

# VOTING RIGHTS IN ARIZONA: 1982–2006

JAMES THOMAS TUCKER,\* RODOLFO ESPINO,† TARA BRITE, SHANNON  
CONLEY, BEN HOROWITZ, ZAK WALTER AND SHON ZELMAN‡

## I. INTRODUCTION TO THE VOTING RIGHTS ACT

### A. HISTORY OF DISCRIMINATION

Before the passage of the Voting Rights Act of 1965 (VRA), Arizonans of Hispanic, American Indian, African-American and Asian heritage were the victims of discrimination in virtually every area of their social and political lives.

The town of Winslow adopted a policy segregating public swimming pools that allowed only Anglos to use the pool on days it was cleaned, and Mexican Americans, American Indians and African-Americans on other days.<sup>1</sup> Similarly, Arizona adopted an anti-miscegenation law banning marriages between persons of “Caucasian blood” and those of “Negro, Mongolian, Malay, or Hindu” blood.<sup>2</sup> American Indians were included in an earlier version of the anti-miscegenation statute, but were removed as a result of a 1942 amendment.<sup>3</sup> African-Americans were not removed from the

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\* Adjunct Professor, Barrett Honors College, Arizona State University.

† Assistant Professor, Political Science Department, Arizona State University.

‡ Student Researchers, Barrett Honors College, Arizona State University.

<sup>1</sup> Complaint, *Baca v. City of Winslow*, No. Civ-394-Prct (D. Ariz. 1955). The policy ended as a result of a consent agreement between the parties.

<sup>2</sup> ARIZ. REV. STAT. ANN. § 25-101(A) (1956). In 1959, an Arizona Superior Court judge declared the statute unconstitutional in *Oyama v. O'Neill*, No. 61269 (Ariz. Super. Ct. Dec. 23, 1959). TERRY GODDARD, ARIZ. ATTORNEY GEN., THE PROMISE OF BROWN V. BOARD OF EDUCATION: A MONOGRAPH 6–7 (Mar. 2005), available at <http://www.azag.gov/publications.html> (follow “The Promise of Brown v. Board of Education” hyperlink).

<sup>3</sup> Arizona’s anti-miscegenation statute was originally enacted by the territorial legislature in 1865.

statute until 1962, just five years before the landmark Supreme Court case of *Loving v. Virginia*.<sup>4</sup>

Segregated schooling was widespread after it was sanctioned by the Arizona Supreme Court<sup>5</sup> and state legislature, which passed a statute permitting school districts to “make such segregation of pupils as they may deem advisable.”<sup>6</sup> Spanish-speaking Latino students were specifically targeted for segregation on the basis of their language.<sup>7</sup> It was not until the 1950s, after *Brown v. Board of Education*, that Latino students were integrated into Arizona’s public schools.<sup>8</sup> American Indian students remained largely segregated from non-Indians because they attended Bureau of Indian Affairs (BIA) schools on reservations.

Even after the public schools were desegregated, Latinos continued to be subjected to Arizona’s sweeping limitations on bilingual education. Arizona has had a longstanding tradition of English-only education in public schools, with English-only courses—known as “1C classes”—mandated by Arizona law in 1919.<sup>9</sup> In districts with large numbers of English as a Second Language (ESL) and English Language Learner (ELL) students, students received English lessons “in a low-level, simplified curriculum.”<sup>10</sup> Many of the students in the 1C classes remained behind for several years “before dropping out of school, never receiving the opportunity to transition to age-appropriate” material.<sup>11</sup> Until 1965, when a limited number of bilingual programs were introduced, “1C courses remained the only option for ELL students.”<sup>12</sup> As a result, “English-only programs flourished.”<sup>13</sup> Limitations on bilingual education, when combined with Arizona’s English literacy test for potential voters, had the effect of denying Latinos access to voting once they were eligible.

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<sup>4</sup> 388 U.S. 1 (1967).

<sup>5</sup> See *Dameron v. Bayless*, 126 P. 273 (Ariz. 1912) (denying injunction to prevent enforcement of school segregation order under *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

<sup>6</sup> ARIZ. REV. STAT. ANN. § 11-2750 (1913).

<sup>7</sup> Laura K. Muñoz, *Separate But Equal? A Case Study of Romo v. Laird and Mexican American Education*, ORG. AM. HISTORIANS MAG. OF HIST., Winter 2001, at 28.

<sup>8</sup> See *Ortiz v. Jack*, No. Civ-1723 (D. Ariz. 1955) (agreeing to discontinue the segregation and discrimination of Mexican school children); *Gonzales v. Sheely*, 96 F. Supp. 1004, 1008–09 (D. Ariz. 1951) (enjoining the segregation of Mexican school children in public schools because “a paramount requisite in the American system of public education is social equality. It must be open to all children by unified school associations, regardless of lineage.”).

<sup>9</sup> Kellie Rolstad et al., *Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona*, 29 BILINGUAL RES. J. 43, 47 (2005).

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

<sup>11</sup> *Id.* at 47–48.

<sup>12</sup> *Id.* at 48.

<sup>13</sup> *Id.*

Similarly, for much of Arizona's history, American Indians were excluded from voting because they were treated as "wards of the nation," who were not full citizens.<sup>14</sup> American Indians in Arizona remained officially disenfranchised until 1948.<sup>15</sup> Even then, barriers to participation by American Indians persisted:

Some Indian people were unsure about their newly won voting rights. Many did not see themselves as active participants in the federal and state political process—simply because they did not view it as their process. Some feared that involvement in this non-Indian process would lead to taxation, further loss of reservation lands, and the termination of their special relationship with the federal government. These fears stemmed in large part from statements generated by the non-Indian community.<sup>16</sup>

In addition to fears about changes in taxation and the loss of the special federal relationship, an estimated 80–90% of the Indian population was illiterate, according to a 1948 *Arizona Republic* article.<sup>17</sup>

Even as Arizona allowed more American Indians to vote, Indians were still subjected to second-class citizenship. Like African-Americans in the South during Reconstruction, American Indians had the legal right to vote, but were not guaranteed that they would be able to cast a meaningful ballot.<sup>18</sup> Language barriers prevented many from being able to read the ballot. "Using poll taxes, literacy tests, English language tests, and refusing to place polling places in or near Indian communities, western states were successful in their efforts to prevent Indians from voting."<sup>19</sup>

#### B. ARIZONA'S ENGLISH LITERACY TEST AND ITS SUSPENSION BY THE VRA

Arizona enacted its first English literacy test in 1912, shortly after statehood. The statute, later amended, provided:

Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

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<sup>14</sup> See *Porter v. Hall*, 271 P. 411, 417 (Ariz. 1928).

<sup>15</sup> See *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948) (overruling *Porter v. Hall*, 271 P. 411 (Ariz. 1928)).

<sup>16</sup> DVD: *The History of Indian Voting In Arizona* (Inter Tribal Council of Arizona, Inc. 2004). A transcript of this DVD is available online at <http://www.itcaonline.com/event001/historyofindianvotinginaz.pdf>.

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

<sup>18</sup> Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 135 (2004).

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

4. Is able to read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, unless prevented from doing so by physical disability.
5. Is able to write his name, unless prevented from so doing by physical disability.<sup>20</sup>

According to historian David Berman, the literacy test was enacted “to limit ‘the ignorant Mexican vote’ . . . . As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians and Hispanics to register to vote.”<sup>21</sup> Berman explained, “Anglos sometimes challenged minorities at the polls and asked them to read and explain ‘literacy’ cards. Intimidators hoped to discourage minorities from standing in line to vote.”<sup>22</sup>

On August 7, 1965, Apache County was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.<sup>23</sup> On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.<sup>24</sup> As a result of this coverage, application of the literacy test was suspended in each of the three counties, where a majority of the voters were American Indian. In 1966, the U.S. District Court for the District of Columbia held that Arizona’s literacy test had not been discriminatorily applied against American Indians in the preceding five years and, as a result, these three counties became the first jurisdictions to successfully bail out from coverage under Section 5.<sup>25</sup>

In 1970, Congress renewed the temporary provisions of the Voting Rights Act and introduced amendments, including a change in the formula for determining coverage under Section 5.<sup>26</sup> As a result of this amendment, Apache, Coconino and Navajo Counties were again covered by Section 5, along with five additional Arizona counties. In addition, the amendments

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<sup>20</sup> ARIZ. REV. STAT. ANN. § 16-101(A)(4)–(5) (1956).

<sup>21</sup> DAVID R. BERMAN, ARIZONA POLITICS AND GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT 75 (1998).

<sup>22</sup> *Id.* at 76.

<sup>23</sup> See Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

<sup>24</sup> Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 14,505 (Nov. 19, 1965).

<sup>25</sup> See *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966).

<sup>26</sup> See Pub. L. No. 91-285, § 4, 84 Stat. 314, 315 (1970); Department of Justice, About Section 5 of the Voting Rights Act: Introduction to Section 5, [http://www.usdoj.gov/crt/voting/sec\\_5/about.htm](http://www.usdoj.gov/crt/voting/sec_5/about.htm) (last visited Oct. 6, 2007).

included a nationwide ban on literacy tests, which again preempted the operation of Arizona's literacy test.<sup>27</sup>

In *Oregon v. Mitchell*,<sup>28</sup> the U.S. Supreme Court considered a challenge to several provisions of the Voting Rights Act Amendments of 1970, including the nationwide ban on literacy tests in any federal, state or local election. Arizona maintained that the ban could not be enforced to the extent that it was inconsistent with the State's literacy test requirement.<sup>29</sup> The Supreme Court rejected Arizona's argument and held that the ban was constitutional under the Enforcement Clause of the Fourteenth Amendment and that it superseded the Arizona statute under the Supremacy Clause of the U.S. Constitution.<sup>30</sup> The Court also noted that Congress enacted Title II in order to ban literacy tests that were used to discriminate against voters on account of their race.<sup>31</sup> Overwhelming evidence showed that the Voting Rights Act's ban on tests or devices had a remarkable impact on minority registration.<sup>32</sup> Additionally, evidence showed that voter registration and participation were consistently greater in states without literacy tests.<sup>33</sup>

Moreover, in enacting the new legislation, Congress demonstrated an awareness of the history of discriminatory educational opportunities in America.<sup>34</sup> The Court noted that Arizona's discriminatory education system had resulted in disenfranchisement of its American Indian citizens:

In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average. Arizona also has a serious problem of deficient voter registration among Indians. Congressional concern over the use of a literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.<sup>35</sup>

Justice Douglas similarly observed:

[Congress] can rely on the fact that most States do not have literacy tests; that the tests have been used at times as a discriminatory weapon against

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<sup>27</sup> See Pub. L. No. 91-285, § 201, 84 Stat. 314, 315 (1970) (current version at 42 U.S.C. § 1973b (2006)).

<sup>28</sup> 400 U.S. 112 (1970).

<sup>29</sup> *Id.* at 132.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> *Id.* at 132–33.

<sup>33</sup> *Id.* at 133.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (citations omitted).

some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.<sup>36</sup>

In effect, the Court's decision showed that American citizens could be informed in their own native language and responsibly and knowledgeably cast a ballot. However, Arizona did not repeal its English literacy test until 1972, two years after *Mitchell* was decided.

### C. SECTION 4(F)(4) COVERAGE

As a result of its lengthy history of discrimination, Arizona became covered by Section 5 and the other special provisions of the Voting Rights Act when the Act was amended in 1975.<sup>37</sup>

Arizona is one of just three states covered statewide under Section 4(f)(4) of the Act for Spanish Heritage.<sup>38</sup> After the amendments in 1975, Arizona became covered based upon the determination that: more than 5% of the voting-age citizens (persons eighteen years and older) on November 1, 1972 were members of a single language minority group (Spanish); and the U.S. Attorney General found that election materials were provided in English only on November 1, 1972 (as a result of Arizona's English literacy requirement);<sup>39</sup> and the Director of the Census determined that fewer than 50% of voting-age citizens were registered to vote on November 1, 1972 or that fewer than 50% voted in the November 1972 presidential election.<sup>40</sup>

As a result of this determination, all political subdivisions in Arizona, including counties, cities and special districts, must comply with Section 203 by providing all election materials, including providing assistance and ballots in the language of the applicable language minority group.<sup>41</sup> In ad-

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<sup>36</sup> *Id.* at 147 (Douglas, J., dissenting).

<sup>37</sup> See 28 C.F.R. 55 app. (2007).

<sup>38</sup> See *id.* Alaska for Alaska Natives and Texas for Spanish Heritage are the other two covered states.

<sup>39</sup> See ARIZ. REV. STAT. ANN. §§ 16-101(A)(4)-(5) (1956).

<sup>40</sup> See 28 C.F.R. 55 app. (summarizing coverage determinations). See generally 40 Fed. Reg. 43,746 (Sept. 23, 1975); 40 Fed. Reg. 49,422 (Oct. 22, 1975); 41 Fed. Reg. 784 (Jan. 5, 1976) (corrected at 41 Fed. Reg. 1503 (Jan. 8, 1976)); 41 Fed. Reg. 34,329 (Aug. 13, 1976). For the formula used to determine coverage, see 42 U.S.C. § 1973b(b) (2006).

<sup>41</sup> See 28 C.F.R. § 55.8(a).

dition, the jurisdictions are subject to the special provisions of the VRA, including Section 5 preclearance.<sup>42</sup>

#### D. SECTION 203 COVERAGE

In addition to statewide coverage under Section 4(f)(4), twelve of Arizona's fifteen counties are separately covered by Section 203 of the Voting Rights Act.<sup>43</sup> Six counties are covered for Spanish: Cochise, Greenlee, Maricopa, Pima, Santa Cruz and Yuma.<sup>44</sup> Nine counties are covered for American Indian languages: Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal and Yuma.<sup>45</sup>

Under Section 203(c) of the Voting Rights Act, a state or political subdivision is covered by the minority language assistance provisions if it has a sufficient number of "limited-English proficient" single-language minority citizens who experience a higher illiteracy rate than the national average.<sup>46</sup> Limited-English proficient (LEP) is defined as the inability "to speak or understand English adequately enough to participate in the electoral process."<sup>47</sup>

The 1992 House Report explains the manner in which the Director of the Census determines the number of LEP persons:

The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. The long form, however, is only received by approximately 17 percent of the total population. Those few who do receive the long form and speak a language other than English at home are asked to evaluate their own English proficiency. The form requests that they respond to a question inquiring how well they speak English by checking one of the four an-

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<sup>42</sup> See *id.* § 55.8(b). For a summary of the preclearance requirements under Section 5, as amended in 2006, see James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 218–23 (2007) [hereinafter *Politics of Persuasion*].

<sup>43</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872 (July 26, 2002).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See 42 U.S.C. § 1973aa-1a(c) (2006). For a discussion of the language assistance requirements under Sections 4(f)(4) and 203, see *Politics of Persuasion*, *supra* note 42, at 223–27; James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEG. & PUB. POL'Y 195 (2006–2007). For a summary of how jurisdictions implement and comply with Section 203 and the costs associated with doing so, 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 (2007); U.S. GEN. ACCOUNTABILITY OFFICE, BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS' STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE (Jan. 2008).

<sup>47</sup> 42 U.S.C. § 1973aa-1a(b)(3)(B).

swers provided—“very well,” “well,” “not well,” or “not at all.” The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than “very well” are deemed LEP.<sup>48</sup>

Under Section 203, a jurisdiction becomes covered if the number of LEP U.S. citizens of voting age in a single language group within the jurisdiction is more than 10,000; or is more than 5% of all citizens of voting age; or on an Indian reservation, more than 5% of the American Indian voting-age citizens are members of a single language minority and are LEP; and the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate.<sup>49</sup>

A jurisdiction is required to provide all “voting materials” in the language of all groups<sup>50</sup> or sub-groups<sup>51</sup> that triggered its coverage.<sup>52</sup> “Voting materials” are defined as “registration or voting notices, forms, instructions, assistance, or other materials or other information relating to the electoral process, including ballots.”<sup>53</sup>

Written voting materials generally do not have to be provided to members of Alaska Native and American Indian groups if their languages are historically unwritten or to other language groups that are “oral or unwritten.”<sup>54</sup> For those groups, the covered jurisdiction “is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”<sup>55</sup> Whatever language assistance a covered jurisdiction offers must be effective and provide equal registration and voting opportunities.<sup>56</sup>

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<sup>48</sup> H.R. REP. NO. 102-655, at 8 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 772.

<sup>49</sup> See 42 U.S.C. § 1973aa-1a(b)(2)(A).

<sup>50</sup> Sections 4(f)(4) and 203 apply to four language groups: Alaska Natives, American Indians, persons of Spanish Heritage and Asian Americans. See 42 U.S.C. §§ 19731(c)(3), 1973aa-1a(e).

<sup>51</sup> The language assistance provisions also apply to the distinct languages and dialects within the four language groups. See 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); S. REP. NO. 94-295, at 24 n.14 (1975), as reprinted in 1975 U.S.C.C.A.N. 790-91 n.14 (quoting Letter from Meyer Zitter, Chief, Population Div., Bureau of the Census, to House Judiciary Comm. (Apr. 29, 1975)). Examples of sub-groups include Pueblo and Navajo within the American Indian language group, and Chinese and Japanese within the Asian language group. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872 (July 26, 2002).

<sup>52</sup> See 42 U.S.C. § 1973aa-1a(b)(2)(A).

<sup>53</sup> *Id.* § 1973aa-1a(b)(3)(A); see also 28 C.F.R. §§ 55.15, 55.18 (2007) (describing other examples of voting materials).

<sup>54</sup> See 42 U.S.C. § 1973aa-1a(c). Yup'ik is an example of an Alaska Native language that is historically written and widely used in the Bethel Census Area, Alaska. See First Amended Complaint, *Nick v. City of Bethel*, No. 3:07-cv-00098-TMB (D. Alaska filed June 11, 2006).

<sup>55</sup> See 42 U.S.C. § 1973aa-1a(c).

<sup>56</sup> See 28 C.F.R. § 55.2(c).



Language assistance is required at all stages of the electoral process.<sup>57</sup> All public elections that are run by the government are included, such as federal, state and local elections, as well as elections of special districts, such as school districts and water districts.<sup>58</sup> Covered elections include not only primary, general and special elections and the election or recall of public officials, but also bond issues, constitutional amendments, initiatives and referendum elections.<sup>59</sup>

Arizona's statewide coverage for Spanish language assistance is based upon Section 4(f)(4) and not Section 203 because it does not currently meet the 5% voting-age citizen LEP threshold at the state level. Nevertheless, there is a great need for language assistance among Latino voting-age citizens in Arizona. According to the 2000 Census, 20.6% (104,967) of Arizona's 510,488 Latino voting-age citizens speak English "less than very well" and need language assistance to vote.

The need for language assistance is equally great among eligible American Indian voters. According to the 2000 Census, 26.1% (40,548) of Arizona's American Indian voting-age citizens are LEP and need voting assistance.<sup>60</sup> The need is particularly acute among Arizona's elderly American Indian citizens: 63.4% of all American Indian citizens over the age of sixty-five are LEP.<sup>61</sup>

In the six Arizona counties that are covered separately under Section 203 for Spanish Heritage, there is a high need for language assistance among Latino voting-age citizens. For example, in Maricopa County, the most populous county in the state and home to the Phoenix metropolitan area, there are 53,385 Spanish-speaking voting age citizens who need language assistance in the voting process.<sup>62</sup> The illiteracy rate among these citizens is 12.71%, over nine times the national illiteracy rate of 1.35%.<sup>63</sup>

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<sup>57</sup> See 28 C.F.R. § 55.10.

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

<sup>59</sup> *Id.*

<sup>60</sup> U.S. Census Bureau, 2000 Census Sample Data File, available at <http://advancedquery.census.gov> (listing English speaking ability for Arizona's American Indians and Alaska Natives age eighteen and older); U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>61</sup> U.S. Census Bureau, 2000 Census Sample Data File, available at <http://advancedquery.census.gov>; U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P12C, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>62</sup> JAMES THOMAS TUCKER & RODOLFO ESPINO, MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS tbl.C-1 (2006).

<sup>63</sup> See *id.*

The need for language assistance is even greater among American Indian voting-age citizens in the nine Arizona counties covered under Section 203 for American Indian languages. Apache County, home to the capital of the Navajo Nation, is the only jurisdiction in the United States that is covered under all three Section 203 coverage formulas: among all voting-age citizens in the county, 26.5% (11,245) are Navajo-speaking LEP persons.<sup>64</sup> Apache County is also covered by the partial reservation trigger because 36.11% of all persons living on the Navajo Reservation, which is divided between several states and counties, are Navajo-speaking LEP persons.<sup>65</sup> The illiteracy rate among these Navajo voting-age citizens is extreme. It includes more than 25% of all eligible Navajo voters, which is nearly nineteen times the national illiteracy rate.<sup>66</sup> Apache County also is covered for the Apache and Hopi (Pueblo) languages.<sup>67</sup>

#### E. THE CONTINUING NEED FOR THE VOTING RIGHTS ACT IN ARIZONA

The Voting Rights Act of 1965 has had a significant impact on Arizona. Hispanic and American Indian citizens are registering and voting in record numbers.<sup>68</sup> These voters are making a difference, representing the decisive vote in several recent statewide elections and the 2002 passage of an Indian gaming ballot proposition supported by most of the state's Indian tribes.<sup>69</sup> Latino elected representatives have nearly quadrupled from 95 in 1973 to 373 in January 2005.<sup>70</sup>

Nevertheless, Arizona still has a long way to go. More than 80% of Arizona's twenty-two Section 5 objections have occurred for voting changes enacted since 1982.<sup>71</sup> Four post-1982 objections have been for statewide redistricting plans, including one in the 1980s,<sup>72</sup> two in the

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<sup>64</sup> See *id.* tbl.C-3.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872 (July 26, 2002).

<sup>68</sup> See *infra* Part X.A.

<sup>69</sup> See FIRST AM. EDUC. PROJECT, NATIVE VOTE 2004: A NATIONAL SURVEY AND ANALYSIS OF EFFORTS TO INCREASE THE NATIVE VOTE IN 2004 AND THE RESULTS ACHIEVED 13, 19 (2005) [hereinafter NATIVE VOTE 2004].

<sup>70</sup> NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS (NALEO) EDUC. FUND, 2005 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS (2005).

<sup>71</sup> Department of Justice, Section 5 Objection Determinations: Arizona, [http://www.usdoj.gov/crt/voting/sec\\_5/az\\_obj2.htm](http://www.usdoj.gov/crt/voting/sec_5/az_obj2.htm) (last visited Feb. 28, 2008).

<sup>72</sup> See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert Corbin, Ariz. Attorney Gen. (Mar. 8, 1982) (on file with authors).

1990s<sup>73</sup> and one as recently as 2002.<sup>74</sup> Since 1982, the Department of Justice has interposed objections to voting changes from nearly half of Arizona's fifteen counties that have had the purpose or effect of discriminating against Latino or American Indian voters.<sup>75</sup>

Northern Arizona has a lengthy history of discrimination against Navajo, Apache and Hopi voters. In 1988, the United States brought a successful case against the State of Arizona and Coconino, Navajo and Apache Counties for denying American Indian voters access to the political process.<sup>76</sup> Those same three counties account for nearly half of all of the post-1982 Section 5 objections in Arizona.<sup>77</sup> Before 1998, nearly all of the federal observers and monitors deployed to Arizona were sent to observe elections in Apache and Navajo Counties.<sup>78</sup> As recently as 2002, the Department of Justice identified significant deficiencies in the availability and quality of language assistance offered to American Indian voters in Apache County.<sup>79</sup>

Other barriers to voting persist for American Indians. Polling places and registration sites can be difficult for some voters to travel to because of the great distances, compounded by lack of transportation.<sup>80</sup> Disparate education opportunities for American Indians enrolled in BIA schools<sup>81</sup> and the failure of the state to adequately address the needs of ELLs in the public schools<sup>82</sup> have also led to high illiteracy rates.<sup>83</sup> Socio-economic barriers have heightened the crippling effect of illiteracy,<sup>84</sup> resulting in

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<sup>73</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Lisa T. Hauser, Ariz. Assistant Attorney Gen. (June 10, 1992) (on file with authors); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Lisa T. Hauser, Ariz. Assistant Attorney Gen. (Aug. 12, 1992) (on file with authors).

<sup>74</sup> See Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., Dep't of Justice, to Lisa T. Hauser, Gammage & Burnham, José de Jesús Rivera, Haralson, Miller, Pitt & McAnally (May 20, 2002), available at [http://www.usdoj.gov/crt/voting/sec\\_5/pdfs/1\\_052002.pdf](http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_052002.pdf) [hereinafter May 20, 2002 Boyd Letter].

<sup>75</sup> See Department of Justice, *supra* note 71.

<sup>76</sup> See Consent Decree, *United States v. Arizona*, No. CIV-88-1989-PHX-EHC (D. Ariz. May 22, 1989). The consent decree was subsequently amended in 1993 as a result of continuing compliance problems. See *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 496-97 (2006) (testimony of Alfred Yazzie, Navajo Language Consultant, Department of Justice); see also *infra* Part V.G.

<sup>77</sup> See Department of Justice, *supra* note 71.

<sup>78</sup> A handful of observers also were deployed to Yuma County in 1991, 1992 and 1993.

<sup>79</sup> See *infra* Part V.H.

<sup>80</sup> See *infra* Part III.A.

<sup>81</sup> 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).

<sup>82</sup> See *infra* Parts VII-VIII.

<sup>83</sup> See *supra* note 66 and accompanying text; see also *infra* note 153 and accompanying text.

<sup>84</sup> See *infra* Part II.B.

voter registration and turnout rates that continue to lag far behind non-Hispanic, white voters.<sup>85</sup>

In December 2005, Arizona was cited for contempt by a federal court for failing to provide adequate English language instruction to the 175,000 LEP students enrolled in its ELL programs in the public schools.<sup>86</sup> The problem has worsened since Arizona's passage of a ban on bilingual education in 2000.<sup>87</sup> According to some estimates, Arizona has under-funded ELL education by as much as 90% for decades, resulting in tens of thousands of voting-age citizens who are LEP and illiterate.<sup>88</sup> Language barriers also remain in place because of lengthy waiting periods for ESL and adult ELL programs.<sup>89</sup>

Proposition 200 has been one of the most recent and controversial issues facing Latino and American Indian voters in Arizona. The "Protect Arizona Now" committee authored this referendum to curb the use of public services by undocumented immigrants.<sup>90</sup> It passed in November 2004 with 56% of the vote.<sup>91</sup> Proposition 200 requires individuals to produce proof of citizenship before they can register to vote or apply for public benefits and makes it a misdemeanor for public officials to fail to report persons unable to produce documentation of citizenship who apply for benefits.<sup>92</sup> Opponents say the measure is unconstitutional, xenophobic, racist and inhumane.<sup>93</sup> The measure has impaired the ability of Latino and American Indian voting-age citizens to participate in elections because many voters, particularly the elderly, do not have birth certificates or other means to prove their citizenship.<sup>94</sup> Latino and American Indian voters

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<sup>85</sup> See *infra* Part X.A.

<sup>86</sup> *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *vacated*, 204 Fed. App'x. 580 (9th Cir. 2006).

<sup>87</sup> See Daniel González, *Arizona Win Encourages Bilingual-Ed Opponents*, ARIZ. REPUBLIC, Nov. 20, 2000, at A1.

<sup>88</sup> See generally *infra* Part VIII.E (describing competing assessments over underfunding of English Language Learner programs in Arizona's public schools).

<sup>89</sup> JAMES THOMAS TUCKER, NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS (NALEO) EDUC. FUND, *WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS* 3 (June 2006), available at <http://renewthevra.civilrights.org/resources/ESL.pdf>; see also James Thomas Tucker, *The ESL Logjam: Waiting Times for ESL Classes and the Impact on English Language Learners*, 96 NAT'L CIVIC REV. 30 (2007) (summarizing the findings of the NALEO report).

<sup>90</sup> Protect Arizona Now, <http://www.pan2004.com/about.htm> (last visited Feb. 24, 2008).

<sup>91</sup> ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS, 2004 GENERAL ELECTION (2004), available at <http://www.azsos.gov/election/2004/General/Canvass2004General.pdf>.

<sup>92</sup> Arizona Secretary of State, Proposition 200, available at <http://www.azsos.gov/election/2004/general/I-03-2004.htm> (last visited Feb. 25, 2008).

<sup>93</sup> E.g., Howard Fischer, *Voters Without ID Must be Tallied, Judge Says*, ARIZ. DAILY STAR, Nov. 2, 2006, at B4.

<sup>94</sup> See *infra* Part IX.D.

have protested Proposition 200 widely, and legal challenges are expected.<sup>95</sup> Regardless of the outcome, one thing remains clear: the Voting Rights Act remains needed in Arizona.

## II. ARIZONA'S DEMOGRAPHICS

### A. HISPANIC VOTING-AGE CITIZENS

Arizona has a growing, vibrant minority community, comprising approximately one-third of its total population.<sup>96</sup> According to the 2000 Census, Hispanics make up the largest single minority group, with approximately 1.3 million persons, or more than one-quarter of the state's total population.<sup>97</sup> There are a little more than 800,000 Hispanic persons of voting age, comprising 21.3% of Arizona's voting-age population (VAP).<sup>98</sup> Two-thirds (510,488) of all Hispanics of voting age in Arizona are citizens, of whom nearly 90% are native-born.<sup>99</sup>

Hispanic voting-age citizens trail non-Hispanic voting-age citizens in every socio-economic category. According to the 2000 Census, 15.4% (78,538) of all Hispanic voting-age citizens live in poverty, compared to 9% (258,037) of non-Hispanic voting-age citizens.<sup>100</sup> Educational attainment for Hispanic voting-age citizens is also extremely low, compared to non-Hispanic voting-age citizens: 4.2% (21,565) of all Hispanic voting-age citizens are illiterate—over three times the national illiteracy rate—compared to an illiteracy rate of .8% (21,899) for non-Hispanic voting-age citizens; 35.6% (181,750) of Hispanic voting-age citizens lack a high school diploma, compared to 13.1% (377,215) of non-Hispanic voting-age citizens; and only 8.6% (43,929) of Hispanic voting-age citizens have at

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<sup>95</sup> See *infra* Part IX.B–C.

<sup>96</sup> U.S. Census Bureau, 2000 Census Summary File 1, at tbls.P3, P4, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>97</sup> *Id.*

<sup>98</sup> See U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171) Summary File, at tbl.PL4, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>99</sup> U.S. Census Bureau, 2000 Census Summary File 4, at tbls.PCT43, PCT46, PCT48, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>100</sup> U.S. Census Bureau, 2000 Census Sample Data File, available at <http://advancedquery.census.gov> (listing poverty figures for Hispanic and non-Hispanic citizen VAP). The poverty rate for non-Hispanic voting-age citizens includes American Indians, who comprise 21.1% (54,424) of all non-Hispanic voting-age citizens living in poverty in Arizona. If American Indians are excluded, the poverty rate among non-Hispanic non-Indian voting-age citizens is 7.5% (203,613) of 2,699,938 non-Hispanic non-Indian voting-age citizens.

least a four-year college degree, compared to 24.7% (710,029) of non-Hispanic voting-age citizens.<sup>101</sup>

#### B. AMERICAN INDIAN VOTING-AGE CITIZENS

There are more than a quarter million American Indians in Arizona, making up 4.5% of the state's total population.<sup>102</sup> Like Hispanics, American Indians are, on average, a younger group with a VAP of a little more than 150,000 persons, making up 4.1% of Arizona's VAP.<sup>103</sup> Most of the members of Arizona's twenty-one American Indian tribes live on reservations.<sup>104</sup> Arizona's American Indian voting-age citizen population, like its Hispanic population, trails non-Hispanic non-Indian voting-age citizens in every significant socio-economic category. According to the 2000 Census, nearly one-third of all American Indian voting-age citizens live below the poverty level.<sup>105</sup> Poverty has a particularly great impact on younger American Indians. Among all American Indians in Arizona: the average per capita income is \$7642, nearly four times less than for non-Indian white persons; 42.1% live below the poverty level; 37.8% of families live below the poverty level; and over 40.9% are sixty-five years and older.<sup>106</sup>

The large percentage of older American Indian citizens highlights the importance of continuing to provide language assistance in Arizona: 46.5% of all American Indian citizens over the age of sixty-five are LEP.<sup>107</sup>

As a result of these socio-economic barriers and other structural obstacles, particularly lack of language assistance, American Indian turnout remains low, comprising just over 54% of all registered American Indian voters in the 2004 presidential election, compared to the statewide turnout of 76%.<sup>108</sup>

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<sup>101</sup> U.S. Census Bureau, 2000 Census Sample Data File, available at <http://advancedquery.census.gov> (listing educational attainment figures for Hispanic and non-Hispanic citizen VAP).

<sup>102</sup> U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>103</sup> U.S. Census Bureau, 2000 Census Redistricting Data (Public Law 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Feb. 28, 2008).

<sup>104</sup> See ARIZ. COMM'N OF INDIAN AFFAIRS, 2002-2003 ANNUAL REPORT 12 (2003).

<sup>105</sup> See *id.* at 14.

<sup>106</sup> *Id.*

<sup>107</sup> U.S. Census Bureau, 2000 Census Sample Data File, available at <http://advancedquery.census.gov>.

<sup>108</sup> NATIVE VOTE 2004, *supra* note 69, at 17-18.

### III. TESTIMONIALS FROM ARIZONANS ABOUT THE CONTINUING NEED FOR THE VOTING RIGHTS ACT

In November 2005, project staff interviewed election officials, community leaders and activists and voters in Apache and Pima Counties, which each have large populations of American Indian and Hispanic voters.<sup>109</sup> The two counties were selected to supplement separate voter surveys conducted in Coconino and Maricopa Counties during the November 2004 presidential election and a telephonic voter survey conducted in Maricopa County from December 2004 until March 2005.<sup>110</sup>

#### A. APACHE COUNTY VOTERS

Apache County has a storied history of discrimination against American Indian voters which has been documented by the United States Civil Rights Commission and a series of court decisions discussed in this report.<sup>111</sup> Demographics for Apache County are likewise included in this report.<sup>112</sup>

This section includes testimonials from ten members of the Navajo Nation who live in Apache County. Their life stories may differ, but they all agree on one thing: the Voting Rights Act has made a significant impact on their ability to participate in elections and continues to be needed to ensure full access to voting in the future.

##### 1. Matthew Noble

The office for voter outreach in District 1 of Arizona's Apache County is located in a double-wide trailer near the small town of Ganado, off of one of the only paved roads on the Navajo Reservation. For the past four years, Matthew Noble has worked from his small office inside, seven days a week, to try and spread news about upcoming elections and ballot proposals to the district's residents. The position he holds has existed since 1993, after a consent decree in 1989 required that Apache County invest in a voting outreach office.<sup>113</sup> That decree expired years ago.<sup>114</sup>

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<sup>109</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbls.P3, P4, available at <http://factfinder.census.gov> (last visited Mar. 4, 2008).

<sup>110</sup> See *infra* Part IV.

<sup>111</sup> See *infra* Part V.B–D.

<sup>112</sup> See *infra* Part V.A.

<sup>113</sup> See Consent Decree, *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (amended Sept. 27, 1993).

<sup>114</sup> See Motion to Dismiss, *United States v. Arizona*, No. 88-1989 (D. Ariz. Dec. 14, 1995).

The requirement from the decree expired in 1995,<sup>115</sup> but the office continued to be run by his father, Harold. Since 2002, when Matthew took over, the office has been moved around at the whim of the county's elected officials. The office has been re-located several times in the past few years, including a stint at a local public school. Such treatment, in addition to a severe lack of funding, indicates to Matthew that outreach is not a priority of the current administration in Apache County. "If it weren't for the Voting Rights Act, we'd be gone," Matthew says. He states that he feels like an outsider, a feeling that is amplified by the fact that the county has not even given him a set of keys for the office in which he works.

The equipment in Matthew's office consists of a few filing cabinets and an outdated computer. He drives an old trailer with no air conditioning from site to site, visiting Navajo chapter houses to talk about voting issues and register people to vote. His cousin, Virgil, is the voter outreach coordinator for District 2. During elections, the two drive around in a rented U-Haul truck, picking up and re-distributing supplies. Many of the roads on the reservation are still unpaved, and in bad weather, it can take more than two and a half hours to reach some of the polling sites.

"It comes from the heart," he says. "You've got to love to talk to the people, or you won't make it."

Despite the logistical obstacles, Virgil and Matthew have made much progress toward making sure every registered voter gets a chance to exercise his or her right to vote. They spend hours translating every proposition from English to Navajo, a process which is made even more complicated by the lack of government vocabulary in the Navajo language. Fortunately, the pair has a glossary, started by Harold Noble, to guide them, but there are still many language barriers that are hard to anticipate, much less resolve.

"A few years ago, there was a proposition on the ballot to legalize marijuana," Matthew says. "The way it was worded allowed for four ounces. We don't know how much four ounces of marijuana is, so we tried measuring four ounces of spices from our spice rack. Then we put it in a drinking cup, and saw that it filled it up about halfway. So we translated four ounces as 'half of a drinking cup.'"

Their translations are then delivered to the residents of the reservation in several forms. Printed pamphlets are distributed at the chapter houses, where Matthew and Virgil also travel on meeting days to explain the

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<sup>115</sup> See *id.*



propositions and answer questions. The translations are also read in Navajo over radio stations such as KTNN, KNDN and KGLX.

The biggest problems the two workers anticipate in the near future relate to Proposition 200.<sup>116</sup> Even filling out the new election form's address portion proves problematic for the Navajo. The closest word for "address" in Navajo means "place in which you pick up your mail." Unfortunately for those registering to vote, the place in which many elderly Navajo pick up their mail is different from what the form requires, namely, a physical address. If the elderly Navajo are made to understand what is being asked of them, their actual physical address may be miles from any official roads and difficult to express on an election form.

In addition to the address issue, many elderly Navajo do not have any of the accepted forms of identification. Most do not have driver's licenses, and because many were born outside of state hospitals, they do not have birth certificates. While some do have tribal identification cards, those who do not often have no other acceptable form of identification to allow their votes to be counted.

Finally, the passage of Proposition 200 may exacerbate an existing problem. One of the biggest challenges Matthew and Virgil face is finding enough poll workers to keep polling places running efficiently on voting days. Even when there is a large turnout of translators for the training days before elections, they do not have enough funding to pay all of the needed poll workers. Moreover, many of the trainees fail to show up on election days. This problem has been somewhat alleviated by the distribution of audio tapes to polling places, although poll worker no-shows still can hamper voter participation.

According to Matthew, Proposition 200 will create an even greater need for poll workers. Specifically, the additional identification checks will call for more personnel to help keep lines moving. Matthew and his cousin worry that with their budget already under-funded, they will not be able to hire enough people to keep lines moving while meeting the new requirements.

Poll workers work closely with federal observers required by the Voting Rights Act.<sup>117</sup> At first, the federal observers who showed up to help poll workers in Apache County were seen as enemies. Often, they would stand by silently, watching over people's shoulders as they voted. Now, both sides have come to a mutual understanding. Observers ensure that

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<sup>116</sup> See *infra* Part IX.

<sup>117</sup> See 42 U.S.C. §§ 1973a, 1973f (2006).

everyone knows why they are there, and poll workers make sure the observers respect voter privacy. Still, an element of tension remains: as Matthew states, many of the observers intimidate the poll workers by maintaining rigid requirements for communication. He says that this tension may be resolved if the observers had a better understanding of what was on the paper and of the delicate nature of translation from English to Navajo.

Matthew's patriotism is apparent just by walking into his office. Two of his four children are in the military, and the walls are covered in patriotic imagery. His biggest fear for Apache County is that someday he may no longer be able to help maintain everyone's right to vote.

"We're pushed off to the side," Matthew says. "We are always seen as a thorn in someone's side."

## 2. Harold Noble

In the 1950s, the Navajo people were not voting. Harold Noble remembers when Dwight Eisenhower visited a ceremony in Gallup, New Mexico, with American Indian servicemen in attendance. Eisenhower asked them what they wanted from him in return for their support. They replied that they wanted to be treated equally; they did not want to be separated based on their skin color in the restaurants and bars. They wanted to vote. Eisenhower promised, "When I get into office, you will vote."

"The Voting Rights Act is very necessary," says Harold.

The Department of Justice (DOJ) sued Arizona and Apache County for discrimination against American Indians, which resulted in a consent decree in 1989.<sup>118</sup> Until 1993, Apache County was in the dark about voting. When Harold started working as a voter outreach official there was a lack of outreach and information on elections for the Navajo citizenry.

The first time Harold translated an election pamphlet from English into Navajo, it took him an entire month. When it was electronically recorded in Navajo for the bilingual poll workers, the duration of the translation was thirty-seven hours from start to finish. Harold called the DOJ and said, "We need to talk. We can't translate Navajo word-for-word. It takes too long!" From that point on, Harold would translate the title and legislative analysis of ballot initiatives instead of translating word-for-word; he would perform an interpretation and look for meaning. According to Harold, it is no wonder that the Navajo do not understand the complicated initiatives, because even the lawmakers themselves do not.

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<sup>118</sup> See *infra* Part V.G.

As the newly appointed Apache County voter outreach official, Harold knew that in order to improve voting conditions for the Navajo he would have to first educate himself on the issues, initiatives and local politics; and second, educate the people. Harold states, “The Navajo people need to be informed in every election.” In 1993, he started translating the Navajo Language Election Glossary in an effort to make the Navajo election terminology as uniform as possible across the county. Other written translations also were provided.

Around the same time, voters started noticing “strange people” at the polling places. These people were actually federal observers from the DOJ. Although having the DOJ federal observers watching the election took some getting used to, Harold has no problem with them. In fact, he welcomes them, as the DOJ should be there to tell the county what it is doing wrong and how it can improve. For the first time, Navajo citizens came into the election office and asked if they had a right to run in the elections. Today, more Navajo are beginning to run, and the current county officials are becoming uneasy because of the new challengers.

Although the consent decree has technically expired, the DOJ assures Harold and the current outreach workers that the improvements in the county will continue to be built upon. “There is still a lot of work to be done,” says Harold. The county is more than 11,000 square miles,<sup>119</sup> making reaching and informing every voter difficult to do with only a few full-time outreach workers. It is important to Harold that everyone understands the issues and votes, and that everyone hears the same thing. This is becoming more of a reality now that issues are being explained in both English and Navajo.

It is difficult for people to travel in Apache County. Many do not have four-wheel drive vehicles, which are essential in order to travel on the unpaved roads. It is especially difficult in bad weather, and most people would rather stay in than brave the roads and weather to vote. Even though people have the option of early voting, it is difficult for Navajo-speakers to do so by themselves. They need the outreach workers to explain the concepts to them. The Elders will often bring their early voting ballot to the outreach office on Election Day to ask for help when it is too late for their vote to be counted.

“Everybody lines up for assistance—young and old,” says Harold. In the elementary and high schools, there is very little access to information about voting. Apache County participated in “Kids Vote” with much suc-

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<sup>119</sup> See Apache County, Arizona, <http://www.co.apache.az.us> (last visited Mar. 4, 2008).

cess; however, the county has since stopped the program. There are some people in the area who are not well-educated. Harold only attended school up to seventh grade. He grew up in the 1930s and 1940s, when times were even harder for the Navajo. There were many problems with the school system, a lack of transportation, and the elements prevented many people from traveling. If someone was lucky enough to get to school, he or she would “just be taught to say ‘yes’ and ‘no.’ ”

Although there are still problems, things are getting better. Because of the efforts of the outreach office, the Navajo are finally talking about their current situation and the issues facing them. One of the topics of discussion is the Proposition 200 voter identification requirements. According to Harold, the proposition is “scary, not needed here and makes things too complicated.” It undoubtedly discourages people from going to the polls, and is considered unnecessary because voters already are required to show either their driver’s license or Navajo Nation I.D. (which costs \$5). Everyone knows everyone else at the polls, and Harold has never observed or heard of anyone voting twice. Proposition 200 has a disproportionate impact on the Elders, most of whom do not have a photo I.D., driver’s license or birth certificate. Navajo Nation members can get a certificate for the Navajo elections, but they still have to vote by provisional ballot for non-tribal elections because there is no picture on the certificate. Problems also arise when people get married and a woman changes her last name, but not her I.D.

### 3. Alice Anderson

Alice Anderson splits her time between Montana, where her husband lives, and her home on the Navajo Reservation in Apache County, Arizona. She has been voting at the St. Michael’s chapter house since 1970, and says she has seen many changes. She states that sometimes the changes can be a source of confusion since the county changes the voting form almost every year.

Anderson is fluent in Navajo but also speaks English, so she rarely has a problem voting. However, she does say that a lack of personnel at the polling places leads her to believe that it would be hard for anyone who did not speak English to vote in Apache County.

One of these people is her father, Ben Francis. Francis does not speak or read any English but cares deeply about politics. Since officials do not care enough to come out and explain things to the Navajo speakers, Anderson says, Francis asks Anderson and her sister to read him the newspaper in the mornings so he can keep abreast of current events and issues.

“There should be a tribal representative to explain voting, Anderson says. “The Elders don’t know what’s going on—there’s not enough help.”

#### 4. Felicia Tsosie

Felicia Tsosie has only been voting for the past ten years, but during that time, she has had the opportunity to observe many problems with voting in Apache County. She says that older people in the tribe, especially those who do not speak English, have difficulties voting. Often, she says, older tribe members will only fill out a few of the issues and leave the ones that they do not understand blank.

As one of the more experienced workers at a hotel in Window Rock, Tsosie often talks to the younger workers about voting. She says that she tries to tell them how important it is to vote so that their rights are protected.

Tsosie votes at a precinct combining the Fort Defiance and Window Rock areas, a combination that often leads to long lines. While voters stand in line to get to the polls, they are frequently yelled at by supporters of propositions or candidates. These individuals are technically breaking the law, but go on unimpeded. The wait can take hours, she says, especially because more young people have started to turn out to vote.

Tsosie says that people she knows pay more attention to local government than the larger elections. This is not just because they believe the local government has more of an impact on their lives, but also because the tribal governments make much more of an effort to reach out to local residents.

#### 5. Stella Begay

Stella Begay works at a museum and library in Apache County, a building with an auditorium that also serves as a gathering place for various groups on the reservation. She has been voting for the past fifteen years in both United States and tribal elections in the Sawmill district. She says that people are generally more interested in local and tribal issues, and more people show up at her polling place for the tribal elections than the state or federal elections. This is despite the fact that the Navajo Nation requires voters to register every four years, she says.

Begay says reservation voters face some unique barriers. In addition to language issues, many Navajo live far from paved roads. If the weather is bad, the roads can become treacherous or even useless. When they do

get to the polling places, help for the illiterate is sporadic—sometimes there are helpers available and other times there are not.

In general, however, Begay states that in the past ten years, elections have been getting better. Though there seemed to be fewer voters in the last few years, generally, more people have been showing up to cast a ballot. Additionally, more Navajo have been running for office. This includes women, a practice that was formerly severely frowned upon. Further, elections are certainly better than when Begay's mother, Nellie Begay, began voting. Begay says that her mother would tell her of how in past elections, the Navajo would be put into a room with votes taken by raised hands.

#### 6. Ernestine Reeder

Ernestine Reeder grew up on the reservation and is fluent in Navajo. When it came time to raise her own son, she thought it was more important for him to learn English. She is now being considered for the position of principal at a new school Arizona State University is building on the reservation. She states that education is one of the primary barriers Navajo face when they go to the polls. "They translate the ballots into Navajo," she says, "but people who only speak Navajo usually don't know how to read it."

With illiteracy still a problem, she says that interpretation is a major issue. But even those who speak English need more outreach. According to Reeder, the propositions are often written in ways that are hard for many Navajo to understand. "We're not attorneys!" she exclaims.

The polling places themselves also are often problematic, she says. Precincts change without much notice, and during the last election, Reeder did not even vote after spending hours waiting in lines because she was at the wrong place. Troublesome roads also prevent people from coming.

"Government officials come out here and talk about issues in the Third World," she says. "I don't think they realize that in a lot of places here on the reservation, people are *living* in the Third World."

#### 7. Rose Williams

Rose Williams is a poll worker in Apache County. She is an Elder and speaks both English and Navajo fluently. She remembers when American Indians voted for the first time. After President Dwight Eisenhower took office and the Navajo were enfranchised, the Republican registrars came to Apache County and gave the Navajos a pink sheet to vote for one candidate and a blue one for the other. Since that point, voting condi-

tions for American Indians have been improving. Williams feels that there has been a great stride forward with the establishment of the voter outreach office in Ganado because of the consent decree. "This is just the beginning," she says.

Speaking from her experience as a poll worker, Williams knows that as long as there is language on the ballot that needs to be translated and explained, outreach workers will still be needed. However, the current resources provided to the outreach workers are not enough. Funding is a big issue, and "the county's answer is to shut the office down." The office needs better equipment so it can relay information to the Navajo instead of relying on information coming from St. Johns, one hundred miles away. Funding is also needed in order to provide more poll workers to manage long lines, which are always a problem and often discourage the Elders, who do not want to wait outside in the elements to vote. Additionally, more poll workers will be needed to check identification under the new Proposition 200 voter I.D. requirement. With limited funds already, Williams does not know how this will be feasible.

Ganado is the center of tribal life. According to Williams, there needs to be a permanent outreach base not subject to the whims of local politics "so the Navajo people know where to go." Since the consent decree expired, the outreach workers have had to vacate the office because they were "taking up space." They moved into a spare room in a local school, but when a new superintendent was elected, they were forced to move because they were again "in the way." The poll workers know that there is no alternative; the outreach workers *have* to be there for the people. In addition to a permanent base, the county also needs more outreach workers. Two full-time employees are not enough for such a large county. More outreach workers would mean that more citizens would be informed on issues, initiatives and candidates.

Williams believes that problems with voting are a symptom of larger problems. The Navajo Nation holds special status with the U.S. government because of its dual sovereignty. The tribe abides by the Trust signed in 1868,<sup>120</sup> and they want the government to uphold its end of the bargain. The Navajo cannot even buy the land on which they live, land that is owned by the federal government. Because they do not own the land, they do not have any rights to minerals or other resources that may be discovered. Williams wants "President Bush to do something out here" for

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<sup>120</sup> Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo, June 1, 1868, 15 Stat. 667.

American Indians: to educate and empower America's first people. The Navajo need good housing, grocery stores and healthcare. As Williams says, "People are suffering."

Williams also reflects on how the federal government rebuilt Hiroshima after destroying it and how it is building up Iraq and other Third World countries. Many Navajo still live in impoverished conditions, with inadequate education, food, water and healthcare. "What about the Navajo? The Third World is right here, right in America's backyard."

#### 8. Lee Chee

Lee Chee has been voting since 1975, when he moved from San Francisco back to Chinle in Apache County with his wife. A true patriot, he served from 1966 to 1967 in the Vietnam War as a member of the 1st Infantry. He proudly dons his veteran's 1st Infantry hat wherever he goes, despite having lost much of his hearing during his service. He was on burial detail, giving last respects to his fellow Navajo who had served in the war and gave the ultimate sacrifice to their country.

Fluent in both Navajo and English, Chee is dissatisfied with his Navajo council delegates and local and U.S. representatives. "Every time they want some votes, they run to us veterans. We vote for them because we believe in what they're saying. We believe the promises. But once we vote, that's always the last we see of them." He believes that there is no accountability, but still thinks the ballot box is the most powerful weapon for effecting change. He recently attended the Diné (Tribal) Change 2006 conference, which focuses on initiating change within the Navajo government. In addition to being an active citizen, Chee religiously reads the newspaper to stay up-to-date on issues facing his people and in order to be informed when he goes to vote.

When voting, Chee notices that many of the other Elders need assistance: "A lot of Elders don't know English, so there needs to be someone there to help them." Sometimes Chee will see bilingual poll workers helping. Other times, there is no one to help the Navajo speakers. He states that there are also people who can speak English but are illiterate and need help understanding the ballot.

Chee suggests that there be more voter outreach to those who cannot read or speak English well. For example, more bilingual outreach workers need to be hired so they can reach the community chapter house meetings. This way, when people go in to vote, they will already be informed and educated on the candidates, issues and initiatives.



#### 9. James Henderson

Former Arizona State Senator James Henderson was one of the first American Indians in the State Legislature. Born in 1942, Senator Henderson did not start paying attention to voting and voter outreach issues until he was elected to serve in the 37th Legislature in 1984.<sup>121</sup> He says that like most Navajo people, “I just voted for whoever sent the most pamphlets . . . because that’s all I had to base my choice on.” At that time, there was no voter outreach office, and no one who would come to chapter house meetings to inform and educate the Navajo on issues. This can be a major problem for Navajo speakers and people who cannot read or write English because candidate pamphlets are in English. Senator Henderson also states that there are not enough bilingual poll workers to accommodate the Navajo-speaking population.

#### 10. Alfred Lee Kahn, Sr.

Alfred Lee Kahn, Sr. has lived in Apache County his entire life. From the time he was young, he was told, “If I vote, then I can get the resources from the chapter, local, state and national government.” He worked in construction for a number of years, and is now employed as a nurse’s aide and helps out at his local chapter house as a community organizer. Kahn has been voting since he turned eighteen, about thirty years ago. He says that one of the biggest barriers to voting is education: “People don’t have rights around here, especially the Elders and uneducated.”

Many Navajo are uneducated about the issues and in general. It is not just the Elders who are illiterate; many of the younger Navajo can barely read and write. Kahn and his children are lucky enough to have received an education; his daughter, Seowah, recently passed the general education development exam through a community college program in Ganado and hopes to pursue a college degree in environmental engineering.

Political disillusionment is also a problem. Every election season, candidates will come to the local chapter houses and ask members to vote for them in return for the candidate keeping promises. However, this is the only time the tribe will see the candidates. Once election season is over, the Navajo never see them again and the promises are never kept. Despite the disillusionment over candidates, more Navajo are participating in politics than ever before. Kahn holds his right to vote close to his heart—it is

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<sup>121</sup> See Arizona State Senate, State Senator James Henderson, Jr., <http://www.azleg.state.az.us/members/jhendens.htm> (last visited Mar. 4, 2008).

his way of creating change. “My right to vote makes me more of a person. I am counted. I am more of a citizen.”

#### B. PIMA COUNTY VOTERS

Pima County is the second most populous county in Arizona,<sup>122</sup> bolstered by the growth of Tucson and its suburbs. It is home to a large Latino population,<sup>123</sup> in addition to the Tohono O’odham and Pascua Yaqui Indian Reservations.

According to the 2000 Census, Pima County has a total population of 843,746 persons,<sup>124</sup> of whom 29.3% (247,578 persons) are Hispanic<sup>125</sup> and 3.2% (27,178 persons) are American Indian.<sup>126</sup> The county has a voting age population of 635,850 persons,<sup>127</sup> of whom 24.9% (158,415 persons) are Hispanic<sup>128</sup> and 2.7% (17,338 persons) are American Indian.<sup>129</sup>

Among the Hispanic voting age population, 31.0% (49,205 persons) are LEP.<sup>130</sup> Among the American Indian voting age population, 19.5% (3,525 persons) are LEP.<sup>131</sup> Nearly one-third (1,670) of the voting age citizens on the Tohono O’odham Reservation are LEP.<sup>132</sup> Nearly one-fifth (280) of the voting age citizens on the Pascua Yaqui Reservation are LEP.<sup>133</sup> The illiteracy rate for both tribes is approximately 10%, which is more than seven times the national illiteracy rate.<sup>134</sup>

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<sup>122</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P1, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>123</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P4, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>124</sup> See U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P1, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>125</sup> U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P4, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>126</sup> U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P7, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>127</sup> U.S. Census Bureau, 2000 Census Redistricting Data (P.L. 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>128</sup> U.S. Census Bureau, 2000 Census Redistricting Data (P.L. 94-171) Summary File, at tbl.PL4, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>129</sup> U.S. Census Bureau, 2000 Census Redistricting Data (P.L. 94-171) Summary File, at tbl.PL3, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>130</sup> See U.S. Census Bureau, 2000 Census Summary File 4, at tbl.PCT38, available at <http://factfinder.census.gov> (last visited Feb. 20, 2008).

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> See TUCKER & ESPINO, *supra* note 62, at tbl.C-3.

### 1. Manuel “Manny” Herrera

Manuel “Manny” Herrera, a seventy-nine-year-old retired postmaster, has lived in the same neighborhood in the city of South Tucson for more than fifty years. Herrera’s family is of Hispanic descent, but he is of the fifth generation to be born in Tucson. A World War II veteran, Herrera has invested substantial time and effort into making sure his community stays active in the political arena.

Herrera says his experience in politics began when he was young. He says he remembers attending political rallies in local parks where politicians would distribute beer to the adults and the kids would run around and have fun. He says he and his wife, Yolanda, registered to vote as soon as they turned twenty-one. “We’ve been voting ever since,” he says. “We felt we could make a difference but we had to get involved.” Herrera says he remembers voting being more difficult for people who did not speak English when he was younger, because fewer materials were available for them. But Herrera states that language has not been an issue in recent elections—as it had been in the past—because newspapers, radio shows, fliers and voting materials are all currently offered in English and Spanish. He also says that polling places in his area are close enough to enable voters to conveniently reach the polls. The only drawbacks are insufficient parking and a slight socio-economic barrier: many workers who are paid hourly cannot afford to take the time off work to vote.

While obstacles for language minority voters have decreased overall, Herrera says the media portrays candidates negatively, so many people do not want to vote. The solution to this, Herrera argues, is to eliminate the view that one vote does not make a difference. “If more people were involved, it could be a different community, a different town, a different state or a different world,” he says.

To help make a difference, Herrera formed the Sunnyside Neighborhood Association—a group that hosts meetings and speakers to advertise for important issues in one square mile of South Tucson—to encourage people to get involved in their community and vote. Together with a friend and fellow World War II veteran, he also created the All-American Student Awards in the mid-1990s to award children in the community for their commitment, community service and respect toward the community. After the program drew more attention, Herrera gained support from community and state leaders, including Governor Janet Napolitano, Tucson Councilmen Steve Leal and Jose Ibarra and Mayor Laila Sarah, who give certificates to the award recipients “so [the children] can follow in their foot-

steps.” “Involvement is voting,” Herrera adds. “Who else is going to lead us in the future?”

## 2. Steve Leal

Steve Leal, a Tucson city councilman, has lived in Tucson since 1977. He says that through his experience as a councilman, he has seen many barriers restricting minority voters in the past decades.

The first obstacle, he says, is the ever-changing location of polling places. He explains that Tucson rents out local schools and churches to host polling places, but sometimes these locations will not renew their contracts with the city. Leal says this often confuses voters who have been going to the same polling place for ten or more years. Instead of looking for their new polling place, they often do not vote.

Leal says there is often a language barrier for minority voters as well. “Not all candidates go out of their way to have things done bilingually or to advertise either in Latino papers or radio,” which discourages less-than-proficient English speakers from voting.

Leal has been trying to get Spanish subtitles on the local Tucson news channel for more than six years. He says many people make important voting decisions based on candidate coverage in the local news. “[Hispanics] have the right to vote. Do we not want them to make an informed choice?” he asks. He says this solution may not be appropriate for all communities, but in Tucson, where there is a large Hispanic population, it could solve a number of problems.

## 3. Alex Rodriguez

Alex Rodriguez, a native to Arizona, is the youngest of ten children in an immigrant working class family. The first in his family to attend college,<sup>135</sup> Rodriguez has been involved in many Pima County organizations, including the University of Arizona Hispanic Advisory Council and the Tucson Hispanic Coalition.

Rodriguez has also worked as the U.S. Department of Defense International Policy Advisor and in International Security Affairs. He is currently running for U.S. Congress.

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<sup>135</sup> Rodriguez received his Bachelor of Arts from the University of Arizona and his Master of Public Policy from Harvard University.

As a minority citizen who has often run for public office, Rodriguez says “[t]he Voting Rights Act is a landmark piece of legislation for our promised democracy. It is crucial for minorities.”

But Rodriguez says there are many barriers for Hispanic and other minority candidates who choose to engage in the political process by running for office.

“Minority populations are often diluted,” he says. Rodriguez cited Proposition 200—the legislation passed in 2004 that requires specific forms of identification in order to vote—as having a large impact on minority voters. “It has had a[n] impact on citizens’ willingness to participate in the political process,” he explains. “While it has created a barrier for all voters by requiring additional identification, it has been an extra burden on minorities.” He says one would expect that more people would want to participate by voting in order to change the face of the nation. But Rodriguez argues that “drastic measures” like Proposition 200 have had the opposite effect.

According to Rodriguez, another barrier barring minorities from having easy access to voting is the language on the ballots. In his opinion, there are two issues surrounding the language. First, ballots should be offered in Spanish and other minority languages. While he believes American citizens should learn and be able to speak English, he says it is often easier for native Spanish speakers to understand materials when they are written in Spanish. “My mom would rather read something in Spanish that she could fully understand,” Rodriguez says. “She’s a citizen just like your mom, but she is unable to understand what is being asked of her as a citizen.”

The second language issue is that the ballots are often too difficult to understand, even for native English speakers. Rodriguez says that when he votes, he asks himself if his brother or his neighbor would understand the ballot. In general, he concludes that the answer is “no.” “The language is much too complex. You would get a lot more people involved in the political process if you gave them the confidence of going into a polling place and understanding what they’re looking at.”

In addition to language barriers, there are often economic barriers to voting. Rodriguez says there is a general lack of outreach to the less wealthy, minority communities because the candidates have less at stake in those communities. Rodriguez also maintains that the voters have less at stake in the political process: “The higher [a person’s] income, the higher

their propensity to vote because people have economic interests at stake in the political process.”

Though there are problems in the voting process in Arizona, Rodriguez mentions that the Voting Rights Act has helped. He compares the VRA to major accomplishments in U.S. history, such as the abolishment of slavery, the interstate system and public education.

“We’ve always gotten the big things right,” he says. “The Voting Rights Act is a big thing.”

#### IV. SURVEY OF VOTERS IN COCONINO AND MARICOPA COUNTIES

##### A. PURPOSES OF THE SURVEY

This section describes a study of voters in Coconino and Maricopa Counties, designed to obtain the perspective of affected voters who voted on November 2, 2004 throughout the State of Arizona, assess the need for minority language assistance among voters, determine the availability and quality of oral and written language assistance and assess the effectiveness of the practices of public election officials in providing oral and written language assistance to voters.<sup>136</sup>

The study assessed the need for, the availability and quality of and the effectiveness of assistance by surveying several different areas about the voter or the election process. These include the ethnicity and national origin of voters; the primary language spoken at home; the oral and written English language ability of voters; the voters’ need for language assistance on Election Day; oral language assistance at every stage of the election process; written language materials provided to LEP voters; and the ability of voters to receive assistance from the person of their choice. These areas were selected because they commonly affect minority language voters or because they are common components of successful language assistance programs.

Finally, respondents were asked their opinion of the quality of the language assistance provided to them in their primary language, and what could be done to improve written and oral language assistance provided to non-English-speaking voters. A total of 829 surveys were completed by

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<sup>136</sup> The study was conducted with the assistance of ten students from the Barrett Honors College at Arizona State University: Rebecca Amrani, Elizabeth Andrews, Linley Barney, Jessica Becker, Nicole Finch, Karissa Kater, Kristine Kelley, Lauron Lovato, Heather (Hinderland) Owens and Laura Thorson.

voters, including 668 in Maricopa County and 161 in Coconino County. Of these 829 completed surveys, 679 were completed on Election Day and 150 were completed through the telephonic survey that followed Election Day.

#### B. OVERVIEW OF THE SURVEY

Voter interviews were conducted on November 2, 2004 at polling locations in Coconino County for American Indian language minority groups and Maricopa County for Spanish language minorities. In addition, telephonic interviews were conducted in February and March of 2005 in Maricopa County precincts surveyed on Election Day to capture the large number of voters who cast early or mail-in ballots.

All survey questions were derived from the Voting Rights Act, the legislative history of the Act, Department of Justice guidelines and commonly used Census terms.

The survey was designed to provoke honest answers from respondents about their actual election and voting experiences. Interviews were conducted in English, Spanish or Navajo by bilingual volunteers. Survey questions were worded carefully to avoid skewing the results and were designed to take less than five minutes of the voters' time. Non-leading questions were used in combination with a non-exhaustive list of possible responses. Respondents were encouraged to provide amplifying information by checking "other" and specifying responses not included in the survey.

All references to Navajo voters refer to voters surveyed in Coconino County and all references to Hispanic voters refer to voters surveyed in Maricopa County.

#### C. SURVEY QUESTIONS

The Election Day voter survey and the telephone survey both consisted of twenty-two questions and were nearly identical. The only deviation arose if the respondent to the telephone survey did not vote in the November 2004 election. The survey questions were simple enough that responding voters could complete the entire survey in as few as five minutes. Respondents were advised of the likely short duration of the interview to decrease the burden on them and thereby increase the overall response rate.

Question 1 of the survey requested information about whether the respondents were able to vote that day (November 2, 2004) and what method

they used; whether they have ever experienced problems voting; any reason why they were not able to vote; and whether they were offered a provisional ballot. For respondents to the telephone survey who did not vote in the 2004 presidential election, Question 1 asked why they did not vote that year and when they had most recently voted.

In Questions 2 through 8, respondents were asked to self-identify in several ways. Question 2 asked how they identify their ethnicity and if they self-identified as Hispanic or Latino; they were then asked for their national origin. Question 3 asked for the respondent's birth year. Question 4 asked if the respondent was a first-time voter, and if not, how long he or she had been voting in the United States. Question 5 asked for the primary language spoken at home. Questions 6 and 7 respectively asked respondents to describe their ability to speak and read English on a scale that reflects commonly used Census terms and that ranges from "very well" to "well" to "not well" to "cannot speak English." Question 8 asked if any members of the respondent's household who are older than age eighteen speak English very well.

Question 9 asked respondents to characterize the poll workers at their polling site in terms of being helpful versus rude or threatening.

Questions 10 through 16 were a series of questions aimed to determine how the availability of language assistance for voters can be improved. These questions asked whether language assistance was needed for the respondent to vote that day and in what ways language assistance was offered to the respondent by election officials. Respondents were also asked to describe the quality of oral and written language assistance that was provided to them by election officials and to respond with suggestions for ways that oral or written language assistance for non-English speaking voters could be improved.

Questions 17 through 19 asked the respondents about circumstances in which they may have ever provided language assistance to another voter.

Questions 20 through 22 were asked to assess the needs of all voters based on their background, including their method of transportation to the polls that day, their educational level of achievement and their citizenship status and country of origin.

After conducting the interview, the volunteer was instructed to make several notes about his or her interaction with the voter. The volunteer was instructed to note the voter's gender, whether he or she was accompanied and by whom, the voter's levels of cooperation and understanding, as well as any other information necessary to successfully interpret the interview.



## D. NOVEMBER 2, 2004 SURVEY

In order to accomplish the Election Day voter survey, project staff recruited more than one hundred volunteers. Project staff focused recruitment efforts on Arizona State University (ASU) undergraduate students from the Barrett Honors College and members of campus student organizations likely to have high percentages of bilingual students. High school students from Coconino County who were bilingual in the Navajo language also were recruited.

For Maricopa County, project staff divided up approximately 105 volunteers into pairs with at least one volunteer in each pair having some Spanish proficiency. These 105 volunteers were placed at forty-three polling locations for at least one of three three-hour shifts on Election Day. The three shifts took place from 6:00 a.m.–9:00 a.m., 10:30 a.m.–1:30 p.m. and 4:00 p.m.–7:00 p.m. Several volunteers worked more than one three-hour shift, and six of the covered precincts had interviewers for two of the three shifts throughout the day.

For Coconino County, a total of thirteen individuals conducted interviews: one thesis project advisor, one thesis project student, two ASU student volunteers and nine bilingual Navajo students from Page High School. The students' Navajo language teacher screened them prior to their participation to ensure they were bilingual. The surveys were conducted in two separate teams. The two ASU student volunteers coordinated with the Page group, focusing on five polling sites—three in Page and two chapter houses on the Navajo Reservation—from 10:00 a.m.–4:30 p.m. The thesis project advisor and student coordinated the Tuba City group, focusing on four voting precincts at three polling places in Tuba City—the elementary (one precinct), middle (one precinct) and high schools (two precincts)—from 11:30 a.m.–3:45 p.m.

The Maricopa County volunteers were required to attend one out of the five offered training sessions throughout the week prior to November 2, 2004. The sessions lasted approximately one hour, and the volunteers were trained on the laws they needed to abide by at the polling places, as well as the rules they needed to follow in order to assure accurate and honest responses from voters participating in the surveys.

The Page High School students were given a similar one-hour training session at Page High School on Election Day.

As part of the voter study, project staff placed interviewers at approximately fifty voting precincts in these two counties. The voting pre-

cincts were selected by stratified random sampling. Bilingual interviewers were instructed to select voters at random to be asked a set of questions about their ability to access election information. Interviewers were also instructed to make objective observations of the polling sites, such as the type of assistance provided and the clarity of presented information. The interviews resulted in a total of 679 completed surveys.

#### E. POST-ELECTION TELEPHONIC SURVEY

To capture the full range of perspectives of potential voters on Election Day, project staff followed up the Election Day voter survey with a telephonic voter survey in Maricopa County. The intent of the telephonic survey was to account for the fact that the Election Day voter survey would not have reached any of the voters who cast early or mail-in ballots or registered voters who did not vote at all. This was a factor in Arizona because, in 2004, approximately one-third of all Arizonans voted early in the November election. Additionally, the telephonic survey aimed to reach persons who were not able to vote at all on Election Day in order to assess whether the availability or quality of language assistance was a factor in preventing them from voting.

Project staff obtained phone numbers for registered voters in Maricopa County. Utilizing a portion of the volunteers from the Election Day survey, project staff made telephone calls to approximately 2000 people in nearly fifty of the original precincts covered in Maricopa County on Election Day. These telephone calls took place in an on-campus calling center beginning on December 7, 2004. The calls began again in late February and continued until March 10, 2005. The approximately 2000 attempted phone calls resulted in responses from 150 registered voters because of wrong numbers, calls that went unanswered, persons who already had completed the Election Day survey and persons who declined to answer the survey questions.

Some precincts that were selected for the telephonic survey were chosen because they have a higher percentage of Latino voters. Project staff also conducted a Spanish surname analysis to identify registered voters who were likely of Spanish heritage and who would have a greater likelihood to need language assistance.

#### F. THE NEED FOR LANGUAGE ASSISTANCE

The data compiled from the voter and telephonic surveys show that there is a continuing need for language assistance during the voting process

in Arizona. The survey results corroborate the need for assistance established by the July 2002 Census determinations that resulted in Section 203 coverage of Coconino and Maricopa Counties.<sup>137</sup>

The Election Day survey conducted in Maricopa and Coconino Counties asked voters if they required language assistance to vote on Election Day. Among all voters surveyed, 7% reported that they required language assistance. Among those of Navajo descent, 20% reported that they required language assistance. By comparison, 9% of Hispanic voters reported that they required language assistance.

Under Section 208 of the Voting Rights Act, people who require assistance while voting are permitted to bring any person of their choice, with a few exceptions, into the voting booth.<sup>138</sup> Among those Navajo voters who needed language assistance, 49% reported bringing someone along to assist them while voting. On the other hand, 10% of Hispanic voters who required assistance reported bringing someone to aid them.

Among Arizona's voting population who needed assistance, 38% brought someone with them to assist in voting; the remaining 62% relied on government assistance at the polls in order to cast a meaningful ballot. This finding highlights the need for election officials to ensure that language assistance is available for non-English-speaking voters at every stage of the election process.

It appears that the lower percentage of Hispanic voters who reported bringing someone with them to assist in voting may be because they believed they would be able to obtain language assistance at the polls, as is required by Section 203.<sup>139</sup> Many of these voters reported that assistance was not available to them in Maricopa County.

The high number of Navajo respondents in Coconino County who brought someone to assist them could be a result of many elections being held at chapter houses where there were many Navajo-speaking people available to assist voters. The distance many Navajo voters had to travel to vote, combined with the limited availability of transportation, meant that many voters came in groups and were able to assist each other.

The percentage of voters who have assisted another voter on Election Day is much higher among Hispanic and Navajo voters than the general population. Among those surveyed, 29% of Hispanic voters and 24% of

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<sup>137</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872 (July 26, 2002).

<sup>138</sup> See 42 U.S.C. § 1973aa-6 (2006).

<sup>139</sup> See *id.* § 1973aa-1a.

Navajo voters have assisted another voter at the polls. By comparison, 19% of all voters surveyed, including Hispanic, Navajo and non-Hispanic voters, reported assisting another voter.

Survey respondents were asked to report their primary language, that is, the language spoken at home. The results showed that 8% of surveyed voters reported Navajo was their primary language and 8% reported Spanish was their primary language.

There is a clear need for language assistance among language minority voting-age citizens in Arizona. The data show that at least 20% of surveyed Navajo voters and at least 9% of surveyed Hispanic voters require language assistance when they vote. These percentages are actually slightly lower than the need for assistance identified by the July 2002 Census determinations,<sup>140</sup> likely due to a lower turnout rate among voters who need language assistance. Nevertheless, they confirm that there is a substantial need for language assistance among the language groups covered in Arizona.

#### G. THE AVAILABILITY OF LANGUAGE ASSISTANCE

The Election Day and telephonic surveys revealed that 68% of surveyed Hispanic and Navajo voters reported receiving some type of language assistance when voting. Among these voters, 17% reported receiving written assistance in the mail, 9% reported receiving written assistance at the polls, 7% reported receiving a bilingual ballot, 7% reported receiving assistance from a bilingual poll worker, 13% reported receiving assistance from two or more of these categories and 15% reported receiving language assistance from some other source. The remaining 32% of voters reported receiving no language assistance of any kind.

Hispanic and Navajo voters from Arizona who speak English as their primary language and voters who speak another language as their primary language were compared according to their perceptions of receiving language assistance on Election Day. Among these voters whose primary language is English, 64% reported receiving language assistance, while the remaining 36% reported that they did not receive any type of language assistance. Among those voters who speak a primary language other than English, 76% reported receiving language assistance and 24% reported receiving no assistance. This difference between voters with English as their primary language and voters with a non-English primary language is statis-

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<sup>140</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. at 48,871-72.

tically significant (difference-of-means test:  $t = 2.34$ ,  $p < 0.02$ ). Therefore, there is a 98% certainty that the primary language spoken by a voter significantly affects his or her perceptions of the availability of language assistance.

This test was repeated in order to compare voters who speak Spanish as their primary language and voters who speak English as their primary language. Among voters who speak Spanish as their primary language, 67% reported receiving language assistance. Since this percentage is very similar to the percentage of voters who reported English as their primary language (64%), it demonstrates that voters whose primary language is Spanish do not significantly differ in their perceptions of language assistance availability from voters whose primary language is English.

On the other hand, there is a statistically significant difference between voters whose primary language is Navajo compared to voters whose primary language is English. Eighty-one percent of voters with a primary language of Navajo reported receiving some type of language assistance. Therefore, the difference in perceptions of language assistance between English and non-English primary language groups is most likely driven by Navajo-speaking voters.

It appears that there are at least two explanations for why voters whose primary language is Navajo perceive more availability of language assistance than voters whose primary language is either Spanish or English. First, Navajo-speaking voters are not provided with as many voting materials written in Navajo, unlike Spanish-speaking voters who may have greater access to both written and oral language assistance. Second, it also appears that although Navajo-speaking poll workers are available in covered polling places for Navajo voters in Coconino County, Spanish-speaking poll workers may not be available in all covered polling places in Maricopa County.

#### H. THE QUALITY OF LANGUAGE ASSISTANCE

The Election Day and telephonic voter surveys also provide information on voters' perceptions of the quality of available oral and written language assistance. Perceptions vary slightly based upon ethnicity and primary language used at home. Among Hispanic voters, 44% rated the quality of oral assistance as "excellent," and 54% as "good." Among Navajo voters, 43% rated the quality of oral assistance as "excellent," and 51% as "good."

Within both groups of voters, however, there are notable differences in perception of the quality of oral assistance based on the primary language used at home. Among Hispanic voters whose primary language is English, 57% rated oral assistance as “excellent,” whereas among Hispanic voters whose primary language is Spanish or both English and Spanish, only 29% rated the quality of oral assistance as “excellent.”

Among Navajo voters whose primary language is English, 37% rated oral assistance as “excellent.” Among Navajo voters whose primary language is Navajo, 41% rated the quality of oral assistance as “excellent,” while 53% of Navajo voters whose primary language is both English and Navajo rated oral assistance as “excellent.”

Unlike Hispanic voters, it appears that Navajo voters’ perception of the quality of oral assistance is invariant to the primary language spoken at home. Sixteen percent of Navajo respondents rated the quality of written assistance as “poor.” In contrast, 6% of Navajo voters rated the quality of oral assistance as “poor.” The difference in these results may be explained by the fact that more Navajo language assistance is provided in oral, rather than written, form.

Voters were asked their perceptions of the quality of both oral and written language assistance. The majority of voters who answered this question felt that more translators would be helpful or should have a higher visibility if they were available to assist. The second largest response was that there is no improvement needed on the part of the government in providing both oral and written assistance. Some other responses listed in order of highest to least amount of responses include: more training for translators/improve quality of assistance provided, assistance should not be provided, more technology/advanced use of media, more languages provided, does not identify with question and simpler translations. Overall, the quality of language assistance available to voting-age citizens in Arizona’s covered languages can be improved significantly.

## V. VOTING DISCRIMINATION IN APACHE COUNTY

### A. BACKGROUND AND DEMOGRAPHICS

Apache County is home to the Navajo Nation, the most populous Indian reservation in the United States.<sup>141</sup> In addition, the county is home to

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<sup>141</sup> Apache County Arizona, <http://www.co.apache.az.us> (last visited Feb. 24, 2008); The Navajo People, [http://library.thinkquest.org/J002073F/thinkquest/Navajo\\_people.htm](http://library.thinkquest.org/J002073F/thinkquest/Navajo_people.htm) (last visited Feb. 24, 2008).

the Apache, who are located on the Fort Apache Reservation, and the Hopi, who are located on the Hopi Reservation.<sup>142</sup>

Apache County is, in acreage, the third largest county in Arizona, but by population it is the tenth largest.<sup>143</sup> According to the 2000 Census, Apache County has a total population of 69,423, of whom 76.9% (53,375) are American Indian.<sup>144</sup> The county has a voting age population of 42,692, of whom 73.7% (31,470) are American Indian.<sup>145</sup> In the 1990s, Apache County's American Indian population was one of the fastest growing in the United States, growing by more than 11%, a net increase of over 5000 citizens.<sup>146</sup>

The county's population density is extremely low, with an average of just six citizens per square mile.<sup>147</sup> By comparison, Arizona's average density is forty-five people per square mile, and Phoenix's density is almost 3000 people per square mile.<sup>148</sup> Even in Apache County's seat, St. Johns,<sup>149</sup> the most densely populated area of the county, the average density does not exceed 500 persons per square mile.<sup>150</sup>

Apache County is one of just three counties in the United States in which the predominant languages spoken are American Indian. Of these languages, the most commonly used is Navajo.<sup>151</sup> As a result of its demographics, over one-third (11,175) of the voting-age citizens on the Navajo Nation Reservation are LEP.<sup>152</sup> Over one-quarter of the voting-age citizens

<sup>142</sup> See 28 C.F.R. 55 app. (2007).

<sup>143</sup> See Arizona Workforce Informer, Population Density and Land Area Data, [http://www.workforce.az.gov/admin/uploadedPublications/421\\_pop\\_density.xls](http://www.workforce.az.gov/admin/uploadedPublications/421_pop_density.xls) (last visited Feb. 24, 2008).

<sup>144</sup> U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P3, available at <http://factfinder.census.gov> (last visited Mar. 4, 2008).

<sup>145</sup> U.S. Census Bureau, 2000 Census Summary File 1, at tbl.P5, available at <http://factfinder.census.gov> (last visited Mar. 4, 2008).

<sup>146</sup> Amy S. Smith, Bashir Ahmed & Larry Sink, *An Analysis of State and County Population Changes by Characteristics: 1990–1999* pt. 3 & tbl.7 (U.S. Census Bureau, Population Div., Working Paper Series No. 45, 2000), available at <http://www.census.gov/population/www/documentation/twps0045/twps0045.html>.

<sup>147</sup> U.S. Census Bureau, Apache County, Arizona QuickFacts, available at <http://quickfacts.census.gov/qfd/states/04/04001.html> (last visited Mar. 4, 2008).

<sup>148</sup> U.S. Census Bureau, Arizona QuickFacts, available at <http://quickfacts.census.gov/qfd/states/04000.html> (last visited Mar. 4, 2008); U.S. Census Bureau, Phoenix, Arizona QuickFacts, available at <http://quickfacts.census.gov/qfd/states/04/0455000.html> (last visited Mar. 4, 2008).

<sup>149</sup> Profile: Apache County, Arizona, <http://www.azcommerce.com/doclib/commune/apache%20county.pdf> (last visited Feb. 24, 2008).

<sup>150</sup> Arizona Workforce Informer, *supra* note 143.

<sup>151</sup> The Navajo Language, [http://library.thinkquest.org/J002073F/thinkquest/Navajo\\_people.htm](http://library.thinkquest.org/J002073F/thinkquest/Navajo_people.htm) (last visited Feb. 24, 2008).

<sup>152</sup> See TUCKER & ESPINO, *supra* note 62, at tbl.C-3.

on the Navajo Nation Reservation are illiterate, which is nearly nineteen times the national illiteracy rate.<sup>153</sup>

American Indians in Apache County have been the victims of voting discrimination since the County was organized in 1879. Some of the key voting cases in the county in the last three decades are described below.

#### B. SHIRLEY V. SUPERIOR COURT FOR APACHE COUNTY

In 1973, the Apache County Board of Supervisors, the county's three-member governing body, obtained a permanent injunction preventing Tom Shirley from assuming his office as a County Supervisor from District 3.<sup>154</sup> Shirley was an enrolled member of the Navajo Indian tribe, residing on the portion of the Navajo Indian Reservation in the county's Supervisorial District Number 3.<sup>155</sup>

In the November 1972 election, Shirley had soundly defeated his non-Indian opponent by a margin of approximately three to one.<sup>156</sup> Nevertheless, the Board of Supervisors refused to certify Shirley as duly elected.<sup>157</sup> The unsuccessful non-Indian candidate brought an action against the county Board of Supervisors seeking an injunction restraining the Board from certifying that Shirley had been elected.<sup>158</sup> The superior court agreed, holding that Shirley was ineligible to serve as a supervisor because he was immune from service of process while on the reservation, did not own any real or personal property subject to taxation by the state of Arizona and had been a trustee for the Apache County School District at the time he was elected (though he resigned within three weeks after his election).<sup>159</sup>

In *Shirley v. Superior Court*, the Arizona Supreme Court reversed the superior court's decision.<sup>160</sup> The court first noted that in light of its 1948 decision in *Harrison v. Laveen*,<sup>161</sup> Indians who lived on a reservation, such as Shirley, were eligible to vote and were, therefore, qualified to run for office.<sup>162</sup> The court further held that Shirley was not disqualified from serving because he was a school trustee for two reasons. First, he had resigned

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<sup>153</sup> See *id.*

<sup>154</sup> *Shirley v. Superior Court*, 513 P.2d 939, 941 (Ariz. 1973).

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

<sup>156</sup> See *id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* at 945.

<sup>161</sup> 196 P.2d 456 (Ariz. 1948).

<sup>162</sup> *Shirley*, 513 P.2d at 941.



well before the time of assuming office in January 1973.<sup>163</sup> Second, the unpaid position of school trustee was not a conflicting “public office,” and Shirley could thus remain in that office without being disqualified as supervisor.<sup>164</sup>

The court rejected the remaining reasons cited by the superior court for disqualifying Shirley. The fact that he was immune from service of civil process did not negate the fact that he was subject to recall like any other state officer.<sup>165</sup> The court also dismissed the lower court’s reliance on the argument that Shirley was not subject to state taxation, observing, “That Tom Shirley is not a taxpayer has been declared no obstacle to voting or holding office. The Supreme Court of the United States has resolved this question . . . .”<sup>166</sup> Accordingly, the Arizona Supreme Court vacated the superior court’s injunction and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor of District 3.<sup>167</sup>

### C. GOODLUCK V. APACHE COUNTY

Apache County and its non-Indian governing Board of Supervisors also resorted to gerrymandering in its effort to prevent Navajo voters, who made up an overwhelming majority of the county, from taking control of the Board. The county drew lines for its three supervisor districts with the following populations: District 1 with a population of 1700, of whom seventy were Indian; District 2 with a population of 3900, of whom 300 were Indian; and District 3 with a population of 26,700, of whom 23,600 were Indian.<sup>168</sup> Each district elected one representative.<sup>169</sup>

In *Goodluck v. Apache County*, several Indian voters who lived on the Navajo Reservation sued the county for violating “one-person, one-vote” principles.<sup>170</sup> The plaintiffs argued that: (1) the districts were unconstitutionally malapportioned in violation of the Fourteenth Amendment; (2) the malapportionment abridged their right to vote on account of race or color in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act; (3) the apportionment plan was a distinction by race in voting in viola-

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<sup>163</sup> *Id.* at 943.

<sup>164</sup> *Id.* at 944–45.

<sup>165</sup> *Id.* at 945.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff’d*, 429 U.S. 876 (1976).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

tion of 42 U.S.C. § 1971; and (4) the apportionment plan was a racially discriminatory application of state laws in violation of 42 U.S.C. § 1971.<sup>171</sup>

In response, Apache County made two arguments. First, it asserted that 8 U.S.C. § 1401, which granted citizenship to Indians, was unconstitutional.<sup>172</sup> Second, it maintained that Indians could not vote because they were not “subject to the jurisdiction” of the United States and did not pay state taxes, both qualifications mentioned in the Fourteenth Amendment.<sup>173</sup> The defendants based their second argument on *Elk v. Wilkins*,<sup>174</sup> an 1884 case holding that Indians not taxed were not to be counted for purposes of representation under the Fourteenth Amendment because they were not citizens of the United States.<sup>175</sup>

The three-judge federal court summarily rejected Apache County’s arguments. The court found that “it is clear that a malapportionment of supervisory districts is present. It therefore appears that Apache County Arizona must be redistricted so that the apportionment may conform to the standards dictated in *Baker v. Carr* . . . .”<sup>176</sup> Consequently, the *Goodluck* court granted the Indian plaintiffs summary judgment.<sup>177</sup>

#### D. APACHE COUNTY HIGH SCHOOL DISTRICT 90 V. UNITED STATES

In 1976, Apache County attempted to avoid integration of American Indian students into its public schools by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county.<sup>178</sup> Although the special election affected Indian students, who would be denied equal schooling, Indian turnout for the election was abnormally low.<sup>179</sup> The circumstances that led to this election were subsequently addressed in a series of Section 5 objections.<sup>180</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> 112 U.S. 94 (1884).

<sup>175</sup> *Goodluck*, 417 F. Supp. at 15.

<sup>176</sup> *Id.* at 16.

<sup>177</sup> *Id.*

<sup>178</sup> *Apache County High Sch. Dist. No. 90 v. United States*, No. 77-1815, slip op. at 2 (D.D.C. June 12, 1980).

<sup>179</sup> *Id.* at 4.

<sup>180</sup> See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to Joe R. Purcell, Gust, Rosenfeld, Divelbess & Henderson (Oct. 4, 1976) [hereinafter Oct. 4, 1976 Pottinger Letter] (on file with authors); Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., Dep’t of Justice, to David Silva, Superintendent of Schs. (Mar. 20, 1980) [hereinafter Mar. 20, 1976 Days Letter] (on file with authors).

Several changes in the number, location, availability and convenience of polling places for the special bond election prevented most American Indians from voting. Between 1974 and 1976, eleven polling places were shut down, and no new ones were opened.<sup>181</sup> Of these eleven polling places, nine were on the Navajo Reservation.<sup>182</sup> These closings forced most Navajo voters without transportation to travel at least twelve more miles to get to their polling place.<sup>183</sup> At the same time, the polling place changes had virtually no impact on non-Indian voters.<sup>184</sup> Although the population of American Indian voters had not changed, the number of reservation polling places was reduced nearly in half, compared to only a 20% decrease in non-Indian areas.<sup>185</sup>

The polling place changes were compounded by the total lack of language assistance provided to Indian voters on the reservation, leading to dramatically low voter turnout. Although two Navajo poll workers were provided for each polling place on the reservation, none of these workers were designated or trained as interpreters.<sup>186</sup> All of the absentee voting procedures were conducted exclusively in English.<sup>187</sup>

No Navajo-language informational meetings regarding the bond election took place anywhere in the county.<sup>188</sup> Even the English-language informational meeting excluded most Indian voters who spoke English because it was held almost one hundred miles from any Navajo community.<sup>189</sup>

As a result of the outright disenfranchisement of Indian voters, the Attorney General objected to several of the changes and procedures when they were submitted for Section 5 preclearance. The first of these objections came in 1976, when the Attorney General objected to the redistricting of School District 90 because of the inadequacy of Navajo-language voting materials and assistance.<sup>190</sup> Similar objections and refusals to withdraw objections continued over the next four and one-half years, during which

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<sup>181</sup> *Apache County High Sch. Dist. No. 90*, No. 77-1815, slip op. at 6.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *Id.* at 5.

<sup>187</sup> *Id.* at 3.

<sup>188</sup> *Id.* at 3, 4.

<sup>189</sup> *Id.* at 3.

<sup>190</sup> *See* Oct. 4, 1976 Pottinger Letter, *supra* note 180.

the county would meet every objection with a new method of voting discrimination.<sup>191</sup>

Finally, Apache County responded to the objections raised by the special bond election by completely dissolving School District 90.<sup>192</sup> In its place, the county sought to create six smaller school districts, closing eighteen polling places, including fifteen on the Navajo Reservation.<sup>193</sup> When the Attorney General objected, Apache County responded by starting to provide Navajo language assistance, coordinating with a board of Navajo officials to select new polling places and offering oral language assistance for non-English speaking Navajo voters trying to cast absentee ballots. As a result of these and other remedial steps, the county's six-district plan was approved in a May 1980 Consent Decree.<sup>194</sup>

#### E. NAVAPACHE HOSPITAL REGION SECTION 5 OBJECTION

Voting discrimination also occurred in an area of western Apache County/eastern Navajo County known as the Navapache Hospital Region. In 1985, the Apache County Board of Supervisors proposed several voting changes, including the elimination of two polling places, the implementation of a rotating polling place system and a reduction in the daily hours of operation for those voting stations that remained open.<sup>195</sup> Of the two polling places that were closing, one was the last remaining polling place on the Fort Apache Reservation.<sup>196</sup> The elimination of all polling places on the reservation was exacerbated by the new rotating poll system, which made polling places even less accessible to Navajo voters.<sup>197</sup> Absentee voting opportunities also were not provided to Indian voters.<sup>198</sup> As a result

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<sup>191</sup> See, e.g., Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Joe Purcell, Gust, Rosenfeld, Divelbess & Henderson (May 3, 1977) (on file with authors); Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Jane R. Greer, Gust, Rosenfeld, Divelbess & Henderson (June 10, 1977) (on file with authors).

<sup>192</sup> See Mar. 20, 1976 Days Letter, *supra* note 180; Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to David Silva, Superintendent of Schs. (May 7, 1980) [hereinafter May 7, 1980 Days Letter] (on file with authors).

<sup>193</sup> Mar. 20, 1976 Days Letter, *supra* note 180, at 2; May 7, 1980 Days Letter, *supra* note 192, at 2.

<sup>194</sup> Consent Decree, Apache County High Sch. Dist. No. 90 v. United States, No. 77-1815 (D.D.C. June 12, 1980) (on file with authors).

<sup>195</sup> Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert C. Bates, Snell & Wilmer (Aug. 16, 1985) (on file with authors).

<sup>196</sup> *Id.* at 1.

<sup>197</sup> *Id.* at 1-2.

<sup>198</sup> *Id.* at 2.

of the clear discriminatory purpose and effect of these voting changes, the Attorney General objected to the voting changes.<sup>199</sup>

#### F. FAILURE TO PROVIDE LANGUAGE ASSISTANCE TO NAVAJO VOTERS

By 1987, Apache County had still failed to provide adequate language assistance to non-English speaking American Indian voters in Apache County.<sup>200</sup> When Apache County submitted new guidelines for multilingual election procedures, the Assistant Attorney General objected because it did not provide language assistance to the primary Navajo speakers in the county.<sup>201</sup>

The Assistant Attorney General informed Apache County that although some English-only documents and assistance were provided to American Indians on the reservation, the county still failed to provide adequate language assistance to the 55% of the American Indian population who could not speak or read English.<sup>202</sup> The Assistant Attorney General acknowledged that the county provided oral absentee ballots and had reformed voter registration processes and voting deadlines to accommodate Navajo speakers.<sup>203</sup> The Assistant Attorney General concluded, however, that the lack of Navajo language assistance prevented the county from effectively promoting the availability of the materials and procedures to voters who required them.<sup>204</sup>

The Assistant Attorney General further pointed out that Apache County had not taken steps to improve the quality of on-site assistance offered to non-English speakers.<sup>205</sup> Although some Navajo poll workers were provided, the county did not provide them with translation training.<sup>206</sup> They were also not trained to provide language assistance, and there was no process in place for having English-language documents disseminated to non-English speakers at a local level.<sup>207</sup>

The Apache County Board of Supervisors responded by forming an advisory committee, which would seek to better inform new voting proto-

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<sup>199</sup> *Id.*

<sup>200</sup> See Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Russell H. Burdick, Jr., Chief Deputy County Attorney (July 17, 1987) (on file with authors).

<sup>201</sup> *Id.* at 3.

<sup>202</sup> *Id.* at 2.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

col and multilingual election procedures.<sup>208</sup> The Assistant Attorney General, however, insisted that the mere promise of a future remedy was not sufficient and continued to deny preclearance until the adequate language assistance required by Section 203 was provided to non-English speaking Indian voters.<sup>209</sup>

#### G. UNITED STATES V. ARIZONA

In 1989, the Attorney General agreed, in a consent decree, to allow Apache County to implement a series of improvements to its language assistance program.<sup>210</sup> The United States alleged that the State of Arizona and Apache and Navajo Counties employed various election standards, practices and procedures that denied or abridged the voting rights of Navajo citizens who resided in the two counties.<sup>211</sup>

The consent decree summarized the complaint:

The challenged practices include alleged discriminatory voter registration, absentee ballot, and voter registration cancellation procedures, and the alleged failure of the defendants to implement, as required by Section 4(f)(4), effective bilingual election procedures, including the effective dissemination of election information in Navajo and providing for a sufficient number of adequately trained bilingual persons to serve as translators for Navajo voters needing assistance at the polls on election day.<sup>212</sup>

In response, the defendants agreed to a variety of relief to bring them into compliance with Sections 2, 4(f)(4), 5, 203 and 208 of the Voting Rights Act. Without admitting liability, the defendants agreed to the court's May 22, 1989 consent decree, which required that the defendants:

- Adopt a Navajo Language Election Information Program that would be submitted to the Attorney General for preclearance under Section 5 within thirty days of entry of the decree;<sup>213</sup>
- Employ at least two full-time, permanent voter outreach employees who were bilingual in Navajo and English, to serve as deputy voter reg-

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<sup>208</sup> See Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Russell H. Burdick, Jr., Chief Deputy County Attorney (Feb. 10, 1988) (on file with authors).

<sup>209</sup> *Id.* at 1-2.

<sup>210</sup> Consent Decree, *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (amended Sept. 27, 1993).

<sup>211</sup> *Id.* at 1-2.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 4.

istrars for purposes of voter registration and the implementation of the language program;<sup>214</sup>

— Train translators and election personnel who were responsible for implementing the language program and encourage the participation of the Navajo Nation's government;<sup>215</sup>

— Increase the number and availability of Navajo-speaking deputy registrars to increase voter registration opportunities;<sup>216</sup>

— Appoint and train as deputy registrars at least three persons fluent in English and Navajo in each county precinct situated entirely or in part on the Navajo Reservation;<sup>217</sup>

— Make training available to all deputy registrars about all phases of the election process, including voter registration, candidate qualification procedures and deadlines, Election Day activities, the differences between state and tribal election regulations and procedures, voter purges and reinstatement and absentee voting;<sup>218</sup>

— Train all deputy registrars in Navajo and English, as requested;<sup>219</sup>

— Conduct periodic voter registration drives at tribal chapter houses, to be coordinated with the Navajo Nation to occur at times convenient for Navajo citizens;<sup>220</sup>

— Disseminate and publicize election information to Navajo voters, including at scheduled chapter house meetings;<sup>221</sup>

— Prepare and disseminate audio tapes with oral translations of ballot propositions in the Navajo language;<sup>222</sup>

— Make public service announcements about election activities and requirements in the Navajo language on designated radio stations and provide written announcements in newspapers relied upon by Navajo voters;<sup>223</sup>

— Provide information and publicity about absentee voting to Navajo voters;<sup>224</sup>

— Ensure sufficient staffing of polling places with effectively trained precinct board workers fluent in Navajo and English;<sup>225</sup>

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<sup>214</sup> *Id.* at 6.

<sup>215</sup> *Id.* at 7.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 8.

<sup>218</sup> *Id.* at 9–10.

<sup>219</sup> *Id.* at 10.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 11–12.

<sup>222</sup> *Id.* at 13.

<sup>223</sup> *Id.* at 13–14.

<sup>224</sup> *Id.* at 16.

- Prevent unreasonable delays in voting or translation of ballots on Election Day;<sup>226</sup>
- Provide training in the proper translation of election information;<sup>227</sup>
- Disseminate information about Navajo voters purged from voter registration lists to allow them to register again;<sup>228</sup>
- Inform voters about registration and voter purge procedures;<sup>229</sup>
- Maintain copies of all records and prepare reports of their efforts under the consent decree, to be provided to members of the public and the United States on request;<sup>230</sup> and
- Adjust the program as necessary to address unforeseen problems.<sup>231</sup>

Nevertheless, even after entry of the consent decree, Apache County continued to fail to provide adequate language assistance.

#### H. THE CONTINUED LACK OF LANGUAGE ASSISTANCE FOR NAVAJO VOTERS

In September 2002, the DOJ documented several American Indian voter complaints in Apache and Navajo Counties.<sup>232</sup> The DOJ noted that in the November 5, 2002 election, the counties improved their practices in opening polling places on time, allowing for early voting at some reservation locations, providing better inter-county cooperation and making available language flip charts.<sup>233</sup> However, the DOJ also documented several problems.

First, training for poll workers and interpreters was too brief to be useful. At the time, training was completely contained in a two-hour session, which left some poll workers confused about the location of, and use for, certain components of the elections supply box with they were provided.<sup>234</sup> The DOJ suggested that the training be extended to a full day, but Apache County only extended the training to six and one-half hours.<sup>235</sup>

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<sup>225</sup> *Id.* at 17.

<sup>226</sup> *Id.* at 18.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 19.

<sup>229</sup> *Id.* at 19–20.

<sup>230</sup> *Id.* at 21–22.

<sup>231</sup> *Id.* at 23.

<sup>232</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, DEPARTMENT OF JUSTICE'S ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES 91–92 (2004), available at <http://www.gao.gov/new.items/d041041r.pdf>.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 91.



The DOJ also expressed concern about cross-over voting within tribal communities. Because tribal elections take place independently of county elections, Indians who live on the Navajo Reservation near county lines often vote in tribal elections at different locations than they do in county or state elections.<sup>236</sup> The confusion created by the use of separate voting places caused many voters to attempt to vote in a county in which they were not registered.<sup>237</sup> As a result, these voters were turned away from the polls or had their votes disqualified.<sup>238</sup> To address this issue, the DOJ suggested that each polling site near a county line be provided with registration lists from each county so that the polling site could inform voters and try to contact appropriate county election departments before refusing voters.<sup>239</sup> Although the counties acted on this suggestion, federal observers later found that most poll workers did not use the registration lists.<sup>240</sup>

#### I. RECENT IMPROVEMENTS IN VOTER REGISTRATION AND TURNOUT

In November of 2005, Penny Pew, the Elections Director for Apache County, testified before the House Judiciary Committee in support of reauthorizing the expiring provisions of the Voting Rights Act.<sup>241</sup> Pew emphasized the importance of Sections 6 and 8 in helping Apache County to establish an effective “indigenous” Navajo Language Election Information Program.<sup>242</sup> Pew also stressed the importance of voter outreach and education, the effective use of radio and newspaper advertisement to raise voter awareness and the development of a Navajo Language Election Glossary to assist with translating election materials.<sup>243</sup> Additionally, she informed the committee that the use of a uniform manual, the use of role playing and the establishment of a training cassette library for personal use have all served to improve the effectiveness of the training given to poll workers and translators.<sup>244</sup>

Pew highlighted the importance of the tri-county, tri-state coordination to monitor the effectiveness of programs initiated to improve American In-

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<sup>236</sup> *Id.* at 91–92.

<sup>237</sup> *Id.* at 92.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 91.

<sup>240</sup> *Id.* at 92.

<sup>241</sup> *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12–13 (2005) [hereinafter *Pew Testimony*] (written testimony of Penny L. Pew, Elections Director, Apache County, Arizona), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=526>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

dian voter awareness and turnout.<sup>245</sup> She also cited the 25% increase in voter turnout between 2000 and 2004 resulting from the increase in voter education and enthusiasm garnered by the “Get the Vote Out” campaign.<sup>246</sup> This campaign was accompanied by the distribution of Navajo language brochures and the distribution of “I Voted” stickers in the Navajo language.<sup>247</sup> Pew concluded by linking the success of all of Apache County’s programs to the continued use of local and federal observers to monitor proceedings and offer educated solutions.<sup>248</sup>

## VI. DEPARTMENT OF JUSTICE ACTIVITIES IN ARIZONA

### A. ENFORCEMENT ACTIONS SINCE 1982

#### 1. *United States v. Arizona*<sup>249</sup>

In *United States v. Arizona*, the DOJ brought suit against two Arizona counties—Coconino County and Navajo County—for failing to obtain preclearance for the creation of new superior court divisions.<sup>250</sup> The DOJ, upon learning of the additional judgeships, sent letters to the counties requesting that they comply with the preclearance requirements of Section 5.<sup>251</sup> Despite receiving objections from the DOJ, both counties proceeded to hold elections to fill the newly-created judgeships.<sup>252</sup> The DOJ then filed suit, claiming that the two counties, as “covered” jurisdictions under the VRA, made changes that were subject to Section 5 preclearance and that, therefore, must be precleared before adoption.<sup>253</sup> The court held that Section 5 applies to the creation of new judgeships because they directly affect voting standards and practices.<sup>254</sup> The court further held that the creation of the new judgeships “does have the potential of causing discrimination or retrogression”<sup>255</sup> and, thus, should be subject to preclear-

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<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> No. CIV-94-1845-PHX-EHC, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994).

<sup>250</sup> *Id.* at \*1–2.

<sup>251</sup> *Id.* at \*3.

<sup>252</sup> *Id.* at \*3–5.

<sup>253</sup> *Id.* at 7, 10.

<sup>254</sup> *Id.* at 12.

<sup>255</sup> “‘Retrogression’ has been defined as the reduction or diminution of minority voting rights or strength.” *Id.* at \*18.

ance.<sup>256</sup> The challenged elections were preliminarily enjoined pending resolution of the defendants' declaratory action.<sup>257</sup>

#### B. FEDERAL OBSERVERS AND MONITORS SINCE 1982

Since 1982, the DOJ has deployed at least 1204 federal observers, who are employees of the Office of Personnel Management (OPM), to Arizona to monitor compliance with federal consent decrees, as well as the availability and quality of language assistance provided to voters under Section 203. Of these observers, 93.8% (1129) have been deployed to monitor access of American Indians in Apache and Navajo Counties, with the remaining 6.2% (75) deployed to Yuma to monitor access of American Indian and Latino voters.<sup>258</sup> The presence of the federal observers has made a tremendous impact on the ability of American Indian and Spanish-

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 25.

<sup>258</sup> The following is a list of observers and monitors deployed since 1982: Apache County: Nov. 4, 1986 (fed. election, 24 obs.); Sept. 8, 1988 (fed. election, 41 obs.); Sept. 13, 1988 (primary, 43 obs.); Sept. 11, 1990 (primary, 26 obs.); Nov. 6, 1990 (fed. election, 43 obs.); Sept. 8, 1992 (primary, 45 obs.); Nov. 3, 1992 (fed. election, 45 obs.); Sept. 13, 1994 (primary, 25 obs.); Nov. 8, 1994 (fed. election, 35 obs.); Sept. 10, 1996 (primary, 25 obs.); Nov. 5, 1996 (fed. election, 36 obs.); Sept. 8, 1998 (primary, 41 obs.); Nov. 3, 1998 (fed. election, 24 obs.); Sept. 12, 2000 (primary, 16 obs.); Nov. 7, 2000 (fed. election, 37 obs.); Sept. 10, 2002 (primary, 52 obs.); Nov. 5, 2002 (primary, unknown no. of obs.); Sept. 7, 2004 (primary, unknown no. of monitors); Nov. 2, 2004 (fed. election, 26 obs.); Cochise County: Sept. 7, 2004 (primary, unknown no. of monitors); Nov. 2, 2004 (fed. election, unknown no. of monitors); May 17, 2005 (local election, unknown no. of monitors); Gila County: Sept. 7, 2004 (primary, unknown no. of monitors); Nov. 2, 2004 (fed. election, unknown no. of monitors); Graham County: Sept. 7, 2004 (primary, unknown no. of monitors); Nov. 2, 2004 (fed. election, unknown no. of monitors); Maricopa County: Sept. 7, 2004 (primary, unknown no. of monitors); Nov. 2, 2004 (fed. election, unknown no. of monitors); Navajo County: Sept. 13, 1988 (primary, 29 obs.); Nov. 4, 1988 (fed. election, 16 obs.); Nov. 8, 1988 (fed. election, 34 obs.); Sept. 11, 1990 (primary, 34 obs.); Nov. 6, 1990 (fed. election, 39 obs.); Sept. 8, 1992 (primary, 42 obs.); Nov. 3, 1992 (fed. election, 34 obs.); Sept. 13, 1994 (primary, 21 obs.); Nov. 8, 1994 (fed. election, 28 obs.); Sept. 9, 1996 (primary, 19 obs.); Nov. 5, 1996 (fed. election, 28 obs.); Sept. 8, 1998 (primary, 23 obs.); Nov. 3, 1998 (fed. election, 16 obs.); Sept. 12, 2000 (primary, 17 obs.); Nov. 7, 2000 (fed. election, 35 obs.); Sept. 9, 2002 (primary, 28 obs.); Nov. 5, 2002 (fed. election, 40 obs.); Sept. 7, 2004 (primary, 38 obs.); Nov. 2, 2004 (fed. election, 28 obs.); Pima County: Nov. 2, 2004 (fed. election, unknown no. of monitors); Santa Cruz County: Sept. 7, 2004 (primary, unknown no. of monitors); Nov. 2, 2004 (fed. election, unknown no. of monitors); Yuma County: Sept. 8, 1998 (primary, 5 obs.); Sept. 7, 2004 (primary, 29 obs.); Nov. 2, 2004 (fed. election, 41 obs.). See DEP'T OF JUSTICE, GEOGRAPHIC PUBLIC LISTING: ELECTIONS IN ALL STATES DURING ALL DATES 7-8 (2003); see also Press Release, Dep't of Justice, Justice Department to Monitor Elections in Arizona, California, Mississippi, New York, and Pennsylvania (May 16, 2005), available at [http://www.usdoj.gov/opa/pr/2005/May/05\\_crt\\_267.htm](http://www.usdoj.gov/opa/pr/2005/May/05_crt_267.htm); Press Release, Dep't of Justice, Department of Justice Announces Federal Observers to Monitor General Election in States Across Country (Oct. 28, 2004), available at [http://www.usdoj.gov/opa/pr/2004/October/04\\_crt\\_725.htm](http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm); Press Release, Dep't of Justice, Justice Department to Monitor Elections in Arizona (Sept. 7, 2004), available at [http://www.usdoj.gov/opa/pr/2004/September/04\\_crt\\_598.htm](http://www.usdoj.gov/opa/pr/2004/September/04_crt_598.htm) [hereinafter DOJ Press Release].

speaking voting-age citizens to participate in elections, as demonstrated by the successful VRA enforcement actions described above in the discussion of Apache County.<sup>259</sup>

In addition, since 2004, the Department of Justice has deployed dozens of monitors in elections held in six other counties: Cochise, Gila, Graham, Maricopa, Pima and Santa Cruz.<sup>260</sup> Federal monitors are generally attorneys, paralegals or civil rights analysts employed by the DOJ, and are not OPM employees.<sup>261</sup> Unlike federal observers, federal monitors have no statutory right to observe elections in polling places.<sup>262</sup> Federal monitors typically are used where there are suspected issues of non-compliance, but in a jurisdiction that has not been designated for coverage by a federal court or the Attorney General.<sup>263</sup> Although each of these six counties is covered by one or more non-English languages under Section 203, none has been designated for observer coverage.<sup>264</sup>

The growing use of monitors highlights the need for modifications to Sections 6 through 9 of the VRA to facilitate the ability of the Department of Justice to use federal observers in non-designated jurisdictions to enforce the Act.

### C. SECTION 5 OBJECTIONS SINCE 1982

Since 1982, Arizona has had eighteen Section 5 objections, which comprise over 80% of all Section 5 objections interposed since Arizona or its political subdivisions were first covered in 1965.<sup>265</sup> Four of these post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002.<sup>266</sup> These objections have affected seven, or nearly half, of Arizona's fifteen counties, with the DOJ finding that these voting changes had the purpose or effect of discriminating against the state's Latino or American Indian voters.<sup>267</sup>

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<sup>259</sup> See *supra* Part III.A.

<sup>260</sup> See *supra* note 258 and accompanying text.

<sup>261</sup> NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005 116 n.201, available at <http://www.votingrightsact.org/report/finalreport.pdf>.

<sup>262</sup> See *id.*

<sup>263</sup> See DOJ Press Release, *supra* note 258.

<sup>264</sup> See *supra* note 258 and accompanying text.

<sup>265</sup> See Department of Justice, *supra* note 71.

<sup>266</sup> See *id.*

<sup>267</sup> See *id.* The objections affecting American Indian voters in northern Arizona are summarized at length in the discussion of Apache County. See *supra* Part V. The remaining objections are summarized on the DOJ website. See Department of Justice, *supra* note 71.

The large number of recent Section 5 objections and the impact of the discriminatory practices those objections prevented highlight the importance of reauthorization to American Indian and Latino voting-age citizens in Arizona. For these reasons and the others stated elsewhere in this report, Section 5 should be reauthorized for twenty-five years and Section 4(f)(4) coverage of Arizona should be kept intact.

#### VII. THE CONTINUED NEED FOR LANGUAGE ASSISTANCE: ENGLISH-ONLY EDUCATION IN ARIZONA'S PUBLIC SCHOOLS

The following discussion demonstrates the continuing importance of the language assistance provisions of the Act.

##### A. THE ENGLISH-ONLY AMENDMENT AND ITS IMPACT ON ARIZONA'S SCHOOLS

In November 1988, an English-only initiative sponsored by Arizonans for Official English was enacted with 50.5% of the ballots cast by Arizona voters.<sup>268</sup> The amendment to the Arizona Constitution was entitled "English as the Official Language" and required that "[t]he State and all political subdivisions of [the] State shall act in English and in no other language."<sup>269</sup> The amendment applied to all state government officials and employees in their official capacities and was enforceable by anyone residing or doing business in the state.<sup>270</sup>

Just two days after the amendment was adopted, a state employee, Maria-Kelley Yniguez, sued to enjoin its enforcement, alleging that it violated the First and Fourteenth Amendments and federal civil rights laws.<sup>271</sup> "Yniguez was bilingual, fluent and literate in both Spanish and English, and, prior to the amendment's passage, she communicated in Spanish with monolingual Spanish-speaking claimants and in a combination of English and Spanish with bilingual claimants."<sup>272</sup>

Ten plaintiffs brought a separate action in November 1992, alleging that the English-only law violated the First, Ninth and Fourteenth Amendments.<sup>273</sup> Like Yniguez, the plaintiffs in the second lawsuit were bilingual

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<sup>268</sup> See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924 (9th Cir. 1995) (en banc), vacated *sub nom.* *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Yniguez v. Mofford*, 730 F. Supp. 309, 310 (D. Ariz. 1990), *aff'd in part, rev'd in part*, *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

in English and Spanish, which they regularly used in their private and official capacities.<sup>274</sup> “The plaintiffs alleged that they spoke Spanish during the performance of their government jobs, and that they feared ‘communicating in Spanish “during the performance of government business” in violation of Article XXVIII of the Arizona Constitution.’ ”<sup>275</sup>

In *Ruiz v. Hull*,<sup>276</sup> the Arizona Supreme Court struck down the English-only amendment as unconstitutional under the First and Fourteenth Amendments. The *Ruiz* court described the breadth of the amendment:

Although English-only provisions have recently become quite common, Arizona’s is unique. . . . Twenty-one states and forty municipalities have official English statutes. However, most of those provisions are substantially less encompassing and certainly less proscriptive than the Amendment. The official English provisions in most states appear to be primarily symbolic. Indeed, the Amendment has been identified as “by far the most restrictively worded official-English law to date” This observation is shared by other commentators—who note that the Amendment “is the *most restrictive* of the current wave of official-language laws,” and “is so far the *most restrictive* Official English measure.”<sup>277</sup>

The court based its reasoning in part on the impact the amendment had on public school teachers, such as one of the plaintiffs:

Assuming *arguendo* that the government may, under certain circumstances and for appropriate reasons, restrict public employees from using non-English languages to communicate while performing their duties, the Amendment’s reach is too broad. For example, by its express language, it prohibits a public school teacher, such as Appellant Garcia, and a monolingual Spanish-speaking parent from speaking in Spanish about a child’s education.<sup>278</sup>

The court also described the dramatically negative impact the amendment would have on political participation by language minorities:

Citizens of limited English proficiency, such as many of the named legislator’s constituents, often face obstacles in petitioning their government for redress and in accessing the political system. Legislators and other elected officials attempting to serve limited-English-proficient constituents face a difficult task in helping provide those constituents with government services and in assisting those constituents in both understanding and accessing government. The Amendment makes the use of non-

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<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> 957 P.2d 984 (Ariz. 1998).

<sup>277</sup> *Id.* at 994–95 (citations omitted).

<sup>278</sup> *Id.* at 996.

English communication to accomplish that task illegal. . . . A substantial number of Arizona's American Indians, Spanish-speaking citizens, and other citizens for whom English is not a primary language, either do not speak English at all or do not speak English well enough to be able to express their political beliefs, opinions, or needs to their elected officials. Under the Amendment, with few exceptions, no elected official can speak with his or her constituents except in English, even though such a requirement renders the speaking useless. While certainly not dispositive, it is also worth noting that in everyday experience, even among persons fluent in English as a second language, it is often more effective to communicate complex ideas in a person's primary language because some words, such as idioms and colloquialisms, do not translate well, if at all. In many cases, though, it is clear that the Amendment jeopardizes or prevents meaningful communication between constituents and their elected representatives, and thus contravenes core principles and values undergirding the First Amendment.<sup>279</sup>

As a result, the Arizona Supreme Court concluded that the English-only amendment was unconstitutional.<sup>280</sup>

#### B. PROPOSITION 203: A GROWING LANGUAGE GAP IN ARIZONA'S SCHOOLS

In 2000, Arizona voters passed Proposition 203, a ballot initiative that banned bilingual education and required schools to use mostly English immersion programs to educate children who have limited English proficiency.<sup>281</sup> The proposition was the second one of its kind in the United States.<sup>282</sup> It was adopted two years after California adopted a less restrictive measure in its Proposition 227,<sup>283</sup> which was widely regarded as having a negative impact on English Language Learners.<sup>284</sup> "Proposition 203 ended local flexibility in program options by repealing Article 3.1 of the Arizona Revised Statutes, replacing it with a requirement that all [English Language Learners] in the state be taught using Structured English Immersion (SEI)."<sup>285</sup> Proposition 203 includes provisions that prohibit teaching

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<sup>279</sup> *Id.* at 998.

<sup>280</sup> *Id.* at 1000, 1002–03.

<sup>281</sup> Rolstad et al., *supra* note 9, at 43.

<sup>282</sup> *Id.* at 44.

<sup>283</sup> *Id.* For an extended discussion of Proposition 227 and its impact on ELL students, see Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000).

<sup>284</sup> Nearly two years after Proposition 227 was passed in California, almost one million students in the state were still classified as LEP after more than a year of English-only immersion. O. Ricardo Pimentel, *Facts Carry Little Clout in Bilingual-Ed Debate*, ARIZ. REPUBLIC, Sept. 6, 2001, at 9B.

<sup>285</sup> Rolstad et al., *supra* note 9, at 43.

or using instructional materials in any language other than English; restrict waivers of the English-only rule; allow waivers to be denied without explanation;<sup>286</sup> reassign ELL students to mainstream classrooms once they reach an ambiguous standard of English proficiency; repeal all other Arizona ELL statutes; require English language tests for all Arizona students; grant enforcement power to any parent or guardian of an Arizona student; hold school administrators personally liable for violation of the statute; and prevent repeal of the statute with less than a super-majority in both houses of the state legislature.<sup>287</sup>

Proponents of the initiative stressed that limited-English proficient students should not receive unfair advantages, such as native language instruction in the classroom.<sup>288</sup> They contended that bilingual education is an ineffective approach to English instruction.<sup>289</sup> They further argued that English immersion would help improve academic performance among ELL students by drawing them into education's mainstream, but so far there have been no marked improvements.<sup>290</sup>

Children who have trouble speaking English are one of the largest and fastest-growing segments of the school population in Arizona.<sup>291</sup> The vast majority of those children are mostly segregated in a small number of schools.<sup>292</sup> These children also tend to be low-income and live in households where little, if any, English is spoken.<sup>293</sup> For example, the Isaac School District serves largely Spanish speaking immigrant neighborhoods

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<sup>286</sup> This provision was included to avoid waivers such as those provided to 170,000 LEP students in California—12% of all English learners—to continue to receive bilingual education.

<sup>287</sup> James Crawford, *Bilingual Education: Strike Two*, RETHINKING SCHOOLS, Winter 2000–2001, available at [http://www.rethinkingschools.org/archive/15\\_02/Az152.shtml](http://www.rethinkingschools.org/archive/15_02/Az152.shtml).

<sup>288</sup> National Conference of State Legislatures, Bilingual Education, <http://www.ncsl.org/programs/educ/bilingualed.htm> (last visited Mar. 6, 2008).

<sup>289</sup> *Id.*

<sup>290</sup> The Arizona Supreme Court struck down the Legislative Council's written description of Proposition 203, which stated that "the existing laws of this state require that public schools provide bilingual education instruction to every pupil who is not fluent in English, without a specific time limit on services." *Sotomayor v. Burns*, 13 P.3d 1198, 1199 (Ariz. 2000). According to the Arizona Supreme Court,

This is misleading because it suggests that English *and* Spanish instruction must be given in all classes. However, state law requires schools to "provide a bilingual program or English as a second language [ESL] program for . . . limited English proficient pupils." ESL instruction is performed entirely in English, and therefore is not bilingual. In Arizona, over 67% of limited English proficient students attend English-taught ESL classes.

*Id.*

<sup>291</sup> Daniel González, *Language Gap Grows; Studies: Schools Face Increased Challenges*, ARIZ. REPUBLIC, Oct. 12, 2005, at 1B.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*



in west Phoenix.<sup>294</sup> More than half of its 9000 students are ELL, and 93% are poor.<sup>295</sup>

School officials in the District say that additional funding would allow schools to create more ELL programs, reduce class sizes and provide more teacher training.<sup>296</sup> Currently, Arizona provides an additional \$360 per ELL student, but this is far below the \$1200 to \$2500 recommended by a court-ordered cost study in the *Flores* decision discussed above.<sup>297</sup> These circumstances compound the challenges for public schools, as these particular schools are already struggling to meet new federal academic standards, according to studies by researchers at two Washington D.C.-based nonpartisan research groups, the Migration Policy Institute and the Urban Institute.<sup>298</sup> These studies are particularly relevant in Arizona, which is one of the few states to ban bilingual education.<sup>299</sup>

#### 1. Studies Showing the Effects of Inadequate Education on ELL Students

The studies by the Urban Institute and Migration Policy Institute measured the size and growth of the school population of ELL students to determine how that population is affecting schools trying to meet the federal standards of the federal No Child Left Behind Act.<sup>300</sup> In 2000, there were 56,000 ELL students in pre-kindergarten to fifth grade, or 12% of the whole population of pre-kindergarten through fifth grade students, the fourth highest share of all states.<sup>301</sup> Only California, Texas and New Mexico have a higher proportion of ELL students.<sup>302</sup> As of 2000, there were almost 140,000 ELL students enrolled in Arizona public schools.<sup>303</sup>

Nationwide, the studies found that one half of all ELL students were born in the United States, including ELL students in high school, which means that they spent their entire lives attending school in the United States, yet failed to learn English adequately.<sup>304</sup> It was also found that ELL students tend to be highly segregated, with 70% attending 10% of U.S. schools, mostly located in urban settings.<sup>305</sup> Additionally, many ELL stu-

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Rolstad et al., *supra* note 9, at 43.

<sup>304</sup> González, *supra* note 291, at 1B.

<sup>305</sup> *Id.*

dents attend schools most likely to fail federal standards and face sanctions.<sup>306</sup> In 2000, there were 3.4 million school children in the United States with limited English proficiency, or 6% of the total student population.<sup>307</sup> The most common language spoken was Spanish, although many students speak other languages, including Arizona's numerous American Indian languages and dialects.<sup>308</sup>

## 2. Waiver Options Under Proposition 203

Proposition 203 permits extremely limited waivers from SEI programs for some students.<sup>309</sup> It allows parents to submit waivers for children younger than ten years of age who "already know English," which is defined as good English skills as measured by oral or standardized tests on which the child scores at or above the state average for his or her grade level or at or above the fifth grade average, whichever is lower.<sup>310</sup> The state grade level average on English oral language assessments has not yet been determined for students in Arizona, so some districts asked test publishers for estimated averages and some estimated an average based on their own district test data.<sup>311</sup>

"However, in February 2003, the newly elected superintendent of public instruction, Tom Horne, who had run for office on a promise to enforce Proposition 203, issued guidelines that had the effect of altering the waiver requirement."<sup>312</sup> These changes have imposed the most restrictions in any state in the nation for ELLs, leaving parents who seek a bilingual education for their children with no alternative to SEI.<sup>313</sup> Horne insisted that the "passing score" listed by the test publisher serve as the minimum requirement for a waiver.<sup>314</sup> The publisher scores are determined arbitrarily and do not factor in ELL students, only English-proficient test takers.<sup>315</sup> The available evidence in Arizona reveals that bilingual education programs have been more effective at raising students' test scores than SEI.<sup>316</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> Rolstad et al., *supra* note 9, at 46.

<sup>310</sup> *Id.* at 46–47.

<sup>311</sup> *Id.* at 47.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

### 3. Confusion and Discrimination Resulting from Implementation of Proposition 203

There have been widespread instances of confusion and discrimination over how non-English languages can be used in the schools after Proposition 203. For example, in a recent article, Kay Hunnicutt and Mario Castro documented several examples of such confusion and discrimination:

Teachers are afraid that they will be disciplined or fired if they speak to a student in Spanish at any time. Teachers in the Isaac Elementary School District were asked to keep Spanish out of the cafeteria, hallways, and recess. The principal and district superintendent believed that the spirit of Proposition 203 meant that no Spanish could be spoken at school under any circumstance, when teachers and students can actually use Spanish for non-instructional purposes.

In April 2003, a teacher allegedly slapped students for speaking Spanish: “[A] school district investigation said she hit and slapped students for speaking Spanish in class. . . . [The teacher] told district investigators that she was enforcing the district’s English immersion program.”<sup>317</sup>

### 4. Tribal Languages Targeted by English-Only Initiatives

Given Arizona’s unique demographics, the English-only Proposition 203 not only impacts Spanish-speaking students, but also impacts members of Arizona’s twenty-one American Indian tribes.<sup>318</sup> Margaret Garcia-Dugan, co-chairwoman of Arizona English for the Children, was under the impression that tribal sovereignty would exempt American Indians from English-only requirements.<sup>319</sup> That would be true if American Indian children were being taught in tribal schools; however, 80% of tribal children are in public and charter schools.<sup>320</sup> American Indians remember well the era from the 1800s to the 1960s when American Indian children were placed in government-run boarding schools and punished for speaking their native language.<sup>321</sup> Proposition 203 revitalizes that much-maligned policy.

Arizona Superintendent of Public Instruction Tom Horne stated in August 2004, “Now that we are enforcing the voter-approved requirement that students who are not proficient in English be in structured English im-

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<sup>317</sup> Kay Hunnicutt & Mario Castro, *How Census 2000 Data Suggest Hostility Toward Mexican-Origin Arizonians*, 29 BILINGUAL RES. J. 109, 122 (2005).

<sup>318</sup> Julie Cart, *Tribal Languages Unintended Target in English-Only Drive*, L.A. TIMES, Nov. 4, 2000, at A4.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

mersion programs, hopefully there are no additional students subjected to these educationally inferior bilingual programs.”<sup>322</sup> How this agenda will apply to the Navajo Nation is unclear. Horne thinks that the impact is minor because most Navajo children come to school proficient in English: “It’s a much more serious problem with Latinos.”<sup>323</sup>

Since voters approved Proposition 203, Arizona and the Navajo Nation have struggled to establish how the law applies to Navajo students.<sup>324</sup> Horne said that for those who come to school where Navajo is spoken at home, “a bilingual program would be inappropriate.”<sup>325</sup> The controversy is due largely to the vagueness of the language in the legislation.<sup>326</sup> While the preface addresses immigration and makes no mention of American Indians, the text in the body fails to specify to whom the law will apply.<sup>327</sup> According to some observers, the heart of the debate is over tribal sovereignty and not bilingual education.<sup>328</sup>

The opposition to English-only has forged a coalition between the tribes and Latino organizations.<sup>329</sup> The initiative spurred many American Indians to register to vote, and a rally at the state capitol drew almost 1000 protesters from even the most remote reservations.<sup>330</sup> The rally was the largest American Indian protest in Arizona in recent history.<sup>331</sup>

## 5. The Impact on Schools

Many school administrators and teachers in Arizona’s schools complained about the negative impact that Proposition 203 would have on their ability to run successful ELL programs. For example, in 2000, Martha Carrasco, bilingual and ELL coordinator at Frye Elementary School in Chandler, said that Proposition 203 would “dismantle the school’s successful bilingual program and leave Spanish speaking children at an academic

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<sup>322</sup> Press Release, Ariz. Dep’t of Educ., Horne Releases Study Showing Arizona Students in Instructed English Immersion Outperformed Students in Bilingual (Aug. 5, 2004), *available at* <http://www.ade.az.gov/pio/Press-Releases/2004/pr08-03-04.pdf>.

<sup>323</sup> *School Chief Touts Arizona’s English-Immersion Programs*, NAVAJO TIMES, Aug. 12, 2004, at A10.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Cart, *supra* note 318, at A4.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

disadvantage.”<sup>332</sup> At the time, nearly 300 students were enrolled in Frye’s bilingual program, and according to Principal Paul Ritz, within four years most would be “transferred to regular classes proficient in reading, writing and speaking English.”<sup>333</sup> According to Carrasco, “We need to have the freedom to say this child is not ready to be put in a regular class with no support, and we won’t have the opportunity to do that any more. Immersion is very limited and won’t work for all kids.”<sup>334</sup>

## VIII. FLORES V. ARIZONA: THE FAILURE TO TEACH ELL STUDENTS

### A. BACKGROUND ON THE FLORES LITIGATION

Federal courts have found that the State of Arizona has repeatedly failed to provide adequate funding to teach non-English speaking students how to speak English proficiently enough to become educated. The lack of funding has resulted in high dropout rates and depressed voter registration and turnout, each of which is exacerbated by inadequate language assistance. The problem has significantly worsened with the passage of Proposition 203 and the burgeoning number of LEP students in Arizona’s public schools.

Spanish-speaking plaintiffs have spent more than thirteen years battling with the State over its violations of federal law. In December 2005, the lengthy battle came to an end in the lower court, resulting in fines levied against the State of \$500,000 per day that are being placed directly into programs to teach limited-English proficient (LEP) students.<sup>335</sup> The State’s intransigence in complying with the federal court orders was pointedly noted by the court, which observed that its ruling “came against a backdrop of state inaction, existing in 1992 when Plaintiffs filed the class action law suit and continuing through the duration of the case.”<sup>336</sup>

On August 20, 1992, Miriam Flores filed a class action as a parent and on behalf of her child seeking declaratory relief against the State of Arizona for “failing to provide LEP children with a program of instruction calculated to make them proficient in speaking, understanding, reading, and

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<sup>332</sup> David Proffitt et al., *Districts Fret Over Bilingual Ed Ban*, ARIZ. REPUBLIC, Nov. 15, 2005, at 1.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> See *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1120 (D. Ariz. 2005), *vacated sub nom.* *Flores v. Rzeslawski*, 204 Fed. App’x 580 (9th Cir. 2006).

<sup>336</sup> *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1044 (D. Ariz. 2000).

writing English, while enabling them to master the standard academic curriculum as required of all students.”<sup>337</sup> The case was brought under the authority of *Lau v. Nichols*,<sup>338</sup> in which the U.S. Supreme Court held that the failure to provide English instruction to non-English-speaking Chinese students denied them “a meaningful opportunity to participate in” public education. “The plaintiffs further challenge[d] the defendants’ funding, administration and oversight of the public school system in districts enrolling predominantly low-income minority children,” which, they argued, enabled schools to provide fewer educational benefits than schools with a predominantly white student body.<sup>339</sup>

The plaintiffs alleged that the State and other defendants violated the Equal Education Opportunities Act of 1974 (EEOA),<sup>340</sup> as well as the regulations for implementing<sup>341</sup> Title VI of the Civil Rights Act of 1964.<sup>342</sup>

#### B. JUDICIAL FINDINGS OF WIDESPREAD VIOLATIONS OF *LAU V. NICHOLS*

On January 24, 2000, U.S. District Judge Alfredo Marquez issued a declaratory judgment against the defendants following a bench trial.<sup>343</sup> Judge Marquez concluded that the State’s system of ELL programs, which appropriated only \$150 for each non-English speaking student, was “arbitrary and capricious.”<sup>344</sup> The impact of the lack of funding was particularly hard on local school districts, which were asked to shoulder the burden despite the absence of a tax base to do so.<sup>345</sup>

The court held as a matter of law that Arizona’s base level of funding programs under *Lau* bore “no relation” to the actual funding necessary to

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<sup>337</sup> *Flores v. Arizona*, 48 F. Supp. 2d 937, 939 (D. Ariz. 1999).

<sup>338</sup> 414 U.S. 563, 568 (1974). *Lau* was cited extensively by Congress in adding the language assistance provisions to the Voting Rights Act in 1975.

<sup>339</sup> *Flores*, 48 F. Supp. 2d at 939.

<sup>340</sup> The EEOA provides that “[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” 20 U.S.C. § 1703(f) (2006).

<sup>341</sup> See 34 C.F.R. pt. 100 (2007).

<sup>342</sup> Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (2006).

<sup>343</sup> See *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1239 (D. Ariz. 2000).

<sup>344</sup> See *id.*

<sup>345</sup> For example, Washington Elementary School District reported in 2001 that the state only paid approximately 10% of the cost of its ESL program, or \$159 out of the \$1527 per pupil annual cost. The District was forced to levy “desegregation taxes” to try to fill in as much of the funding gap as possible. Lori Baker, *Proposal Would Hike WESD Taxes by 37 Percent*, ARIZ. REPUBLIC, July 7, 2001, at 1.

provide “essential” English skills to LEP students.<sup>346</sup> Rather, Arizona’s per-student appropriation was “arbitrary and capricious because it was not reasonably calculated to effectively implement the *Lau* programs adopted by the Nogales Unified School District (NUSD), which have been approved by the State.<sup>347</sup> The court cited the following *Lau* program deficiencies in support of its judgment: too many students in too few classrooms; not enough qualified teachers, including teachers to teach ELL and bilingual methods of instruction in content area studies; not enough teacher aides; an inadequate tutoring program; and insufficient teaching materials for both ELL classes and content area courses.<sup>348</sup>

As the plaintiffs’ reply brief correctly noted, these “deficiencies are not the result of an inadequate model. The model was prescribed by the state and adopted by NUSD. The problem is the state’s inadequate funding to support the model.”<sup>349</sup> The court made this finding based on a 1987–1988 cost study that showed it cost approximately \$450 per LEP student—three times what the State actually budgeted—to provide *Lau* program instruction.<sup>350</sup>

### C. ARIZONA’S INTRANSIGENCE IN REMEDYING THE VIOLATIONS

“At the time the court ruled, the state defendants questioned the reliability of their own 1987–1988 cost study. Defendants attacked their study’s credibility because it was so old, and the methodology for the study was not ascertainable,” calling into question its integrity.<sup>351</sup> Moreover, the study had never been updated.<sup>352</sup> At trial, the defendants informed the court that the state legislature had established the English as a Second Language and Bilingual Education Study Committee to conduct a cost study to determine the amount of funding provided by the state and federal governments for English instruction of LEP students and the amount of money being spent by schools to educate those students. The court expressed that

[T]his was the first step the state needed to take towards setting a minimum base funding level for *Lau* programs that would not be arbitrary and capricious.

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<sup>346</sup> *Flores*, 172 F. Supp. 2d at 1239.

<sup>347</sup> *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1044 (D. Ariz. 2000); *see also Flores*, 172 F. Supp. 2d at 1239.

<sup>348</sup> *Flores*, 172 F. Supp. 2d at 1238–40.

<sup>349</sup> *Flores*, 160 F. Supp. 2d at 1046; *Flores*, 172 F. Supp. 2d at 1238–39.

<sup>350</sup> *Flores*, 160 F. Supp. 2d at 1043–44.

<sup>351</sup> *Id.* at 1044.

<sup>352</sup> *Id.*

The [State legislative committee] was supposed to submit the report to the governor's office by December 1, 1999, to recommend the level of funding necessary to support the programs that it determined to be the most effective. The report was timely submitted, but it failed to contain the recommendations for funding levels. After the regular legislative session convened in January, 2000, the plaintiffs sent a letter to the legislature asking that the cost study be performed. A Senate bill was introduced that would have provided for the study, but it was defeated. Several amendments were also defeated which would have provided funding for the State Department of Education to perform the cost study. The legislative session ended April 18, 2000, with the state continuing its pattern of inaction.

On June 6, 2000, Governor [Jane] Hull convened a special session on education to address a 0.6 % funding increase in the state sales tax for specified educational programs. *Lau* programs were removed from the list of permissible items to be funded by the state sales tax. Again, the legislature rejected an amendment that required the state to conduct the cost study of *Lau* programs. On June 30, 2000, Governor Hull signed the bill providing for the increase in state sales tax to finance education. Again, the state failed to take any action to fund *Lau* programs in Arizona at a level reasonably calculated to make LEP students proficient in speaking, understanding, reading, and writing English. Contrary to the information provided to this Court in January of 2000, the State has not even taken the first step of conducting the cost study.<sup>353</sup>

On October 12, 2000, the federal court granted post-judgment relief to the plaintiffs to address Arizona's failure to comply with the January 2000 judgment.<sup>354</sup> In doing so, the court accepted the plaintiffs' argument:

There is no reason to wait to address [the] cost of the deficiencies identified by the Court. The cost implications of those deficiencies have not changed as a result of the Consent Order. The Consent Order did not change the models for providing bilingual and ELL instruction at all. Instead, the Consent Order prescribes implementation procedures for those models. . . . While there may be additional cost implications associated with the Consent Order, they are most assuredly modest compared to the structural funding problems identified by the Court.<sup>355</sup>

The court also rejected the State's argument to await development of a "new" English immersion model after the passage of Proposition 203 because "[t]here are costs which are common to all programs of instruction

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<sup>353</sup> *Id.* at 1044–45.

<sup>354</sup> *Id.* at 1047.

<sup>355</sup> *Id.* at 1046–47.



for LEP students.”<sup>356</sup> The court found that “[u]nless a realistic cost assessment is prepared and available this legislative session, which begins January 8, 2001, Plaintiffs will miss the biannual budget process and will have to wait until 2003 for *Lau* programs to be funded at a level that is not arbitrary and capricious.”<sup>357</sup> The court concluded that given the refusal to act by both the State and the courts, “without judicial action, the federal law violations as set out in this Court’s Order of January 24, 2000, will continue for at least another three years.”<sup>358</sup>

On January 11, 2001, members of Arizona’s Senate released a report estimating that it would cost an additional \$170 million per year to meet the requirements of the *Flores* decision.<sup>359</sup> At the time, only \$20 million was budgeted for ELL programs in Arizona’s public schools.<sup>360</sup> According to one report, “Arizona spends about \$150 on every student who is classified as an ‘English learner.’ The study says about \$1,500 per student would fulfill the judge’s ruling.”<sup>361</sup>

In late 2001, the legislature passed a bill that was designed as an “interim measure that would allow for the study to be completed and for the legislature to have time to pass the necessary legislation to comply with the Court’s order.”<sup>362</sup> The court allowed the legislature three years to complete this process.<sup>363</sup>

#### D. POST-JUDGMENT ORDER REQUIRING ARIZONA TO ADEQUATELY FUND ELL PROGRAMS

In January 2005, the plaintiffs approached the court, now presided over by U.S. District Judge Raner C. Collins, to complain that the study had yet to be completed and that they believed more than enough time had passed for the legislature to complete its obligation.<sup>364</sup>

“On January 28, 2005, the Court gave the state until the close of the 2005 legislative session to comply with the Court’s Order and essentially to fulfill its promise to set the appropriate funding for ELL programs.”

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<sup>356</sup> *Id.* at 1046.

<sup>357</sup> *Id.* at 1047.

<sup>358</sup> *Id.*

<sup>359</sup> Chip Scutari, *Bilingual Spending Falls Short: Court Order Puts State in a Jam*, ARIZ. REPUBLIC, Jan. 11, 2001, at 1A.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1113–14 (D. Ariz. 2005), *vacated sub nom. Flores v. Rzeslawski*, 204 Fed. App’x 580 (9th Cir. 2006).

<sup>363</sup> *Id.* at 1114.

<sup>364</sup> *Id.*

Against that backdrop, the court gave the legislature and the state one last chance to comply with Judge Marquez's February 2000 order before applying sanctions.<sup>365</sup> The legislature passed HB 2718 at the end of the 2005 session, which would have added \$13.5 million to the \$80 million that the state currently spends a year on English-learner programs. However, Governor Janet Napolitano vetoed it because she believed it was inadequate to comply with the court's order and was far less than the \$1200 to \$2500 annual cost per student recommended by a court-ordered cost study of *Lau* compliance.<sup>366</sup>

#### E. COMPETING STUDIES OF ADEQUATE FUNDING FOR ARIZONA'S ELL PROGRAMS

The parties and *amici* in the *Flores* litigation offered several competing studies of how much funding is required to bring Arizona into compliance with Title VI and *Lau*. Although the studies reported different amounts for what the authors believed was necessary to satisfy the *Flores* order, each of the studies agreed on the bottom line: Arizona's ELL programs are significantly underfunded.

The Arizona Legislative Council, a statutory committee of the Arizona State Legislature, contracted with the National Conference of State Legislatures' (NCSL) National Center on Education Finance to estimate the additional cost of educating ELL students.<sup>367</sup> The NCSL study analyzed data from fourteen school districts and charter schools, looking at student instruction costs, such as teacher and aide salaries and benefits, the costs of administering ELL programs and student assessments and staff development.<sup>368</sup> As a result of its analysis, the NCSL concluded that the average additional annual cost for an effective ELL program in Arizona was \$670 per ELL student.<sup>369</sup> Thus, according to the legislature's own study, Arizona needed to spend approximately four and one-half times the \$150 per ELL student in 2001, and nearly twice the currently budgeted \$360 per ELL student.<sup>370</sup>

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<sup>365</sup> *Id.*

<sup>366</sup> *See id.*; Robbie Sherwood & Chip Scutari, *Arizona Highway Funds Imperiled*, ARIZ. REPUBLIC, Oct. 30, 2005, at A1; González, *supra* note 291, at 1B.

<sup>367</sup> *See generally* NAT'L CONFERENCE OF STATE LEGISLATURES, ARIZONA ENGLISH LANGUAGE LEARNER COST STUDY (2005), available at [http://www.azleg.state.az.us/alispdfs/council/ELL\\_Cost\\_Study.pdf](http://www.azleg.state.az.us/alispdfs/council/ELL_Cost_Study.pdf).

<sup>368</sup> *Id.* at 8, 14–17.

<sup>369</sup> *Id.* at 39.

<sup>370</sup> *See id.*

Two professional panels disagreed with the NCSL's findings and the State's proposal. A panel of ELL experts from Arizona recommended spending based on grade level, ranging from annual costs of \$1785 per ELL student in K–2, to \$1447 in grades 3–12.<sup>371</sup> The ELL experts proposed the differential in funding levels because they believed that earlier investment would result in greater proficiency and lower costs later on.<sup>372</sup> The panels further found that the ELL programs could be improved by establishing clearer oversight and accountability, placing ELL specialists in schools to work with staff and providing native language support programs in schools with large ELL populations.<sup>373</sup>

National experts examining the issue have determined that the appropriate annual per student costs range from \$1026 for lower-need, high school ELLs, to \$2571 for high-need, elementary school ELLs.<sup>374</sup> The panel based its conclusions on a combination of proficiency, socioeconomic status and age.<sup>375</sup> The panel further recommended that Arizona provide adequate funding and adopt quality ELL curricula and train administrators, among other recommendations.<sup>376</sup>

The plan from the legislature proposed ELL per-student funding of \$432,<sup>377</sup> far short of the \$670 per student proposed by its own NCSL report.<sup>378</sup> Governor Napolitano has said that she wants an increase to \$1289 per ELL student.<sup>379</sup>

#### F. ARIZONA CITED FOR CONTEMPT AND FINED MINIMUM OF \$500,000 PER DAY

Despite the federal court order, the Arizona still failed to comply.<sup>380</sup> On December 15, 2005—over five years after the court granted post-judgment relief and over thirteen years after the action was filed—Judge Collins cited the defendants for contempt.<sup>381</sup> In doing so, Judge Collins

<sup>371</sup> *Id.* at 24.

<sup>372</sup> *See id.* at 24–39.

<sup>373</sup> *Id.* at 27–28.

<sup>374</sup> *Id.* at 31.

<sup>375</sup> *Id.* at 28.

<sup>376</sup> *Id.* at 38–39.

<sup>377</sup> Press Release, Katherine Lu, Nat'l Access Network, Teachers Coll., Columbia Univ., Court-Ordered Fines Reach \$20 Million in Arizona (Feb. 28, 2006), available at <http://www.schoolfunding.info/news/litigation/2-28-06azellcoststudy.php3> [hereinafter Lu].

<sup>378</sup> *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 367, at 39.

<sup>379</sup> Lu, *supra* note 377.

<sup>380</sup> *See* Flores v. Arizona, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *vacated sub nom.* Flores v. Rzeslawski, 204 Fed. App'x 580 (9th Cir. 2006).

<sup>381</sup> *Id.* at 1120–21.

observed that “[t]housands of children who have now been impacted by the State’s continued inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case.”<sup>382</sup> The court strongly criticized Arizona’s intransigence:

The Court can only imagine how many students have started school since Judge Marquez entered the Order in February 2000, declaring these programs were inadequately funded in an arbitrary and capricious manner that violates ELL students’ rights under the EEOA. How many students may have stopped school, by dropping out or failing because of foot-dragging by the State and its failure to comply with the original Order and compliance directives such as the Order issued on January 28, 2005? Plaintiffs are no longer inclined to depend on the good faith of the Defendants or to have faith that without some extraordinary pressure, the State will ever comply with the mandates of the respective Orders issued by this Court.<sup>383</sup>

The court granted the plaintiffs’ request to enjoin the State from requiring that ELL students be subject to passing the state-mandated AIMS test as a graduation requirement “until such time as ELL student’s education have been funded at an appropriate level and have had appropriate time to benefit from such funding.”<sup>384</sup> Judge Collins reasoned,

The State has failed to comply with the Court’s judgment for almost six years by under-funding ELL programs, which would provide ELL students with the necessary tools to pass the AIMS test. The State’s offering tutoring outside the classroom and other things to all students for the purpose of passing the AIMS test does not remedy the fact that the under-funded ELL programs deprive ELL students of an equal opportunity to pass the AIMS test in the first instance.<sup>385</sup>

In addition, the court held that if the State did not comply with its January 28, 2005 order within fifteen calendar days after the beginning of the 2006 legislative session, it would impose a fine of \$500,000 per day for the first thirty days, \$1 million per day for the next thirty days, followed by fines of \$1.5 million per day until the end of the legislative session and \$2 million per day if appropriate funding was not allocated during the 2006 legislative session.<sup>386</sup>

Despite the State’s lengthy history of noncompliance with the decisions of two federal judges in the *Flores* case, State Superintendent of

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<sup>382</sup> *Id.* at 1113.

<sup>383</sup> *Id.* at 1114.

<sup>384</sup> *Id.* at 1120.

<sup>385</sup> *Id.* at 1114.

<sup>386</sup> *Id.*

Schools Tom Horne expressed his intent to continue to fight the decision.<sup>387</sup> In a press release issued on December 16, 2005, the day after the State was cited for contempt, Superintendent Horne stated, “I am asking the Attorney General to file an immediate appeal to the Ninth Circuit, with a request that the district judge’s order not take effect until the Ninth Circuit has a chance to review the important public policy issues presented.”<sup>388</sup> Horne cited many reasons for wanting to continue to delay providing adequate funding for Arizona’s ELL programs, including that “this problem was originally created, in part, by the negligence of the federal government in guarding our borders.”<sup>389</sup>

Arizona lawmakers passed a bill that adds \$14 million for one year into programs for Arizona’s 150,000 ELL students.<sup>390</sup> Furthermore, the funding would last for only one year.<sup>391</sup> New requests “could be rejected by Superintendent of Public Instruction Tom Horne and lawmakers if the schools are not spending enough of their federal education and desegregation dollars on [ELL] programs.”<sup>392</sup> Governor Napolitano vetoed the bill because she believed it was necessary to add \$185 million a year to the programs and make an ongoing commitment to compliance with the court order.<sup>393</sup>

On January 24, 2006, Arizona failed to meet the court deadline, accumulating \$20 million in fines through the end of February 2006.<sup>394</sup> At the request of Arizona’s Attorney General, Judge Collins directed that all of the fines paid under the contempt order be placed directly in the State’s ELL programs.<sup>395</sup> After that order was vacated and remanded by the Ninth Circuit for an evidentiary hearing on the question of whether changed circumstances required a different remedy, Judge Collins found they did not.<sup>396</sup>

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<sup>387</sup> Press Release, Ariz. Dep’t of Educ., Statement of Tom Horne, State Superintendent of Schools Re: Court Order of December 15, 2005 (Dec. 16, 2005), available at <http://www.ade.state.az.us/pio/press-releases/2005/pr12-16-05.pdf>.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> Chip Scutari & Robbie Sherwood, *English Bill Beats Deadline; \$14 Mil to Aid State Learners, Satisfy Judge*, ARIZ. REPUBLIC, Jan. 24, 2006, at 1A.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Lu, *supra* note 377.

<sup>395</sup> See Mary Ann Zehr, *Arizona Starts Accruing Big Fines in Lawsuit Over English-Learners*, EDUC. WK., Feb. 1, 2006.

<sup>396</sup> See *Flores v. Arizona*, 480 F. Supp. 2d 1157 (D. Ariz. 2007), *aff’d*, 516 F.3d 1140 (9th Cir. 2008).

## G. THE IMPACT OF ARIZONA'S INADEQUATE ELL AND ESL FUNDING

## 1. Low Test Scores by Language Minorities

The inadequate public education provided to Arizona's language minorities is reflected in the low scores that they receive on national and state standardized tests. Arizona uses what it calls the AIMS test, which ranks students in four categories: "Exceeds the standard," which includes students whose academic performance goes substantially beyond the state's goals; "Meets the standard," which includes students who demonstrate solid academic performance with challenging subject matter and are ready to begin working on material required for the next grade; "Approaches the standard," which includes students with a partial understanding of subject matter and who demonstrate competency in required skills but do not demonstrate full understanding; and "Falls far below the standard," which includes students with insufficient evidence of skills needed to meet standards. Students at this level have serious gaps in knowledge and will likely require more work on skills needed at the current grade level.<sup>397</sup> Students must pass the AIMS test to graduate from high school in Arizona.

A 2005 study by Arizona's three public universities demonstrated that language minorities, particularly Hispanic and American Indian students, lagged well behind non-Hispanic white students in every category.<sup>398</sup> Some examples of this disparity include, first, that over 80% of roughly 3000 juniors and 5000 sophomores who qualify as English learners failed key portions of the AIMS test.<sup>399</sup> Second, about half of non-Hispanic whites have passed the AIMS test, but three-quarters of certain minority groups have not.<sup>400</sup> Third, twice as many (65%) non-Hispanic whites have passed the math section of AIMS as African-American and Hispanic students.<sup>401</sup> Fourth, only about 25% of American Indian students have passed the math section.<sup>402</sup> Fifth, 70% of over 13,000 students who continued to score among the lowest in the four possible categories were minorities.<sup>403</sup> Finally, in fifth-grade reading, 70% of non-Hispanic white students met or

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<sup>397</sup> *Elementary, Junior High School Results by District*, TUCSON CITIZEN, July 13, 2005, at 8A.

<sup>398</sup> Pat Kossan, *Minorities Score Low on AIMS; Requirement for Graduation Looms Large*, *Study Indicates*, ARIZ. REPUBLIC, Apr. 22, 2005, at 1B.

<sup>399</sup> Robbie Sherwood, *Federal Court Asked to Waive AIMS Test for English Learners*, ARIZ. REPUBLIC, July 26, 2005, at 3B.

<sup>400</sup> Robert Robb, *AIMS' Moving Target Gives Arizona an F*, ARIZ. REPUBLIC, May 1, 2005, at 5V.

<sup>401</sup> Kossan, *supra* note 398.

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

exceeded AIMS standards, compared with only 42% of Hispanic students.<sup>404</sup> In eighth-grade math, 29% of non-Hispanic white students met or exceeded AIMS standards, compared with just 10% of Hispanic students.<sup>405</sup>

As a result of the *Flores* decision, 1437 Hispanic students who are LEP have been exempted from the requirement that they pass the AIMS test.<sup>406</sup> As board member Cecilia Owen, Coconino County Superintendent of Schools observed, “It’s completely unacceptable to me to disenfranchise this percentage of the population.”<sup>407</sup>

Language minorities have not fared better on national tests. According to the 2005 results of the National Assessment of Educational Progress test administered to Arizona’s students, Arizona’s scores were far below the national average of students who scored below the “basic” grade level:

- Forty-eight percent of Arizona’s students scored below “basic” in fourth grade reading, compared to the national average of 38%.
- Thirty percent of Arizona’s students scored below “basic” in fourth grade math, compared to the national average of 21%.
- Thirty-five percent of Arizona’s students scored below “basic” in eighth grade reading, compared to the national average of 29%.
- Thirty-six percent of Arizona’s students scored below “basic” in eighth grade math, compared to the national average of 32%.<sup>408</sup>

According to one commentator, “The test results were grim for poor and minority children. More than 60 percent of Arizona’s poor, African-American, and Latino kids in the fourth grade scored below grade level in reading, double the percent of White and wealthier kids falling behind.”<sup>409</sup>

## 2. Waiting Lists for ESL Programs

The absence of adequate ESL programs for adults exacerbates the lack of ESL education that children are receiving in Arizona’s schools. For example, it was reported in 2000 that 16,000 adults completed Rio Salado Community College’s ESL classes in Maricopa County in a single year as

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<sup>404</sup> Mel Melendez, *Still Unequal: Socioeconomics Fuel Gaps in County’s Schools*, ARIZ. REPUBLIC, May 16, 2004, at 1A.

<sup>405</sup> *Id.*

<sup>406</sup> See Pat Kossan, *18,000 Down to AIMS Wire*, ARIZ. REPUBLIC, Dec. 21, 2005 at 1A.

<sup>407</sup> Kossan, *supra* note 398.

<sup>408</sup> Pat Kossan, *Arizona Students Lag on National Test*, ARIZ. REPUBLIC, Oct. 20, 2005 at 1B.

<sup>409</sup> *Id.*

part of the college's basic education program in 1999.<sup>410</sup> Rio Salado is the largest provider of ESL classes in the Phoenix area.<sup>411</sup> Despite the large number of adults completing the ESL program, Rio Salado has been unable to keep up with demand.<sup>412</sup> According to Kathy Price, coordinator of the college's Adult Basic Education program, "the school could add 20 more classes at any given time and still not meet the demand."<sup>413</sup>

## IX. PROPOSITION 200

### A. BACKGROUND

The latest voting controversy in Arizona has arisen from a ballot-approved initiative in the statewide election of 2004. The bill, formally known as the Arizona Taxpayer and Citizen Protection Act, is popularly referred to as Proposition 200. Its supporters say that it exists to prevent undocumented immigrants from voting or taking advantage of other benefits of United States citizenship, while detractors claim that it prevents many legal citizens from voting, or taking advantage of those benefits. Two years after its passage, debate over its impact on Arizona's racial and ethnic minority voting-age citizens continues.

### B. COURT CHALLENGES AND SECTION 5 PRECLEARANCE

Concerned about the changes to voting and concerned about Arizona's jurisdiction in regulating undocumented immigrants, Arizona Governor Janet Napolitano decided to wait for Section 5 preclearance before signing the voter-approved measures into law.<sup>414</sup>

On November 30, 2004, U.S. District Court Judge David C. Bury signed an order prohibiting the implementation of the provisions in Proposition 200 that apply to public services, stating that further investigation into whether the new law would illegally contradict federal regulations was necessary.<sup>415</sup> He did, however, rule that Napolitano could sign into law the

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<sup>410</sup> O Ricardo Pimentel, *Who Are These Mexicans Who Won't Learn English?*, ARIZ. REPUBLIC, Oct. 28, 2000, at 7B.

<sup>411</sup> *Id.*

<sup>412</sup> *See id.*

<sup>413</sup> *Id.*

<sup>414</sup> *See Governor Signs Immigration Measure*, L.A. TIMES, Dec. 9, 2004, at A23.

<sup>415</sup> *Friendly House v. Napolitano*, No. 4:04-cv-00649-DCB (D. Ariz. Nov. 30, 2004) (order granting temporary restraining order).



portions of Proposition 200 dealing with changes to the requirements for voter registration.<sup>416</sup>

The law requires that proof of citizenship be provided in order to register to vote and that identification be shown at the polls in order to cast a ballot.<sup>417</sup> According to the Maricopa County Recorder's Office, acceptable forms of identification include an Arizona driver's license number (or copy of the license) or non-operating identification license number (or copy of the identification license) issued after October, 1, 1996; a driver's license or non-operating identification license from another state that identifies United States citizenship; a legible photocopy of a birth certificate with the name of the applicant that verifies United States citizenship; a legible photocopy of the pertinent pages of the United States passport; United States naturalization certificate number or the presentation of the original certificate of naturalization.<sup>418</sup> For the following identification, if only the number is provided, the county recorder must verify the number with INS prior to adding the applicant to the voter rolls: Bureau of Indian Affairs Card Number, Tribal Treaty Card Number or Tribal Enrollment Number.<sup>419</sup>

In January 2005, the Department of Justice precleared the proposed changes.<sup>420</sup> Arizona Secretary of State Jan Brewer then moved forward to implement the changes necessary for registration to meet the new requirements.

Resistance to Proposition 200 continued throughout the year. In one attempt to stop Proposition 200, a group of state employees sought to prevent the law from going into effect in *Friendly House v. Napolitano*.<sup>421</sup> Initially denied by the district court, the group continued to the Ninth Circuit Court of Appeals, where the court upheld the district court's decision in the summer of 2005.<sup>422</sup> The courts both held that the employees did not have sufficient standing as persons who would be adversely affected by the laws, as they could offer no example of how they would personally be injured by it.<sup>423</sup>

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<sup>416</sup> See *id.*

<sup>417</sup> Pat Flannery, *Voters Tangled in New ID Law*, ARIZ. REPUBLIC, Nov. 26, 2005, at 1A.

<sup>418</sup> Chip Scutari & Yvonne Wingett, *Arizonans Lacking ID Won't Have Vote Counted*, ARIZ. REPUBLIC, Oct. 8, 2005, at 1A.

<sup>419</sup> See Howard Fischer, *Ariz. Voter ID Requirements OK'd*, ARIZ. DAILY STAR, Oct. 8, 2005, at A4; Scutari & Wingett, *supra* note 418, at 1A.

<sup>420</sup> Press Release, Ariz. Sec'y of State, Prop. 200 ID at Polls Procedure is Pre-Cleared by U.S. Department of Justice (Oct. 7, 2005), available at <http://www.azsos.gov/Releases/2005/pressrelease24.htm>.

<sup>421</sup> 419 F.3d 930, 932 (9th Cir. 2005).

<sup>422</sup> *Id.* at 932-33.

<sup>423</sup> *Id.*

## C. COMMUNITY RESPONSES

The response among Hispanic community organizations has been varied. Some argue that Hispanic voters supported Proposition 200, even though the majority of Hispanic rights groups voiced strong opposition to the effect they thought it would have on Hispanic Americans.<sup>424</sup> Such groups claim that the legislation will prevent legal citizens from voting and legal residents from receiving benefits.<sup>425</sup> Community groups offering resistance included the League of United Latin American Citizens (LULAC)<sup>426</sup> and the Mexican American Legal Defense and Educational Fund (MALDEF).<sup>427</sup> MALDEF subsequently sued to enjoin enforcement of Proposition 200.<sup>428</sup>

One way in which the Latino community attempted to derail Proposition 200 was through the use of their economic power. Several groups called for boycotts across the Phoenix area, hoping that by flexing their economic muscle they would be able to convince local business owners to pull support of the legislation.<sup>429</sup> While the boycotts had varying levels of economic impact, for the most part, they did little to convince the business owners that supporting Proposition 200 was an unwise decision.<sup>430</sup>

In a different move, one group chose to provide a toll free number to Hispanic voters who may have difficulties understanding the new requirements of the Proposition.<sup>431</sup> The group, Unidos Contra 200, provided the number with an answering service.<sup>432</sup> Callers could ask any question they had about the new legislation.<sup>433</sup> Messages were then returned, and ques-

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<sup>424</sup> See generally Daniel González, *Latino Activists to Boycott Gas*, ARIZ. REPUBLIC, July 1, 2005, at B1 (describing protests by Latino activists and citing one study indicating that 44% of Latinos voted in favor of Proposition 200); John Gizzi, *Immigration Issue Helped Make Kolbe Quit Congress*, HUMAN EVENTS, Dec. 5, 2005, at 6 (asserting that 47% of Mexican-Americans voted in favor of Proposition 200).

<sup>425</sup> See Amanda Shorey, *Federal Judge Bars Arizona Immigration Initiative from Becoming Law*, ASSOCIATED PRESS, Dec. 1, 2004.

<sup>426</sup> See Yvonne Wingett, *Mesa Latino Activist Calls for Boycott of Auto Dealer Over Prop. 200 Support*, ARIZ. REPUBLIC, June 8, 2005, at B6.

<sup>427</sup> See Elvia Diaz, *State Plan: ID Needed for Vote to Count*, ARIZ. REPUBLIC, Sept. 5, 2005, at B1.

<sup>428</sup> See Press Release, MALDEF, MALDEF Files Lawsuit Challenging Proposition 200 Restrictions, May 9, 2006, available at <http://www.maldef.org/news/press.cfm?ID=312>.

<sup>429</sup> See *supra* notes 421–422; Amanda Keim, *Hispanic Groups Plan National Boycott of Arizona Businesses*, ASSOCIATED PRESS, May 19, 2005.

<sup>430</sup> See generally Yvette Armendariz, *Valley Hispanic Boycott Called a Success*, ARIZ. REPUBLIC, May 11, 2005, at B1 (describing the mixed results of a Valley-wide boycott by Hispanics).

<sup>431</sup> Yvonne Wingett, *Number Offers Prop. 200 Info*, ARIZ. REPUBLIC, Dec. 3, 2004, at 1.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

tions answered, by volunteers.<sup>434</sup> Unidos Contra 200 is not necessarily operating in opposition to the law, but is trying to educate as many Hispanic residents of Arizona as possible about what Proposition 200 will mean for them.<sup>435</sup> Representing the broad-based concern about the legislation among Hispanic community leaders, Unidos Contra 200 was founded by members of the Phoenix Catholic Diocese, the Arizona Bankers Association, the Superintendent of the Tolleson Union High School District, Value Options, the Phoenix Police Department and the First New Life Baptist Church.<sup>436</sup>

The City Council of Phoenix has declared that the city will pay to defend any city employee charged for failing to report an undocumented migrant; other cities may follow suit.<sup>437</sup>

#### D. IMPACT OF PROPOSITION 200

Between the time that the new voting requirements went into effect and November of 2005, the effect of Proposition 200 on voter registration was severe. More than 12,000 applications were rejected because of the new requirements in Pima and Maricopa Counties alone.<sup>438</sup> In addition, in the period from April until August in Pima County, only 5872 new voters even attempted to register (1492 were denied), compared to 2004, when more than 30,000 voters were successfully registered.<sup>439</sup> Had the laws been in effect in 2004, more than 10,000 of those new voters would have been rejected.<sup>440</sup>

Of the voter registration applications rejected in Pima County, none were because the applicant was a non-citizen.<sup>441</sup> In Maricopa County, county officials identified and charged ten non-citizens attempting to register to vote, including three who had cast effective ballots in the 2004 election.<sup>442</sup> According to one report, the non-citizens were incorrectly told by

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<sup>434</sup> *Id.*

<sup>435</sup> *See id.*

<sup>436</sup> *See id.*

<sup>437</sup> Ginger D. Richardson, *Phoenix Staff Shielded From Prop. 200 Suits, Riling Voters*, ARIZ. REPUBLIC, Nov. 11, 2004, 1A.

<sup>438</sup> Pat Flannery, *Voters Tangled in New ID Law*, ARIZ. REPUBLIC, Nov. 26, 2005, at 1A.

<sup>439</sup> Editorial, *Prop. 200 Causing Voter Registration Rejections*, ARIZ. DAILY STAR, Aug. 22, 2005, at B4.

<sup>440</sup> *See id.*

<sup>441</sup> *See 10 Charged With Voter Fraud in Maricopa County*, TUCSON CITIZEN, Aug. 13, 2005, at 4A.

<sup>442</sup> *Id.*

individuals paid to circulate petitions that they could register to vote because they were in the final stages of becoming naturalized citizens.<sup>443</sup>

Proponents of Proposition 200 contend that one of the purposes of the bill is to prevent undocumented immigrants from voting. The lack of results from the new law may reflect the already existing misperceptions about the number of undocumented residents of Arizona, as shown in studies by the Behavior Research Center. In September of 2005, the Center reported that a poll with a 5% margin of error showed that adults in Maricopa County, on average, think that 39% of Hispanic people in Arizona are undocumented immigrants.<sup>444</sup> However, Census data show that only 28% of Hispanic people in Arizona are non-citizens.<sup>445</sup>

#### E. THE FUTURE OF PROPOSITION 200

With the first statewide election approaching in 2006, voter outreach officials, as well as potential new voters, face many new obstacles. The new current address requirement for identification presents many unique problems for American Indians, some of whom may lack traditional mailing addresses. The new requirements are also expected to be a problem for college-age voters, especially those who may be living in Arizona from out-of-state. Students may not have long-term addresses, and may not have access to other forms such as birth certificates, which are often the parents' responsibility to maintain. Married couples may face barriers as well, as often the forms of proof-of-residence only list one spouse's name. Elderly voters, especially those who may be living in assisted living facilities, may also lack the necessary identification.

The biggest problem for election officials may come after the election. Voters who show up with improper identification—a driver's license with an old address, for example—or no license at all will vote provisionally. Each provisional ballot must be verified and counted by hand in the days after the election. The new personnel and training requirements will be intense.

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<sup>443</sup> See Nicholas Riccardi, *New Voter Identification Law Catches Voters Unaware*, L.A. TIMES, Nov. 5, 2005.

<sup>444</sup> BEHAVIOR RES. CTR., ROCKY MOUNTAIN POLL, PUBLIC OVER-ESTIMATES ILLEGAL IMMIGRANT POPULATION IN ARIZONA AND BELIEVES MOST LATINOS CANNOT SPEAK ENGLISH 4 (2005), available at <http://www.brcpolls.com/05/RMP-2005-III-10.pdf>.

<sup>445</sup> *Id.*

X. ELECTORAL PARTICIPATION AND REPRESENTATION IN  
ARIZONA

A. HISPANIC AND AMERICAN INDIAN VOTER REGISTRATION AND  
TURNOUT

As a result of its large Hispanic and American Indian citizen voting-age populations, Arizona continues to have one of the lowest voter turnout rates in the United States. According to a recent study, Arizona ranks forty-seventh out of the fifty states in voter turnout.<sup>446</sup> The depressed voter registration and turnout has a negative impact on Latino and American Indian voters in their representation at the state level. It also has a particularly detrimental effect on minority voters because of the number of ballot initiatives. According to the Morrison Institute, Arizona ranks fifth nationally in ballot initiatives at 150, trailing only Oregon, California, Colorado and North Dakota.<sup>447</sup> Many of these ballot measures, such as Proposition 203's ban on bilingual education and Proposition 200's impact on minority voters through new registration and identification procedures, have a particularly high impact on Hispanic and American Indian voters.

The turnout rate of voting-age Hispanics substantially trails the turnout rate of non-Latinos.

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<sup>446</sup> See ARIZ. STATE UNIV., MORRISON INST. FOR PUB. POLICY IN THE SCH. OF PUB. AFFAIRS/COLL. OF PUB. PROGRAMS, HOW ARIZONA COMPARES: REAL NUMBERS AND HOT TOPICS, GOVERNMENT 47 (2005), available at <http://www.asu.edu/copp/morrison/APC2005web.pdf>.

<sup>447</sup> *Id.* at 47–48.

Table 1.  
Hispanic Registration & Turnout in Arizona, 1992–2002<sup>448</sup>

Year	Hispanic Reg. Voter Turnout %	Total Reg. Voter Turnout %
1992	79.2%	91.8%
1994	69.7%	74.0%
1996	70.9%	80.7%
1998	58.3%	66.0%
2000	81.3%	87.5%
2002	59.8%	72.4%

American Indian voter registration and turnout in Arizona also has increased as a result of the Voting Rights Act, although in most cases it is still far below the statewide average. In the two most recent presidential elections, in which turnout is historically the highest, American Indians continued to trail the statewide average by approximately 23%.<sup>449</sup> At the same time, however, some American Indian tribes continue to see record numbers of voters turning out. In 2004, the Fort McDowell tribe matched the statewide turnout average of 77%.<sup>450</sup> The Colorado River and Salt River tribes had all-time highs of over 60% of registered voters turning out, and most of the remaining tribes had a turnout over 50%.<sup>451</sup> Reauthorization of the Voting Rights Act is necessary to lower the disparity between American Indians and non-Indians in voter registration and turnout.

As a result of language assistance and outreach efforts under Section 203, turnout in Navajo precincts in Apache County increased by 26% in four years.<sup>452</sup> In 2004, 17,955 registered voters cast ballots in the thirty-three Navajo precincts, compared to 14,277 voters in 2000.<sup>453</sup>

<sup>448</sup> U.S. Census Bureau, Current Population Reports: Voting and Registration in the Election of November 1992, 1994, 1996, 1998, 2000 and 2002 (on file with authors).

<sup>449</sup> See NATIVE VOTE 2004, *supra* note 69, at 17–18.

<sup>450</sup> *Id.* at 17.

<sup>451</sup> *Id.*

<sup>452</sup> Pew Testimony, *supra* note 241, at 8–9.

<sup>453</sup> *Id.*

This follows the trend of increasing registration and turnout since Arizona became covered by Section 4(f)(4) of the Voting Rights Act. Voter turnout in precincts on seven Arizona Indian reservations rose from 11,789 in 1972 to 15,982 in 1980, with voter registration increasing by 87% in Navajo County and 165% in Coconino County. Turnout among American Indians in Navajo County increased by 120% between 1972 and 1990, while Apache County experienced an 88% increase during the same period. American Indians in New Mexico and Utah experienced similar increases in voter registration and turnout.<sup>454</sup>

#### B. NUMBER OF HISPANIC AND AMERICAN INDIAN ELECTED OFFICIALS

The Voting Rights Act has had a substantial impact on the number of Hispanic and American Indian candidates elected to public office in Arizona. This impact has come in many forms. Section 2 has removed structural barriers to participation in places such as Apache County, while Section 5 has eliminated barriers and prevented their implementation. Section 203 has dramatically increased voter registration and turnout of language minorities by making oral and written language assistance available to non-English speaking voting age citizens. The federal examiner and observer provisions have allowed the DOJ to monitor state and local compliance in Arizona.

American Indian representation has been greatest at the local level as a direct result of the litigation in northern counties, including Apache, Coconino and Navajo Counties. On the other hand, American Indian representation in the state legislature has declined in the last five years as a result of statewide redistricting changes following the 2000 Census and demographic changes because of the large growth of non-Indian population moving into Arizona. The NCSL reported that there were five American Indian state legislators in 2001, dropping to three in 2003 and two in 2006.<sup>455</sup> Both of the American Indians in Arizona's legislature, Senator Albert Hale and Representative Albert Tom, are Navajo.<sup>456</sup>

American Indians also have had a substantial impact on recent elections in Arizona. In 2002, American Indian turnout was credited with the

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<sup>454</sup> See H.R. REP. NO. 102-655, at 6-7 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 770-71; S. REP. NO. 102-315, at 12 (1992); see also *Voting Rights Act Language Assistance Amendments of 1992: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 102d Cong. 181-89 (1992) (statement of Marshall Plummer, Navajo Nation Vice-President).

<sup>455</sup> Figures derived from the NCSL data, on file with authors.

<sup>456</sup> National Conference of State Legislatures, 2006 Native American Legislators, <http://www.ncsl.org/programs/statetribel/2006triblbg.htm> (last visited Mar. 6, 2008).

passage of Proposition 202, an Indian gaming initiative supported by seventeen of the state's tribes, which passed by 20,836 votes—about 2% of all of the ballots cast.<sup>457</sup> In that same election, American Indians were the difference in a close gubernatorial race decided by only 11,819 votes—less than 1% of all those cast.<sup>458</sup>

The Act's impact is most apparent in the number of Hispanics elected to every level of public office in Arizona. Between 1973 and 1984, Hispanic representation in Arizona increased by 154%, growing from 95 to 184 elected officials.<sup>459</sup> That trend has continued in the past twenty years. Between 1985 and 2005, the number of Hispanic elected officials in Arizona increased by 62%, from 230 to 373.<sup>460</sup>

Hispanics are elected at every level of office in Arizona, except for statewide office, where elections are at-large among all voters in the state. In 1974, Mexico-born Raul Castro became Arizona's first Mexican-American governor.<sup>461</sup> Arizona has added two Hispanic representatives to its congressional delegation, the Honorable Raul Grivalja (elected in 2003) and the Honorable Ed Pastor (elected in 1991). The greatest increases have occurred at the local level, particularly on county commissions and local school boards where Hispanics have more than doubled their representation in the past twenty years.<sup>462</sup>

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<sup>457</sup> RUSS LEHMAN, FIRST AM. EDUC. PROJECT, THE EMERGING ROLE OF AMERICAN INDIANS IN THE AMERICAN ELECTORAL PROCESS 14–15 (2003), available at <http://www.centerforcivicparticipation.org/resources/libraryresearch/electoralprocess-1.attachment/302077/ElectorP.pdf>.

<sup>458</sup> NATIVE VOTE 2004, *supra* note 69, at 13, 19.

<sup>459</sup> NAT'L ASS'N OF LATINO ELECTED OFFICIALS (NALEO) EDUC. FUND, NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS xiii (1985) [hereinafter 1985 NALEO ROSTER].

<sup>460</sup> *See id.*; NALEO EDUC. FUND, NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS (2005) [hereinafter 2005 NALEO ROSTER].

<sup>461</sup> Arizona State University Libraries: Chicanos in Arizona, 1864–1985, <http://www.asu.edu/lib/archives/chicaz.htm> (last visited Mar. 6, 2008).

<sup>462</sup> *See infra* Table 2.



Table 2.  
Increases in Latinos Elected to Office in Arizona, 1985–2005<sup>463</sup>

Level of Office	1985 Total	2005 Total	Change	% Change
United States Representatives	0	2	+ 2	N/A
State Officials	0	0	0	0%
State Senators	6	5	- 1	- 17%
State Representatives	6	11	+ 5	+ 83%
County Officials	9	19	+ 10	+ 111%
Municipal Officials	104	122	+ 18	+ 17%
Judicial/Law Enforcement	29	44	+ 15	+ 52%
Education/School Board	76	159	+ 83	+ 109%
Special District Officials	0	11	+ 11	N/A
Totals	230	373	+ 143	+ 62%

## XI. EPILOGUE

On July 27, 2006, President Bush signed the VRA reauthorization bill into law, extending the temporary provisions—including Sections 5 and 203—for another twenty-five years.<sup>464</sup> Two weeks later, *Arizona Republic* columnist Robert Robb published a scathing editorial of the renewed Act entitled *The Racism in Voting Rights*.<sup>465</sup> According to Robb, the bill should have been defeated because he claimed that the Act provides “that race should be the primary consideration in political representation”

<sup>463</sup> See 2005 NALEO ROSTER, *supra* note 460; 1985 NALEO ROSTER, *supra* note 459.

<sup>464</sup> See generally *Politics of Persuasion*, *supra* note 42, at 264.

<sup>465</sup> See Robert Robb, *The Racism in Voting Rights; 1965 Act is Outdated and Outmoded, But Who Dares Touch It? Not Congress*, ARIZ. REPUBLIC, Aug. 9, 2006, at 9.

through Section 5 preclearance.<sup>466</sup> He likewise attacked Section 203, arguing that “the bilingual ballot requirement” was unnecessary because “naturalized citizens are supposed to demonstrate English literacy and native-born Latinos, even those with parents who don’t speak English, are almost universally English-capable.”<sup>467</sup> Robb was particularly critical of the VRA’s continued application to Arizona, which he contended did not have “a history of voting discrimination.”<sup>468</sup>

The evidence of Arizona’s past and present history of discrimination against racial and language minority voters, as described in this article, conclusively refutes Robb’s thesis.<sup>469</sup> The 1975 addition of Arizona to obtain pre-approval of voting changes from the Department of Justice was well founded. Arizona has a lengthy history of voting discrimination that included the enactment of an English literacy test to suppress the vote of African-Americans, Native and American Indians and Latinos. Native Americans were officially disenfranchised until 1948. That discrimination is not ancient history. Arizona’s past four statewide redistricting plans have been rejected by the Department of Justice for discriminating against Latino and Native American voters.<sup>470</sup> The most recent rejection occurred in 2002, under the Bush Administration.<sup>471</sup> Over 80% of the Justice Department’s objections to Arizona’s voting changes have been since 1982.<sup>472</sup>

Robb’s criticism of language assistance likewise is wrong in suggesting that all American citizens speak and read English well enough to vote without what he calls “bilingual ballots.”<sup>473</sup> While most new citizens speak English, some may need extra assistance to read and understand complex ballot language, especially Arizona’s citizen-sponsored initiatives. Over 20% of all Latino voting age citizens in Arizona, including tens of thousands of native-born citizens, need election materials and assistance in Spanish to cast a meaningful ballot. Almost one-quarter of American Indians in Arizona and nearly half of elderly American Indians, all of whom

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<sup>466</sup> *Id.*

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> A response to Robb’s ideological criticisms of the VRA has been discussed elsewhere. See, e.g., Tucker, *supra* note 81; Tucker, *supra* note 46, at 229–59 (responding to criticisms of Section 203); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007); Kristen Clarke, *Reports of My Demise Have Been Overstated: Assessing the Constitutionality of the Recently Renewed Section 5 Preclearance Provision of the Voting Rights Act*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* (Benjamin E. Griffith ed., Feb. 2008) (responding to criticisms of Section 5).

<sup>470</sup> See Department of Justice, *supra* note 71.

<sup>471</sup> May 20, 2002 Boyd Letter, *supra* note 74.

<sup>472</sup> See Department of Justice, *supra* note 71.

<sup>473</sup> Robb, *supra* note 465, at 9.

are native born, also need language assistance to vote. Likewise, merely being native-born does not ensure that voters are proficient in English. Thanks to educational discrimination in Arizona's schools, which was detailed in the *Flores* decision in late 2005 and early 2006, an entire generation of native-born Latinos and American Indians has been denied an opportunity to adequately learn English. The state has been fined several million dollars since then. Latino and Indian students have paid a far higher price.

Robb faults the renewed VRA for being "led by Democrats, who clearly prefer to play race politics."<sup>474</sup> Again, the evidence does not support his criticism. The renewed VRA received strong bipartisan support from Republican conservative leaders, such as President Bush, House Majority Leader John Boehner, House Judiciary Chairman James Sensenbrenner and Senate Majority Leader Bill Frist.<sup>475</sup> Far from rejecting conservative values, VRA supporters from Arizona, such as Republican Representative Jeff Flake, embraced those values by committing to eradicate racism that still infects our democracy. The inability of commentators like Robb to acknowledge Arizona's past and present discrimination in voting and other areas proves precisely why the Voting Rights Act is still needed. It also shows that while we have made substantial progress, we still have a long way to go.

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<sup>474</sup> Robb, *supra* note 465, at 9.

<sup>475</sup> *Politics of Persuasion*, *supra* note 42, at 210–17, 233–34, 243–65.