwined.<sup>156</sup>

That said, Section 203(e) specifically bases coverage not on the language spoken but instead on whether the individual falls within a certain nationality or ethnicity.<sup>157</sup> Thus, because of the specific language in Section 203,<sup>158</sup> there may be an argument that the law not only treats people differently based on the language they speak but also includes a race-based classification.

In any case, for the purposes of Equal Protection analysis, voting is a fundamental right, which means that a court will more carefully scrutinize the law.<sup>159</sup> In doing so, a court would need to consider whether the language access provisions of the Voting Rights Act serve a compelling government interest and are narrowly tailored to serve that interest.<sup>160</sup>

#### *D. Compelling Government Interest*

As stated in the text of the Act, the intention behind the law is to extinguish discrimination in voting for people who do not speak English as their primary language.<sup>161</sup>

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

<sup>154</sup> *Pimentel v. City of Methuen*, 323 F. Supp. 3d 255, 271 (D. Mass. 2018).

<sup>155</sup> *Id.*

<sup>156</sup> *Olagues v. Russoniello*, 770 F.2d 791, 801 (9th Cir. 1985) (“[A] language-based classification is not the equivalent of a national origin classification, and does not denote a suspect class.”). Nevertheless, that case framed the class as people who *choose* to speak a language other than English. *See id.* Perhaps future courts could readdress the issue with the perspective that the language one speaks is not a *choice*, so much as a trait that the speaker was born into and that represents a core part of their identity. From that perspective, there could be a reason to make language-based classifications subject to strict scrutiny.

<sup>157</sup> *See* 52 U.S.C. § 10503(e) (including only people who are “American Indian, Asian American, Alaskan Natives, or of Spanish heritage” in the definition of “language minorities” covered by Section 203).

<sup>158</sup> *See id.*

<sup>159</sup> *See Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667–68 (1966).

<sup>160</sup> *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (explaining that a court applying strict scrutiny will assess whether policies are “narrowly tailored measures that further compelling governmental interests”).

<sup>161</sup> *See* 52 U.S.C. § 10503(a).

In other words, the government interest served is to ensure that all LEP voters have the resources necessary to vote and to guard against any measures that would prevent this group of citizens from voting on the basis of their language abilities.<sup>162</sup> Certainly, protecting the integrity of elections is a compelling government interest.<sup>163</sup> In a democracy, fair elections require that all qualified citizens who wish to vote are not prevented from doing so.<sup>164</sup> In that sense, the stated interest in Section 203 is an integral part of maintaining the integrity of elections and is, therefore, compelling.<sup>165</sup> Thus, these provisions of the Voting Rights Act may pass the first part of strict scrutiny analysis.

### *E. Narrow Tailoring*

Nevertheless, the Voting Rights Act minority language provisions do not actually serve these interests. In fact, as discussed above, the practical consequences of Sections 203 and 208 indicate that the law does not successfully expand the availability of resources that many LEP voters need in order to actually go vote.<sup>166</sup>

By failing to provide this access, the law actually undermines the integrity of elections because the limitations on which states and localities are covered effectively prevent a large number of LEP voters from going to the polls.<sup>167</sup> Of course, it is true that the Act expands access to *some* voters who might not otherwise be able to read their ballot or find an appropriate interpreter to accompany them.<sup>168</sup> Nevertheless, if every eligible citizen who wishes to vote—not to mention a group of people large enough to swing elections—cannot due to artificial barriers imposed by the government, then the results of an election do not accurately reflect the opinion of American citizens.

In addition, the five-percent threshold set by the Act seems arbitrary.<sup>169</sup> The California Elections Code, for example, utilizes a lower threshold—three percent—to determine the areas where foreign language materials and services should be provided.<sup>170</sup> This significantly increases the number of minority language speakers that receive assistance.<sup>171</sup> The fact that some states and localities have adopted more

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<sup>162</sup> *See id.*

<sup>163</sup> *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (“A State indisputably has a compelling interest in preserving the integrity of its election process.”); *see also Grebner v. State*, 744 N.W.2d 123, 127 (Mich. 2007) (“States have a ‘strong interest’ in the stability of their political systems.”).

<sup>164</sup> *See* 52 U.S.C. § 10503(a).

<sup>165</sup> *See id.*

<sup>166</sup> *See supra* Part II (discussing the barriers to access faced by LEP voters).

<sup>167</sup> *See supra* Part II.

<sup>168</sup> *See* 52 U.S.C. § 10503(b)(1) (providing some language support, including translated election materials, to LEP voters who live in covered areas).

<sup>169</sup> *See* 52 U.S.C. § 10503(b)(2)(A)(i)(I).

<sup>170</sup> *Language Access*, S.F. DEP’T OF ELECTIONS, *supra* note 77.

<sup>171</sup> *See id.* (explaining that, based on calculus, the San Francisco Department of Elections

inclusive policies shows that a different threshold percentage is feasible—and may even be preferable for expanding voter access and maintaining the integrity of elections.<sup>172</sup> After all, some states and localities have decided that more expansive language access better protects a large class of voters (LEP voters), even after considering costs and other practicalities for implementation.<sup>173</sup>

#### *F. Disparate Impact*

Certainly, it seems a bit odd to assess whether the Voting Rights Act actually violates the Equal Protection Clause. After all, the purpose of the Voting Rights Act was actually to expand access to voting for all citizens, not to deprive certain groups of these rights.<sup>174</sup> Though the law actually functions to exclude certain groups (those language groups that are less common and, therefore, more likely to fall below the five-percent threshold, for example), that certainly was not the intent of those who drafted the legislation.<sup>175</sup> So, it is possible that the law merely has a disparate impact with no discriminatory intent behind it. In situations where laws had a disparate impact on certain groups, without more, courts have determined that there is no equal protection violation.<sup>176</sup> Of course, if the law was neutral on its face, the language at the beginning of Section 203 would likely be enough to demonstrate that there was no discriminatory purpose underlying the decision to enact the law.<sup>177</sup> On the other hand, unlike in *Washington*, the Voting Rights Act specifically discusses the groups of people protected by the law and those not.<sup>178</sup> It ties legal protection directly to the language that a person speaks, whether that language is more or less common, and classification as “American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”<sup>179</sup>

Because Section 203 of the Voting Rights Act expressly creates a scheme where some voters can more easily access their right to vote than others and cannot survive

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provides language services in “Burmese, Japanese, Korean, Thai, and Vietnamese,” in addition to the Chinese and Spanish required by the Voting Rights Act).

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See* 52 U.S.C. § 10503(a) (explaining that the purpose of this law is to “enforce the guarantees of the [F]ourteenth and [F]ifteenth [A]mendments to the United States Constitution,” and eliminate practices which “effectively exclude[] [language minorities] from participation in the electoral process.”).

<sup>175</sup> *See id.*

<sup>176</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”).

<sup>177</sup> *See id.*

<sup>178</sup> *See id.* at 229, 242.

<sup>179</sup> *See* 52 U.S.C. § 10503(a), (e).

strict scrutiny analysis, it violates the Equal Protection Clause.<sup>180</sup> In light of these constitutional violations, the following Section discusses possible solutions and remedies to prevent further denial of voting rights moving forward.<sup>181</sup>

#### IV. LOOKING AHEAD: RECOMMENDATIONS AND POSSIBLE CHALLENGES

When provided, foreign language assistance can “increase[] turnout for citizens who speak little English.”<sup>182</sup> But, the question remains: how can the U.S. government provide adequate foreign language assistance in order to strengthen American democracy and increase voter turnout, and what are the barriers to making the requisite changes? This Section will address that question.

##### *A. Federal Change*

Congress must amend the language minority provisions of the Voting Rights Act. Rather than passively allowing people to bring an interpreter if they need one, as in Section 208,<sup>183</sup> Congress should build towards requiring each state to proactively offer translation and interpretation services to anyone who needs it, regardless of the language they speak. As a first step, Congress should at least eliminate the portion of the statute that limits recovery to only people with certain backgrounds.<sup>184</sup> In addition, it should reconsider the threshold requirement of five percent and ensure that the calculations for covered areas keep pace with the rapid growth of language minority communities.

Of course, enacting and implementing such reform will come with a number of challenges. First, such initiatives will require substantial funding. In fact, some commentators have argued against government-funded translations and government-provided interpreters for financial reasons.<sup>185</sup> One commentator argued that the solution to language access problems involved a heavier reliance on “empower[ing] [LEP voters] to take matters into their own hands” by finding interpreters for themselves, explaining that any additional government support would be “impractical and costly” and “an unnecessary waste of resources.”<sup>186</sup> However, this argument neglects

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<sup>180</sup> See *id.* § 10503(e).

<sup>181</sup> See *infra* Part IV.

<sup>182</sup> Daniel J. Hopkins, *Translating into Voters: The Electoral Impacts of Spanish-Language Ballots*, 55 AM. J. OF POL. SCI. 813, 813 (2011) (explaining, in addition, that “[s]mall changes in election procedures can influence who votes as well as what wins”).

<sup>183</sup> See 52 U.S.C. § 10508.

<sup>184</sup> See *id.*

<sup>185</sup> See Terin M. Barbas, Note, *We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters*, 37 FLA. STATE UNIV. L. REV. 189, 203–04 (2009); see also, e.g., 152 CONG. REC. S7904 (daily ed. July 19, 2006) (statement of Sen. Leahy) (remarking on witness testimony that the costs of Section 203, as currently drafted, are “extremely burdensome”).

<sup>186</sup> Barbas, *supra* note 185.

to consider that LEP voters already have—under Section 208—the full legal ability to “take matters into their own hands” and find an interpreter of their choosing to accompany them to the polls.<sup>187</sup> But this has not proven successful in practice.<sup>188</sup> Further, it would not resolve the Equal Protection issue, where certain individuals under the current scheme would need to find an interpreter and pay for it themselves merely to effectively access their ballots while others, who speak more common languages like English or Spanish, would not.<sup>189</sup> In addition, though implementation could be costly, the cost seems insignificant when compared to the inestimable value of a functioning democracy and upholding the core principles of the U.S. Constitution. Access to ballots is not a mere luxury or judgment call left to Congress’s discretion in a budget debate—it represents the very foundation of American democracy, a core ideal which has served as this nation’s bedrock since its inception. As Senator Patrick Leahy of Vermont noted when considering the Voting Rights Act Reauthorization in 2006, the costs of providing language assistance are “reasonable” and, further, that “[e]nsuring full access to American[s]’ right to vote certainly is worth this reasonable cost.”<sup>190</sup>

Similarly, others criticize this solution because these provisions are currently unfunded mandates that states cannot afford to actually implement.<sup>191</sup> Therefore, Congress should also offer additional federal financial assistance to encourage—and make possible—more robust participation from states. In addition, Congress could consider increasing the stakes for states that do not comply. For instance, it could condition receipt of related federal funding on proper implementation of the Voting Rights Act.<sup>192</sup> Adding financial incentive could go a long way to ensuring compliance, which has historically been a challenge in guaranteeing even the limited support required through Section 203 for covered areas.<sup>193</sup>

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<sup>187</sup> *Id.*; see also 52 U.S.C. § 10508.

<sup>188</sup> See *supra* Part II.

<sup>189</sup> See *supra* Part III.

<sup>190</sup> 152 CONG. REC. S7904 (daily ed. July 19, 2006) (statement of Sen. Leahy).

<sup>191</sup> James Thomas Tucker, *Ensuring Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 195, 259 (2006) (referencing statements from various members of Congress who have “decried the imposition of the provisions [of the Voting Rights Act] as yet another unfunded federal mandate”).

<sup>192</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987) (explaining the conditions under which Congress may properly exercise its spending power and attach conditions to receipt of federal funds).

<sup>193</sup> See, e.g., JoNel Newman, *Ensuring that Florida’s Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 349–50 (2007) (“Despite the clear requirements under the Section 4(f)(4) and 203 bilingual-assistance provisions . . . some covered jurisdictions in Florida have historically failed to comply with this requirement.”); Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 37 (2004) (“Notwithstanding Section 203’s federal mandate, AALDEF has discovered many troubling instances of local non-compliance.”).

Another criticism about federal funding for implementing more extensive services for LEP voters could be concerns regarding federalism.<sup>194</sup> Organizing and structuring elections has traditionally been an area of state concern, and having the federal government step in and mandate certain ways a state must conduct elections could violate the principles of federalism.<sup>195</sup> On the other hand, the federal government would be stepping in to vindicate rights guaranteed to all citizens by the U.S. Constitution, which have always been considered an area of federal concern.<sup>196</sup> Further, these policies affect the validity of *federal* elections. Finally, the federal government has been able to step into areas of traditional state concern, like passage of laws concerning the minimum drinking age or education, through Congress' spending power.<sup>197</sup>

Finally, with any change in federal law, lawmakers will need to confront the political nature of new policies that could significantly affect election outcomes. The policies advocated in this Note may be politically unpopular to some constituencies, especially in a country where many continue to advocate for making English the official language of the United States.<sup>198</sup> In fact, some scholars have criticized even the existing, limited foreign language support, saying, "the government should be encouraging our citizens to be fluent in English, which, as a practical matter, is our national language."<sup>199</sup> But English is not, in fact, our national language.<sup>200</sup> Until Congress has expressed its intent for English to become the national language through enacted legislation, a vague sense that the most people speak English or that most government business is conducted in English will not suffice to justify disenfranchisement on the basis of language spoken. Further, they argue that provision of foreign language ballots "devalues citizenship for those who have mastered English

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<sup>194</sup> See Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J. L. & PUB. POL'Y 561, 562 (2007) ("In terms of law, the statute violates the constitutional principles of federalism.").

<sup>195</sup> See *id.* at 565 ("[T]here are federalism concerns insofar as it requires states . . . to get advance federal approval in areas traditionally . . . committed to state discretion.").

<sup>196</sup> For instance, federal courts have subject matter jurisdiction over disputes involving the infringement of rights guaranteed in the United States Constitution. 28 U.S.C. § 1331.

<sup>197</sup> See *Dole*, 483 U.S. at 206–07.

<sup>198</sup> This English-only rhetoric is dangerous and fails to celebrate the impressive diversity of languages spoken in this country. Unfortunately, given the current political climate, it is easy to imagine arguments that a person should be able to read English on an official government ballot if they want to exercise their right to vote. Though this would undermine basic constitutional principles regarding Equal Protection and the right to vote, many in the United States continue to hold harmful discriminatory views about those with a different cultural background or experience than themselves.

<sup>199</sup> Clegg & Chavez, *supra* note 194, at 576.

<sup>200</sup> Cf. English Language Unity Act of 2017, H.R. 997, 115th Cong. (2017) (aiming to "declare English the official language of the United States"). Notably, this bill—and others like it—has not been enacted. *Id.*



as part of the naturalization process.”<sup>201</sup> To push against these assumptions, however, arbitrarily requiring that a voter speak English devalues the promise of American democracy and the guarantee that all citizens have meaningful access to the ballot. Those who worked to become American citizens through the naturalization process did so, in part, for the unique promise that *all* citizens have the opportunity to select their political leaders and have their voices heard. To offer anything less is what truly “devalues citizenship.”<sup>202</sup>

Nevertheless, such arguments and increasing gridlock in the legislative branch and division along party lines could make an otherwise simple change difficult to accomplish.<sup>203</sup> In the absence of legislative action, therefore, federal courts should also prepare to intervene and recognize Equal Protection violations when voters and legal advocacy groups manage to raise claims about vote denial stemming from insufficient language access.<sup>204</sup>

### *B. State Change*

In the absence of change at the federal level, states must also continue working to develop their own policies in order to expand language access. As discussed above, some states and localities have already begun this process, while others refuse to do so without federal intervention.<sup>205</sup>

At the most basic level, before they even take affirmative action to remedy violations by providing increased access and extending resources to more citizens, states must first remove laws that impose limitations on who a voter may bring with them to the polls, because those laws violate Section 208 of the Voting Rights Act.<sup>206</sup> Requiring certain qualifications, such as requiring that an interpreter also be registered to vote in the same locality, functionally means that a voter cannot exercise their federal right to an interpreter of their choosing.<sup>207</sup> Of course, “it has been well settled that state law that conflicts with federal law is ‘without effect.’”<sup>208</sup> The

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<sup>201</sup> Clegg & Chavez, *supra* note 194, at 576.

<sup>202</sup> *See id.*

<sup>203</sup> While it may seem uncontroversial to spend a relatively small amount of money to ensure American democracy, some scholars continue to express unfounded doubts about the number of individuals who actually require non-English ballots, for instance. Compare Clegg & Chavez, *supra* note 194, at 576 (“As a practical matter, there are very few citizens who need non-English ballots.”), with *supra* Section I.B outlining the number of individuals, including voting-age citizens, who speak a language other than English at home.

<sup>204</sup> *See supra* Part III (discussing how the Voting Rights Act violates the Equal Protection Clause of the Fourteenth Amendment).

<sup>205</sup> *Supra* Section I.C.3, Part II.

<sup>206</sup> *See* 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, 350 (2009).

<sup>207</sup> *See* OCA—Greater Houston v. Texas, 867 F.3d 604, 614 (5th Cir. 2017).

<sup>208</sup> *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (citing Maryland v.

federal government's guarantee that any voter can bring an interpreter of their choosing directly conflicts with any state law imposing additional requirements on voter assistants that limit who a voter may bring with them to vote. Plainly, both laws cannot exist simultaneously.

Beyond this baseline, however, states must also actively recruit, train, and provide interpreters for any citizen who requests one. Given the increased familiarity with video conferencing due to social distancing during the COVID-19 pandemic and innovation in voting technology, the costs of providing interpreters and the ability to access interpreters who speak rarer languages will grow increasingly reasonable over time.<sup>209</sup> For example, as has already been done in Texas, providing a tablet where voters can video call with an interpreter in a large variety of languages, could make this easier and more affordable than ever before.<sup>210</sup> In addition, some states have already expanded protections beyond those included in the Voting Rights Act, including providing an interpreter to anyone who wants one and expanding the languages covered.<sup>211</sup> Following the lead of localities which have already taken up the task, states can meaningfully improve language access and strengthen the American democratic system as well.

#### CONCLUSION

The minority language provisions set forth in the Voting Rights Act do not adequately protect all citizens' right to vote and to equal protection under the law.<sup>212</sup> The current federal scheme denies coverage, resources, and voting rights to individuals on the basis of their geographic location, the prevalence of the language they speak, and their nationality.<sup>213</sup> This violates the Equal Protection Clause of the U.S. Constitution.<sup>214</sup> Therefore, Congress should amend the Voting Rights Act to extend protection and eliminate the requirements tied to nationality or country of origin. Further, federal courts should intervene when individuals bring cases to vindicate their constitutional right to vote and equal protection. Finally, states should continue to expand access beyond that required by the federal government. Without such change, the right to vote and to equal protection under the law will remain beyond the reach of a large subset of the population. The integrity of American democracy depends on continued effort to improve language access, and these changes—including those suggested in this Note—are within reach.

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Louisiana, 451 U.S. 725, 746 (1981)); U.S. CONST. art. VI, cl. 2 (explaining that the Constitution and federal law "shall be the supreme law of the land").

<sup>209</sup> See Harab, *supra* note 78.

<sup>210</sup> See *id.*

<sup>211</sup> See *supra* Section I.C.3.

<sup>212</sup> See *supra* Part II.

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

<sup>214</sup> See *supra* Part IV.